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REVISITING OVERTON PARK: POLITICAL AND JUDICIAL CONTROLS OVER ADMINISTRATIVE ACTIONS AFFECTING THE COMMUNITY

Peter L. Strauss*

Overton Park is a 342-acre municipal park lying close to downtown Memphis, Tennessee, in one of that city's better residential areas. Citizens to Preserve Overton Park, Inc. v. Volpe is a Supreme Court decision frequently cited for its general propositions about judicial review of informal administrative action that, to the citizens of Memphis, was one way-station in a more than two-decade struggle concerning whether and where an inner-city expressway, part of Interstate 40, would be built. Overall, the story of that struggle

* Betts Professor of Law, Columbia University School of Law. More people provided helpful support than one could normally list here—Memphians such as James Jalenak and Charles Newman, opposing counsel in the Overton Park litigation; Dean Fred Davis and his colleagues at the Cecil B. Humphreys School of Law of Memphis State University; participants in faculty colloquia at Columbia and the University of Minnesota Law Schools; the participants in this Symposium; and individual colleagues and friends like Bernie Black, Cynthia Farina, and Daniel Gifford. Iqbal Ishar, Columbia, L.L.M. '87, William Bruce, Memphis State University '94, and the staff of the Memphis and Shelby County and the Memphis State University Libraries provided valuable research support, and the Frank A. Sprole Fund and Columbia Law School Alumni provided welcome financial assistance.

Responsibility for any errors is, of course, mine. In this essay, in particular, I write with limited access to my research materials. Able to spend only a week in Memphis, I relied on the extensive clippings file and paper collections at the Memphis and Shelby County Library and the Memphis State University Library. Mr. Bruce subsequently went to the microfilm records of the Memphis Commercial Appeal and the Memphis Press-Scimitar to check what was in my notes and provide full citation forms. He was unable to find a few of these citations, as will be evident from the form of citation in some of the footnotes. This may be the result of my error in transcribing or a librarian's error in preparing a clipping for the file. While I am confident of the physical reality of the articles cited, I deeply regret that time has not permitted confirming the precise date and place of their publication.

reveals a complex brew of national and local politics about the marriage of highway convenience to urban amenity; but the direct concern of the decision itself is "law," interpreting a statute governing the decisions of federal highway officials about the location and design of interstate highways that might affect parks. At a time when the very idea that politics and law have separate domains is controversial, revisiting Overton Park may be instructive about judicial attitudes toward politics and political controls, and about the impact of judicial skepticism in that regard.

Case reports inevitably reflect only the tiniest portion of the events that lie behind them. The very project of the law requires abstraction; the nature of adjudication invites focus on particulars of parties and immediate issues, and hides from view the richer context within which disputes arise and are pursued. We may not much care about these losses in the paradigmatic setting for litigation disputes between individuals about the outcomes of discrete transactions or events; whether Justice Cardozo did or did not accurately capture the facts of Palsgraf v. Long Island Railroad, the legal future builds on what he described, and neither of the parties to that litigation was much affected beyond the order that ultimately resulted. But Overton Park, like much recent litigation, emphatically presented the Supreme Court with a contest between complex and competing community values, not claims of individual right, and the contest might equally have been resolved in the conventionally political arenas; indeed, we have come to see the engagement of courts in litigation of this character as a form of surrogate or supplemental political process. More than a pair of opposed individual interests are concerned in such cases, and judicial outcomes have a continuing shaping effect on the behaviors of the participants (and others who might have been participants), well past the apparent immediate resolution of the dispute presented to the court. Given the substitution of judicial for directly political action, the multiplicity of interests involved, and the possible complexity of their interaction, one may readily imagine the hidden context of this case and its implications for the apparent dispute to be rich and illuminative.

This Article seeks to capture that context, however imperfectly, to illustrate a limited, but in my judgment important, proposition about the relationship of judging and politics—that judges should recognize the potential workability of political controls over

administrative action when interpreting statutes that structure the resolution of essentially political disputes. The statute the Overton Park Court had to interpret was open to readings both of text and of legislative history that would either credit or discredit the workability of political controls. The Court chose a reading that maximized the possibilities of judicial control of agency decision through litigation, reasoning in part that only this reading could vindicate the policies that underlay the statute in question. The alternative reading would have credited the possibility of effective political controls, and the Court concluded that in the context before it these controls would inevitably fail. Overton Park thus presents us not only with the use of the courts as a surrogate for political action, but also with a declaration by the Court that only the surrogate can work. It is this declaration that I wish to examine. The more widely known aspects of the Overton Park opinion, which concern the reviewability of action arguably committed to agency discretion and the standard of review applicable to informal agency action, are not of direct concern here.

Part I of this essay sets out a brief, general summary of some important judicial statements concerning the difficult borderland between politics and law. The basic argument is that what are generally accepted as the foundational opinions concerning judicial engagement with politics regard the political arena as an alternative to the judicial one, and do not explicitly accept judicial engagement in politics. As an aspiration we say with Hamilton that judges are to act on the basis of reason, not will; recognizing that politics may nonetheless enter in, we treat its appearance as a weakness, and the self-conscious judicial exercise of political will as an abuse of office. However, it has been thought the courts may have a special role to play in correcting disfunctions (such as malapportionment) that impede generally the functioning of the political system. Translating that thought to the arena of administrative law underlay the development of public interest representation arguments from the '60's forward, and also appears to explain the questioned proposition in Overton Park.

Part II describes the Court's opinion in Overton Park in some detail, and then makes two passes through the political history of the dispute that opinion addressed—first, to place it in the context of developments within the federal government concerning the development of the interstate highway system and its administering

bureaucracy; second, to place it in the political history of the community most directly affected, Memphis, Tennessee. In my judgment, this inquiry reveals that even if the inquiry whether politics could work to control the decisions in question was an appropriate one, the negative answer the Court gave—that politics could not have worked to control those decisions—was in error. Political controls, so far as one can tell, were the only controls Congress had considered; and in the instance, they were working well. A fuller appreciation for the Overton Park controversy, whether viewed from Washington, D.C. or Memphis, Tennessee, shows wide and effective engagement of a variety of political actors in the controversy. The effect of the Court's action in surrogate politics was to empower one of those actors to an extent that had not been contemplated and that is not sustainable on any general political view. The Court's move, from recognizing litigation's surrogate political role respecting some controversies to basing its decision on a distrust of the processes litigation arguably supplements, is especially problematic.

The Conclusion returns to some recent developments, in an effort to raise some questions about judicial review and its possible limits as a substitute for, or form of, political action.

I. BUILDING BLOCK CASES ON "POLITICS AND LAW"

Before turning to the Overton Park controversy itself, it is useful to start with an overview of judicial attitudes toward the difficult borderland between politics and law. Two undercurrents that have shaped the administrative state and proved particularly difficult to analyze reflect the tensions present here. The first concerns how we characterize the agencies responsible for administrative law; we alternate between imagining an expert, rationalistic, technocratic system of bureaucratic decision and understanding agencies to exercise essentially political power, responsive to the interests of the varying groups able to make their influence felt within agency processes. The second concerns how we approach the controls that exist over administrative action—how we rationalize the varying relationships of Congress, the President, and the courts to the output of the administrative process, what legitimacy and importance we accord to each. The longstanding impatience of Washington practitioners with much academic administrative law4 owes a good deal to aca-

democratic emphasis on the rationalistic view of agency procedures and judicial controls over its outputs; law school academics have not developed a disciplined view of presidential and congressional relations to administrative action, although recent years (spurred perhaps by increased attention to developments in political science and economic analysis) have seen some change, at least in the descriptive literature.

The separation between the domains of politics and law made a dramatic (if somewhat misleading) appearance in *Marbury v. Madison*, that foundation stone of judicial control of the administrative state. In the initial parts of the opinion, often not much noticed but nonetheless influential, the great Chief Justice drew a sharp line between the world of executive discretion and the world of law. Only the latter, he assured, is open to judicial control. For his "important political powers," the President "is accountable only to his country in his political character"; the officers he appoints

[t]o aid him in the performance of these duties . . . act by his authority.

[Their acts are his acts; and . . . there exists, and can exist, no [judicial] power to control that discretion. The subjects are political. They respect the nation, not individual rights . . . .

[N]othing can be more perfectly clear than that their acts are only politically examinable. But where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured, has a right to resort to the laws of his country for a remedy.

It is scarcely necessary for the court to disclaim all pretensions to [intermeddle with the prerogatives of the executive]. . . . The province of the court is, solely, to decide on the rights of individuals, not to enquire how the executive, or executive officers, perform duties in which they have a discretion. Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.10

6. 5 U.S. (1 Cranch) 137 (1803).
9. Id. at 166.
10. Id. at 166, 170.
We now recognize that this sharply drawn dichotomy is at the least a trichotomy—that there exists a middle ground of discretion-under-law that characterizes the operating environment of the administrative state. Few today would claim that decisions of the Secretary of Transportation concerning whether to authorize the expenditure of federal funds for the construction of a segment of interstate highway constitute "political" questions beyond the reach of the judiciary, even though substantial elements of discretion and no elements of strictly individual right inhere in those decisions. Yet the separation of the worlds of political and legal controls persists in several respects: for example, in the acceptance of delegation of authority to agencies, and the posture of deference that acceptance entails; and in the model of rationalized, expert, technocratic and above all apolitical bureaucratic judgment on which courts nonetheless appear to draw when applying themselves to such decisions.

A second prominent distinction between the worlds of politics and law appears in Justice Holmes' opinion for the Court in the still influential Bi-Metallic Investment Co. v. State Board of Equalization. That case presented a due process challenge to the adoption of a forty percent increase in the valuation of all Denver real estate; the plaintiffs sought the shelter of an earlier assessment case, Londoner v. City of Denver, that appeared to promise a quasi-judicial hearing before an assessment change could finally be applied. The constitutional constraints of due process, Holmes responded, do not apply to decisions of this general character:

Where a rule of conduct applies to more than a few people it is impracticable that every one should have a direct voice in its adoption. . . . General statutes within the state power are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard. Their rights are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule. . . . In Londoner . . . [a] relatively small number of persons was concerned, who were exceptionally affected, in each case upon individual grounds . . . . [T]hat decision is far from reaching a general determination dealing only with the principle upon which all the assessments in a county had been laid.14

12. 239 U.S. 441 (1915).
Politics, one's "power, immediate or remote, over those who make the rule," provides the remedy when the courts are not involved. Note that although Holmes twice mentions the consideration of number, the due process equation cannot be seen as turning on that issue; if all the plots bordering Broadway were reassessed to pay for its repaving from New York City's Battery Park to Albany, individual landowners would still have a due process claim to some kind of a hearing before having to pay an assessment based in some degree upon the individual circumstances of their plots. Although the Federal Administrative Procedure Act (APA) has since provided a general statutory regime for the control of rulemaking that offers significant scope for both public and judicial participation, Holmes' general dichotomy endures.

Although Holmes' conclusion was procedural—at issue was the application of the Due Process Clause of the Constitution to require quasi-adjudicatory process—the contrast he drew was grounded in conventional notions regarding the relative strengths and weaknesses of legal and political process. Politicians, not judges, should be responsible for setting the dimensions of social policy that may involve trades among the interests of broad groupings of citizens; judges' strengths lie in resolving discrete controversies between individuals, in which one wins, another loses, and broad social adjustments are secondary to the outcome of their concrete dispute. That contrast was given later, influential expression by Professor Lon Fuller, who noted the difference between the "bipolar" disputes characterizing typical judicial action and the "polycentric" controversies that characterize legislatures and the policy-making side of administrative action. The give-and-take resolutions typical of the latter are more readily achieved by meliorative than winner-take-all procedures and are less easily justified in terms of a system structured as rational analysis than one grounded in accommodation.

A third influential statement about the separate domains of politics and law, whose influence on administrative law is perhaps more implicit than overt, was made in United States v. Carolene

15. Id. at 445.
16. One might imagine adjustments of the burden of going forward to take account of the exigencies of number if the numbers were very large. See, e.g., Yakus v. United States, 321 U.S. 414 (1944).
Products Co. and its famous footnote four. In the opinion in chief, the Supreme Court underscored the finality of its turn away from "substantive due process" analysis in economic affairs, which had been criticized as entailing excessive and politically grounded judicial interference with legislative political judgments. Justice Stone indicated that henceforth the Court would restrict "inquiries [into the constitutionality of legislation], where the legislative judgment [upon social facts] is drawn in question, . . . to the issue whether any state of facts either known or which could reasonably be assumed affords support for it." Outside that narrow compass, "decision was for the Congress," the political branch.

Footnote four raised, inter alia, the question whether a special and more intensive judicial role might exist for protecting the integrity of political processes:

It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny . . . .

Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, or national, or racial minorities: whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

That is, judgments about social policy were to be made in the world of politics. The risks that special interests might distort legislative judgments were regarded as less significant than the risks judicial redetermination of political issues posed—at least, to paraphrase Holmes, where citizens enjoyed possible political controls, immediate or remote, over those who made the rules. Perhaps the judiciary could claim a special role in representation reinforcement, in protecting the general integrity of the political processes that produced such results from restrictive or invidiously discriminatory legislation.


21. Id.

22. Id. at 152–53 n.4 (citations omitted).

23. The legislation at issue in Carolene Products is readily characterized as special interest legislation chiefly, if not solely, driven by the economic interests of the dairy industry. See Miller, The True Story of Carolene Products, 1987 SUP. CT. REV. 397, 398–99.
Theorists have taken the view expressed in Footnote 4 to suggest the appropriateness of a special judicial role to protect the integrity of political processes. In the context of administrative law, the representation reinforcement approach associated with *Carolene Products* is reflected most prominently by theories that regard judicial review of administrative action as a means of enhancing "public interest representation." These theories found prominent expression with the emergence of a presumption of reviewability of agency action, broadened standing for those representing regulatory beneficiaries, review to assure that agencies had taken a "hard look" at all significant issues placed before them and other similar judicial developments. These developments followed in the wake of concerns about agency "capture" by regulated interests and other apparent indicators that the political processes of administrative policy judgment were proving warped mirrors for the various public interests at stake. Judicial support, it was imagined, would empower underrepresented groups that otherwise were encountering difficulty in having their voices heard, and for whom the promise of agency pursuit of a genuinely "public" interest was proving illusory. In *Office of Communication of the United Church of Christ v. FCC*, Judge Warren Burger of the D.C. Circuit (shortly to be Chief Justice) made an influential statement of the point:

The theory that the [Federal Communications] Commission can always effectively represent the listener interests in a [broadcast license] renewal proceeding without the aid and participation of legitimate listener representatives fulfilling the role of private attorneys general is one of those assumptions we collectively try to work with so long as they are reasonably adequate. When it becomes clear, as it does to us now, that it is no longer a valid assumption which stands up under the realities of actual experience, neither we nor the Commission can continue to rely on it. The gradual expansion and evolution of concepts of standing in administrative law attests that experience rather than logic or fixed rules has been accepted as the guide.

In Judge Burger's case, the interests of a discrete, insular, and affirmatively disempowered group were in fact involved—plaintiffs

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29. 359 F.2d 994 (D.C. Cir. 1966).
30. *Id.* at 1003--04.
represented black consumers of broadcast services in pre-Voting Act Mississippi. Nothing in his language made that fact more than a happenstance, however, and in subsequent judicial developments and academic commentary the central idea has been that the integrity of a failed political process was being reclaimed—answering what might otherwise have been concerns about judicial intrusion on political judgment.

The late 1960's and early 1970's witnessed the emergence of "public interest representation" approaches to administrative law and judicial control of administrative agencies across a broad range of issues, more or less simultaneously with the explosion of new ambitions for regulatory government signalled by the health and safety statutes of that time. It was to be presumed that administrative rulemaking was reviewable at the time a rule was adopted, thus opening rules to challenges by persons other than those directly subject to its application in enforcement proceedings; "standing" was greatly expanded in similar directions; statutes like the National Environmental Policy Act proclaimed a new sensitivity to the community impact of government, and were taken to empower broad elements of the population to participate in administrative action. Within the agencies themselves, it could be hard to tell whether participating groups were seeking legal or political remedies—particularly when, as would usually be the case for issues of policy significance, the agency procedures in which participation was sought were highly informal, even unstructured. When judicial review of agency outcomes was invoked, of course, the remedy sought was in formal terms legal—but alternative political means of redress might be available, and the question of institutional failure Judge Burger attributed to the FCC in United Church of Christ, after his court's many years of experience with that agency, presented complex issues even when such experience was at hand and the proceeding being challenged was one required to be decided after and on the basis of an on-the-record hearing embracing named parties. In the heady excitement of the developing view, it was perhaps easy to assume political failure, or that the court could appropriately effect a surrogate political role, or indeed that the role of enforcing politics had been statutorily chosen for the courts. It was in this context that Overton Park came to the Supreme Court.

II. **Citizens to Preserve Overton Park, Inc. v. Volpe**

*Citizens to Preserve Overton Park, Inc. v. Volpe* 34 is perhaps the most frequently cited decision in modern administrative law. 35 The immediate stakes in *Overton Park* were, on the one hand, traffic patterns in and around downtown Memphis, Tennessee and, on the other, the integrity of Overton Park, a 342-acre park in a predominantly white residential area, long considered one of the city's principal environmental assets. Interstate 40, a transcontinental route through Nashville to the east and Little Rock, Arkansas to the west, was to cross the Mississippi at Memphis. Plans from the mid-fifties, which followed the usual course of joining inter-city expressway with local enhancement of commuter access, 36 located the bridge and the general route to provide a high-speed east-west corridor through the heart of the city. From the first, the proposal was to cross Overton Park, although the park might have been avoided (producing changes in dislocation and in other impacts) without giving up the intra-city corridor.

Overton Park is roughly rectangular in shape, a mile by half a mile, approximately, with its longer sides pointing east and west. Its boundary roads, north and south, are wide boulevards that are part of the city's main east-west commuter routings; its eastern boundary is a major north-south connector. A zoo lies in the western half of its northern part; south of the zoo, across a long-established, two-lane road restricted to municipal buses, are a nine-hole golf course, a theater, an art museum, and landscaped open areas; in the eastern half of the park are picnic areas and 170 acres (about a quarter of a square mile) of virgin forest; riding and walking trails integrate the ensemble. Lick Creek, a rivulet occasionally swollen by storm run-off, runs north and south through the forest. As finally developed, the plan called for taking twenty-six acres embracing the bus road, depressed below ground level as it passed the zoo, but rising above ground level to cross Lick Creek. An interchange

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34. 401 U.S. 402 (1971).
36. While there is evidence that President Eisenhower, usually credited as its architect, proposed the interstate program to improve long-distance interconnections, not local commuting patterns, and expected the interstates to bypass urban centers, that intent was never honored. See Schwartz, *Urban Freeways and the Interstate System*, 49 S. CAL. L. REV. 406 (1976).
using some park land, but principally located outside it, would connect I-40 with the eastern boundary road. A six-lane expressway and busy interchange, of course, would have impacts on the public enjoyment and ecological integrity of the park well beyond those the bus road had imposed.

Citizens to Preserve Overton Park ("CPOP") was a small group of Memphis citizens that since 1957 had been leading a campaign opposing the siting of Interstate 40 through the park. Operating on a shoestring and probably never larger than one hundred in active membership, CPOP regularly organized protest meetings, appeared at hearings, produced write-in campaigns, and lobbied local, state and federal officials in its efforts to prevent the highway. Three or four members carried the brunt of the effort; newspaper and correspondence files suggest that this effort was unstinting, particularly after 1964; in that year construction began to seem more imminent, and two new officers, its President Arlo Smith and its Secretary Anona Stoner, joined the organization with devotion even

37. Four principal design alternatives were debated throughout the long history of the controversy: building the road on the surface; building it below grade to the extent the water table and natural drainage constraints permitted; building it below surface throughout its length, overcoming water table and drainage problems; and constructing a tunnel in some fashion, hiding the road completely throughout its traverse of the park. During the period prior to the Court's decision, Tennessee highway officials consistently sought the first alternative—the cheapest, least complicated, and most familiar form of construction—relying on landscaping to reduce the impact of the road and its traffic on the park. City officials were more open to building below grade, but consistently expressed concerns about costs and the possible results of ignoring water table and drainage constraints: that building the road below water table and creek levels would risk flooding if storms caused electric outages, and in any event would create a body of still water in which malarial mosquitoes could breed at each end of the inverted syphon used to conduct the creek under the roadway. Thus, for the city, the road should never be more than ten feet or so lower than the surrounding park, because of the high local water table, and should rise above grade to cross Lick Creek. Federal officials consistently pursued the more dramatic and far more expensive possibilities of making a deeper cut (below the water table), syphoning the creek's flow under an entrenched roadway, or tunneling the whole length of the park. When the second design—below grade to the maximum extent drainage and the water table permitted—was approved in 1969, the parties to the litigation may well have thought that whether this choice reflected "all possible planning to minimize harm to [the] park," would be the principal statutory issue the Court would decide.

Once the Court had indicated how protective a reading was due the statute's verbal formulae, Secretaries of Transportation consistently felt bound to insist on a full tunnel; by 1978, the state and city were presenting a plan for a partially covered roadway built below the surface throughout its length, but in the face of continuing opposition from Citizens to Preserve Overton Park they could not win approval for this approach. See Proposed Highway Construction Through Overton Park, Memphis, Tenn.: Hearings Before the Subcomm. on Transportation of the Senate Comm. on Environment and Public Works, 95th Cong., 2d Sess. 6–16 (1978).
more passionate than their predecessors to protecting the park. As we will see, the litigation in *Overton Park* was only one of CPOP's many efforts to protect the park.

This case is best known as the foundation stone for contemporary "hard look" judicial review. It challenged the Secretary of Transportation's decisions in April 1968 to "reaffirm" the Department's earlier commitments to provide federal monetary support to Tennessee for building the road through the park and in November 1969 to approve a design that (as a result of strong departmental guidance) sought in a variety of ways to control the road's impact on the park. The approval procedure at the agency level had been highly informal, indeed bureaucratic. Route approvals dated from 1956, but periodic re-examination (prompted in no small part by CPOP's continuing efforts) and the development over time of increasingly precise location and design specifications finally produced these two agency decisions, which fall into the Administrative Procedure Act's residual classification of informal agency adjudication. In part, the Supreme Court's decision explained the manner in which judicial review of this informal action should occur. While the opinion ostensibly stressed the necessary limits of judicial review—for example, that courts must be careful not to substitute their own judgments for agency views on policy issues—it also indicated that within these "narrow" limits review was to be "searching" and "thorough," and the latter words are the ones that have tended to stick. The extensive nature of the inquiry *Overton Park* outlined is what underlies the subsequent development of "hard look" review.

For our purposes, however, the important aspects of the case concern statutory interpretation. These aspects, which have attracted much less attention than the "standard of review" discussion, involve the meaning to be given a pair of then-recent enactments that required the Secretary of Transportation to ascribe special value to parkland preservation in deciding questions of highway routing and design. The Federal-Aid Highway Act of 1966, passed in September 1966 and effective July 1, 1968, required federal highway administrators to engage in "all possible planning, including consideration of alternatives . . . to minimize any harm to . . . [any] park" that might be affected by interstate highway construction.\(^38\) Section 4(f) of the Department of Transportation Act,

passed one month later but effective upon the Department's forma-

tion in April, 1967, directed the Secretary not to

approve any program or project which requires the use of any

publicly owned land from a public park . . . of national, State, or

local significance as determined by the Federal, State, or local

officials having jurisdiction thereof . . . unless (1) there is no feasi-

ble or prudent alternative to the use of such land, and (2) such

program includes all possible planning to minimize harm to such

park . . . resulting from such use.39

The Federal-Aid Highway Act of 1968, enacted after the Secre-
tary's approval of the route through Overton Park but effective Au-
gust 23, 1968, well before the subsequent submission of the road's

design for approval, reconciled the two provisions by adopting the

latter formulation.40 It was the meaning of the latter formulation

that the Court considered in Overton Park.

The Court noted support in the legislative history for the "view

that the statutes are merely general directives to the Secretary re-

quiring him to consider the importance of parkland as well as cost,

community disruption, and other factors."41 The specific history of

the I-40 project as well as the general practice of administration in

the Department, developed in the pages following, would have sup-

ported the judgment that the Department was implementing the di-

rective, in the context of this understanding, with some rigor—

refusing to approve some projects, placing stringent design limita-

tions on others, insisting that decisions to use parklands be consid-

ered by local officials free of cost considerations and in a manner

that was accountable to concerned electorates. But despite its con-

cession that the legislative history would have authorized this ap-

proach, the Court declined to interpret this statutory reference

permissively:

[N]o such wide-ranging endeavor was intended. It is obvious

that in most cases considerations of cost, directness of route, and

community disruption will indicate that parkland should be used

for highway construction whenever possible . . . Congress clearly
did not intend that cost and disruption of the community were to

be ignored by the Secretary. But the very existence of the stat-
utes[42] indicates that protection of parkland was to be given par-

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931, 934.


823 (codified at 23 U.S.C. § 138 (1988)). The legislative history of the 1968 act is dis-

cussed in the text infra following note 88.

41. Overton Park, 401 U.S. at 412 n.29.

42. It is just at this point that the Court footnotes its observation about the ambigu-

ity of the legislative history—its failure to support the categorical assertions about in-
amount importance. . . . If the statutes are to have any meaning, the Secretary cannot approve the destruction of parkland unless he finds that alternative routes present unique problems.\footnote{Id. at 411–13 (footnotes omitted).}

Rather than draw from a finding of congressional indecision the conclusion that "reasonable" agency judgment should prevail or editorialize about the appropriate role of political controls within a setting in which Congress has failed to decide, the Court forced a choice upon the agency that it recognized to be unnecessary as a matter of the statutory language ("prudent") and unchosen by the legislature.

The course of the proceedings before both the Secretary and the courts doubtless contributed to the Court's choice. Given the informal and managerial character of highway administration, the Secretary had, understandably enough, given no definitive account of his application of the statutes to this particular project.\footnote{See Gray, \textit{Section 4(f) of the Department of Transportation Act}, 32 MD. L. REV. 327, 371–72 (1973). Oscar Gray, director of the Department of Transportation's environmental programs during the Overton Park controversy and a strong supporter of an aggressive approach to the requirements of \textsection{4(f)}, acknowledges that the Court's interpretation was beyond what even the "staunchest environmentalists in the Office of the Secretary" had urged during the internal considerations; they had argued that the statute prohibited regarding parkland values as on a par with nonenvironmental considerations, but did not exclude the possibility of a balancing approach within that framework. \textit{Id.} at 371.}

(One might, indeed, have inferred an understanding of the statute from his course of action generally on such issues, bureaucratic instructions and procedures, and the like, but such interpretive acts—well understood and consistent as they may be within a managerial context—do not have the character courts are accustomed to find in opinions, or even in the statements of basis and purpose that attend contemporary rulemakings.) Moreover, the case came to the Court in a context that sharply reduced the chance its own processes would permit the development of full understanding. The lower courts had upheld the Secretary; absent Court action, Overton Park would shortly be under construction; homes and businesses had already been razed on the near approaches. Perhaps persuaded that time was of the essence, the Court granted certiorari on an emergency schedule that provided two weeks briefing time to each side followed one week later by argument, rather than the customary ninety-day/sixty-day periods with several weeks then elapsing before oral argument; its opinion, given apparent priority as well,
was issued six weeks after argument. These conditions would permit neither the attorneys in the Office of the Solicitor General responsible for briefing the government's case nor the writers of Supreme Court opinions time to get far beyond the surface of things, to develop the body of materials on understanding and implementation that might have made the agency's view plausible.45

Whatever the contribution of external influences, the Court's reasoning obscured important questions about the judicial-legislative relationship, and rested on a strongly political choice. The Court's premise was that political controls could not be effective in relation to administrative action, that they would likely fail, but it appeared to attribute this assumption to congressional choice. Recall the intellectual process of the Overton Park passage quoted in text two paragraphs above: the Court decides to introduce an artificially structured legal constraint because—in its estimation, unsupported by reference to the actualities of administration during the intervening period—the policy judgment Congress "intended" cannot otherwise be implemented. But did Congress make that judgment, or was it the Court that was making it?

45. That the two weeks in question, for the government, were the weeks between Monday, December 21, 1970, when petitioner's brief was received, and Monday, January 4, 1971—the winter holiday season—made the resource constraint all the greater, even for a government attorney himself willing to sacrifice plans to the schedule thus set. The reader is entitled to know that I was an attorney in the Office of the Solicitor General, but not the attorney responsible for Overton Park during this period.

The Solicitor General doubtless complicated matters for the government (by appearing to acknowledge weakness in the case) when he filed a motion suggesting remand to the Secretary for the development of a complete record. The motion—which infuriated Memphians favoring construction of the road by conceding the appropriateness of an indefinite stay while such proceedings could be held—would have eliminated the time pressure at the Court had it been granted. The Court, which earlier had rejected a request that CPOP be made to post a bond for added construction costs imposed by the delays caused by its petition, denied the motion.

The suggestion that there was a record in the case, which underlay the Solicitor General's motion, was itself a mischievous one, as the remand was to show. An informal and largely bureaucratic action such as this continuing course of route and design negotiation and approval generates no record in the judicial sense—indeed, at one point in its opinion the Court recognizes that the agency process "is not designed to produce a record that is to be the basis of agency action—the basic requirement for substantial evidence review." Overton Park, 405 U.S. at 415. Nonetheless, the Court was persuaded that "there is an administrative record that allows the full, prompt review of the Secretary's action that is sought without the additional delay which would result from having a remand to the Secretary." Id. at 419. Unsurprisingly, the remand proved that no such record existed. Time to develop the appeal would have avoided the error—indeed, by focusing the Court's attention on the difficulties of reviewing the factual and judgmental bases of informal agency action, might have led to a rather different result.
Given the conceded indeterminacy of the congressional debates, talk about what Congress "intended" was not helpful. What faced the Court, rather, was the clash between two conventional views of statutory interpretation. Is a statute to be given meaning as a political act, with attention to the actual indeterminacies, compromises and imperfections a sensitive historian might find on full acquaintance with its political history? Or should it be treated as a text drawing force from its words as such, as a thoughtful (but not particularly historical or politically inclined) reader might find them? This is not the place to rehearse the arguments for and against textualist approaches (although Justice Marshall, author of Overton Park for the Court, was not usually among their stronger proponents), but on the textualist view the issue is what the statute says, and the Court indicates it is taking that posture by its reliance on language alone. The artificiality in its approach then comes in its expressions of concern about what Congress did or did not "intend," as if that historical/political judgment (as distinct from the words employed and contemporaneously read) had any bearing. From the textualist perspective it is irrelevant whether the Secretary's understanding of the statute is, in actuality, having an influence on policy implementation in the direction and to an extent suggested by the historical workings of the legislative process.\textsuperscript{46} It is the Court that chose to elevate park values rather than balance

\textsuperscript{46} Writing about another highway dispute, in the D.C. Circuit, Jerry Mashaw made the following apt observation:

The court of appeals reveals a preference for highway planning which is nonpolitical, rational, exhaustive and federal, and this preference becomes, in effect, a set of assumptions which color its review of agency action under the terms of the statute. This is doubtless a possible model for highway decisionmaking, but it is probably not the model Congress constructed. It is certainly not the model under which the Federal Highway Administration and state highway departments have been operating. The court's mandate to reform the decision process in its own image is uncertain at best. Nor is it clear why changes in the decision process of the sort the court requires will result in "better" decisions, save perhaps in the special sense of being more palatable to the plaintiffs in highway litigation.

Nevertheless, while I disagree with the approach of the [D.C. Circuit], I find its position wholly understandable. There is a progressive logic to judicial review which tends to push administrative action into a conceptual mold that employs clear divisions of function, sharp criteria for judgment and detailed explanation of reasons. . . . The influence of history, of intergovernmental politics, of the nonscientific side of planning, or of funding priorities on decisionmaking is difficult to reproduce. Such factors appear in the mouths of defendants to be lame explanations for incompetence or evasion of legislative mandates. And so the administrator is . . . trapped between a legislature which finds rationalization of
them against other values, thereby signalling distrust of a more political process.

Suppose the possible workability of a political remedy were taken more seriously than the Court appears to have done, either because that may have been the historic congressional choice of remedy or because the Court, admitting its own responsibility for decision on this issue and understanding its own political susceptibilities, undertook to inquire rather than simply assert a conclusion on the question. An inquiry sympathetic to the possibility might proceed along either of two lines: first, there is the question how the Secretary of Transportation might have placed this new statutory provision in the general context of statutes under his aegis, and of any trends he might have noted in their evolution. Second would be the question how political controls appeared to have worked in this case—whether and to what extent CPOP had succeeded in drawing attention to its views and securing accommodation to them. Sections A and B address these questions in turn, suggesting that the case for the secretary's choice is reasonably strong, and that the political effectiveness of CPOP in securing recognition if not full satisfaction of its claims was reasonably high.

A. Political Controls Over Highway Routing: The View From the Bridge

It is, indeed, not hard to see how the Secretary—that is to say, departmental lawyers—might have reached the conclusion that promoting local political inputs and comprehensive planning was the appropriate response to give to Section 4(f). From his perspective, this provision was to be understood in the context of other statutes and a general course of development; for the very reasons that led to the creation of the administrative state, we expect an agency to try to understand and apply the whole body of statutes committed to its administration as a coherent consistent whole—in a programmatic way. In the years between the 1956 launching of the interstate highway system by the Eisenhower administration and the Johnson administration's establishment of the Department of Transpor-
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tation in 1967, the steady course of development in highway planning processes had been towards increasing involvement of local authorities and increasing opportunities for generating political pressure on issues of location.

1. From Technocracy to Politics—the Increasing Presence of Localities in Federally Required Highway Siting Processes

The story of this evolution begins with an allocation of authority and responsibility among state, local, and federal officials and with the growth, as well, of a new science and industry associated with the automobile and the truck. In the first half of this century, roads were the business of local communities if they were in-town; states if they connected towns; and the federal government hardly at all. Federal aid to the states for highway construction began in 1916,\(^49\) but until the statutory commitment to planning a national system of highways in 1944,\(^50\) the federal role was strictly financial. Moneys were allocated for primary, secondary and tertiary roads in accordance with a statutory formula. The decision concerning which roads would be constructed and where was entirely a state matter. Even with the definition of the National Interstate and Defense Highway system, the federal role was little more than facilitative. In the discussions that produced the map of the new system to be built, states had the predominant voice; the system was presented as if it were a treaty, the product of negotiations that carefully provided each state its due, that recognized state judgments about routing, and that acknowledged that changes required the states’ consent.

Localities came late to the table. The road system within a municipality was its planning and fiscal responsibility; in general, state support for municipal roadbuilding came in the form of allocations made from general revenues to all municipalities on a distributive basis such as population, not in response to the particular needs of a particular place. If Highway 13 passed through Elmtown, the state would bring the road to the town limits on either side, leaving the town to plot and pay for its transit. The state made the judgment whether to go through Elmtown at all, or to bypass it in favor of a straighter, cheaper, or faster route. The stakes in routing made for lively politics.


These allocations of responsibility, and the tensions they produced, were reflected in the arrangements for decisionmaking. Highway planning at the state level became the domain of the professionalized highway engineer. Limited funds were available for building the connective road tissue of the state, and every community had a stake in how those judgments were made; judgments had to be made about construction, safety, and carrying capacity as well as route. It was obvious in the circumstances that responsibility should be placed in the hands of a technocratic office removed from the distortions of politics and informed by the science of roadbuilding, that could translate traffic patterns, geography and engineering parameters into an efficient network. Within the cities, roads were a part of the domain of the urban planner; roads were more easily seen as only one element of infrastructure and of future growth in relation to others. Correspondingly, the professional interests of city planners are more comprehensive than those of highway engineers; whether to use roads or subways to transport urban workers, or what balance to strike between transportation and the need for urban green spaces, were questions much more likely to appeal to the professional judgment of the former than the latter. State and urban political tensions were mirrored in the resulting professional juxtapositions.

The postwar explosion of suburban growth and road-haul commerce brought the first federal statute requiring states to offer hearings on highway routing decisions. In 1950, Congress provided that before a state could fix the route for a federally supported highway to "bypass" a center of population, it must hold public hearings (or offer the opportunity for them) on the economic effects of bypassing the community, and certify that the question of economic impact

51. As the President of the American Association of State Highway Officials told Congress in 1968, state highway administrators by and large "dislike the philosophy that local lay people [should] have a more prominent role in highway location and design. . . . To allow local people to have a greater voice . . . for which they are not trained would negate the experience of trained highway professionals."

B. KELLEY, THE PAVERS AND THE PAVED 128–29 (1971). While Kelley's book has some of the flavor of the several "highway exposes" published in the late 1960s and early 1970s (e.g., H. LEAVITT, SUPERHIGHWAY—SUPERHOAX (1970); A. MOWBRAY, ROAD TO RUIN (1969)), his position directing the press office for the federal road program in the Department of Transportation during the Johnson administration gives his account particular interest. The account of general change in these paragraphs draws significantly on his account.

52. See M. LEVIN & N. ABEND, BUREAUCRATS IN COLLISION: CASE STUDIES IN AREA TRANSPORTATION PLANNING 236–42 (1971).
had been considered by the state official making the bypass judgment. Evident in the limited legislative history of the provision is both an awareness of the professionalization of state judgments on these questions, and skepticism about the soundness of these judgments.53

While the provision gave the community's small businessmen a chance to express their views, views about which there can have been little doubt, it would be wrong to consider the hearing to be significant in itself—as if it provided the opportunity to persuade a rationalized administration about the merits of the question being decided. No substantive requirement was attached to the hearing requirement. The hearer was not required to opine or to judge, no articulated conclusion was required, and no judicial review could ensue. Within the structure of the highway grant program, as it was understood, the federal government had little enforcement role. The Bureau of Public Roads did not supervise state highway commissions in any active sense, serving largely as a conduit for funds under the grant programs provided for. Refusing funds because a wrong choice had been made, or procedures imperfectly implemented, was not one of the expected outcomes. In this sense, the provision was more political than procedural—without flatly banning the bypassing of towns, it nonetheless provided a focus for arousing opposition to such choice; it expressed the hope—perhaps even sentimentally—of having some impact within state processes, not a plan for enhancing federal bureaucratic, much less federal judicial, controls.54

The statute was amended in 1956 by adding the words “or going through” to the previous reference to “bypassing” cities, towns, and villages. The effect was to require a hearing on the question of

53. 96 CONG. REC. 13,006 (1950) (statement of Sen. Chavez). Senator Chavez, the chairman of the Senate Public Works Committee, told his colleagues of a case where a by-pass was proposed to save four miles in five hundred and $38,000 in expense. He stated:

Little towns and villages are being ruined because . . . an engineer has an idea that automobiles going to the next town should be able to reach it five minutes sooner.

Id.

54. The decision to honor local interests in this way, it may be noted, had a decidedly antifederal overtone. Bypassing a town would contribute to the usual national interest in road-building, facilitating the interstate carriage of commerce; there would be no traffic light at the intersection of Main and Oak, no slowing for a school crossing or reduced speed limit. To insist that towns about to be bypassed have notice and an opportunity to speak—roughly translated, to gather whatever political force they could in opposition to the plan—was to acknowledge the local character of the decision in an unusually forceful way.
economic effects and a certification by the state department that these effects had been considered for every routing decision made in the vicinity of a concentration of population. Again, one would be hard pressed to construct from the legislative history any expectation of federal bureaucratic or judicial enforcement, at least any effort beyond bureaucratic checking for the existence of the required certification. Such discussion as there was—and there was very little—focused on the immediate political benefits of having an opportunity to be heard. The evident expectation was that having to discuss plans in public before they were made final would both tend to assure attention to the issue and arm the informal processes by which various community interests might be expected to make their wishes known. No hint is to be found that those who adopted the provision expected either a particular federal decision process or a particular weighting for economic impact issues in whatever process was employed. The literature of the time is virtually empty of discussion on this subject and the case law undeveloped. The federal bureaucratic practice is characterized by those few who have written about it as having been one of benign neglect.

To cast the provision in this light is not to suggest that it was thought inconsequential. One must remember that those enacting it were practical politicians, persons who—perhaps especially in that era before the "Reformation of American Administrative Law"—need not have acted with either judicial or bureaucratic controls foremost in their thoughts. They understood that road-building decisions were matters of tremendous consequence to states and localities, and that the states would have decision mechanisms roughly responsive to political realities. Leaving the judgment to politics, in this sense, was a natural instinct; forcing the issue onto the table, thus giving access to local politics, was a significant federal intrusion—yet one that respected the local character of the ultimate decision.

The nation's effective commitment to the Interstate system also occurred in 1956, through enactment of legislation that established the Highway Trust Fund, made a federal commitment to pay ninety percent of the cost of the system from the Fund, and earmarked federal taxes on fuel, tires, and other use surrogates that would fill the Trust Fund without further congressional action and assure pay-as-you-go financing. The Interstate highways, for the first time,
committed the nation to the construction of roads whose limited access and demands for physical space threatened local transportation and even the integrity of individual farms. Engineers converting the rough maps charted in federal-state negotiations to on-the-ground reality concerned themselves with safety and with direct alignments that would reduce cost and total length, without much regard for the impact on Farmer Jones' acres or his ability to get to town. Nineteen fifty-eight then saw a further extension of the hearing process to permit persons in rural areas through or contiguous to whose property a highway would pass to express any objections they might have. Again, these hearings appear to have been seen as facilitating state or local political processes, not informing federal controls. The federal government, the Federal Highway Administrator informed the relevant Senate Committee, did not participate in these hearings and had no authority to hold its own inquiries about location.

Under Bureau procedures, the States first propose the general location of a designated route or section thereof, which, if found satisfactory, is tentatively agreed upon by the Bureau. Following this, the States proceed with the development of preliminary plans for the route proposed by the State to the degree adequate for presentation at a public hearing. They also collect appropriate data concerning alternate locations. This material is presented and fully discussed at the public hearing. The States then weigh the evidence presented at the hearing, determine a final location, and request Bureau approval for further advancement of the project.57

The state hearing for the Overton Park segment was held in Memphis March 14, 1961, presided over by the State Highway Commissioner himself "because of the extreme interest evidenced by the citizens of Shelby County in the location of this segment of the project."58

In 1962, the Federal-Aid Highway Acts were once again amended, in a way that seems directly responsive to the state-local tensions over routing issues. For any urban area of more than 50,000 population, federal aid highway projects were not to be approved (after July 1, 1965) unless they were based on a "continuing comprehensive transportation planning process carried on coopera-


58. See infra note 123. Federal approval following these hearings (and other developments recounted within) occurred in July 1965 and, again, in January 1966.
tively by States and local communities.” The states must now talk to the cities; and they must talk to them in the professional terms that most concerned the cities—city planning, not simply highway engineering. This change was not connected with the hearing processes, as such; indeed, explanations of it tended to stress (however unrealistically) that city planning, like highway engineering, was a technocratic process removed from “the vagaries of the political system.” At the time, indeed, the conditions of federal aid and the Bureau of Public Roads in administering that aid tended to pressure the states into committing matters to highway departments as a safeguard against political corruption. The impulse seems nonetheless similar, to provide for inputs that, within state processes, would inform and perhaps divert the highway juggernaut from concerns only about speed, directness, safety and cost.

By 1966, following increasing White House attention to highway beautification, the Bureau of Public Roads was requiring that state processes include consultation with public agencies having jurisdiction over parks and other outdoor amenities that might be affected by highway construction. The same year saw enactment of the Federal-Aid Highway Act of 1966 and the Department of Transportation Act, with their differing provisions for requiring the consideration of park values. While one could say much about the specific legislative histories of these two provisions and their differences, it may be enough to explain the apparent casualness of

63. For both Acts, the provisions originated in the Senate and appear to have been closely connected to the particular concerns of Senator Yarborough of Texas about an interstate highway proposed for San Antonio that was threatening Breakinridge Park there. The Federal-Aid Highway Act originated in the Senate Public Works Committee, and the Department of Transportation Act, concerned overall with government organization, in the Senate Committee on Governmental Operations. In each case, the Senate language was more restrictive than ultimately enacted. In considering the Federal-Aid Highway Act of 1966, the conference committee substituted the language enacted for a Senate-passed provision that would have prohibited approval unless there were “no feasible alternative to the use of [park] land,” 112 CONG. REC. 14,074 (1966); in considering the Department of Transportation Act, it inserted the additional qualifier “and prudent.” 112 Cong. Rec. 19,530 (1966); see also Gray, Environmental Requirements of Highway and Historic Preservation Legislation, 20 CATH. U.L. REV. 45 (1970). Neither provision was much discussed at the time; the difference in effective date was
the difference between two provisions on the same subject, enacted within weeks of one another, to note that they were small elements of larger packages—elements respecting which close congressional attention was not to be expected. The important large scale change was the creation of a national Department of Transportation, which assumed the prior responsibility of the Department of Commerce for highway construction, but now as an element of general national transportation planning. Embedding the Bureau of Public Roads in a new structure with responsibilities for mass transportation and other like issues changed the dynamics from promotion to balance, made it more likely as a political and bureaucratic matter that highway decisions would be made with more in view than the professional concerns of highway engineers. To take only one example—its a product of increasing environmental awareness—the engineers would now have to deal with an office within the Department specifically responsible for promoting environmental awareness and responsiveness.

It is tempting to describe the variation in formulae as simply a by-product of committee process and particular legislators' pet interests. The pattern of Senate enthusiasm and House reluctance continued, however, over several years. It was explained in the House as reflecting concern for human values ("if there were a choice between using public parkland or displacing hundreds of families . . . I would want the Secretary to weigh his decision carefully, and not feel he was forced by the provision of the bill to disrupt the lives of hundreds of human beings," 112 CONG. REC. 26,651-52 (1966) (statement of Rep. Rostenkowski)), although it was associated in some other minds with greater House attachment to pork barrel politics and the highway lobby. See, e.g. A. MOWBRAY, supra note 51, at 220-28. Whichever explanation one prefers, seeing the pattern also strongly argues that this matter was not resolved in Congress, that House and Senate had differing views that persevered and were repeatedly compromised.

For individual members of Congress, of course, the stakes might be higher. The one piece of congressional correspondence provided by the Department in response to a Freedom of Information Act request asking specifically (inter alia) for documents reflecting legislative oversight on such issues as the meaning of section 4(f) was a letter sent to Secretary of Transportation Boyd in April 1967 (with copies to the Secretaries of Agriculture, Housing and Urban Development, and Interior) by Senator Henry Jackson, then Chair of the Senate Committee on Interior and Insular Affairs, a particularly powerful Senator and a leader of the environmental movement. He wanted to be sure both that the Secretary understood that the section applied to all transportation ventures, not just highways, and that he would be consulting regularly with the secretary's counterparts in other departments—who could perhaps be relied upon to insist that other than transportation values be served. Underlying the letter is an understanding that there would be "difficult and controversial cases," and that the Senator did not expect conservation values automatically to prevail—as, indeed, the legislative selection of the Secretary of HUD as one of the consultative players in decision would itself suggest.

See Gray, supra note 44.
The same requirements of balance are reflected in the provisions of section 4(f) and also section 2(b)(2) of the Department of Transportation Act, requiring consultation with other parts of the federal government—the Departments of Agriculture, Housing and Urban Development, and the Interior—that could be counted upon to bring other values to bear in controversial situations. For the first time, to be sure, federal highway officials were unambiguously made the source of approval, not merely guidance, respecting highway location issues; but the legislative materials suggest no recognition, much less expectation, that judicial enforcement might be in the offing. With "public interest representation" rationales having, as yet, no voice, it is difficult to ascribe to the approval requirement any purpose to alter the conventional bureaucratic means by which highway decisions occurred.

2. The Dispute Over I-40 in Nashville

While the statutory provisions specifically at issue in Overton Park concerned park and environmental values, these provisions were only part of a larger development. A highway bureaucrat working through the changes we are considering would have experienced the requirement to consider "social value" issues in opposition to the "professional" values of highway engineers, and to do so in connection with "public hearings," across a wide range of concerns. An important episode, that also concerned the location of I-40 through the state of Tennessee, the opposition of highway and more broadly public interests, and the integrity of a public hearing process to inform bureaucratic decision, arose in Nashville, and reached the Sixth Circuit in 1967, at the height of the Memphis debates. Nashville I-40 Steering Committee v. Ellington was pregnant with overtones of Carolene Products; it may illustrate both the strengths and weaknesses of the hearing process as, not an end in itself, but a catalyst for community political effort.

Some facts of the case support the proposition that the state highway department had been a party to manipulations producing an outcome improperly favoring dominant white interests over black interests. The route through Nashville would separate the campuses of Fisk University and Meharry Medical College from the nearby black community of North Nashville, while disrupting

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classes with its noise and diverted traffic; it would destroy a public park used largely by blacks; and accompanying street changes proposed by the city would close a substantial segment of Jefferson Street, site of Nashville's most successful black merchant community. According to the plaintiffs, preliminary indications of I-40's route had not threatened this dramatic impact. As originally proposed in 1956, the route had been a direct east-west road traversing railroad tracks and yards and a few white-owned retail businesses. This was the only portion of the initial plan not finally approved in preliminary meetings among state and local officials, and by the time the proposal was made public for the federally required hearing in 1957, it swung north through the black community. As would not be the case in Memphis, the required public hearing was—perhaps intentionally—obscure; notices were sent only to the County Judge, the Mayor, and a few post offices located in white neighborhoods. The notices were unspecific about the route, and gave as the date for the hearing May 14, 1957, when in fact the hearing occurred May 15. The hearing was imperfectly transcribed—only remarks from the podium were recorded, not those from the audience—and the only formal reference to its use appeared in the following statement of the attorney for the state highway department, responsible for route selection:

I certify that I am an official of the Department of Highways and Public Works of the State of Tennessee and that the above transcript of the public hearing heretofore conducted regarding the location of the above mentioned project has been read by me. I further certify that said Department has considered the economic effects of the location of said project and that it is of the opinion that said project is properly located and should be constructed as located.

Yet viewed as an outcome of a political process, as the Ellington court appeared to understand it, the Nashville result was ambivalent—indeed, not yet finally settled when the matter came before the court. The court feared that the invocation of judicial remedies threatened its own distortions. With regard to the problem of notice, for example, while the court concluded that notice had been given in an "unsatisfactory way . . . especially when for some unexplained reason the notice announced the hearing for May 14, and it actually was held . . . May 15," it also observed that the matter had been an issue of substantial public controversy in Nashville—that

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69. Ellington, 387 F.2d at 184.
voices were in fact raised within the local political process. Similarly, while agreeing with the district court's conclusion that "the consideration given to the total impact of the link of I-40 on the North Nashville community was inadequate," the court also appears to have concluded that the hearing requirement could be little more than a formality from judicial perspective, and that litigation processes were not the appropriate setting for providing or even assuring adequate consideration to this impact. The court thought that the "emergency" resulting from the refusal of state officials to postpone the soliciting of bids on the process was at least in part an emergency of plaintiffs' own making—one that, if recognized, would encourage litigating manipulations in the course of future such disputes. While agreeing to treat the dispute as an emergency, to be heard at trial and argued on appeal under unusually stringent time constraints, the court also expressed regret "that appellants waited so late to begin their efforts to correct the grave consequences which will result from the construction of this highway." Thus, unless persuaded to regard Nashville's political processes as requiring the intervention Carolene Products' Footnote 4 sug-

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70. *Id.* at 183.

The proof indicates that the hearing was well attended . . . . Based upon the record before us, . . . we are convinced that the District Judge would have been justified in concluding that no literate citizen of the Nashville community could have been unaware since 1957 of the proposed route of the interstate highway, including the approximate location of the section now under attack. The record contains copies of many newspaper clippings from 1957 forward, setting forth maps and descriptions of the proposed route. Judge Leech [at the time, the State Commissioner of Highways] testified that he made many public speeches concerning the proposed system, including an address before a Negro civic group in North Nashville, and that there was much newspaper publicity concerning the proposed routes. Some of the appellants testified that they had known the general location of the proposed route through North Nashville long before the complaint in this action was filed.

71. *Id.* at 183, 185–86.

[T]he District Court had no practical way of determining to what extent highway officials gave consideration to the economic effects of the proposed route. The . . . attorney who made the . . . certification is now dead. Former Commissioner Leech testified that his department employed a reputable firm of engineers and that exhaustive studies were made by this firm and by personnel of the highway department.

Under these circumstances we hold that justification existed for reliance upon the presumption of regularity of public records and compliance by public officials with duties imposed upon them by statute.

72. *Id.* at 186.
gests, the court could believe the hearing requirement served its implicit function of catalyzing local political discussions, and that the outcome merely reflected failure on the part of one of a number of contending community voices to have achieved all that it might have desired in the ordinary processes of decision. The court was writing in December 1967, a decade after the "public hearing"; during this decade efforts to affect the outcome could have been active and enduring at every level. Moreover, the court was writing in the context of litigation that had erupted with the filing of a demand for a temporary restraining order on October 26, 1967. If there had been a decade of potentially unruly coming-to-judgment about the location issue, in a political process engaging the broad community and requiring the accommodation of widely varying social interests, the agency's decision to go forward with contracts could properly have been understood as merely a culmination, not the equivalent of a judicial decision only just reached, for the first time, after all arguments have been heard, all briefs submitted. If so, that decision would create no real emergency, and litigation would have a decidedly obstructive potential.

Lawsuits like this one do not have compromise and accommodation as primary outputs. As if to underscore the point, the court ended its opinion with a discussion of the possibility that negotiations under way in the federal Department of Transportation might yet avoid many if not all of the consequences complained of. Such negotiations are essentially political.

73. See supra text following note 23. In portions of the opinion not discussed in text, the Ellington court considered the claims of racial discrimination on the merits and found that they were not proved well enough to require reversing the lower court's denial of preliminary relief. Ellington, 387 F.2d at 185. Acting on such claims would have carried its own risks to a setting complicated by the existence of many conflicting and important interests. Not only would "alternative routes undoubtedly . . . impose hardships upon others"; the more public precise route selection is required to be, the greater the chance for real estate manipulations increasing public costs for private profit. Moreover, delay in effecting a project that will serve the public good also creates public expense; at some point, one must be able to act. Id.

74. The propositions in the text are carefully stated in the conditional. A contemporary account, one of the several "superhighway expose" books of the time, presents Nashville officials as having refused to specify the exact route until construction bids were sought in 1967 (although the route had been federally approved in 1958 and property acquisitions began in 1965). On this account, the public response was immediate, and included unavailing political interventions at local, state and federal levels as well as litigation. See A. Mowbray, supra note 51, at 179–80.

75. If, as stated in oral argument, the United States Department of Transportation has announced that it will not approve the letting of the contract for this project pending further study, it would appear that final approval of this segment of highway may not yet have been given by that Department. We cannot presume that the Department of Transportation...
events; the role the Department was willing to play in them could be taken as a sign of its awareness of the growing importance of political rather than technocratic resolutions of issues of highway location and design.

3. The Victory of Comprehensive Planning Over Highway Technocracy

By the spring of 1968, over a year after the Department’s creation and just as the decision to locate I-40 in Overton Park was being made final, the dynamics of balance had become dominant, with the strong support of the Department’s leadership. In May of that year, both Secretary Boyd and Federal Highway Administrator Bridwell testified at the conclusion of hearings on urban planning, location and design that had been continuing for several months under the aegis of the Subcommittee on Roads of the Senate’s Committee on Public Work. The general thrust of their testimony was strongly to support wide consultation and the involvement of local politics to determine community interests and engage planning across a wide range of issues, rather than simply rely on the profes-

\[\text{will fail to give consideration to possible revisions in the plans and specifications so as to alleviate as much as feasible the grave consequences which this record shows will be imposed under the present plans upon the North Nashville community.}\]

\[\text{Ellington, 387 F.2d at 186. Similar awareness of the place of politics may be reflected in the court’s reasons for reversing the district court’s dismissal of one defendant, the Metropolitan Mayor of Nashville and Davidson County, on the ground that he lacked jurisdiction over the locating of an interstate highway and could not participate in any decision with respect thereto.}\]

Although the District Court is correct in its conclusion that the Mayor has no legal power to decide the location of an interstate highway, it cannot be doubted that he possesses considerable powers of persuasion and cooperation. We cannot predict the ultimate disposition of this case in the District Court on its merits. It is conceivable that the final solution could require the closing, opening, or rerouting of city streets, rezoning or other municipal action. A correction of these problems could require cooperation among Federal, State and local governments. We consider it proper to retain a representative of the Metropolitan Government as a party defendant.

\[\text{Id.}\]

FHWA Administrator Bridwell eventually reaffirmed approval of the route, but with some changes to reduce the barrier effect of the highway and recommendations to the city for action that would ease the relocation of black businesses. A. Mowbray, supra note 51, at 183. His explanation for the approval, that by this point the location issue was fait accompli, and his specification of desirable changes are part of the record of the 1968 hearings on Urban Highway Planning, Location and Design that also figured significantly in the Overton Park controversy. \text{See Hearings, supra note 60, at 509–16, 560–64.}
sional expertise of highway engineers. "We have no choice," the Secretary argued, "but to follow planning procedures which are sensitive to the needs of individual communities and elicit community involvement in the development of the plans." 76

Administrator Bridwell testified the following day, and detailed both the Department's understanding of and support for section 4(f), and the course of action it had followed in a number of controversial highway decisions, specifically including Overton Park. "Unfortunately," he told them, "there is no legislative history on [section 4(f)], so there is no real guidance from the Congress in interpreting the act. Therefore, we are faced with the bare words, 'if prudent and feasible,' and if it is not prudent and feasible, to minimize the damage." 77 The Department had been experimenting with a variety of approaches to section 4(f) in a number of urban settings where conflict had arisen over conflicting values: redevelopment, community displacement, racial justice, "white flight," business district reorganization, environmental and historic preservation, and so forth. He described an approach that did not treat park values as absolute or presumptively controlling, but relied heavily on the injection of park values into local hearing processes where issues such as neighborhood integrity and dislocations would also be considered. Rather than treat route decisions as

76. Hearings, supra note 60, at 455 (testimony of Alan S. Boyd, Secretary of Transportation). In contrast, consider the May 6 testimony of Governor John Volpe of Massachusetts, the former contractor who would shortly become President Nixon's first Secretary of Transportation, who spoke on behalf of the Governor's Conference. Perhaps state highway departments should expand the range of disciplines they incorporated, he conceded, but to provide for an urban design team or for consultation with local politics in competition with these professionals would be to invite chaos. Id. at 248-49 (testimony of John A. Volpe, Governor of Massachusetts and Chairman of the Governor's Conference).

To the same effect, again promoting professionalization centered in the highway department over politics or authority shared with municipal planners, see the testimony of the President of the American Association of State Highway Officials before the same subcommittee at its June 4, 1968 hearings specifically on S. 3418, which became the Federal-Aid Highway Act of 1968: "[T]he manner in which section 4(f) of the Transportation Act of 1966 is being administered is working as a delaying factor in getting the program completed and some of the material being drafted relative to double public hearings would allow dissidents, through legal procedures, to tie highway projects up almost indefinitely"; the Department was guilty of "over emphasis and over enthusiasm in administering Section 4(f)"; and Section 4(f) was "being used to reopen decisions previously made or to slow down the program." Highway Safety, Design and Operations; Freeway Signing, and Related Geometrics: Hearings Before a Special Subcomm. on the Federal Aid Highway Program of the House Comm. on Public Works, 90th Cong., 2d Sess. 74, 76, 108-09 (1968).

77. Hearings, supra note 60, at 473 (statement of Lowell K. Bridwell, Administrator, Federal Highway Administration).
primarily for the Washington bureaucracy, their approach accorded substantial decisional responsibility to properly instructed and supported local officials. The statutory recognition that there might be no “prudent” alternative route permitted a balancing of competing interests—safety, neighborhood integrity, and the avoidance of large-scale urban relocations. Although “a few years ago” federal officials had emphasized both “developing local planning competence . . . and . . . removing it from the vagaries of the political system,” he now acknowledged that the professionals had proved insufficiently responsive to community values;78 hence the Department was seeking to promote greater community involvement in the development of the transportation plans, to make professional planners and engineers more responsive to community needs and goals.79 Bridwell told the Subcommittee that approximately

78. Id. at 533 (testimony of Lowell K. Bridwell, Administrator, Federal Highway Administration). The point was well expressed in M. Levin & N. Abend, supra note 52, at 245:

Area transportation planning, like other subjects that most people find both complex and boring, is relegated to professionals. Decisions are frequently made in back rooms on the basis of narrow technical criteria far removed from public discussion. Public hearings, until recently at any rate, have tended to be perfunctory pro forma affairs in which the participants are overwhelmed by masses of expensive maps and data. Accordingly, most significant development decisions are made by members of narrow professional guilds. Alan Altshuler has called this “creeping fait accomplisism,” in which agency professionals adopt a series of decisions under the guise of technical necessity until those decisions eventually, and sometimes unwittingly, accumulate into a major policy.

The colliding bureaucrats, in Levin and Abend’s account, are highway planners and general purpose city planners—the one group focused in the Department of Transportation (at the federal level), the other at the Department of Housing and Urban Development. Their case studies, they thought,

helped to bring into focus the long-standing suspicion, current among [city] planners, that highway engineers are narrow, callous technicians, heedless of the social impact of their efforts. Highway engineers were confirmed in their belief that planners are woolly-headed theoreticians lacking the practical sense to build a birdhouse, let alone to exert a useful influence on the routing of major expressways. The planning agencies were firmly committed to the concept of citizen participation, the highway agencies to the limited involvement of affected individuals and groups through statute-satisfying public hearings.

Id. at 244.

79. Cf. Hearings, supra note 60, at 454, 533–34 (testimony of Administrator Bridwell & Secretary Boyd). In colloquy with the committee chairman toward the end of his appearance, Bridwell made the point this way:

We are trying to accommodate it by much more deeply involving the public in discussion, in the presentation of facts, and hearing of their points of view, and instead of letting the professional planners make the
twenty-five cases pending in the Department raised "fundamentally . . . the same problem, namely, the conflict of community values." 80

I reject the idea that we have an either/or situation before us, either/or in the sense that you must choose one as distinct from the other and that you cannot have both. In other words, either you can't have highway or you can't have housing or you can't have a highway and you can't have a park, because in my opinion if we do our job, do it thoroughly, do it right, and you give us the tools to work with there isn't a reason in the world why we can't accomplish both. 81

Bridwell told the committee that in Memphis the controversy involved a park that was "extremely attractive and highly used," and that the long-standing plans to build the highway through it had culminated "recently in considerable controversy over whether the park could or should be used" 82 for the highway. Mr. Bridwell said

Once again this 4(f) portion of the Department of Transportation Act came into play. In effect it required us to do the same type of thing that we did in New Orleans, 83 go back and look at, is there another feasible and prudent location.

decision saying to the elected representatives of these people, 'this is your decision to make'.

Id. at 533–34 (testimony of Administrator Bridwell).

80. Id. at 486.

81. Id.

82. Id. at 479.

83. Bridwell had discussed the New Orleans project, like the Memphis project, as an illustration of the Department's effort to form "joint concept teams," id. at 471, that would bring "a multiple professional discipline effort," id. at 472, to bear on the problems of highway location and design. The issue in New Orleans had been the location of the road along the riverfront of the city's historic French Quarter. Administrator Bridwell said that when the FHW Administration had first become seriously concerned about this controversy, the State had planned the highway with the city concurrence. For the FHWA, it presented two considerations—first, whether there was "another reasonable, feasible location for this highway," id., and second, whether all possible measures had been taken to make the road in its projected location consistent with "preserving and enhancing the historical features of the city of New Orleans and the French Quarter." Id.

Regarding location, the Department had found that alternative locations would have been more disruptive to the community than the originally chosen; or that the alternative locations, did not serve the same corridor of traffic or; third, that alternatives were so much different that those originally planned that they couldn't be accomplished for other reasons, for example, limitation upon the number of interstate miles available.

Id. Design then became a central issue, given section 4(f) of the DOT Act. "From my standpoint, we have made the determination that there is no feasible and prudent alternative so the problem then becomes one of minimizing damage." Id. at 473. Bridwell then showed and explained some photographs to illustrate how the design had been
Again experimenting we handled this one a little bit differently. We went to the city council of Memphis and we said, "Yes, there are alternatives..." We told them that a highway could be built through the area on almost any conceivable line that they could pick, that engineeringly [sic] it was feasible... We went through this for approximately [three and a half] hours in which we left it completely in the hands of the city council to choose anything they wanted to choose, and after several days the city council voted to stick with the original line through the park.84

Bridwell said he and the City Council had discussed four alternatives and the disruptions each would cause, and that he had put to them the issue of priorities. Many sociological factors, that are not particularly susceptible to quantification "in our ordinary use of the word ‘quantification’ have been and are being taken into account and without any question increasingly so now and in the recent past."85 Although some of the contending community values in Memphis could be measured, some could not be, and none could be measured in a "completely satisfactory sense." Nor could hearings be relied upon to supply a resolution. Witnesses who appeared in Memphis hearings, as elsewhere, had been critical of the decision to go through the Park; but those witnesses were understandably expressing a preference for "their own personal set of values" in a situation of inevitable conflict.

There is no nice, easy answer to this and there never will be. . . . Anytime there is disruption to an established pattern in the urban environment there necessarily must be conflicting sets of values brought into play and some one has to make the decision about which set of values prevails. The Secretary testified yesterday that except for very unusual circumstances the decision of the local people would prevail, in the form of the action of the elected representatives, their mayor, their city council, their appropriate local officials.86

84. Id. at 479-80.
85. Id.
86. Id. As part of his deposition on the 1971 remand in Overton Park, Mr. Bridwell’s then deputy, Edward Swick, had testified that Bridwell had been concerned throughout the process with the overall attitude of Memphians to the controversy. "He had a real desire to know if the people wanted it, if it was just a splinter group opposed to it and if there was any real concern in the city as a whole about the route. It was an attitude he took in regard to all urban controversies of this nature..." Black & Jones, Appeal Court Denies Pleas by X-City Route Protesters, Memphis Press-Scimitar, Sept. 29, 1971.
Bridwell continued:

That was precisely the reason that we went to the Memphis city council and in effect said, 'Take your choice. You can have anything you want and we won't even as much as tell you how many dollars it costs because we don't want to influence your decision. You have to decide on the basis of contending unquantifiable community values.'

His lively dialogue with the Subcommittee sympathetically explored, and did not condemn, the approach he described.

Once these hearings were concluded, the Subcommittee moved immediately to consider the Federal-Aid Highway Act of 1968. While this legislation would resolve the linguistic inconsistency between section 138 of the Federal-Aid Highway Act of 1966 and section 4(f), ultimately choosing the section 4(f) formulation, its focus was on the general problem of urban disruption occasioned by expressway construction. In that context, the legislation moved unmistakably toward balance, and larger participation of local political processes as against the state highway technocracies. Thus, much of the Committee effort, led by Senator Baker of Tennessee, was to develop a more effective and equitable program for relocation of displaced individuals, an effort which matured as Title II of the 1968 Highway Act. Section 128 of Title 23, which previously required State highway departments to provide public hearings only to consider the economic effects of urban highway projects, was amended to require that these hearings also consider the "social effects of such a location, its impact on the environment, and its consistency with the goals and objectives of such urban planning as has been promulgated by the community." Having heard both the departmental plans for enlarging political participation in highway planning, and highway officials' objections that the Department's political approach to section 4(f) would slow and

87. Id.
89. Relocation provisions were later taken out of the Federal Highway Code and included in the Uniform Relocation Assistance Act of 1970, 42 U.S.C. §§ 4601–4655 (1988), which applies to all federally funded projects, including highways.
90. 23 U.S.C. § 128 (1988). Section 128 of Title 23 was amended again in December 1970, effective immediately, to add the requirement that the certification by the State Highway Department regarding public hearings and the consideration of economic, social, and environmental effects "shall be accompanied by a report which indicates the consideration given to the economic, social, environmental, and other effects of the plan or highway location or design and various alternatives which were raised during the hearing or which were otherwise considered." Federal-Aid Highway Act of 1970, Pub. L. No. 91-605, § 135, 84 Stat. 1713, 1734.
deprofessionalize the process, the Committee was well aware that adding these factors would require greater involvement by local government officials and agencies and by private individuals and groups.

While the Senate Committee's bill suggested no change in section 4(f)—the formulation it knew to be the departmental choice—its actions overall seem strongly to endorse the general approach to that section the Department had described in its testimony. The Committee remarked in its report,

The Committee is firmly committed to the protection of vital park lands, parks, historic sites, and the like. We would emphasize that every thing possible should be done to insure their being kept free of damage or destruction by reason of highway construction. The Committee would, however, put equal emphasis on the statutory language which provides that in the event no feasible and prudent alternative exists, that efforts be made to minimize damage.

The committee would further emphasize that while the areas sought to be protected by section 4(f) and section 138 are important, there are other high priority items which must also be weighed in the balance. The committee is extremely concerned that the highway program be carried out in such a manner as to reduce in all instances the harsh impact on people which results from the dislocation and displacement by reason of highway construction. Therefore, the use of the park lands properly protected and with damage minimized by the most sophisticated construction techniques is to be preferred to the movement of large numbers of people.

The Committee leadership reiterated this understanding when, responding to the proposal in the House to adopt the section 138 formulation, Senator Jackson successfully moved from the Senate floor to amend section 138 to conform it to the requirements of section 4(f).

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91. See supra note 51.
92. S. REP. NO. 1340, 90th Cong., 2d Sess. 11, reprinted in 1968 U.S. CODE CONG. & ADMIN. NEWS 3482, 3492. Based on the information received during the hearings, the Committee was of the view that many controversies now facing the highway projects would be ameliorated, if not eliminated, had local officials been brought into discussions at a sufficiently early stage in the hearing process. Id.
93. Id. at 18–19, reprinted in 1968 U.S. CODE CONG. & ADMIN. NEWS 3482, 3500.
94. 114 CONG. REC. 19,530 (1968). When Senator Jackson sought assurance from Senator Randolph, Chairman of the Public Works Committee, that his Committee had determined not to modify Section 4(f) and to uphold the previously expressed intent of the Congress on the question of protection of parks, Senator Randolph gave that assurance by quoting from the Senate Public Works Committee Report the second of the two passages in the text as evidence of what the Committee had decided.
On the House side Secretary Boyd also argued that section 4(f) was the preferable formulation. He wrote the Speaker of the House on July 1, 1968, opposing a House Committee's recommended amendment of section 4(f) to conform it to the language of the more permissive section 138.

The [House] report indicates the Committee's belief that the perspective in decision-making should be broadened, not narrowed, and that preservation for use is sound conservation philosophy. . . . It is in this spirit that the [Department of Transportation] proposes to administer the Act. . . . The department is aware of no problems which have arisen in the course of administering the present language, nor does the Committee report refer to any. We think the present language of 4(f) is a clear statement of Congressional purpose. 95

The House nonetheless voted to conform section 4(f) to section 138. The Senate prevailed in conference, choosing the section 4(f) formulation as the Department had urged. It would be hard, however, to take this as a repudiation of what the Administration had advised Congress it was doing. The Managers on behalf of the House included the following statement in their report to their colleagues:

This amendment of both relevant sections of law is intended to make it unmistakably clear that neither section constitutes a mandatory prohibition against the use of the enumerated lands, but rather, is a discretionary authority which must be used with both wisdom and reason. The Congress does not believe, for example, that substantial numbers of people should be required to move in order to preserve these lands, or that clearly enunciated local preferences should be overruled on the basis of this authority. 96

While the Senators principally responsible for the legislation told their colleagues in a colloquy that this interpretation had not been discussed in conference, and that they disagreed with it, their principal emphasis appears to have been on preserving the Secretary's discretion to disapprove local choices that ran counter to the statute. 97 The provision appeared as the consequence of a few Senators'...

95. Id.
97. 114 Cong. Rec. 24,033, 24,036–37 (1968) (statements of Sens. Jackson, Yarborough, Randolph, and Cooper). Thus, the disagreement was with the proposition that "clearly expressed local preferences" should not be overruled. In the speakers' opinions, Sections 4(f) and 138 gave discretion to the Secretary to veto the decision of the State and local authorities to locate highways through parks. Senator Yarborough, the original proponent of the amendments that resulted in both section 138 and section 4(f), in particular, wanted assurances from Senator Randolph that the Secretary would
undoubtedly strong interest in protecting parks, yet the consequences for ongoing projects were not explored. Also unexplored were the possible consequences for other strongly held values at stake in highway construction—in particular, the urban relocation, often of the residents of poor and/or minority neighborhoods, that was the principal focus of the legislation at hand. Significantly, the statute as a whole was regarded as a defeat for an administration seeking additional measures for beautification and highway amenity at the hands of highway interests particularly influential in the House. 98

The Federal-Aid Highway Act of 196899 became effective on August 24, 1968. The amendment to section 138, in the context of a bill that dealt chiefly with the problem of urban dislocation and that expanded the scope of required public hearings, understandably confirmed Secretary Boyd in the course he and Administrator Bridwell had described to the committee. Routing decisions Boyd had made (as for Overton Park) were not reopened, and the procedures he had described as proposals in May of 1968100 were adopted as standard departmental operating procedure as he left office, in January 1969.101 Under these procedures, routing and design were to be treated as separate issues; local public hearings were required for each, as were consultations with possibly interested federal and state agencies—in effect, environmental compliance enforcers. Thus, the April 1968 decision to reaffirm the location of I-40 through Overton Park in Memphis would lead to a second set of proceedings on design attended by, among others, officials of the Department of the Interior and of the National Recreation and Park Association, and to a further decision in November 1969—now with John Volpe as Secretary of Transportation—specifying where and how deeply the road was to be depressed as it crossed the park.

100. 33 Fed. Reg. 15,663 (1968). In describing the proposal to the Senate Subcommittee in his May 27, 1968 testimony, Secretary Boyd referred to it as a step towards "improving sensitivity to local community interests and goals" in planning future urban highway programs. Hearings, supra note 60, at 455.
On the whole, then, Department officials were addressing—and credibly understood recent legislation to be addressing—deficiencies that had been revealed in the presuppositions of professional highway planning, namely that "expert" understanding of the issues of highway design and traffic movement had worked to exclude considerations of social impact important to the communities highways served. On the whole, too, the development in response to these emerging understandings was a political one. The issues involved were not issues of individual rights. Rather, they engaged many conflicting strands of interest in the general community at the national, state and local levels, and in their polycentricity captured the full force of Holmes' Bi-Metallic aphorism. Not surprisingly for such a setting, the politics of opposition was most intensely expressed at the local level; the forces of highway construction were already arrayed at the state level, where federal as well as state law placed most of the required authority to plan transportation infrastructure in a format more expert than openly political. Locally the situation was rather different. Here the dominant issues were political: will the road go through my neighborhood or yours, or will it circumvent the city entirely? Will merchants (or affected landowners) gain or lose by its placement? On whom, and to what extent, will loss of amenities (clean air, peace and quiet, unity of neighborhood, park enjoyment, etc.) be inflicted and who will gain (an easier commute to work, access to a broader or richer pool of customers)? Who will have to move, and where will they move to? Local sources of news—papers, radio, TV—can be expected to pay a good deal of attention to the controversy and to generate interest in it. As can rarely be the case for statewide offices, it may define issues around which campaigns can be waged, funds raised, political positions won or lost. From this perspective, the issues appear as matters not for expert determination, but for community resolution. The legislative changes highway bureaucrats had experienced over a decade put these local processes in ever greater relief; little if any attention was paid to the possible contribution of the courts.

102. See supra text accompanying note 14.

103. There may be political contests over interregional competition and advantage, and the awarding of contracts for construction notoriously provides opportunities for graft or favoritism; but these factors may seem to weigh heavily in favor of removing the state highway process from politics altogether. See Tippy, supra note 61, at 131. A given decision or action will involve the interests of large segments of a state's population too infrequently for one to believe that the constraints of honest electoral politics will often have much play, and that argues for the use of experts.
The increasing emphasis on local politics, as we have already seen, was reflected strongly in the Department's response to the issues about Memphis's Overton Park. Whatever may have been the situation in Nashville, Memphians treated the proposed Interstate, and particularly its impact on Overton Park, as a local political issue from the moment it appeared on the city's horizons. We now turn to that side of the story.

B. Politics and Overton Park: The Local Struggle

The particular dispute over the location of Interstate 40 through Memphis continued throughout the period we have been sketching. As local and particularly urban values became more central to the federal highway process, the citizens of this southern city struggled over their own values and the implications for them of the new mobility the highway represented. This section attempts briefly and impressionistically to provide an account of that struggle, with two principal ends in view—illustrating the complexity of the struggle, as it presented itself to Memphians, and examining the variety of ways in which the participants sought to exercise "their power, immediate or remote," over those responsible for decisions about the road. We will find that the struggle was complex, and that CPOP and its friends repeatedly were successful in gaining access to those responsible for decisions. They were successful, however, only to the extent of winning partial relief—a road more deeply buried in the ground, more carefully routed, less demanding of acreage, but never sent in other directions. On the whole, it seems more likely that these outcomes accurately reflected the wishes of Memphians than that they were the imposition of a narrow and entrenched road-building cabal.

Memphis in the 1950's was a southern city of approximately 450,000, about sixty percent white and forty percent black, long the center of the cotton trade, the largest commercial center on the Mississippi between New Orleans to the south and St. Louis to the north, and imagining itself in competition with each. If one imagines a boll of cotton oriented east from a Mississippi River stem, the commercial center of town was where the boll joins the stem; the black population lived in the dark casing of the boll, north and south and bending eastward; and the white population lived in

104. See supra text accompanying notes 12-14.
the cotton itself. Overton Park lay in the center of the cotton, surrounded by campuses and gracious homes and at the time a park for whites only; black citizens could visit its zoo on Tuesdays. At a time when the city was reasonably compact, the park was flanked by the two principal streets carrying traffic between eastern suburbs and downtown. There was no circumferential road system—in deed, no highway system at all—and the bridge across the Mississippi, a bit to the south of the city center, brought long distance travellers through.

For decades, Memphis had been administered under the watchful eye of E.H. Crump, an unusually effective machine politician whose taste for low taxes led him to ignore infrastructure and planning. His hand-picked Mayor from 1949 to 1953, Watkins Overton, for whose distant relative Overton Park had been named, was also a bitter opponent of planning and reform. It was not until 1953, when Overton was succeeded by Frank Tobey and Crump's grip on the city was beginning to fail, that the city would begin to think about the limited access freeways other southern cities had already begun to construct. In the effort to catch up, and to prepare for the coming interstate system, the city commissioned a thorough planning study by Harlan Bartholomew & Associates, a St. Louis firm, in 1953. Crump died the following fall, and a civic reform group that had been working with progressive business leaders to develop support for planning and urban development, in opposition to Crump, then emerged as the most important political force among the white voters of the city. In 1955, shortly after the multivolume comprehensive plan was received, they would secure the election as mayor of their leader, Edmund Orgill.

1. The Route Through the Park, 1956–1968

The Harlan Bartholomew plan proposed a familiar pattern for the limited access roads that were among its recommendations: a circumferential ring through areas that were described at the time as largely undeveloped, where the limited population was predominantly black; a north-south expressway parallel to the river but far enough inland to bypass the commercial center; and an east-west expressway carrying projected Interstate 40 just north of the center and across a new Mississippi River bridge, at about the same dis-

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106. The narrative in this paragraph draws largely on the accounts given by Tucker. Id. at 67–72.
tance from the center as the existing bridge to the south. East of the river, a study of existing traffic patterns led the engineers to place I-40 between the two principal streets now carrying most of the traffic to and from downtown in those directions—and hence, through Overton Park. It was the one piece of the proposed system that traversed the residential area of Memphis that was largely white in character.

Over the years following, a variety of alternative east-west routings would be suggested and studied. The most serious were three routings that ran north of the projected location: first, to use the north leg of the circumferential, and simply omit a central east-west road; second, a routing along creekbeds and railroad rights of way north of the park; and, third, to run the expressway just inside the northern boundary of the park—now requiring the movement of the zoo from its existing location on the northern boundary, but consequently avoiding bisection of the park. From the traffic engineer's perspective, all three choices were inferior to the park route, because all involved making people drive more miles—quite a few more in the case of the first, and with sharp turns in the bargain where accidents could happen (and have happened in substantial number since the first alternative became the de facto choice). However, other values were also in play. Omitting the central road threatened the fact, or at least location, of the new Mississippi River bridge, and thus risked raising the costs of a trip downtown, relative to other places; the downtown Chamber of Commerce people were consequently clear that their interest lay in having the bridge and the central artery, long before the city's effective center moved away from the river and competing shopping and commercial areas sprang up along the circumferential. The creekbed/railroad route would have impacts not unlike those that proved so objectionable in the routing of I-40 through Nashville, disrupting a stable integrated neighborhood, and perhaps also interfering with water supplies. Using the northern edge of the park would take more acres of park

107. On the whole, the black community of Memphis did not participate in the Overton Park controversy. When it was at its height, they were embroiled in the garbagemen's strike that would end with the tragic assassination of Martin Luther King; and the city park nearest to substantial black housing areas, Riverside Park, had been significantly affected by the earliest stages of construction of the expressway construction, south of the city, without much community opposition. Because of its impact on their interests they did get involved when the railroad/creekbed alternative began to receive serious attention and they contributed to the successful opposition to that substitute. See, e.g., Merrell, A Power Mightier than Ecologists, TRANSPORT TOPICS, May 14, 1973, at 1, 20.
land, and increase the financial outlay required of the city, which could not expect either federal or state subvention of the costs of moving the zoo. Finally, as plans developed and other steps were taken, the psychological as well as fiscal costs of change grew higher and higher; although politics knows neither stare decisis nor res judicata, communities can develop impatience with those of its members who will not accommodate, and intolerance for the delays continued resistance can bring.

The proposal to build an expressway through Overton Park, which first surfaced with the revival of Memphis politics in 1955, received its final municipal imprimatur, for our purposes, with another municipal cleansing in the spring of 1968, when a new City Council took time from its consideration of the agonizing and racially charged municipal garbagemen's strike to meet twice with Lowell Bridwell, the Federal Highway Administrator, and to advise him that the proposal still had the city's support. The years between would see four mayors, two governors, and several state and federal legislators bringing their influence to bear on the controversy, as it passed before four directors of the state highway department, and federal highway administrators in the administrations of four Presidents.

Harlan Bartholomew & Associates delivered its proposed Comprehensive Plan to Mayor Tobey and the Commissioners of Memphis on July 7, 1955. In mid-July, the newspapers said enough about the City Engineer's recent speech to a downtown organization for a careful reader to know that one of the new expressways would go through Overton Park; in September they reported, the Commissioners gave preliminary overall approval to the Harlan Bartholomew plan. However, while some implementing steps were taken during the year-and-one-half following—notably, the reservation of subdivision lands in accordance with the plan—surveying of the relevant portions did not begin until 1957, and matters only came to a head in April 1957. The newspapers then first printed maps that clearly showed the proposed routes through the

city, including the park, and indicated the public would get its
chance to speak out on routing issues. There followed a well-at-
tended meeting of the City Commissioners to hear citizen questions
and views (Overton Park was only one of the subjects), and the for-
amation of Citizens to Preserve Overton Park, which included for-
mer mayor Overton among its more active members.

In its initial efforts, CPOP enjoyed partial success, although it
quickly made it clear that accommodation was not an acceptable
outcome. By mid-May, the city was urging the state to change the
expressway's route through the park to reduce its impact, by align-
ing it with the existing bus road rather than following the planned
route, which would have greater impact on picnic and athletic fields
in the park, and on the forested area. Provisional route approval
appears already to have been given to a park route by the Federal
Bureau of Public Roads. In September, William Pollard, the
chief engineer for Harlan Bartholomew in Memphis, appeared
before a hearing of the City Commission, presenting a design that,
from his perspective, accommodated the concerns expressed at the
Commissioners' meeting. It proposed a roadway depressed below
the surface, fenced, with provision for pedestrian crossings, and
landscaped to reduce its impact. He was met by more than 300
protesting citizens, unwilling to hear him speak or to entertain any
plan that would use the park; they had gathered more than 10,000
signatures on petitions opposed to use of the park—a highwater
mark in numerical support for the opposition, it appears—and the
persons who spoke on their behalf at the hearing included Fred
Ragsdale, the head of the city's traffic advisory commission, who
strongly urged limiting the expressways to the circumferential
highway.

On the surface, accommodation was all that was offered by
those favoring the park route. Following a pattern that would be-
come familiar, Mayor Orgill, who presided at the hearing, expressed

111. See supra text following note 106.
114. See Ginn, supra note 109, at 26.
annoyance at the unwillingness of attendees to listen to an explanation of the reasons for putting the expressway through the park and the imprecations cast on the good faith of its supporters. One could without difficulty believe that his experience of the meeting (if not its actuality) was as an echo of his earlier struggles with then-Mayor Overton and the Crump machine over whether to have such planning at all.

Nonetheless, one apparent result of the hearing was a restudy of the railway/creekbed route by Harlan Bartholomew during 1958. Previously, that route had been rejected by the state on expense grounds; it was now disparaged as likely to serve somewhat less traffic. Later, it would prove to be the route that provoked the greatest resistance from the local black community, because of its neighborhood impacts. The Overton Park route, atypically for the interstate system and uniquely for the proposed Memphis expressway system, passed through elite neighborhoods on its way to and from the park; doubtless this empowered the protesters in numerous ways, but it may also have contributed to a certain "share-the-burden" stubbornness on the part of supporters. Be that as it may, the Overton Park controversy appears to have receded from public prominence after 1957. Clippings files are dominated by general debate about the Ragsdale proposal to limit the expressway system to a circumferential highway, and stories about construction on the southern part of the circumferential, which had been begun. It appears that one candidate for Public

116. Johnson, Young Man, supra note 115. Mayor Orgill commented: "[A]ny group of people who will sit down and listen to how the expressways were planned, the reasons they were placed where they are, will be just as convinced as I am." Id.

117. Harlan Bartholomew undertook preliminary studies of twenty-five distinct routes using the railway/creekbed alternative to the north, and more detailed studies of six; it considered as factors present development, neighborhood boundaries, traffic needs, relation to the current road system (including crossings of major thoroughfares and the ease of locating desired interchanges), maximizing use of the railroad right-of-way, extent of taking required, and relationship to routes to public schools. The park was chosen as much more direct (saving time and energy resources), more readily accommodated to existing roads and useful spacing of interchanges, and offering less disruption to industry. See Ginn, supra note 109, at 31 (citing 1970 correspondence within the Bureau of Public Roads). At the height of the Overton Park dispute in 1968, the Press-Scimitar published excerpts from what was apparently this report, taken from the Federal Highway Commissioner's files. Ray, Federal Highway Commission Says City Council Must Act on Overton Cross-Way, Memphis Press-Scimitar, Mar. 26, 1968, at 1.


119. See supra note 107.

Works Commissioner ran on a platform of opposition to the east-west route in 1959; he lost the election—but then, he had not been selected as a member of the “white unity” ticket that swept all results that fall.  

The controversy heated up again in 1961, when the state highway commissioner came to Memphis to conduct the federally prescribed hearing for the segment of the east-west route including Overton Park. In light of the controversy, the Commissioner himself conducted the hearing. Several hundred crowded the auditorium, largely to ask “what we can do to stop you from going through the park.” Pollard presented an analysis of the route strictly in economic terms. Downtown Association speakers were supportive, but on the whole the (to judge by a news photo) largely white and well-dressed audience wanted to register its disapproval. Within two weeks, the Press-Scimitar reported that Mayor Loeb—who had been the city’s Commissioner of Public Works in the mid-'50's, when the plan was first presented and approved—met with CPOP and endorsed the east-west expressway as the route that “will help Memphis more than any other expressway segment.” A month later, it reported an indication by the City Engineer that the controversial route would be built last, to see if it was in fact required, as well as an indication that alternatives had been pursued. “We’ve tried to get every other possible route approved by the engineers, and they have made at least 32 studies to avoid going through Overton Park, and they found it impossible.” “Impossible” is hyperbole; but the point to see here is the evidence that the citizen resistance was being heard and responded to, that the system was being pushed, albeit not changed in major respects.

121. D. TUCKER, supra note 105, at 102-03.
122. See Ginn, supra note 109, at 39-40.
126. The report later given to Federal Highway Commissioner Bridwell, see supra note 117, contained the following characterization of the outcome of the 1961 hearing: At a public hearing . . . there was some opposition to the location that goes through the park. The opposition came from private citizens whereas approval for the route came from city and county authorities, various planning groups and civic groups as well as individuals and businesses. Because of opposition at the hearing and by letters received after
Again, controversy subsided while other parts of the expressway were built; the first five miles of the southern circumferential opened in December of 1961, and its construction pushed forward steadily. In 1963 the city elected a new mayor, William Ingram, and in 1964—with completion of the Memphis expressways nearing the half-way point—the issue of constructing the east-west expressway from the circumferential to the projected Mississippi River bridge resurfaced. In March, the Tennessee Highway Department hired Buchart-Horn, an engineering firm, to design this segment; this was the only segment for which the original planners, Harlan Bartholomew, were not hired.\(^\text{127}\) By late spring, construction of the Overton Park segment and the renewal of CPOP’s resistance were in the news.\(^\text{128}\) The citizens’ group promised an eleventh hour blitz, and the files again suggest that CPOP was successful in gaining the attention of relevant figures: although the City Beautiful Commission (“CBC”)\(^\text{129}\) and local newspapers\(^\text{130}\) supported the expressway, the Park Commission, the Shelby Forest Council, a number of City Commissioners, and Mayor Ingram preferred that Overton Park not be used—although they were doubtful that anything could be done to change matters, and in some cases were satisfied that “every


\(^\text{129}\) Overton Park Group Renews Fight to Block Expressway, Memphis Press-Scimitar, May 27, 1964, at 5. Formed in the Crump days as an official women’s organization to monitor the neatness of Memphis neighborhoods in each of the city’s wards, the CBC had survived as a voluntary group since Mayor Orgill’s election. D. Tucker, supra note 105, at 27, 80.

\(^\text{130}\) Through the City, Com. Appeal, May 5, 1964, at 6 (editorial). Newspaper support for the roads that presented them as a balanced judgment (“If we saw another way, we would oppose the Overton Park route,” response to Skinner, Letter to the Editor, Memphis Press-Scimitar, Mar. 8, 1961), was a constant irritant to the supporters of CPOP, who remain certain that their viewpoint had no fair hearing in the press. It may be noted, however, that the president of the Forest Council, see infra note 131, was the editor emeritus of the Press-Scimitar.
effort” had already been made to find another feasible location.\footnote{131} As they had done on earlier occasions, the Mayor and Commissioners tended to talk about this decision as one to be made at the federal and state levels, not by them; and for them, if not for CPOP, a great deal of good would be done by reducing the road’s impact on the park—for example, by moving parts of a planned interchange out of the park.

The CPOP blitz reached well past the councils of city government. Although State Highway Commissioner David Pack (who would resurface as Tennessee’s Attorney General in the later litigation) announced in late June that the state planned “to push right ahead,”\footnote{132} he wrote CPOP in late July that his office would study all possible alternatives before going ahead—and this despite pressure from the Memphis Chamber of Commerce and the Downtown Association for an immediate start on what was already a considerably delayed project.\footnote{133} He was apparently acting under instructions from Tennessee Governor Frank Clement, who at the time was in a primary campaign for the Democratic nomination for U.S. Senator.\footnote{134} In late September, Pack reported that, after “considerable effort to see if we could go by alternate routes,” the route seemed fairly certain to remain unchanged.\footnote{135} However, the Senate campaign was not yet over; within a few days the papers reported that Governor Clement had met with Pack and CPOP, stating that he “didn’t mind saying . . . in front of the engineers [that he] would prefer to keep the expressway out of the park.”\footnote{136} The same story indicates that the controversy had reached the head of the Federal Bureau of Public Roads (“BPR”), Rex Whitton; Whitton is said to have stated that the necessary studies had not yet been finalized, and that no effort would be spared to see that all considerations

\footnote{131}{Brown, Commissioners Think Park Route Is Certain, Memphis Press-Scimitar, June 22, 1964, at 1; White, Moore Is Opposed to Overton Park Route, Memphis Press-Scimitar, June 18, 1964, at 25; Porteous, Forest Council, Park Board Oppose Overton Expressway, Memphis Press-Scimitar, June 5, 1964, at 17.}

\footnote{132}{“We have studied and restudied this question and decided some time ago that the Overton Park route is the most realistic. To change now would mean a loss of considerable money and time . . . . We’re definitely going through Overton Park . . . barring intervention by Washington.” Vanderwood, X-Way Will Go Through Park, Memphis Press-Scimitar, June 24, 1964, at 1.}

\footnote{133}{Vanderwood, Park X-Way Studied Again, Memphis Press-Scimitar, July 30, 1964, at 1.}

\footnote{134}{Id.}

\footnote{135}{Topp, Overton Park Route Seems All Settled, Memphis Press-Scimitar, Sept. 24, 1964, at 1.}

\footnote{136}{Whisenhunt, X-Way Opponents Win New Delay, Memphis Press-Scimitar, Oct. 10, 1964, at 7.}
were properly balanced.\textsuperscript{137} By mid-November, mid-level BPR officials had met with CPOP and the engineers from Buchart-Horn to discuss possible changes; these were, however, largely directed at reducing the road's impact rather than rerouting it altogether.\textsuperscript{138}

The officers of CPOP also knew how to involve federal politicians, and state officials were beginning to weary of delay. January 1965, brought news of Tennessee Senator Gore's engagement in the controversy. He apparently had been persuaded to ask Mr. Whitton for a status report after the BPR visit, and forwarded Whitton’s response to CPOP. This response ascribed support for the Overton Park routing to city officials, but indicated the matter had not yet been resolved at the state level. Mayor Ingram, however, could remember no Commission vote on the subject;\textsuperscript{139} the outcomes included an April vote in which only the Mayor opposed the route, and one Commissioner’s hasty visit to Nashville to assure Highway Commissioner Pack of the city’s support for construction.\textsuperscript{140}

Now the news stories began to suggest that the stakes had been raised. Perhaps, Commissioner Pack intimated, the new bridge over the Mississippi would not be built in Memphis if the east-west leg were not constructed, and the funds would be used to speed construction of another bridge further to the north. But perhaps, also, building the expressway would lead a major Memphis facility, St. Jude’s Hospital, to move out of the city, as its leadership began

\textsuperscript{137} Id. Mr. Whitton was no enemy of parks. Within six months after this correspondence, the BPR issued a circular promoting the protection and improvement of public recreational resources in the road-building process. See Gray, supra note 44. In December 1965, it participated in a conference calling on highway planners to relate transportation plans and programs to social and community values. Holmes, The State-of-the-Art in Urban Transportation Planning or How We Got Here, 1 Transp. 379, 391–93 (1973). Moreover, in 1966—in advance of legislation on the subject—Administrator Whitton published an analysis of the Bureau’s attitude to aesthetic values in which he claimed that it required states to give “full consideration to the preservation” of parklands and demonstrate their responsiveness to suggestions made. Whitton, Highway Location: A Socio-Economic Problem, 1 Parks & Recreation 24, 26 (1966) (emphasis omitted). To be sure, other pressures sometimes contributed to rather quick and dirty decision-making by the federal bureaucracy. See Tippy, supra note 61, at 135. Nonetheless, the federal bureaucracy was sending clear signals that these considerations were valid and valued.

\textsuperscript{138} Goodman, Roads Official Makes Tour of Overton Park, Memphis Press-Scimitar, Nov. 18, 1964, at 23.

\textsuperscript{139} Whisenhunt, Mayor Bucks Overton Park Expressway, Memphis Press-Scimitar, Jan. 4, 1965, at 18.

\textsuperscript{140} See D. Tucker, supra note 105, at 111–12. Ingram, it may be remarked, was something of a maverick in Memphis politics; his election had been an unpleasant surprise to the city establishment, and four-to-one face-offs between him and his commissioners were commonplace.
to express fears that vibrations and fumes from the highway would interfere with medical care.\footnote{Williams, \textit{Expressway Project Voted a Green Light Despite Ingram's "No."}, Com. Appeal, Apr. 14, 1965, at 1; \textit{Ingram Loses X-Way Vote by 4 to 1}, Memphis Press-Scimitar, Apr. 14, 1965, at 1.} Aware that this dispute was becoming a national symbol of a viewpoint with which Pack claimed some sympathy,\footnote{\textit{Park v. X-Way---A "National Symbol,"} Memphis Press-Scimitar, June 1, 1965, at 4.} and with the results of a new alternative route study again demonstrating the economic advantages of the park route in hand,\footnote{See Ginn, supra note 109, at 49.} Commissioner Pack announced two modifications at the end of July: construction measures would be taken to protect the hospital, and the design of the projected interchange on the eastern edge of Overton Park would be altered to remove most of it from the park. There would, however, be no departure from the route as a whole.\footnote{Brown, \textit{Green Light Flashes for E-W X-Way}, Memphis Press-Scimitar, July 31, 1965, at 11.} Pack's correspondence with Administrator Whitton makes plain that his purpose was to recognize the opposition to the road, and to go a substantial distance toward meeting it.\footnote{See Letter from David M. Pack to Rex M. Whitton (Aug. 23, 1965), \textit{reprinted in} Record at 143-48, Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971) (No. 70-1066).}

Resistance to the road found a new voice in the fall of 1965 when a wealthy local philanthropist, Abe Plough, indicated that he might withdraw a promised $1,000,000 gift for zoo renovation in light of a proposed design that would require zoo visitors to use a pedestrian bridge over the expressway to get from parking areas to the zoo.\footnote{Brown, \textit{Overton Park X-Way Fight Is Revived}, Memphis Press-Scimitar, Sept. 16, 1965, at 1.} In October, he and Mayor Ingram made a secret visit to Nashville to meet with Governor Clement and Highway Commissioner Pack; they outlined a new proposal: that the expressway be moved to the park's northern border and the zoo relocated south into the main body of the park.\footnote{Porteons, \textit{Lane Blasts Zoo Plan Handling; Proposal Surprises Commissioners}, Memphis Press-Scimitar, Oct. 23, 1965, at 1.} The Governor instructed Commissioner Pack to study the proposal. The city commissioners, when they heard about it, were incensed by the intrigue—the city would be obliged to pay much of the cost of relocation—but open to the merits of the proposal. It led to no change.

In December,Administrator Whitton visited Memphis to inspect the route and possible alternates personally. On January 17,
1966, he informed Commissioner Pack of a decision that "reaffirm[s] our previous approval" of the Overton Park route, subject however to "the most exacting efforts to assure a finished product which is in keeping with the area and future Park usage" as "a condition to our action. We ask that the design be subjected to continuous evaluation by qualified architectural landscape personnel . . . fully coordinated with the appropriate city park officials."  

Pack's reaction was peculiarly ungracious. The newspaper reports carry as his reaction to the news of approval that "the route through the park probably will not be depressed, as was earlier considered. Rather, the plan is to have the route on grade and to make full use of landscaping."  

Mr. Plough thereafter withdrew his offer of financial support for the zoo. While the plans Burchart-Horne eventually developed and cleared with the Bureau called for the road to be depressed six or seven feet below ground level where it passed the zoo—the maximum thought consistent with drainage requirements—Pack's reaction must have suggested to those Memphians who wanted to have the road, but protect the park, that the engineers in Nashville could not be fully trusted. Thus, an issue that might have been settled in 1966 carried forward into 1967—into the administration of a new governor and a new head of the highway department, and then into the new world of the Department of Transportation, its first Secretary, Alan Boyd, and its first Federal Highway Administrator, Lowell Bridwell. Politics knows no res judicata, and battle once again was joined.

Governor Ellington and Commissioner Speight began 1967 by indicating they had reconsidered the route and its alternatives—doubtless in response to pressure to do so from CPOP and its friends—and were convinced that "the route through the park is the most direct and the most economically feasible." Not long after, the Shelby County (i.e. Memphis) legislative delegation introduced a bill in the Tennessee legislature that would prohibit the spending of state funds to build a road through a public park in Shelby County; its plain purpose was to block the passage of I-40 through

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Overton Park. City Commissioners denied knowledge of the initiative; D. Jack Smith, the sponsoring representative, claimed it came from the complaints of his Overton Park district constituency. While the Press-Scimitar editorialized that the bill illustrated the evils of the small election districts against which it had recently inveighed, by putting "a legislator under pressure to put the wishes of his particular district ahead of the welfare of the whole community," responsiveness of this sort surely also illustrates citizens' "power, immediate or remote, over those who make the rule." On March 15, still a few weeks before Section 4(f) was to take effect, the BPR announced its preliminary approval of the road design in Overton Park and on May 2, the City Commission again voted to accept the park route, with Mayor Ingram again in dissent. Representative Smith's proposed statute appears to have sunk into oblivion. In the meantime, the BPR authorized the acquisition of approaches in late May and preparation of the ground for the east-west road began moving toward Overton Park from both the circumferential in the east, and the bridge site in the west.

New political resources, however, again loomed. In 1966, Memphians had agreed at last to replace the five-member City Commission with a thirteen-member City Council, whose members would be elected by representative districts to strictly legislative capacities rather than by the city as a whole to executive responsibili-


154. *Id.* It is perhaps worth noting that, in a southern city so soon after the Voting Rights Act had been passed, the virtues (or vices) of election district size included the greater tendency of small districts to return an ethnically diverse body of representatives. *Cf.* D. Tucker, *supra* note 105, at 148–51. The Press-Scimitar may as well have been commenting on the recent agreement of Memphians to adopt a city council form of government, in which district representation would for the first time play a role—injecting blacks into municipal government.

155. See *supra* text accompanying notes 12–14.


159. See *infra* note 170.
ties (as the commissioners had been). In the same year, the flight of conservative southern white voters from the Democrats to the Republicans led to the election of Memphis's first Republican Member of Congress, Dan Kuykendall. In 1967, this flight together with the drive to municipal reform, produced a City Council only one of whose members had previously held elective office; moreover racial polarization resulted in the election of former Mayor Henry Loeb, a well-established opponent of civil rights, thus setting the stage for the 1968 garbagemen's strike.

Despite what might be suggested by Jack Smith's legislative effort the preceding spring, CPOP was not successful in making the expressway an overt issue in the 1967 council elections. It was not for want of trying. CPOP sent each of the more than one hundred candidates a questionnaire about his or her attitude. Most candidates avoided responding or otherwise taking an explicit position on the park; a few spoke in code that may have signalled a position; one candidate for the council made his opposition to the road a centerpiece. Like those who seem to have spoken in code, he lost. Nonetheless, CPOP quickly sought meetings with the new council to explore the possibility of change.

At the same time, CPOP had been actively seeking intervention in Washington. By this time, section 4(f) was in force, and the Johnson administration had given prominence to highway beautification—a diversion from Vietnam, perhaps, but a welcome one. The Senate Public Roads Committee opened hearings into urban highways in November 1967, and Overton Park was identified at the outset as a trouble spot. In early December, Representative Kuykendall announced that Highway Administrator Bridwell would be visiting Memphis, and asked for reexamination of the route. Repeated letters from CPOP's indefatigable secretary...

160. A position on the Council was part-time, bringing members $6000 per year. J. Beifuss, At the River I Stand: Memphis, the 1968 Strike, and Martin Luther King 145 (2d ed. 1989).

161. The first council, political tyros, were characterized as "a business oriented group . . . moderately wealthy and middle class," and by early March 1968 entirely distracted by the garbage workers' strike. Id.

162. Only one-third responded—that third, not surprisingly, preferring alternatives over the road through the park by a substantial margin. Correspondence in Box 6, CPOP collection, Memphis & Shelby County Library.

163. Such as "no delays in dealing with local, state and federal projects," or "I oppose . . . concerned citizen digressions." Id.

164. Id.

165. The Overton Park Issue Again, Memphis Press-Scimitar, Dec. 7, 1967, at 8 (editorial). The Representative hedged his bets—he was not seeking "economic suicide"—
Anona Stoner to Secretary Boyd and Administrator Bridwell—and presumably also to the Representative—brought the response from Bridwell that "I have spent some time looking into the issues . . . and reviewing the files . . . [and] plan to visit Memphis to take a first-hand look at the situation and discuss the problem with interested citizens and State and city officials."166 In mid-December, a DOT Assistant Secretary, referring specifically to the Overton Park controversy and Bridwell's coming visit, told Memphis Kiwanis that Memphians would have a "much greater voice" in making the transportation decisions that affect their lives. "We [DOT] feel you should make this decision because you are best equipped to make it—because you will know what will make your commerce thrive and what will make the lives of your people more meaningful."167

Bridwell's first visit (at least the third by ranking federal highway officials, overall) would eventually occur in mid-February; in the two intervening months proponents and opponents jockeyed for position. In January, the Commercial Appeal reported a meeting between Tennessee Highway Commissioner Speight and Mayor Loeb (Memphis' Commissioner of Public Works and a supporter of the road when the plan was first received in the mid-'50's); the Mayor is said to have assured Speight that the city stood behind use of the park and urged its construction.168 At about the same time, CPOP and other interested opponents had the first of two meetings with the new Council to express their views, and CPOP's Chair, Arlo Smith, wrote Bridwell that it hoped for a private audience, at which CPOP, rather than Mayor Loeb, would control the presentation made:

The new Mayor Henry Loeb is one of the most obstinate proponents . . . although this was not a campaign issue of his . . . The new council members are strongly influenced by the mayor, and anxious to get along with him, and they are unaware of the fact—

but still encountered predictable editorial criticism. "Instead of rising at this late hour in support of die-hard opposition to the project," wrote the Press-Scimitar, "Kuykendall should be exerting his efforts toward speeding completion of the expressway as planned and approved." Id. The previous day's edition had reported the renewal of the fight in an article generally about construction progress, under the headline "Millions Go into X-way Route to Park." Millions Go into X-Way Route to Park, Memphis Press-Scimitar, Dec. 8, 1967.

166. See supra note 162. In deciding thus to reopen the issue, Bridwell was permitting the new standards of Section 4(f) to apply, and he apparently understood that he was doing so. He was under no apparent legal obligation to do this; whether a response to Kuykendall's pressure or his administration's views on such issues, it seems clearly the product of politics.


tual information as we have long been in a news blackout, in all media, relative to such information.\textsuperscript{169} . . . Previous “hearings” . . . have been chaired and controlled by persons refusing to hear or “have time for” further consideration. . . . [Attending a meeting between you and the Council] will not enable us to fairly present to you our well documented factual information. We will still need a minimum of an hour with you, privately, for our case to be presented. If you wish a joint meeting with the council and the mayor, it should follow our private meeting with you. . . . We are anxious to have you visit Memphis as soon as possible, because frantic efforts are being made to . . . skip-buy property to show “it is too late to change” now.\textsuperscript{170}

On February 13—the day on which the Memphis garbagemen’s strike began—CPOP spent half an hour with the Council presenting its case. The \textit{Commercial Appeal} counted at least three members as “obviously support[ing] relocation, [one, the immediate past president of the Downtown Association,] to the

\textsuperscript{169} While the letter is not explicit just what this information was, acquaintance with the dispute suggests it concerned the projected costs in money and displacement of alternative routes. State officials regularly presented these costs as millions higher than the costs of the park route, and these were the figures that tended to be repeated in newspaper stories. Opponents of the park route had a different set of figures, which showed less community disruption and lower costs for some alternatives. Repeatedly presented to various official bodies, including Administrator Bridwell in this instance, these competing figures were never accepted.

\textsuperscript{170} Letter from Arlo Smith to Lowell Bridwell (Jan. 19, 1968), \textit{supra} note 162. Preparation and even construction at the outer ends of the ten-mile east-west highway had, of course, been going on for some time. An account of progress appearing in the \textit{Press-Scimitar} on March 26, 1968 gives the following break-down, offering some confirmation of the skip-buying complaint:
point of presenting his own alternative route swinging north.”171
The following morning, Bridwell briefly met the Mayor, the Chairman of the Council and representatives of the Downtown Association together with the press. He then made a tour of the park and the expressway route, and returned to the federal building for a four-hour hearing at which CPOP and others both opposing and favoring the road made presentations; about seventy-five were in attendance. He left the city indicating that he had a decision to make in “several days”; that “we have had all the studies on this that we need”; that if he didn’t act, the expressway would be built; and that “as of right now, the city of Memphis’ official position is in favor of I-40 and going through Overton Park.”172 If the City Council wanted to change the city’s position, it should do so soon.

Perhaps distracted by the strike, the Council did not act until its March 5 meeting. It then unanimously adopted the following resolution:

<table>
<thead>
<tr>
<th>Western end to Waring Road</th>
<th>99% purchased, all but one structure razed, $1.9 million spent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Waring Road to Holmes</td>
<td>95% purchased, all but 15 structures razed, $3.9 million spent</td>
</tr>
<tr>
<td>Holmes to Collines (about 1.5 mi., to within .5 mi. of park)</td>
<td>7% purchased, remainder under appraisal; $470,000 spent</td>
</tr>
<tr>
<td>Collins to McLean (about 1.5 mi., three quarters in Overton Park)</td>
<td>52% purchased (under prior authorization), excluding park property; $1.1 million spent</td>
</tr>
<tr>
<td>McLean to Claybrook (about 1.5 mi., west from park boundary)</td>
<td>Awaiting City Council authorization</td>
</tr>
<tr>
<td>Claybrook to Ayres (includes mid-town intersection with N-S Xway)</td>
<td>Under construction; $2.9 million spent</td>
</tr>
<tr>
<td>Ayres to Mississippi River bridge</td>
<td>90% purchased; expenditures not given.</td>
</tr>
</tbody>
</table>

The alternative routings considered in the spring of 1968 all fit within the Holmes–Claybrook interval; but the railroad/creekbed alternative earlier considered appears to fall outside of it. See Official Study of Alternatives to Overton Park Expressway, Memphis Scimitar-Press, Mar. 26, 1968, at 13.

REVISITING OVERTON PARK

The Council of the City of Memphis prefers that the Expressway through Overton Park not be routed in its present proposed location but that the said proper authorities select another feasible route, with the provision that if no better route can be obtained, the route using the northern perimeter of Overton Park and the southern part of Northern Parkway be chosen.173

One month later, a few days after the strikers' riots and minutes before Martin Luther King, Jr. would be assassinated at the Lorraine Motel, it adopted the following resolution by a vote of 8-2 (three members not participating):

Whereas . . . representatives of the Federal Government and the Department of Highways of the state of Tennessee have furnished the Council with considerable information and data to the effect that no other feasible and prudent route is available through Overton Park for Expressway I-40; and

Whereas the Council has likewise been informed . . . that its action to date has caused no delay in the building of this part of the expressway, but that further study and hearings could materially affect the beginning of construction;

Whereas the Council realizes that the construction is very essential for the growth and progress of the City of Memphis;

Now Therefore be it resolved . . . that the Council finds the route presently designated . . . is the feasible and prudent location for said route and that the design as presently made is acceptable to the Council.174

During the intervening month CPOP and the proponents of the road had contended for the attention of the Council and Administrator Bridwell. For its part, CPOP kept up a steady stream of letters to Bridwell, keeping him informed of local machinations such as the Highway Department's efforts (as CPOP saw them) to force the issue by removing tenants from housing on the approaches on either side of the park.175 Similarly, it wrote privately to the chair of the Council to be sure he was aware of Bridwell's eagerness, as it averred it had learned, to have the Council's help in "reaffirming its stand against the Expressway."176

174. Id. at 515.
175. E.g., Letter from Arlo Smith to Lowell Bridwell (Mar. 8, 1968), supra note 162 (also questioning the good faith of one council member's reported second thoughts about the March 5 resolution); Letter from Arlo Smith to Lowell Bridwell (Mar. 18, 1968), supra note 162 (also asking whether, and if so why, federal funds were being used to finance the acquisitions, if the Department had reopened the park issue); cf. Lentz, Homeowners Stew over I-40 Path Uncertainties, Com. Appeal, Mar. 17, 1968, at 12.
176. "So much pressure has been brought to bear on Mr. Bridwell and his supporter, Secretary Boyd, by conservation and recreation organizations throughout the
Bridwell let it be known that he needed a specific, reasonably well-developed alternative routing proposal, and the newspapers presented this in a manner that made him appear impatient, and possibly threatening the east-west expressway project and the Mississippi River bridge. Yet underlying the stories was not only Bridwell's clear understanding that the requirements of Section 4(f) would now have to be met if the route were to go through Overton Park, but also his acknowledgment of an enforcement device within the Executive branch to keep the Department honest in its approach to the provision—that Secretary of the Interior Udall had been charged by a President notably committed to highway beautification with assuring the enforcement of the new law, and would not likely be satisfied unless the Council were to take a positive position. The Press-Scimitar printed stories examining the alternatives under consideration in some detail and with apparent seriousness, reminding its readers that the northern perimeter alternative the Council resolution mentioned had previously been urged by Abe Plough, and assessing its advantages as well as its disadvantages in relation to the route already approved.

Annoyed that the Administrator would air the controversy in the pages of newspapers already full of criticism over the country that they are ready to favorably negotiate alternate routes." Letter from Anona Stoner to Charles Pryor (Mar. 30, 1968), supra note 162.


178. Id. Bridwell appeared also to be aware that a lawsuit might be brought to challenge any final decision to route I-40 through the park. His personal commitment to environmental values is suggested, inter alia, by a talk given during this period to a Pennsylvania Department of Highways seminar. 1968 Highway Research Record, Highway Research Board (1968). Addressing the problems his office faced in quantifying many values, Bridwell spoke about the importance of considering and integrating them; highways are not everything, he acknowledged, and must coexist with the rest of the communities they serve. He used as his example in this talk a recent effort in Baltimore, where he had undertaken a series of meetings, contacts, etc., seeking to develop consensus and understanding. Without these efforts, he warned, likely results included poor design, loss of community values, placards and lawsuits. Id.; see also supra note 60.

179. Brown, Possible Council X-Way Route Once Rejected, Memphis Press-Scimitar, Mar. 27, 1968, at 37; Official Study of Alternatives to Overton Park Expressway, Memphis Press-Scimitar, Mar. 26, 1968, at 13. The northern perimeter route through the park, in addition to requiring relocation of the zoo, would be slightly longer, cost somewhat more to construct, take more land, destroy more forest, and render more of the park useless (by isolating very small portions) than the approved route; but it would create an integral park of the remainder and enhance the zoo's present use and future potential. In 1965, Buchart-Horn had also studied a more southerly route through the park, that would have left a buffer area between the expressway and the zoo to the north; it, too, would have consumed more land and forest, and interfered with other uses of the park. See also supra note 117.
garbagemen’s strike, the Council first discussed the matter with him in a conference call, and then persuaded him to meet them at Memphis airport on April 3. The discussions included measures to protect the park, the costs of design and route alternatives, and the Department’s reluctance to proceed in the face of threatened litigation without the Council’s backing. Representative Kuykendall still urged “thorough study” of the park route and any “specific alternative that might be offered.” The Council’s movement toward approval of the original route was characterized as stemming from its realization of how far the project had progressed, and a general sense of its overall importance to the city. They now had information they previously lacked, and were impressed with the complexity of the issues and Bridwell’s command of them. He, in turn, remarked on the eve of his April 3 meeting that

the Overton Park route and a similar park crossing in San Antonio are two “hot spots” being eyed closely by the conservation interests for compliance with a 1966 federal law limiting the use of park property for expressways. What we have in Memphis is a question of conflicting values . . . . It is preferable for the City of Memphis, through the mayor and council, to decide what values are to be applied. If city officials don’t do this, then I have the obligation of doing it. But I would much rather be guided by local officials. This doesn’t mean of course, that I will accept any kind of guidance from them. It must be reasonable, rational and prudent.

The April 3 meeting was the occasion for one of those events that contributed to CPOP’s continuing suspicions about the honesty of the process in which they were embroiled. In the 1961 state hearing, audience comments, largely opposing the route, somehow had not been recorded; a similar mishap had befallen the Nashville I-40 process. Now CPOP would be excluded from this meeting, although the press, state and city representatives, and a representative of Harlan Bartholomew & Associates would be there. They

181. Even before the publication of Administrator Bridwell’s interview, Councilwoman Gwen Awsumb had written Anona Stoner of CPOP that “The Council does not wish to be responsible for further delay on a needed section of the Expressway, nor for added unnecessary expense. The response to the resolution seems to indicate that no doubt the original route will more than likely prevail. But we felt we had to try to do what we could. It was worth a try but probably an effort made at too late a date.” Letter from Gwen Awsumb to Anona Stoner (Mar. 11, 1968), supra note 162.
183. See supra text accompanying note 69.
secured Bridwell's promise that the meeting would be recorded; but no sooner had the meeting concluded than he called CPOP Chair Smith to report that the City Council's recording equipment had been, embarrassingly, inoperative.\textsuperscript{184} An anguished letter of April 6 from Smith to Bridwell refers to television clips he had seen of Bridwell explaining the diversion costs of the outside-the-park alternatives and to reports he had received from a councilman about Bridwell's "very fair . . . magnificent presentation." What, Smith wanted to know, were the alternatives discussed? Did Bridwell realize with how much regret Council members had now cast their votes favoring the park route? Wasn't this all the product of permitting the state to continue purchases that basically forced the city's hand?\textsuperscript{185} At about the same time, CPOP's energetic secretary, Anona Stoner, was writing Secretary Udall of the Department of the Interior, seeking to enlist his aid.\textsuperscript{186}

Later arguments would question how open Bridwell was to reconsideration, whether he had not extorted the Council's agreement by threats or perhaps misrepresentation. Yet although contemporary newspaper accounts and correspondence give some support to this view, it is hard to square with the general course of action he took toward Overton Park in particular, and toward his responsibilities in the new Department in general. His DOT administration repeatedly emphasized its openness to the consideration of multiple values, and took a variety of steps (including the legally unnecessary step of reopening the Overton Park controversy) to implement that attitude. It knew it was acting under close political and legal oversight. For the Administrator to make two trips in a two-month period personally to review a three-mile segment of public road was an extraordinary commitment of effort, not readily made simply for show. More than a decade had transpired since the route had been fixed; it had been reconsidered again and again under political impedus not readily discredited as a comprehensive and continuing sham. And life had continued. The issues were close; as the remainder of Memphis expressway system grew and as citizens and businesses began to appreciate and accommodate themselves to its

\textsuperscript{184} A year later, at the hearing on design, recording equipment would again fail as those challenging the proposal came forward to present their views.

\textsuperscript{185} See supra notes 162 & 170. Newspaper accounts confirmed the regret with which the vote had been cast and the members' stated sense that it was virtually forced by decisions made a decade earlier. Kellett, Overton Parkway Route Cleared by City Council, Com. Appeal, Apr. 5, 1968, at 25.

\textsuperscript{186} Letter from Mackey to Anona Stoner (June 11, 1968) supra note 162 (referring to letter of Apr. 15, 1968); see also supra note 162.
changes, commitments had been made that over time narrowed options and hardened attitudes. For the members of the Council, indeed, the issue was doing what they could to respond to the interests of this committed group of citizens—but not at unacceptable cost to the rest of the community. When that cost emerged, the judgment to be made, if painful, was obvious.

On April 19, Bridwell announced his decision to reaffirm the earlier federal approvals to direct I-40 through Overton Park. As with earlier federal approvals, this one came with instructions—now undergirded by federal statutory requirements—that “in the actual design stages we will try to minimize as much as possible the impact of the highway on the park facilities.” The newspaper account reporting the decision also carried statements from Governor Ellington and Representative Kuykendall announcing their acceptance of the decision.

2. “All Possible Planning to Minimize Harm,” 1968–69

The subsequent history continued to be politically rich, but need not be detailed here. The road’s fate was sealed by the Court’s construction of the threshold “feasible and prudent” test of section 4(f), and readers now have before them what they require to evaluate both the alternative, political understanding of that threshold test the Secretary appears to have held, and the Carolene Products question about the accessibility of the responsible, political officials to those who opposed the road. Thus, to understand the remaining events leading up to the court’s decision in Overton Park, it may suffice merely to sketch the events leading to Secretary Volpe’s refusal to revisit the location issue, and his approval of a design sunk more deeply into the ground than the state wanted, albeit not deep enough to avoid the impacts the road’s opponents feared.

As the preceding narrative shows, issues of design to protect the park had been important from at least the hiring of Buchart-Horn to design the park segment in 1964, and “the most exacting efforts” to protect the park had been a stated condition of the federal route approval in January 1966, months before the appearance

187. Adams, Park X-Way Route Gets Final O.K., Memphis Press-Scimitar, Apr. 19, 1968, at 1. Note that this did not foreclose the possibility that one of the other routes within the Park, the northern perimeter route, for example, might be chosen. CPOP appears not to have pursued this option; opposing any use of parkland, they restricted their arguments on design to arguing for a tunnel or deep trench that would keep the road entirely from view.

188. Id.
of a statutory command. The effect of section 4(f), however, was to permit the Secretary to force the Tennessee Highway Department's hand on the question of design; and the effect of section 128, as the Secretary understood it, was to increase the political pressures on this issue. Thus, when in early June the Highway Department sought approval of its design for the road, which the City Council had already approved, Bridwell promptly responded with a request that it study a lowered grade line. A September story in the Commercial Appeal made it clear that East-West expressway construction had been slowed on instructions from Washington to take all possible steps to minimize damage to the park.

With the pendency of a presidential election and then the election of Richard Nixon, construction slowed still further—now, at the initiative of state and city officials who may have understood that Secretary Boyd was likely to require some form of tunnel and hoped a Republican Secretary of Transportation and Highway Administrator would permit the road to be built at or near ground level. President Nixon had appointed as his first Secretary of Transportation the former head of a large construction company, John Volpe. Revised plans for a lowered grade line traveled from the Bureau of Public Roads to the Tennessee Highway Department and back again in February and March of 1969, and the Department held the required design hearing in Memphis on May 19, before an audience of about 100. The principal issue discussed was whether the road should be tunneled under the park, with the Department of the Interior's Bureau of Outdoor Recreation and the National Park and Recreation Association, among others, strongly

189. See supra text accompanying note 148.
193. See Means, Freeway Route Bisecting Park Delayed Again, Com. Appeal, Jan. 30, 1969, at 1; Park Route's Up-or-Down Issue: Whose Decision?, Com. Appeal, Feb. 11, 1969, at 15 ("[Tennessee Highway Commissioner] Speight decided two weeks ago to stop expressway work and see what the Nixon Administration's view would be. 'Any engineers that would recommend that we build that monstrosity [a depressed freeway across the park] ought to have his head examined,' he said.") The city engineers had long opposed any suggestion that the road be built beneath water table. See supra note 37.
supporting that option.195 The state’s recording of the proceedings once again failed,196 although through the Bureau of Public Road’s insistence written submissions were obtained.197

While design approval was pending, state and city officials took an action that seems strongly to reflect an understanding that they were obliged to protect park values. The State had permission to secure the necessary rights of way, and in September it completed that process by purchasing the 26 acres of Overton Park land it required from the city for a negotiated price in excess of $2,000,000. The city had undertaken by ordinance to spend all the funds thus received for the acquisition of new park lands; half the purchase price was immediately committed to purchase a 160-acre golf course that had long been on the city’s list of possible park acquisitions.198 Although the materials consulted for this study are not explicit that the ordinance was prompted by the requirements of section 4(f), one readily understands the undertaking as a direct means by which park values were protected in the transaction as a whole.

In the meantime, the opposition to the road once again had reached the Secretary of Transportation. In July, the Secretary of the Interior wrote to urge the use of a tunnel “to minimize harm to the park”;199 a late September story in the Press-Scimitar remarked that Department officials had ordered a halt to development of I-

196. See supra note 184.
198. Eventually, 405 acres of new park land would be acquired to “replace” the 26 acres to be removed from Overton Park. Memphians had recently been told that the city had only about half the acreage national standards suggested for a city of its size, Land Purchases from Overton Park Account, Com. Appeal, Oct. 7, 1977, at 29, and the new acreage represented only a very small proportion of the new park facilities a city planning document had suggested were required (Vol. 5, Community Facilities Study for the Memphis City Council, June 1968, in CPOP Box 1, recommended that city parks be expanded from 10,334 acres to 42,719 by 1990, at a cost in excess of $100,000,000). Yet the transaction produced a 16:1 improvement in committed “green space.” A map of land purchased from the Overton Park land account, published in the Commercial Appeal for October 7, 1977, shows the bulk of the new acreage falling outside the city center and, as with Overton Park, in areas of predominantly white population.
40, pending Secretary Volpe's return from a European trip;\textsuperscript{200} and the Commercial Appeal reported first a telephone interview on October 1 indicating that he was having a "second look [at the route] to see that it is the most feasible location" and then a telegram that "there is no feasible alternate route" and "therefore my decision, which will be made as soon after my return as possible, will be related to design considerations in preserving the environmental quality of the park."\textsuperscript{201} The same story indicated that the design currently under consideration in the Department was for a tunnel in at least some portions of the park, and documents at the hearing on remand included a strong internal recommendation, from the Department's Assistant Secretary for Urban Systems and Environment, to that effect.\textsuperscript{202}

Design approval was finally issued November 5, 1969, after the state and city had agreed to depress most of the roadway by an additional one or two feet, so that even the tops of trucks would be below ground level at most locations.\textsuperscript{203} Whether for reasons of expense or genuine fear of the consequences of floods and of still water as a breeding ground for mosquitoes, however, the city remained adamant that the road could not interfere with the natural drainage of Lick Creek, and so the design provided for the road to rise above grade level to cross the creek.\textsuperscript{204} One month later, CPOP filed its lawsuit. Preparation moved fitfully as the case made its way from district court to Sixth Circuit to the Supreme Court, with the Department prevailing in each venue but the last; the park itself was untouched, but the approaches could be—and were—prepared.

3. Aftermath, 1971–87

The preparations, the roaring of bulldozers and wrecking cranes on the verge of the park, animated the Supreme Court's brief but intense encounter with the issues.\textsuperscript{205} The Court's opinion, with its strong reading of Section 4(f), sent the case back to district court

\textsuperscript{203} Expressway Improved and OK'ed, Memphis Press-Scimitar, Nov. 5, 1969, at 8 (editorial).
\textsuperscript{204} \textit{Id.}; see supra note 37.
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with instructions to conduct a hearing to review the Secretary’s judgments in light of that reading and of the record that had been compiled during the course of decision.\textsuperscript{206}

Remand produced a twenty-seven day hearing in the fall of 1971, seeking to reconstruct what the administration knew or should have known on the questions of prudence and feasibility; on January 5, 1972, the trial judge ordered the case remanded to the Secretary to decide the matter in accordance with the statute as the Supreme Court had interpreted it. The Department’s prior action had not been based on a correct understanding of the statute, he found; but his opinion also strongly signalled a substantial willingness to uphold whatever decision the Secretary might reach.\textsuperscript{207}

Now Secretary Volpe found himself obliged to apply the National Environmental Policy Act of 1969.\textsuperscript{208} After further hearings in Memphis in the fall of 1972, he found in January of 1973—without specifying what it would be—that at least one “feasible and prudent alternative” did exist to the route through the park.\textsuperscript{209} In April 1974, reversing the district court, the Sixth Circuit upheld that judgment; the Secretary need not identify a particular alternative as long as he found at least one to exist.\textsuperscript{210}

Under continuing pressure from the state, the Department continued to study how I-40 might be completed. While alternative routes were apparently considered, serious discussion focused only on alternative designs for a road going through the park, in apparent recognition of the disruption otherwise likely to be caused.\textsuperscript{211}

\begin{footnotes}
\item[206] A partial dissent argued for the more conventional remedy of a remand to the Secretary with instructions to reconsider his judgment in light of the construction the Court had now given section 4(f). For the majority, however, the absence of an explanation or a record meant it could not be certain the Secretary had failed to understand the statute correctly.
\item[207] Citizens to Preserve Overton Park, Inc. v. Volpe, 335 F.2d 873 (W.D. Tenn. 1972). In particular, the trial judge indicated his skepticism about the principal alternative route that had been argued for on remand, following creekbeds and railroad tracks north of the park—a route that threatened racially integrated neighborhoods, water supplies, and several small parks. Id.; see also Memphis Press-Scimitar, Oct. 7, 1971, at 1; supra note 107.
\item[209] He reached this judgment despite a finding from the FHWA that no feasible and prudent alternative to the park route did exist. Highway proponents, recalling that at the time his nomination to be Ambassador to the Vatican was pending, are as willing to speculate about the politics of this judgment as highway opponents had been about earlier federal judgments.
\item[211] See, e.g., supra note 107.
\end{footnotes}
In September 1974, Tennessee submitted a new proposal opting for an open cut design through the park. Secretary Brinegar instructed the FHWA in January of the following year that an open cut design could not be approved under section 4(f) and asked for an evaluation of tunneling alternatives. In April 1975, President Ford's Secretary of Transportation, William Coleman, announced his provisional judgment that the road should be built as a two-tier tunnel under the Park. However, even apart from the initial outlay, the expense of maintaining such a tunnel—not then payable from the federal Highway Trust Fund—made that alternative unacceptable to the state. A study of a single level tunnel was completed in March 1976, and Tennessee held further hearings in Memphis in August. The Deputy Secretary of Transportation scheduled a hearing in Memphis for November 1976, but canceled it once Jimmy Carter had been elected, in response to a request from Tennessee officials who evidently expected to find the new administration more cooperative.

The state then proposed a design that would be partially tunneled, partly depressed, and in October 1977 the Department rejected it; within weeks a new design for more, but still not complete, tunneling had been presented and, again, rejected. The State threw in the towel in the waning moments of the Carter administration and asked that the segment through Memphis be dropped from the interstate system; about $300 million in federal funds committed to building the road then began to be released to Memphis for other transportation purposes, and in 1987 Tennessee returned the parkland to the city.

The possibility of an east-west expressway, now outside I-40, still lives in the minds of some Memphians. The land purchased for the right-of-way leading up to the park remained in public owner-

217. Id. In 1990 the Memphis Business Journal reported that $100,000,000 of these funds remained unexpended. Mark Borowsky, $17 Million Raleigh-Millington Project Moving Forward, Memphis Bus. J., Sept. 10, 1990, § 1, at 3. Projected cost of the roadway portion through the park, in the 1960's, was variously estimated between $2,000,000 and $16,000,000, with still higher estimates if a tunnel design was to be used.
ship in the spring of 1991, with debate swirling whether and how it should be returned to private hands. To this day, then, a corridor of green denuded of houses verges on the park, both east and west, reminding commuters and park-lovers each what might have been.

C. *A Triumph of the Under-Represented Over Entrenched Interests?*

Understandably enough, CPOP and its friends regard their ultimate victory in Memphis as the triumph of public interest against entrenched Mammon, the highway machine. Theorists looking with favor on the intensified judicial review which *Overton Park* both represented and encouraged have found in that review the means by which the unrepresented achieve some protection against the tendency of the state to respond to concentrated, self-interested power. Yet twenty years later, with the potential of that intensified review to contribute to the stymieing of public initiatives repeatedly illustrated, one may fairly ask whether distrust of the political process was the proper lesson for the Court to draw.

Notably, the political process had been changing the framework of highway development in response to its intrusions, but in a manner more nuanced than the Court in *Overton Park* could see. In the particular case of Overton Park, political processes had produced commitments to design the road much more expensively than the state would have preferred, and its footprint on the park had been reduced by more than half; the parkland taken from Overton Park had been converted into almost twenty times its acreage in new parks scattered throughout the city. Both were unmistakable recognitions of the park values the Court had concluded would inevitably be slighted.

More generally, the political process had produced typically complex, not dichotomous, change. One can with some confidence attribute to Congress repudiation of the almost mechanical "cost-benefit" calculations of economic advantage that had marked early highway planning. This is explicit in the 1968 text of section 128, and implicit in the Department of Transportation Act and its early implementation by Secretary Boyd and Administrator Bridwell. By creation of a Department of Transportation to join highways to other transportation media, coordination with other federal depart-

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219. *See supra* note 198. In 1962, when plans still called for half an interchange in the park, and retaining the bus road, the acreage to be taken was estimated at 56. White, *Park Feels the Price of Progress*, Memphis Press-Scimitar, Apr. 10, 1962, at 8.
ments holding other responsibilities, and the provision for local political voice and multi-disciplinary teams in competition with professional highway design, Congress and the President signalled the need to consider more than the quantifiable issues of time, cost, anticipated traffic burden, and miles.

To demand that the not-readily-quantified be considered, however, is not to choose *which* such value is to be favored; the political history gives no reason to believe that Congress and the President were collectively ready for that, and perhaps they would never have been ready. Their judgment appears to have been to direct that question to local processes in the first instance, under some supervision to see that those values were seriously considered: neighborhood disruption, the requirement of resettling, the erection of racial barriers or interference with racial integration entailed values as ineffable as the use of parks. One can find much recognition of the difficulties, varying willingness to accept that in some cases no road at all might be built, and no consensus that in these problematic contexts the park value was entitled to prevail.

The Court read the statutory language, not as an instruction to political officials encouraging particular attention to park values in a continuing political/planning process, but as an absolute and court-enforceable command that parkland was to be used only in extremis. Where the Secretary naturally (and one could say appropriately) understood this statute in the context of the variety of new arrangements that had been made in the highway statutes and bureaucracies, the Court saw isolated diktat. The Court's opinion, strikingly, admits that the legislative history does not resolve the choice between these two approaches, and justifies its choice on its own understanding of the policy considerations involved.

It is reasonably clear that the Court was further from the prevailing political understanding than the Secretary. The relevant events occurred during the Johnson administration, when Congress and the President were as closely allied as they have been in this half-century. Intuitively, one would believe that the first Secretary of Transportation and his associates would have a reasonable understanding of the political play: the DOT Act, with its inconsistency with the Federal-Aid Highway Act of 1966, had been enacted only two years earlier; and a full Senate oversight hearing coincided with the last administrative consideration of the routing decision. The Secretary's approach to the Overton Park issues was fully discussed in that hearing; the hearing produced no evident negative feedback; and shortly thereafter, as the Secretary had explicitly re-
quested, Congress reenacted the section 4(f) formula in a context (general concern for urban relocation) that reaffirmed his approach. Nor is it likely the Department would have agreed to reopen a decided controversy if it had expected so dramatic a reading of the new statute as the Court eventually gave it. One usefully recalls here the usual judicial acceptance of readings given statutes by administrators first charged to put them into effect and who may have participated in their formation, and the evident good sense that underlies those propositions, if one is after an accurate rendition of the legislation as it might have been understood during the enactment process.

CONCLUSION

What relevance might telling this story about a quarter-century-old dispute have for today? Doing it is in some respects an academician’s self-indulgence; having known for a long time that there was another side to an important case, it was, at one level, just an account I wanted to write, and finally an academic leave came along that permitted the writing. Possibly making this material and these views available will change the shape of a still influential opinion. But it is also possible to name deeper and perhaps more contemporary elements of the urge to write, without imagining that I can today come to resolution of them: How we are to maintain, at a time of extraordinary politicization of the judicial appointments process, the proposition that judging entails the exercise of reason, not will? Does the “public interest representation” model of administrative law that has been so influential in the intervening decades risk making courts more political precisely by failing to stop at the Carolene Products question whether existing political controls over agency behavior are credible, thus arrogating to the judicial side what must inevitably be struggles of will? Finally, is it right to perceive that in some, but not all, respects the judiciary in fact is moving toward a recognition of the validity and workability of political controls—that perhaps Overton Park would not be decided in the same way if it were to be litigated today?

To take the last of these questions first: in a number of recent opinions, the Supreme Court appears to have taken serious account of political controls over agency behavior as alternatives to judicial controls. These accounts not only acknowledge the existence of political controls over what agencies do, but also suggest that in some contexts they may be normatively superior, providing affirmative reasons for the judiciary to refrain from acting. In Chevron,
U.S.A., Inc. v. Natural Resources Defense Council, for example, the possibility of presidential guidance respecting an agency’s administration of a statute of uncertain meaning was given as a reason for judicial acceptance of the agency’s reasonable interpretations. In Robertson v. Methow Valley Citizens Council, the Court was faced with a choice between competing views of the National Environmental Policy Act. On the one hand, its requirement that agencies prepare and circulate Environmental Impact Statements for public comment might imply a judicially enforceable requirement to act on environmental hazards or impacts identified by the Statement, taking steps to mitigate them; on the other, the requirement could be seen simply as a means for arming the political

221. In Chevron, the Court found itself unable to identify a determinate meaning for the statute before it, on the basis of either statutory language or the conventional materials of legislative history. The Court did not conclude from this that it was facing a case of legislative failure—the unlawful delegation of legislative authority—as it has periodically been urged to do. Rather, Justice Stevens wrote for all his sitting colleagues, in such a case the issue of meaning could be settled by an agency rule, subject only to the usual review to determine whether the agency's judgment was "arbitrary, capricious, or manifestly contrary to the statute." Id. at 894 (footnote omitted).

For judicial purposes, it matters not [why Congress failed to resolve the question decided by the agency]. Judges are not experts in the field, and are not part of either political branch of the Government. Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges' personal policy preferences. In contrast, an agency to which Congress has delegated policy-making responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. While the agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities. Id. at 865-66. Thus, the court serves both to define the area within which the agency enjoys discretion and, in some measure, to assess the reasonableness of the exercise of that discretion. Its activities are constrained, however, by recognition that political controls actually and permissibly operate within that area. Rather than a dichotomy between political and judicial controls, one finds unusually explicit in the quoted language recognition both of a shared space within which both judges and politicians have legitimate oversight functions to perform, and of reasons for the appropriateness of the sharing.

223. Two such impacts had been identified in connection with the challenged project, a proposed ski resort in a national forest: a diminution in air quality, and possible inhibitions to deer migratory patterns. These impacts would be brought about not so much by development of the ski area itself as by the inevitable off-site real estate development accompanying it. Dealing with these impacts would require the cooperation of the state and county officials responsible for controlling such developments. The claim
processes that could be brought to bear on the exercise of agency discretion, by providing "a springboard for public comment."224 The Court chose the latter meaning, leaving action-forcing to the ordinary processes of political oversight. Finally, in Lujan v. National Wildlife Federation,225 environmental litigators seeking judicial review of the Bureau of Land Management's implementation of a statutory program were told that they could expect to be able to challenge only those particular decisions that might have a direct impact on individual parcels of land their members controlled and that more general oversight of program implementation belongs in Congress or the White House:

The case-by-case approach . . . is the traditional, and remains the normal, mode of operation of the courts. Except where Congress explicitly provides for our correction of the administrative process at a higher level of generality, we intervene in the administration of the laws only when, and to the extent that, a specific "final agency action" has an actual or immediately threatened effect. Such an intervention may ultimately have the effect of requiring a regulation, a series of regulations, or even a whole "program" to be revised by the agency in order to avoid the unlawful result that the court discerns. But it is assuredly not as swift or as immediately far-reaching a corrective process as those interested in systemic improvement would desire. Until confided to us, however, more sweeping actions are for the other Branches.226

The trust of political processes stated in these and other recent opinions, reflected back on Overton Park, suggests that the contemporary Court might find it easier to accept assignment of the 4(f) judgment to constrained politics in the first instance.227 The understanding of the statute that the Secretary exposed to the Senate Committee in hearings would be accepted as setting the framework (successful below) was that the project could not be permitted to move forward until that cooperation had been secured. Id.

224. Id. at 349.
226. Id. at 3191.
227. In building on these repeated propositions about the place of political processes, I do not wish to be taken as believing that the current Court itself has consistently abjured politics. Elsewhere I have stated at some length a concern that the court's approach to issues of legislative history, by enlarging the play of presidential influence and suppressing congressional signals, gives the appearance of choosing sides between political actors each selected in ordinary political processes, during a period when voters appear to want both sides represented. Strauss, Relational Readers of Intransitive Statutes: Agency Interpretation and the Problem of Legislative History, 66 CHI-KENT L. REV. 321 (1990); see also Ross, Reaganist Realism Comes to Detroit, 1989 U. ILL. L. REV. 399.
within which his judgment was to be reached; and then that judgment, not one influenced by the much more restrictive statute-reading given by the Overton Park Court, would be subject to review for abuse of discretion. The location decision would almost certainly have survived such a challenge, leaving a statutory question the Court did not have to reach in the case as decided, whether the design Secretary Volpe approved had embodied "all possible planning to minimize harm" to the park. 228

Would such a difference hold more than passing interest? Enthusiasm for the particular results achieved, or the apparent empowerment of citizens' groups like CPOP, ought not distract us from concern with the general impact on judging or the use of courts that may be produced by saying out loud—making explicit—that the courthouse is a place where surrogate politics is properly practiced. Here it seems appropriate to consider the special risks that the "public interest representation" model may pose for judging over the longer term. Overton Park is one of the cases marking the dawn of that approach to administrative law and, particularly, judicial review. On Chief Justice Marshall's simple dichotomy between law and politics in Marbury, the Secretary's obligation to support Tennessee's construction of I-40 with federal funds only if no alternative to use of the park was prudent or feasible evokes a discretion that falls easily on the political side. Strikingly, too, the context of Overton Park was that of Holmes' Bi-Metallic opinion: individual rights were not at issue, and as to procedural claims at least, this is a setting in which we might expect to celebrate the citizen's powers, "immediate or remote," over those who make the rule. The only plausible basis, then, for judicial involvement in "classic" terms is the Carolene Products concern that these powers have gone bad or are, for institutional reasons, untrustworthy. Indeed, that does appear to be the Court's basis in choosing its reading of the statute; a reading that left enforcement of park values protection to politics, the Court feared, must inevitably fail. But, the preceding pages should suggest, unless authorization of the road

228. See supra note 37. Strikingly, this is the question to which the Department kept recurring, after the decision we have been discussing, as argument over I-40 and the park continued for years. Respecting this question, it is more difficult to find the complex and competing community factors that characterize the question of location, and solutions are largely a function of resources—regarding which the federal government, contributing 90% of construction cost, is on the whole the most interested party. Consequently, one would think a construction leaving significant scope for political resolution less justified, even though the question what is "possible" has surface parallels to the question what is "feasible" or "prudent."
is itself proof of failure—and that, after all, is the proposition to be proved—*Carolene Products* defects are not to be found. CPOP and its members had ready access to and moved the levers of power at all levels of government; their failures were failures of persuasion, not the result of either institutional barriers to being heard or politicians insensitive to the importance of the values being promoted.

In considering the claims and risks of "public interest representation" ways of thinking about judicial review, it may be helpful to distinguish between judicial actions in the nature of "representation reinforcement," directly suggested by the *Carolene Products* footnote, and actions that imagine the judicial role itself as a form of substitute politics. When judges act to strengthen political processes they find to be impaired, to make those processes hew more strongly to their premises—as has been thought the nature of the reapportionment cases, for example—the judicial intervention does not entail particular outcomes, and the overall impact may indeed be beneficial. The Tennessee state legislature, revived by long-overdue redistricting, will produce unknowably different legislation than it might have if left to its former districting, and that legislation may now be more likely to reflect the broad wishes of Tennessee citizens. No one doubts that the legislature, thus revived, will be acting politically; the judiciary intervenes momentarily, not continuously, to right a balance, and the supervision that it does exercise is not in tension and competition with oversight supplied by explicitly political sources.

Affirming the judicial role itself as a form of substitute politics respecting polycentric issues, in contrast, does entail particular outcomes, continuing politically inspired oversight, and continuing competition with other, explicitly political sources; and it can be expected to be more problematic. The risks that came to fruition with substantive due process analysis are generally present when judges imagine themselves in a political role. Whether or not even a well-apportioned legislature remains subject to special interest capture by, for example, dairy interests, a legislature has the virtues of periodic election for its members and a mandate to accommodate citizens' complex and varying interests. The citizen's "power ... over those who make the rule" is the most remote (and normatively nonexistent) in the case of judges. Further, whether or not legislatures are subject to capture, Holmes' truth remains: judicial processes are simply not adapted to accommodating the competing

229. See supra text accompanying note 24.
social interests of broad groupings of citizens. And even if we could imagine judges successfully resolving polycentric disputes, we might not often choose to have them do so; much as we may accept redistribution as a proper end of legislation, we seem unlikely to accept either that end or legislation's concomitant arbitrariness in outcome as a proper output of adjudication. That is, it remains important to us that the law judges administer be no respecter of persons, and that the decisions they make be susceptible to rationalization along lines of principle, not accommodation. Consequently, judicial doctrine created to serve the imagined political interests of the pauper needs to be equally available in litigation brought by the prince.

One need remember only that the prince is likely to have more in the way of litigating resources and, over time, more control over who becomes a judge. Inviting judges to interfere with particular outcomes in the absence of constitutional or like instructions, simply on the grounds that political processes may have been inadequate, is inviting the whirlwind.

Both the temptations and the justifications for judges to imagine their role in political terms may seem greater when they are overseeing administrative action. Electoral controls over administrators are at best indirect. Although those controls exist in forms judges emphatically do not experience—viz., the legislative oversight hearing, or the possibility of policy-based dismissal—their very inappropriateness for judges may in itself contribute to judicial underestimation of their legitimacy and/or effectiveness and may make judges think judicial control all the more important. Moreover, in the administrative context, it may not be so easy to say whether judicial action is best characterized as political play or as representation reinforcement. In United Church of Christ, for example, Judge Burger could claim to have been strengthening agency process rather than injecting judicial politics; he was specifying participation rules for an administrative agency acting under political as well as judicial oversight, seeking political as well as legal ends.

One might expect problems to arise more frequently when courts themselves are urged to participate in the "public interest representation" model. Judicial action, by whomever brought, threatens to focus the proceedings on the interests of those who happen to be the parties to the proceeding, to the exclusion of others possibly interested. The very possibility of bringing an action places in the hands of the initiator the capacity to inflict transaction

230. See supra text accompanying note 30.
costs on others that may themselves bend the outcomes of polycen-
tric issues toward its interests, or (as has frequently been claimed of
late respecting agency rulemakings) may induce levels of agency de-
fensiveness that in and of themselves significantly raise the costs of
public regulation.231 Yet the attractiveness of the “public interest re-
presentation” model is that the potential empowerment of “pri-
vate attorneys general” in court can also be seen to carry with it
advantages not unlike those Judge Burger claimed for broader par-
ticipation within the agency. Wide distribution of the capacity to
inflict the costs that judicial review entails can protect agencies
from the effective co-option that may result when this punishment
can be inflicted only from one direction—and the agency therefore
bends its actions to avoiding those costs. Indeed, Congress may
choose widely to distribute the right to challenge agency behavior in
court both as a means of assuring agency fidelity to its aims and as a
reliable device for signalling to it when administration is going
astray—as a substitute, as it were, for its own political oversight.232

Justice O’Connor’s 1984 opinion in Block v. Community Nutri-
tion Institute, [CN1]233 appears to give significance to the difference
between congressional and judicial choice of “public interest repre-
sentation.” Milk marketing legislation provides elaborately for ad-
ministrative proceedings among producers of milk (dairy farmers)
and handlers (dairies and other processors of raw milk). Although
the ostensible idea of the legislation is to protect consumer interests
in assured milk supply and reasonable prices, as well as dairy
farmer “special interests” in overcoming the economic difficulties
resulting from the milk production cycles caused by the seasonal
characteristics of cows’ lactation,234 the statute makes no mention

231. See J. Mashaw & D. Harfst, The Struggle for Auto Safety 226
(1990); R. Melnick, Regulation and the Courts: The Case of the Clean Air
Act 360–61 (1983); J. Mendeloff, The Dilemma of Toxic Substance Regula-
232. See McCubbins, Noll & Weingast, Administrative Procedures as Instruments of
234. Cows produce much more milk during spring months than at any other time.
Assuring a sufficient supply of cows to satisfy public demand for fresh milk during low-
production months thus promises a glut every spring. This extra milk is useful for
cheese, ice cream, butter, yogurt, powdered milk, sterilized milk and other dairy prod-
ucts with longer shelf-life than fresh milk—but if the annual glut affected the price of all
milk each spring the feared result would be concentration of the dairy industry in a few
low-cost areas. To avoid this result—perhaps, in fact, more harmful to local dairy inter-
ests than to milk consumers and people who enjoy driving past cow-studded mead-
ows—the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. §§ 601, 671–74
(1988), permitted the Secretary of Agriculture to establish local milk marketing areas in
of consumer participation at the administrative stage. In *CNI*, a consumers' group had sought judicial relief from a common aspect of the resulting milk marketing orders, one which they claimed inhibited the development of a cheap form of drinkable milk; the group had never attempted to invoke or take part in administrative proceedings under the act. Justice O'Connor found an implied preclusion of judicial review at this group's behest in the elaborate administrative scheme Congress had designed without mentioning consumer roles. In dicta she remarked that they had no more claim to participate before the agency than she had found they had to bring a judicial proceeding unrelated to administrative actions. Congress, she appeared to be saying, had not chosen to invite consumer participation and the courts then could not do so.

The contrast with *United Church of Christ*—and, for that matter, with much of the subsequent jurisprudence on standing—is stunning. The statute in question is framed in terms of protecting consumer interests. The regulation of milk marketing, perhaps as much as any area of federal regulation, is infused with the potential to serve private rather than public interests. It would have been easy to characterize the setting as Judge Burger did, as one in which [t]he theory that [handlers or the Agriculture Department] can always effectively represent [consumer] interests in a . . . proceeding without the aid and participation of legitimate [consumer] representatives fulfilling the role of private attorneys general is . . . no longer a valid assumption which stands up under the realities of actual experience . . . .

Perhaps *CNI* is best understood as concerned with exhaustion or ripeness at root, for there had been no administrative proceeding, and no apparent effort by the plaintiffs to engender one. One could find that the consequence of permitting the litigation as brought would play havoc with the statutory scheme and invite premature and highly disruptive judicial engagement. Certainly some subsequent standing cases in which these elements were not present seem to have brought extension rather than retrenchment of the

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which price spreads between milk used for "fresh" and long shelf-life purposes would be artificially maintained. Subsequent improvements in milk transportation and processing technologies, which might be thought to have undercut such consumer interests as there may once have been in this regime, have not much affected this approach.


236. *CNI*, 467 U.S. at 348; see supra note 23.


238. Requiring the Department to permit consumer appearances in administrative proceedings need have no such effects.
1970s' general presumption favoring public interest representation.239 Yet the striking elements in the opinion are the dicta extending to administrative participation, and the proposition that it is for Congress, not the courts, to make the participatory judgment.240

If we consider participation in the judicial review process as surrogate for an impaired political-democratic process, we must immediately be struck that the pricing of judicial review makes it an extremely inaccurate marker for the competing interests that may be involved in the proceeding. The investment of $100,000 in a review proceeding may inflict investment costs in the millions on the builder of an opposed project, making it less likely the project will be built even if the permission to construct it is eventually upheld.241 Ostensible concern with the survival of a striped bass fishery may mask wealthy landowners' interest in preserving an unspoiled mountain view or "any-way-we-can" opposition to the construction of a nuclear power plant.242 In a political process, we might expect those interests to be tested against others with, often, some form of accommodation in the outcome. But we would not expect a settlement reflecting a balance of strength of interests to be the result of a judicial proceeding, and the way the costs of judicial review are experienced makes it unlikely that accommodation will occur in its shadow.243


240. Focusing on Congress's procedural choices in CNI served to highlight the private-interest-serving side of the legislation. The consumer interests it proclaims but provides no direct mechanism to represent may, indeed, be little more than window dressing. Finding legislation invalid on the basis of such realities would run too high a risk of judicial misadventure, as Carolene Products tells us. See supra text accompanying note 19. However, courts would run fewer risks if they held Congress to its public interest pretensions by finding in them a basis for procedural choices—such as, in this case, requiring the Department of Agriculture to accept consumer participation in its administrative proceedings. In Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model, 86 COLUM. L. REV. 223 (1986), Jonathan Macey elegantly argues that such an approach, in effect making Congress be explicit in choosing to transfer resources from public to private pockets, will tend at the margins to promote public interest purposes of legislation; unlike findings of constitutional invalidity, it imposes no permanent barrier to legislative choice. From this perspective, the Court's dicta, although not its holding, were profoundly ill-advised.

241. Of course this works both ways—Shapiro & McGarity, Reorienting OSHA: Regulatory Alternatives and Legislative Reform, 6 YALE J. REG. 1, 24–31, 44–53 (1989) gives an example of industrial incentives to oppose "simple" and underregulating OSHA actions.


243. Political resolutions are commonly said to be rendered inaccurate by the difficulties large groups with relatively diffuse interests face in organizing and acting collec-
Finally, broad distribution of review rights in the "public interest representation" model may convey to the courts and litigants the message that judicial review is a part of the political process. Conventionally, judicial review doctrine denies this proposition in limited ways: by limiting the formal terms of judicial engagement to exclude policy issues; by limiting access to the courts to persons suffering demonstrable injury-in-fact; by identifying particular types of agency judgment (notably enforcement or other priority-setting judgments) as beyond the possibility of review; and by providing at the extremes for sanctions in the event law suits are brought without reasonable justification. The limitations of these responses are evident, however, and they are severe in the face of general commitment to a "public interest representation" model; to serve the model's ends, "injury-in-fact," must be understood to embrace a wide variety of asserted harms. Imagining its processes as a part of the political process may encourage a court formally unable to substitute its preferences on policy questions for agency choices to interpret governing statutes to favor preferred ends; if priority-setting is ordinarily outside judicial view, the court may be able to find priorities set by statute. Yet, again, neither the court's capacity to reach accommodating outcomes on polycentric questions nor the attractiveness of normatively embracing the proposition that judges are politicians is in any way strengthened by this view.

Thus, while in historic fact rights of participation at the agency level were built on the shoulders of decisions about standing to seek judicial review,\(^2\) consideration of the different ways politics works at the agency and judicial levels suggests stronger claims for agency participation than for judicial review. To put that proposition a slightly different way, perhaps it suggests that in cases presenting issues engaging multiple interests and likely trade-offs, courts should be more assiduous to enforce full participation before the

agency than correctness of outcome. The burgeoning literature about the ossification of rulemaking\textsuperscript{245} suggests a lightening of the standard of review on the merits; a "pass-fail" test of agency rulemaking, Professor McGarity suggests, would dramatically reduce the transaction costs agencies encounter on judicial review,\textsuperscript{246} without disproportionately empowering one or the other set of interests as revised rules about standing might do. The lesson for Overton Park, in particular, would be that CPOP's access to the various actors, and federal officials' support of park values within the framework the statute might be considered to create, should in general suffice to meet legal obligation.

In the end, we return to a rather modest point: The risks created by accepted judicial participation in the political process should lead judges to pay serious attention to the realities of political controls over administrative action before acting on the assumption that such controls will not prove effective. A court aware that it is being asked to intervene respecting polycentric issues and that agency action is subject to political as well as judicial controls, may discover in a given context that the political controls are not unbalanced in the ways that, in the past, have suggested a special warrant for aggressive judicial intervention. In these circumstances it is appropriate for the court to consider the risks of intervention as a reason to make those choices about the intensity or character of judicial review that honor the possible effectiveness of those controls. Even if the court concludes that political controls cannot be relied upon to encourage balanced outcomes, it would be preferable for it directly to address the institutional causes of imbalance—seeking to restore the effectiveness of the political controls, rather than transforming the judicial review process into a surrogate political process.

\textsuperscript{245} See text accompanying supra note 231; see also McGarity, Some Thoughts on "Deossifying" the Rulemaking Process, 1992 Duke L.J. (forthcoming); Pierce, Unruly Judicial Review of Rulemaking, 5 Nat. Res. & Env. 23 (1990).

\textsuperscript{246} McGarity, supra note 245.