ARTICLES

INDIGENOUS PEOPLES’ ENVIRONMENTAL RIGHTS: EVOLVING COMMON LAW PERSPECTIVES IN CANADA, AUSTRALIA, AND THE UNITED STATES

Peter Manus

[pages 1–86]

Abstract: Common law decisions on the environment-related interests of indigenous peoples that have emerged from the high courts of Canada, Australia, and the United States over the past several decades show a spectrum of approaches to fundamental issues. These issues include the questions of whether sovereign nations should acknowledge such environmental interests as legal rights and, if so, how they may do so in a manner that is both fair to indigenous peoples and achievable in the face of competing nonindigenous interests. In tracing the development of common law on indigenous peoples’ environmental rights in the three nations, this Article offers a discussion of key cases that establish the three high courts’ perspectives on matters such as the sovereign obligation of nations toward indigenous persons, the judiciary’s duty to embrace a tribal perspective on land and natural resources, and the difficulties inherent in translating indigenous peoples’ environment-related historical traditions into nonindigenous forms of evidence and other proof requirements.

GOVERNMENTS AND UNCONSTITUTIONAL TAKINGS: WHEN DO RIGHT-TO-FARM LAWS GO TOO FAR?

Terence J. Centner

[pages 87–148]

Abstract: State anti-nuisance laws, known as right-to-farm laws, burden neighboring property owners with nuisances. The purpose of the laws is to protect existing investments by offering an affirmative defense. Activities that are not a nuisance when commenced cannot become a nui-
sance due to changes in land uses by neighbors. While most state laws involve a lawful exercise of the state’s police powers, a right-to-farm law may set forth protection against nuisances that is so great that it operates to effect a regulatory taking. Judicial rulings that two Iowa right-to-farm laws went too far in reducing neighbors’ constitutionally protected rights augur an opportunity to rethink right-to-farm laws. Rather than relying upon a marketplace economy to protect businesses, a law based upon an economy of nature may be drafted to protect farmland and other natural resources.

NOTES

CONFRONTATION ON SANDY NECK: PUBLIC ROAD ACCESS RIGHTS, ENDANGERED SPECIES PROTECTIONS, AND MUNICIPAL LIABILITY

Jillian K. Mooney

Abstract: Sandy Neck’s barrier beach in Barnstable, Massachusetts provides critical habitats for piping plovers and other threatened species listed by the Endangered Species Act (ESA) and the Massachusetts Endangered Species Act (MESA). To protect the species, the Town must regulate vehicle access to the beach and the nearby cottages. The cottage owners assert that the regulations amount to a regulatory taking of their access rights to the cottages. This Note proposes alternatives for the Town to protect the threatened species, without working a taking of the cottage owners’ access rights, recommending that the Town apply for an incidental take permit under ESA, eliminate restrictions on guest access, and hire additional pilots to guide cottage owners around piping plovers on the trails leading to the cottages.

WHEN “COMPREHENSIVE” PRESCRIPTIVE EASEMENTS OVERLAP ADVERSE POSSESSION: SHIFTING THEORIES OF “USE” AND “POSSESSION”

Will Saxe

Abstract: Human nature dictates that private ownership of land creates conflict among neighbors. In the realm of adverse possession and prescriptive easements, the law intervenes to settle these disputes. Adverse possession quiets conflict by providing the ripened possessor with title in fee simple absolute. In contrast, a prescriptive easement provides the
holder with only a right of use. However, there are occasions when a prescriptive easement establishes a right of use so broad and encompassing that it amounts to a grant of de facto possession. Thus, such a “comprehensive prescriptive easement” enables the court to award the equivalent of possession while only requiring proof of mere prescriptive use. This Note examines the problems of comprehensive prescriptive easements, and explores possible solutions where rights of use are the equivalent of possession.

MANUFACTURED NANOMATERIALS: AVOIDING TSCA AND OSHA VIOLATIONS FOR POTENTIALLY HAZARDOUS SUBSTANCES

Peter J. Tomasco

[pages 205–245]

Abstract: Public and private spending on nanotechnology research and development continues to increase. At the same time, government agencies around the world are spending millions to assess the potential risks to nanotechnology workers, the public, and the environment. However, innovative and opportunistic manufacturers are not waiting for test results before forging ahead. This Note focuses on the obligation of such manufacturers under the Toxic Substances Control Act (TSCA) to report and/or test nanomaterials for their effects on health, safety, and the environment prior to their release into the stream of commerce. In addition, this Note addresses the duty of manufacturers to protect workers from recognized hazards under the Occupational Safety and Health Act of 1970 (OSH Act).
INDIGENOUS PEOPLES’ ENVIRONMENTAL RIGHTS: EVOLVING COMMON LAW PERSPECTIVES IN CANADA, AUSTRALIA, AND THE UNITED STATES

Peter Manus*

Abstract: Common law decisions on the environment-related interests of indigenous peoples that have emerged from the high courts of Canada, Australia, and the United States over the past several decades show a spectrum of approaches to fundamental issues. These issues include the questions of whether sovereign nations should acknowledge such environmental interests as legal rights and, if so, how they may do so in a manner that is both fair to indigenous peoples and achievable in the face of competing nonindigenous interests. In tracing the development of common law on indigenous peoples’ environmental rights in the three nations, this Article offers a discussion of key cases that establish the three high courts’ perspectives on matters such as the sovereign obligation of nations toward indigenous persons, the judiciary’s duty to embrace a tribal perspective on land and natural resources, and the difficulties inherent in translating indigenous peoples’ environment-related historical traditions into nonindigenous forms of evidence and other proof requirements.

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It is imperative in today’s world that the common law should neither be nor be seen to be frozen in an age of racial discrimination.

—High Court of Australia, 1992

The deck is stacked against the native-title holders whose fragile rights must give way to the superior rights of the landholders whenever the two classes of rights conflict.

—High Court of Australia, 2002

INTRODUCTION

On November 18, 2004, the Supreme Court of Canada issued a pair of opinions affirming the Canadian government’s sovereign obligation to honor the environment-related rights of two native tribes of British Columbia. The opinions in Taku River Tlingit First Nation v. British Columbia and Haida Nation v. British Columbia are the latest judicial expressions of such rights in a relatively steady stream of high court opinions emerging over the past several decades out of common law courts around the world. Considering the centuries-old relationships between aboriginals and northern-European-rooted sovereigns in nations such as Canada, Australia, and the United States, these recent cases have grappled with some surprisingly elemental issues. These issues include the nature of indigenous peoples’ rights to land or natural resources, and the burdens and types of proof required to establish such rights in the courts. As may be expected, high court decisions in all three countries have met with contentious

1 Mabo v. Queensland II (1992) 175 C.L.R. 1, 41–42 (recognizing that an aboriginal tribe holds proprietary interests in its environmental resources).

2 Western Australia v. Ward (2002) 213 C.L.R. 1, 240–41 (McHugh, J., dissenting) (writing separately in a case that undermined the rhetoric favoring aboriginal rights in the Mabo opinion).


5 See, e.g., Peter Poynton, Dream Lovers: Indigenous People and the Inalienable Right to Self-determination, in Resources, Nations and Indigenous Peoples: Case Studies from Australia, Melanesia and Southeast Asia 42, 45 (Richard Howitt et al. eds., 1996). “Canadian and Australian jurisprudence have both dealt with questions of [aboriginal peoples’] prior sovereignty relatively late in their history.” Id. (citing 1990 and 1992 Canadian and Australian high court cases as the first in each country’s history addressing the question).

6 See, e.g., id.
popular and political responses over the years, and all three courts
have reacted, with the result that current common law on the envi-
ronmental rights of indigenous peoples remains unsettled in spite of
recent attention.7 Taku River Tlingit First Nation and Haida Nation,
both of which work to reassert fundamental ideals of sovereign duty
and aboriginal autonomy,8 make the present an appropriate moment
to review the evolving judicial views on the environment-related rights
of indigenous peoples in nations with significant indigenous popula-
tions and common law court systems.

This Article examines decisions from the courts of Canada, Aus-
tralia, and the United States in which the rights of an indigenous
people have come into conflict with property claims or the natural
resource regulations of the dominant culture. Part I offers analyses of
selected high-profile court cases emerging in the late twentieth and
early twenty-first centuries in which Canadian, Australian, or Ameri-
can Indian tribes strove to find verification of their environment-
related aboriginal rights in the courts of the sovereign under whose
protection they dwell.9 Not all such cases end successfully, but neither
do all support a conclusion that indigenous peoples in these countries
enjoy no judicial protection or that a sovereign’s acknowledgment of
its obligations to indigenous peoples amounts to nothing more than
political hyperbole.10

Part II offers observations about the commonalities and distinc-
tions among the three high courts insofar as their views on aboriginal
rights and their tactics in analyzing such rights in the context of indi-
vidual controversies.11 On the basis of this comparative analysis, this
Article concludes that the foremost factor in the survival of tribal cul-
tures in nations with common law court systems may be the courts’
willingsness to accept as part of its judicial role a responsibility to both
recognize and impose the sovereign obligation to understand, value,
and preserve the environmental interests of native populations.

7 See, e.g., discussion of Marshall v. The Queen, [1999] 3 S.C.R. 456 (Can.), infra Part
I.A.2.c.
8 See discussion infra Part I.A.3.
9 Infra Part I.A–C.
10 See, e.g., infra notes 21–60, 177–99 and accompanying text.
11 Infra Part II.
I. ENLIGHTENMENT, RETREAT, AND RETRENCHMENT IN THE COMMON LAW OF CANADA, AUSTRALIA, AND THE UNITED STATES

Over the last several decades, the high courts in countries with common law judicial systems and significant tribal populations have grappled with issues surrounding the aboriginal rights to territory or natural resources. A review of opinions from Canada, Australia, and the United States reveals some common patterns among the three nations’ on the nature of such rights and the role of the courts in protecting them. These opinions also reveal that high court justices on all three courts are sharply divided in their views on the extent and durability of indigenous peoples’ rights and authority as related to land and natural resources.

A. Canada: The Constitutionalization of Aboriginal Environmental Interests

Canadian law addressing its indigenous peoples’ rights is unique in that Canada’s Constitution Act, 1982 constitutionalized aboriginal rights; section 35 of that Act states that “[t]he existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.” This constitutional protection is not part of the

13 See Montana, 450 U.S. 544; Mabo, 175 C.L.R. 1; Sparrow, [1990] 1 S.C.R. 1075.
14 Constitution Act, 1982, § 35, ch. 11 (U.K.). The section reads, in full:

(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
(2) In this Act, “aboriginal peoples of Canada” includes the Indian, Inuit and Métis peoples of Canada.
(3) For greater certainty, in subsection (1) “treaty rights” includes rights that now exist by way of land claims agreements or may be so acquired.
(4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

Id. § 35.

Section 25 of the Canadian Constitution also grants particular rights to indigenous populations:

The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including (a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and (b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.

Id. § 25.
Canadian Charter of Rights and Freedoms, and therefore is not qualified by section 1 of the Charter, which subjects the rights of non-aboriginal peoples of Canada to “such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.” Indeed, section 52 of the Constitution Act, 1982 declares the Constitution to be the “supreme law of Canada,” making the aboriginal and treaty rights recognized in section 35 part of the supreme law of Canada. It is from this perspective that the Canadian courts have addressed the rights of indigenous peoples over recent decades.

A number of cases since 1982 have examined aspects of section 35, ranging in focus from the meaning and scope of aboriginal rights to the forms of evidence that courts may require in making determinations of whether aboriginal rights exist. Some of these cases discuss the related concept of aboriginal title, and explain the relationship between aboriginal rights and title. Even a cursory review of the most prominent of these cases reveals a pattern of reaction by the Canadian Supreme Court—reaction both to prior cases and to subsequent political responses. Indeed, the Canadian Supreme Court may be perceived as having come full circle recently, both building upon and reacting to prior cases until its recent reassertion of the basic ideals expressed in the landmark case of *Sparrow v. The Queen*.


In the 1990 case of *Sparrow v. The Queen*, the Supreme Court of Canada analyzed the environmental protection offered by section 35 in the context of aboriginal fishing rights. In *Sparrow*, a member of the Musqueam Indian Band had been charged with violating Canada’s

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16 Constitution Act, 1982, § 52.


22 Id. at 1091–1121.
Fisheries Act and its regulations for fishing with a longer drift net than was permitted under the terms of the Band’s food fishing license.\(^\text{23}\) The fisherman defended himself by claiming that he had been exercising an aboriginal right to fish and that the net length restriction in the Band’s license violated section 35.\(^\text{24}\) The Court agreed, and in so doing took the opportunity to interpret section 35 exhaustively.\(^\text{25}\)

### a. Section 35 of the Canadian Constitution

First, the Court limited the scope of aboriginal rights that enjoyed constitutional protection by pointing out that the “existing” aboriginal rights referenced in section 35 included those in existence at the time that the Constitution Act took effect, and not rights that had been extinguished prior to that time.\(^\text{26}\) The Court also found, however, that any manner of regulating such existing rights that happened to apply to them at the time the Constitution Act took effect would not define the parameters of the rights.\(^\text{27}\) As the Court observed, “[t]he notion of freezing existing rights would incorporate into the Constitution a crazy patchwork of regulations.”\(^\text{28}\) Instead, the

\[\text{Id. at 1083. The Canadian Fisheries Act granted broad regulatory powers:}\]

\[
"(a)\text{ for the proper management and control of the seacoast and inland fisheries};
"(b)\text{ respecting the conservation and protection of fish};
"(c)\text{ respecting the catching, loading, landing, handling, transporting, possession and disposal of fish};
"(\ldots)
"(e)\text{ respecting the use of fishing gear and equipment};
"(f)\text{ respecting the issue, suspension and cancellation of licences and leases};
"(g)\text{ respecting the terms and conditions under which a lease or licence may be issued.}"
\]

\[\text{Id. at 1088 (quoting Fisheries Act, R.S.C., ch. F-14, § 34 (1970)). The fishing incident that triggered the case occurred in Canoe Passage, a water body in which the Musqueam were licensed to fish; the license limited drift net length to twenty-five fathoms, and Mr. Sparrow was discovered using a drift net of forty-five fathoms in length. Id. at 1083.}\]

\[\text{Id. at 1083.}\]

\[\text{See id. at 1120.}\]

\[\text{Id. at 1091 (noting that “[t]he word ‘existing’ makes it clear that the rights to which § 35(1) applies are those that were in existence when the Constitution Act, 1982 came into effect. This means that extinguished rights are not revived by the Constitution Act, 1982.”).}\]

\[\text{Sparrow, [1990] 1 S.C.R. at 1091 (“[A]n existing aboriginal right cannot be read so as to incorporate the specific manner in which it was regulated before 1982.”).}\]

\[\text{Id. The Court also pointed out that an effect of reading regulations into a constitutional provision:}\]
Court explained, the aboriginal rights coming under constitutional protection needed to be “interpreted flexibly so as to permit their evolution over time.” Acknowledging that the Musqueam had occupied their native territory “as an organized society long before the coming of European settlers, and that the taking of salmon was an integral part of their lives,” the Court concluded that the Crown had failed to meet its burden of proving that these aboriginal fishing rights had been extinguished prior to 1982. Thus, regardless of any patterns of regulation, the Indians held a constitutionally protected, existing aboriginal right to fish in the area where Mr. Sparrow had been fishing at the time he violated the terms of the Band’s fishing license.

"[D]oes not permit differentiation between regulations of long-term significance and those enacted to deal with temporary conditions, or between reasonable and unreasonable restrictions. Moreover, it might require that a constitutional amendment be enacted to implement regulations more stringent than those in existence on 17 April 1982. This solution seems unsatisfactory."


_Id._ at 1093. The Court clarified its approach by observing that aboriginal rights must be recognized in “‘contemporary form rather than in their primeval simplicity and vigour.’” _Id._ (quoting Slattery, _supra_ note 28, at 782).

_Id._ at 1094. The Court went on to note that:

“The salmon was not only an important source of food but played an important part in the system of beliefs of the Salish people, and in their ceremonies. The salmon were held to be a race of beings that had, in ‘myth times’, established a bond with human beings requiring the salmon to come each year to give their bodies to the humans who, in turn, treated them with respect shown by performance of the proper ritual.”


_Id._ at 1099. The Court stated:

The test of extinguishment to be adopted, in our opinion, is that the Sovereign’s intention must be clear and plain if it is to extinguish an aboriginal right.

There is nothing in the _Fisheries Act_ or its detailed regulations that demonstrates a clear and plain intention to extinguish the Indian aboriginal right to fish. . . . These permits were simply a manner of controlling the fisheries, not defining underlying rights.

We would conclude then that the Crown has failed to discharge its burden of proving extinguishment.

_Id._

The Court acknowledged but rejected the Crown’s argument that a:

[P]rogressive restriction and detailed regulation of the fisheries . . . had the effect of extinguishing any aboriginal right to fish. . . . There is, . . . a funda-
b. Canada’s Sovereign Duty

Perhaps more significantly, the Court went on to examine the breadth of the Musqueam Band’s aboriginal right to fish so as to draw a conclusion as to whether the net length license limitation at issue in the underlying case breached this right.\textsuperscript{35} The Court expressed itself as bound by history, honor, and the nature of the Constitutional Act in question to construe aboriginal rights liberally.\textsuperscript{34} Such liberal construction, the Court noted, included the requirement that it interpret the historical, ceremonial, cultural, and subsistence habits of the Musqueam “in a contemporary manner.”\textsuperscript{35} Thus, while Mr. Sparrow had been engaged in commercial fishing at the time he was found to be violating the Musqueam Band fishing license, and while commercial fisheries were introduced by European settlers and were not part of the aboriginal history of the tribe—the Court indicated its openness to the contention that the ancient Musqueam practice of bartering might be construed as a modern aboriginal right to engage in

\footnotesize{\textsuperscript{33} Sparrow, [1990] 1 S.C.R. at 1099. \textsuperscript{34} Id. at 1106. “The nature of s. 35(1) [of the Constitutional Acts, 1982] itself suggests that it be construed in a purposive way. When the purposes of the affirmation of aboriginal rights are considered, it is clear that a generous, liberal interpretation of the words in the constitutional provision is demanded.” Id. “This view is reflected in recent judicial decisions which have emphasized the responsibility of Government to protect the rights of Indians arising from the special trust relationship created by history, treaties and legislation.” Id. at 1107–08 (quoting R. v. Agawa [1988], 28 O.A.C. 201, 215–16).}

The way in which a legislative objective is to be attained must uphold the honour of the Crown and must be in keeping with the unique contemporary relationship, grounded in history and policy, between the Crown and Canada’s aboriginal peoples. The extent of legislative or regulatory impact on an existing aboriginal right may be scrutinized so as to ensure recognition and affirmation.

\footnotesize{\textsuperscript{35} Id. at 1099 (stating that “[t]he Musqueam have always fished for reasons connected to their cultural and physical survival. As we stated earlier, the right to do so may be exercised in a contemporary manner.”).}
commercial fishing that could be regulated only within constitutionally protected limits.\textsuperscript{36}

The \textit{Sparrow} opinion’s ultimate significance, however, may have been its powerful discussion of the “recognition and affirmation” doctrine, which the Court articulated as a duty on the part of Canadian courts to sensitize their interpretations of aboriginal rights to the fact that their existence had been recognized and affirmed in the Constitution.\textsuperscript{37} The Court detailed a Canadian history of many years during which the rights of tribes in connection with their aboriginal lands “were virtually ignored.”\textsuperscript{38} Characterizing section 35 of the Constitution Act of 1982 as “the culmination of a long and difficult struggle in both the political forum and the courts,”\textsuperscript{39} the Court determined that the section’s promulgation “renounce[d] the old rules of the game under which the Crown established courts of law and denied those courts the authority to question sovereign claims made by the Crown.”\textsuperscript{40} After quoting from a number of previous cases that charged the Canadian government with the duty to construe Indian treaties and statutes liberally in favor of the Indians, the Court concluded that the “recognition and affirmation” demanded by section 35 invoked a fiduciary responsibility on the part of the Crown to show “restraint on the exercise of sovereign power” in its dealings with aboriginal tribes.\textsuperscript{41}

\textsuperscript{36} See id. at 1100–01. The Court limited its analysis, ultimately, to consideration of the Musqueam’s aboriginal right to fish for food, and for social and ceremonial purposes, due to the fact that the challenged license was one for food fishing. Id. at 1101.

\textsuperscript{37} Id. at 1101–05.

\textsuperscript{38} Id. at 1103. “We cannot recount with much pride the treatment accorded to the native people of this country.” Id. (quoting Pasco v. Canadian Nat’l Ry. Co., [1986] 69 B.C.L.R. 76, 79 (Can.) (MacDonald, J.).

\textsuperscript{39} \textit{Sparrow}, [1990] 1 S.C.R. at 1105. “Section 35(1), at the least, provides a solid constitutional base upon which subsequent negotiations can take place. It also affords aboriginal peoples constitutional protection against provincial legislative power. . . . In our opinion, the significance of s. 35(1) extends beyond these fundamental effects.” Id.

\textsuperscript{40} Id. at 1106 (quoting Noel Lyons, \textit{An Essay on Constitutional Interpretation}, 26 OSGOODE HALL L.J. 95, 100 (1988)).

\textsuperscript{41} Id. at 1109. The Court cited \textit{Reference re Manitoba Language Rights}, [1985] 1 S.C.R. 721, 745 (Can.) (“The Constitution of a country is a statement of the will of the people to be governed in accordance with certain principles held as fundamental and certain prescriptions restrictive of the powers of the legislature and government.”); Nowegijick v. The Queen, [1983] 1 S.C.R. 29, 36 (Can.) (“[T]reaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indians.”); and Taylor & Williams v. The Queen, [1981] 34 O.R.2d 360, 367 (Can.) (“In approaching the terms of a treaty quite apart from the other considerations already noted, the honour of the Crown is always involved and no appearance of ‘sharp dealing’ should be sanctioned.”). \textit{Sparrow}, [1990] 1 S.C.R. at 1106–07.
Thus, while the Court expressly refrained from precluding all regulations impacting aboriginal rights, it placed a heavy burden on the Crown to establish that such regulations were enacted to meet valid objectives.\(^{42}\) Observing in this context that “Canada’s aboriginal peoples are justified in worrying about government objectives that may be superficially neutral but which constitute de facto threats to the existence of aboriginal rights and interests,” the Court concluded that “[t]he extent of legislative or regulatory impact on an existing aboriginal right may be scrutinized so as to ensure recognition and affirmation.”\(^{43}\)

c. The Sparrow Test for Regulatory Interference with Aboriginal Rights

Stepping back from the facts of the case, the Sparrow Court then presented a two-part test for determining the constitutionality of a government regulation challenged under section 35.\(^{44}\) First, the Court stated, courts must consider whether the aboriginal group challenging the legislation is able to establish that it interferes with an existing aboriginal right.\(^{45}\) Proof of this, under the Court’s test, would constitute a prima facie constitutional infringement.\(^{46}\) The Court warned that a court’s analysis of aboriginal rights must consider those rights from the perspective of their aboriginal genesis rather than in their common law form.\(^{47}\) Fishing rights, the Court explained, are “rights held by a collective and are in keeping with the culture and existence of that group,”\(^{48}\) and courts considering the impact of regulation on such rights “must be careful . . . to avoid the application of traditional common law concepts of property as they develop their understanding of . . . the ‘sui generis’ nature of aboriginal rights.”\(^{49}\) In determining whether the right has been infringed, the Court instructed, courts must ask whether the regulation is reasonable and whether it imposes undue hardship; courts

\(^{42}\) Sparrow, [1990] 1 S.C.R. at 1110. The Court stressed that “[i]mplicit in this constitutional scheme is the obligation of the legislature to satisfy the test of justification.” Id.

\(^{43}\) Id.

\(^{44}\) Id. at 1111–13.

\(^{45}\) Id. at 1111. “The onus of proving a prima facie infringement lies on the individual or group challenging the legislation.” Id. at 1112. Inherent in the tribe’s burden of proof is its initial task of establishing the existence and scope of an aboriginal right. Id.

\(^{46}\) Id. at 1111.

\(^{47}\) Id. at 1112.


\(^{49}\) Id. (citing Guerin v. The Queen, [1984] 2 S.C.R. 335, 382 (Can.)).
must also ask whether the regulation denies the aboriginal people “their preferred means of exercising that right.”

Under the facts before the Sparrow Court, then, the inquiry would not merely be whether the net length restriction in the fishing license reduced the Musqueam fish catch to levels below that needed for food and ceremonial purposes, which would be a typical, property-grounded measure of impact. Rather, the inquiry would be whether the net length restriction caused the Musqueam to “spend undue time and money per fish caught,” or otherwise resulting in hardship to them in catching fish. In short, the Court infused a traditional regulatory impact analysis with a high level of sensitivity to the aboriginal perspective on their native rights and a relatively low level of tolerance for the disruption of those rights.

Part two of the Court’s test shifts the burden from the tribe to the regulator and the focus of the courts’ inquiry to the question of whether the government can justify its infringement on the tribe’s constitutionally protected aboriginal rights. This inquiry encompasses examination of Parliament’s objective in authorizing the regulation under scrutiny, as well as the objective of the regulating agency itself. Rejecting the vague “public interest” justification, along with the “‘presumption’ of validity,” which it characterizes as outdated, the Court characterized justified objectives as needing to be “compelling and substantial.”

Examples of valid justified regulations the Court offered included: “[a]n objective aimed at preserving [the tribe’s section] 35(1) rights by conserving and managing a natural resource,” and “objectives purporting to prevent the exercise of [section] 35(1) rights that would cause harm to the general populace or to aboriginal peoples themselves.” Conservation, the Court acknowledged, is a valid gov-

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50 Id.
51 Id.
52 Id. at 1112–13.
53 See id.
54 Sparrow, [1990] 1 S.C.R at 1113 (“If a prima facie interference is found, the analysis moves to the issue of justification. This is the test that addresses the question of what constitutes legitimate regulation of a constitutional aboriginal right.”).
55 Id.
56 Id. (stating that “[w]e find the ‘public interest’ justification to be so vague as to provide no meaningful guidance and so broad as to be unworkable as a test for justification of a limitation on constitutional rights.”). The Sparrow Court also noted that “the ‘presumption’ of validity is now outdated in view of the constitutional status of the aboriginal rights at stake.” Id. at 1114.
57 Id. at 1113.
ernment objective that is consistent with aboriginal beliefs and may work to preserve aboriginal rights.\textsuperscript{58} However, in allocating a scarce natural resource that is threatened by modern commercial practices and the contemporary iteration of aboriginal rights, the Court demanded that regulation prioritize the interest of perpetuating Indian access to the natural resource over all non-Indian commercial and recreational interests.\textsuperscript{59} The constitutional protection afforded to the Musqueam food fishing right, the Court concluded, dictated that “any allocation of priorities after valid conservation measures have been implemented must give top priority to Indian food fishing.”\textsuperscript{60}

2. Judicial Retreat from \textit{Sparrow}

The \textit{Sparrow} Court’s assertive, sensitive approach to the indigenous interests at stake may be explained by their status as newly recognized constitutional rights. Over the decade following \textit{Sparrow}, the Canadian Supreme Court partially undermined the landmark decision, in particular through its issuance of a trio of decisions in 1996.\textsuperscript{61} The leading case among these was \textit{Van der Peet v. The Queen}, which fo-

\begin{footnotesize}
\footnote{58} Id. at 1114 (“[I]t is clear that the value of conservation purposes for government legislation and action has long been recognized. Further, the conservation and management of our resources is consistent with aboriginal beliefs and practices, and, indeed, with the enhancement of aboriginal rights.”). The Court further stated that “‘[c]onservation is a valid legislative concern.’” Id. at 1115 (quoting Jack v. The Queen, [1979] 1 S.C.R. 294, 313 (Can.)).

\footnote{59} Id. at 1115–16. (“[The tribe’s] position . . . is one which would give effect to an order of priorities of this nature: (i) conservation; (ii) Indian fishing; (iii) non-Indian commercial fishing; or (iv) non-Indian sports fishing; the burden of conservation measures should not fall primarily upon the Indian fishery.’ I agree with the general tenor of this argument . . . . With respect to whatever salmon are to be caught, then priority ought to be given to the Indian fishermen . . . .” (quoting Jack, [1979] 1 S.C.R. at 313)).

\footnote{60} \textit{Sparrow}, [1990] 1 S.C.R. at 1116. The Court noted that:

If, in a given year, conservation needs required a reduction in the number of fish to be caught such that the number equaled the number required for food by the Indians, then all the fish available after conservation would go to the Indians according to the constitutional nature of their fishing right. If, more realistically, there were still fish after the Indian food requirements were met, then the brunt of conservation measures would be borne by the practices of sport fishing and commercial fishing.

\textit{Id.} Based on the above analysis, the Court affirmed the lower court decision setting aside the conviction of Mr. Sparrow, and affirmed an order for a new trial on the question of whether the net length regulation infringed on aboriginal rights, and whether any infringement was nevertheless consistent with the Canadian Constitution. \textit{Id.} at 1120–21.

\end{footnotesize}
cused primarily on a tribe’s burden of establishing its aboriginal interests.62

a. The Van der Peet Trilogy: Narrowing the Aboriginal Rights Concept

*Van der Peet* involved a member of the Sto:lo tribe selling fish and thereby violating a food fishing license granted under the Canadian Fisheries Act.63 When charged, the tribe challenged the law as an unconstitutional infringement of the Sto:lo people’s aboriginal right to sell fish.64 In the course of rejecting the tribe’s claim, the Court took the opportunity to rein in the “liberal enlightenment” approach of the *Sparrow* decision.65 Because aboriginal rights are held only by certain members of Canadian society, the Court reasoned, courts must define aboriginal rights precisely and narrowly.66 Aboriginal rights derive from a tribe’s ancient presence and customs, the Court admitted, but they are not a mere perpetuation or modernization of those customs.67 They are, instead, a reconciliation of ancient tribal customs and Crown sovereignty.68 Thus, the Court determined, aboriginal rights are limited

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63 *Id.* at 527. “The appellant Dorothy Van der Peet was charged under s. 61(1) of the *Fisheries Act*, R.S.C. 1970, c. F-14, with the offence of selling fish caught under the authority of an Indian food fish licence, contrary to s. 27(5) of the *British Columbia Fishery (General) Regulations*, SOR/84-248.” *Id.* “The charges arose out of the sale by the appellant of 10 salmon on September 11, 1987.” *Id.*
64 *Id.* at 528. “The appellant has based her defence on the position that the restrictions imposed by s. 27(5) of the Regulations infringe her existing aboriginal right to sell fish and are therefore invalid on the basis that they violate s. 35(1) of the *Constitution Act, 1982*.” *Id.*
65 *Id.* at 534. The Court stated:

In the liberal enlightenment view, reflected in the American Bill of Rights and, more indirectly, in the [*Canadian* Charter [of Rights and Freedoms]], rights are held by all people in society because each person is entitled to dignity and respect. Rights are general and universal; they are the way in which the “inherent dignity” of each individual in society is respected.

*Aboriginal* rights cannot, however, be defined on the basis of the philosophical precepts of the liberal enlightenment.

*Id.* (citations omitted).

66 See *id.* at 535 (warning that courts analyzing claims of aboriginal rights must not “ignore the necessary specificity which comes from granting special constitutional protection to one part of Canadian society”).
67 See *id.* at 545.
68 *Van der Peet*, [1996] 2 S.C.R. at 547. The Court further noted:

[T]he aboriginal rights recognized and affirmed by s. 35(1) are best understood as, first, the means by which the Constitution recognizes the fact that prior to the arrival of Europeans in North America the land was already oc-
to the integral or defining features of an aboriginal society.\textsuperscript{69} A tribe attempting to establish a practice as aboriginal must demonstrate that the practice was distinctive, or was an element of tribal life that “truly made the society what it was.”\textsuperscript{70} Moreover, even a distinctive practice, to receive protection as an aboriginal right, must be established as “independently significant” to the tribe claiming it, as opposed to being “an incident to another practice, custom or tradition.”\textsuperscript{71}

To this narrow definition of aboriginal rights the Court added several additional requirements that a tribe must satisfy to establish that an aboriginal right warrants constitutional protection.\textsuperscript{72} First, the tribe must demonstrate that it engaged in its aboriginal practice, custom or tradition prior to contact with Europeans.\textsuperscript{73} Second, the tribe must establish a reasonable degree of continuity between the ancient practice, custom or tradition and the current practice that the tribe claims to constitute an aboriginal right.\textsuperscript{74} In short, the \textit{Van der Peet} Court reduced the concept of aboriginal rights protection from one under which

cupied by distinctive aboriginal societies, and as, second, the means by which that prior occupation is reconciled with the assertion of Crown sovereignty over Canadian territory.

\textit{Id.} at 547–48.

\textsuperscript{69} \textit{Id.} at 548–49. “[I]n order to be an aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right.” \textit{Id.} at 549.

\textsuperscript{70} \textit{Id.} at 553. “The court cannot look at those aspects of the aboriginal society that are true of every human society (e.g., eating to survive), nor can it look at those aspects of the aboriginal society that are only incidental or occasional to that society . . . .” \textit{Id.}

\textsuperscript{71} \textit{Id.} at 560.

Where two customs exist, but one is merely incidental to the other, the custom which is integral to the aboriginal community in question will qualify as an aboriginal right, but the custom that is merely incidental will not. Incidental practices, customs and traditions cannot qualify as aboriginal rights through a process of piggybacking on integral practices, customs and traditions.

\textit{Id.}

\textsuperscript{72} \textit{Id.} at 553–55.

\textsuperscript{73} \textit{Id.} at 554. “It is not the fact that aboriginal societies existed prior to Crown sovereignty that is relevant; it is the fact that they existed \textit{prior to the arrival of Europeans in North America}.” \textit{Id.} at 555.


Where an aboriginal community can demonstrate that a particular practice, custom or tradition is integral to its distinctive culture today, and that this practice, custom or tradition has continuity with the practices, customs and traditions of pre-contact times, that community will have demonstrated that the practice, custom or tradition is an aboriginal right for the purposes of s. 35(1).

\textit{Id.} at 556.
courts must acknowledge and protect an indigenous culture to one under which courts scrutinize individual tribal practices. Under this approach, it is unsurprising that the Court concluded that the Sto:lo tribe had failed to demonstrate that the exchange of fish for money was an aboriginal right warranting constitutional protection.

The Supreme Court of Canada rendered judgment on two additional aboriginal rights cases simultaneously with its deciding Van der Peet: Gladstone v. The Queen and N.T.C. Smokehouse Ltd. v. The Queen. Both applied the Van der Peet test to situations in which members of indigenous tribes had sold sea catches without commercial fishing licenses. In Gladstone, although the Court determined that trading in herring spawn kelp was an integral tribal practice, it seriously undermined the Sparrow Court’s view that the constitutionalization of aboriginal rights warranted their prioritization over competing rights to limited natural resources. Applying the Van der Peet view that the scope of aboriginal rights be defined in terms of their reconciliation with Crown sovereignty, the Gladstone Court determined that government regulations intent on conserving sparse natural resources could allocate rights to that natural resource among aboriginal and non-aboriginal users. As the Court would later observe: “[i]n the wake of

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75 See id. at 593 (L’Heureux-Dubé, J., dissenting) (writing that “s. 35(1) should be viewed as protecting, not a catalogue of individualized practices, traditions or customs, as the Chief Justice does, but the ‘distinctive culture’ of which aboriginal activities are manifestations.”).

76 Id. at 571 (majority opinion). The Court stated:

The exchange of fish took place [prior to contact with Europeans], but was not a central, significant or defining feature of Sto:lo society. The appellant has thus failed to demonstrate that the exchange of salmon for money or other goods by the Sto:lo is an aboriginal right recognized and affirmed under s. 35(1) of the Constitution Act, 1982.


79 Gladstone, [1996] 2 S.C.R. at 724 (examining the charges against two members of the Heiltsuk Band under § 61(1) of the Fisheries Act for offering to sell herring spawn on kelp caught under an Indian food fishing license); N.T.C. Smokehouse, [1996] 2 S.C.R. at 672–73 (presenting the charges against members of the Sheshat and Opetchesaht Indian Bands for selling salmon caught under an Indian food fishing license).


81 For a discussion of justification issue in Sparrow, see supra notes 44–50 and accompanying text.


Because . . . distinctive aboriginal societies exist within, and are a part of, a broader social, political and economic community, over which the Crown is
Gladstone, the range of legislative objectives that can justify the infringement of aboriginal title is fairly broad.\textsuperscript{83}

\textit{N.T.C. Smokehouse Ltd.}, the third of the \textit{Van der Peet} trilogy, focused almost solely on the task of defining the aboriginal practice under examination with precision.\textsuperscript{84} Relying on the fact that the case involved the sale of over 119,000 pounds of salmon, the Court concluded that the aboriginal right in question was the right to fish commercially.\textsuperscript{85} As the Court itself observed, this characterization heightened the tribe’s burden in establishing the right as aboriginal; not only did the tribe need to establish that the exchange of fish for money or other goods was integral to its peoples’ distinct tribal identity at a time prior to its contact with Europeans, but the tribe needed to establish that this practice took place on a large enough scale to qualify as commercial.\textsuperscript{86} Once again, the Court’s approach of fragmenting the rights under scrutiny allowed it to isolate some tribal practices from others—here the “few and far between” sales of fish by ancient members of the tribes and the “exchanges of fish at potlatches and at ceremonial occasions,” which the Court admitted to being integral features of the tribes’ cultures—and in this way defeat

sovereign, there are circumstances in which, in order to pursue objectives of compelling and substantial importance to that community as a whole . . . some limitation of those rights will be justifiable. . . .

The recognition of conservation as a compelling and substantial goal demonstrates this point. . . . [B]ecause conservation is of such overwhelming importance to Canadian society as a whole, including aboriginal members of that society, it is a goal the pursuit of which is consistent with the reconciliation of aboriginal societies with the larger Canadian society of which they are a part. . . .

. . . I would suggest that with regards to the distribution of the fisheries resource after conservation goals have been met, objectives such as the pursuit of economic and regional fairness, and the recognition of the historical reliance upon, and participation in, the fishery by non-aboriginal groups, are the type of objectives which can . . . satisfy this standard.

\textit{Id.}\textsuperscript{83}


\textit{Id.}\textsuperscript{84}

[T]he first stage in the analysis of a claim to an aboriginal right requires the Court to determine the precise nature of the claim being made, taking into account such factors as the nature of the action said to have been taken pursuant to an aboriginal right, the government regulation argued to infringe the right, and the tradition, custom or practice relied upon to establish the right.

\textit{Id.}\textsuperscript{85}

\textit{Id.}\textsuperscript{86} at 688.

\textit{Id.}\textsuperscript{86}
the tribes’ ability to demonstrate the practice as integral, distinctive, and continuous.  

b. Delgamuukw v. British Columbia: *Justifying Infringements of Aboriginal Title*

In the same time period that the Court produced the *Van der Peet* trilogy, it produced a pair of decisions that made their primary focus not the meaning and scope of aboriginal rights, but rather the meaning and scope of aboriginal title, a related concept. In 1996, the Court published *Adams v. The Queen* and *Côté v. The Queen*, two cases that considered the constitutionality of fishing license limitations on the fishing practices of indigenous tribes. The *Adams* Court, after determining that the Mohawk tribe had adequately demonstrated aboriginal fishing rights under the *Van der Peet* test, engaged in a straightforward *Sparrow* analysis and concluded that the “unstructured discretionary administrative regime” infringing upon aboriginal fishing rights was unconstitutional. Likewise the *Côté* Court determined through a *Van der Peet* analysis that the Algonquin tribe maintained its claimed aboriginal fishing right, and that the licensing regulations in that case allowed regulators to exercise too much discretionary control over that right. These cases established that it was possible for a tribe to protect

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87 *Id.* at 690.
88 *Van der Peet* itself addressed the distinction between aboriginal rights and title, but examined only aboriginal rights in depth. See *Van der Peet*, [1996] 2 S.C.R. 507, 562 (Can.) (stating that “[A]boriginal title is a sub-category of aboriginal rights which deals solely with claims of rights to land.”).
90 [1996] 3 S.C.R. 139 (Can.).
its aboriginal rights, even under the Eurocentric *Van der Peet* mode of analysis.\(^95\) Perhaps more importantly, *Adams* and *Côté* clarified that a claim to aboriginal rights is a separate and distinct claim from a claim to aboriginal title.\(^96\) As the *Adams* Court noted:

Where an aboriginal group has shown that a particular practice, custom or tradition taking place on the land was integral to the distinctive culture of that group then, *even if they have not shown that their occupation and use of the land was sufficient to support a claim of title to the land*, they will have demonstrated that they have an aboriginal right to engage in that practice, custom or tradition.\(^97\)

Following on the heels of these opinions that upheld *Sparrow*, in 1997 the Canadian Supreme Court issued the definitive statement on the interplay between aboriginal rights and title in *Delgamuukw v. British Columbia*.\(^98\) The case had been brought by a number of communities that made up the Wet’suwet’en and most of the Gitksan people—indigenous tribes occupying and claiming aboriginal title to separate portions of a 58,000 square kilometer area of British Columbia.\(^99\) The Court determined that factual disputes between the parties required a new trial, but offered guidance to the judge of that trial on the nature of aboriginal title.\(^100\) The opinion produced was tantamount to a dissertation on aboriginal title and its relation to aboriginal rights and section 35.\(^101\)

Aboriginal title, the Court explained, arises out of the physical occupation of Canadian land by aboriginal peoples from a time prior

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power is exercised in a manner consistent with the Crown’s special fiduciary duties towards aboriginal peoples.

- *Côté*, [1996] 3 S.C.R. at 186–87. The *Adams* Court concluded that the fee required for motor vehicles to enter the Controlled Harvest Zone did not infringe upon the tribe’s aboriginal access right, because the fee did not prevent tribe members from entering the Zone by any nonmotorized means of transportation. *Id.* at 187.
  \(^97\) *Adams*, [1996] 3 S.C.R. at 117; *see Côté*, [1996] 3 S.C.R. at 166 (quoting the same language and further stating that an aboriginal right might be defined in site-specific terms while still not constituting or amounting to aboriginal title).
  \(^100\) *Id.* at 1079–81.
  \(^101\) *See generally id.*
to the introduction of a European system of government. Due to its unique derivation, aboriginal title is not completely consistent in nature with either the common law rules of property or the rules of property found in aboriginal legal systems. It is, the Court stressed, “sui generis,” or something less than fee simple or absolute ownership but more than the right to engage in activities recognized as aboriginal rights under section 35. In the language of the common law of property, aboriginal title is an exclusive right to occupy held by all members of the tribe as a collective right. As under U.S. law, this occupancy right does not include the right to alienate, a right held by the Canadian government. In practical terms, then, aboriginal title is the government’s recognition of a tribe’s historically rooted right to engage in any activities on tribal lands, whether traditional or contemporary, as long as such activities are not irreconcilable with the tribe’s aboriginal rights that underlie its unique form of title. Thus, aboriginal title is related to, but not directly dependent on, a tribe’s ability to assert aboriginal rights.

102 Id. at 1082 (stating that “[w]hat makes aboriginal title sui generis is that it arises from possession before the assertion of British sovereignty, whereas normal estates, like fee simple, arise afterward.”).

103 Id. at 1081 (describing aboriginal title as “sui generis” to distinguish it from “‘normal’ proprietary interests, such as fee simple. . . . As with other aboriginal rights, [aboriginal title] must be understood by reference to both common law and aboriginal perspectives.”).

104 Id. at 1080–81.

105 Delgamuukw, [1997] 3 S.C.R. at 1082–83 (“Decisions with respect to that land are also made by that community. This is another feature of aboriginal title which is sui generis and distinguishes it from normal property interests.”).

106 Id. at 1090.

Alienation would bring to an end the entitlement of the aboriginal people to occupy the land and would terminate their relationship with it. What the inalienability of lands held pursuant to aboriginal title suggests is that those lands are more than just a fungible commodity. The relationship between an aboriginal community and the lands over which it has aboriginal title has an important non-economic component. The land has an inherent and unique value in itself, which is enjoyed by the community with aboriginal title to it.

Id.

107 Id. at 1090 (warning against the misperception that the fact that aboriginal title arises out of a particular physical and cultural relationship that a tribe has had with its land restricts the tribe’s modern use of their land to its historical uses, “[t]hat would amount to a legal straitjacket on aboriginal peoples who have a legitimate legal claim to the land.” Furthermore, “[t]he approach [set forth in the opinion’s preceding paragraphs] allows for a full range of uses of the land, subject only to an overarching limit, defined by the special nature of the aboriginal title in that land.”).

108 Id. at 1080.
The *Delgamuukw* Court also declared that section 35 of the Constitution Acts of 1982 encompassed and thus constitutionalized aboriginal title.\textsuperscript{109} Pointing out that section 35 did not create rights, but constitutionalized those rights of Canada’s aboriginal peoples that existed in 1982, the Court logically concluded that aboriginal title, a species of Canadian common law recognized well before 1982, is among those rights constitutionalized by the Acts of 1982.\textsuperscript{110} This groundwork allowed the Court to clarify the relationship between aboriginal title and aboriginal rights. Citing *Adams*, the Court stated: “[A]lthough aboriginal title is a species of aboriginal right recognized and affirmed by s. 35(1), it is distinct from other aboriginal rights because it arises where the connection of a group with a piece of land ‘was of a central significance to their distinctive culture.’”\textsuperscript{111} Thus, aboriginal title is a type of aboriginal right that confers a unique form of legal protection on those aboriginal practices that are tied closely to the land.\textsuperscript{112}

Although the Court’s language expressed a high degree of sensitivity to the special place that the environment occupies in indigenous cultures, the test that the Court set forth for tribes to prove aboriginal title at least partially undermined the notion that the recognition of aboriginal title as a constitutionally protected, historically rooted indigenous right conferred a presumption of protection of a tribe’s environmental interests.\textsuperscript{113} Under *Delgamuukw*, an indigenous community asserting aboriginal title must satisfy three criteria.\textsuperscript{114} First, the

Aboriginal title is a right in land and, as such, is more than the right to engage in specific activities which may be themselves aboriginal rights. Rather, it confers the right to use land for a variety of activities, not all of which need be aspects of practices, customs and traditions which are integral to the distinctive cultures of aboriginal societies. Those activities do not constitute the right per se, rather, they are parasitic on the underlying title. However, that range of uses is subject to the limitation that they must not be irreconcilable with the nature of the attachment to the land which forms the basis of the particular group’s aboriginal title.

\textsuperscript{109} *Id.* at 1091–95. “Aboriginal title . . . is protected in its full form by s. 35(1). This conclusion flows from the express language of s. 35(1) itself, which states in full: ‘[t]he existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.’” *Id.* at 1091 (quoting Constitution Act, 1982, § 35(1), ch. 11 (U.K.)).

\textsuperscript{110} See *id.* at 1091–92.


\textsuperscript{112} *Id.* at 1095 (“What aboriginal title confers is the right to the land itself.”).

\textsuperscript{113} See *id.* at 1097–98.

\textsuperscript{114} *Id.* at 1097.
community must establish that its predecessors occupied the land in question as an indigenous community prior to the British assertion of sovereignty over the land.\textsuperscript{115} The Court required that the indigenous group present—as evidentiary sources of its historical occupation of the land in question—both evidence of its historical physical presence on the land to which it claims aboriginal title and evidence of aboriginal law reflecting the group’s land holdings at the initial British assertion of sovereignty over the land.\textsuperscript{116}

Second, if the group is presenting its current occupation of the land as proof of its presovereignty occupation, the group must establish a degree of continuity between the current and historical periods of occupation.\textsuperscript{117} Although the Court admitted that aboriginal occupation of the land may have been disrupted for some time due to the aggressive actions of European colonizers, the Court nevertheless insisted that to prove aboriginal title, a tribe must establish its “‘substantial maintenance’” of a continuous presence on the land.\textsuperscript{118}

Finally, the group must establish that at the moment of British assertion of sovereignty, the indigenous community maintained exclusive occupation of the land.\textsuperscript{119} The Court determined that exclusivity “flows from the definition of aboriginal title itself,” a logical point rendered less compelling by the fact that it was the Court itself that defined aboriginal title in terms of a tribe’s exclusive occupation.\textsuperscript{120} Although the Court admitted that exclusivity is a common law principle that may have far less of a presence in aboriginal societies, it concluded that a tribe must be able to demonstrate at least “‘the intention and capacity to retain exclusive control.’”\textsuperscript{121} The Court allowed that more than one indigenous community might be able to assert joint title or a shared exclusive possession, but it left to another day the task of “work[ing] out all the complexities and implications of

\textsuperscript{115} Id. at 1097–98.
\textsuperscript{116} Id. at 1099–1100 (“[T]he source of aboriginal title appears to be grounded both in the common law and in the aboriginal perspective on land; the latter includes, but is not limited to, their systems of law. It follows that both should be taken into account in establishing the proof of occupancy.”).
\textsuperscript{117} Delgamuukw, [1997] 3 S.C.R. at 1102.
\textsuperscript{118} Id. at 1103 (quoting Mabo v. Queensland II (1992) 175 C.L.R. 1 (Austl.)).
\textsuperscript{119} Id. at 1104.
\textsuperscript{120} Id. (stating that “[t]he requirement for exclusivity flows from the definition of aboriginal title itself, because I have defined aboriginal title in terms of the right to exclusive use and occupation of land.”).
\textsuperscript{121} Id. at 1104 (citing Kent McNeil, Common Law Aboriginal Title 204 (1989)).
joint title, as well as any limits that another band’s title may have on the way in which one band uses its title lands.”\textsuperscript{122}

It is, perhaps, the \textit{Delgamuukw} Court’s discussion of justification, or the government purposes that may justify its infringement on aboriginal title, that stands as its bluntest attempt to undermine the sovereign obligations owed by the Canadian government to the tribes as expressed in \textit{Sparrow}.\textsuperscript{123} Noting that the general principles of justification set forth in \textit{Sparrow} for determinations of aboriginal rights apply equally to determinations of aboriginal title, the Court quoted \textit{Gladstone} to assert that “‘distinctive aboriginal societies exist within, and are a part of, a broader social, political and economic community.’”\textsuperscript{124} The Court then opined that the following government projects all could justify the infringement of aboriginal title: “the development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those aims.”\textsuperscript{125}

Insofar as the fiduciary obligation raised in \textit{Sparrow}, the \textit{Delgamuukw} Court suggested that the government’s inclusion of the holders of aboriginal title in one or another capacity in such government projects could adequately meet the government’s fiduciary obligation.\textsuperscript{126} Good faith consultation with tribes in making government decisions impacting their lands, the Court suggested, could satisfy this obligation.\textsuperscript{127} Finally, the Court relied on the fact that aboriginal title has an

\begin{itemize}
\item \textsuperscript{122} \textit{Id.} at 1106. As a note of solace, the Court pointed out that “if aboriginals can show that they occupied a particular piece of land, but did not do so exclusively, it will always be possible to establish aboriginal rights short of title.” \textit{Id.}
\item \textsuperscript{123} \textit{Delgamuukw}, [1997] 3 S.C.R. at 1111; \textit{see also supra} Part I.A.1.
\item \textsuperscript{124} \textit{Delgamuukw}, [1997] 3 S.C.R. at 1111 (quoting \textit{Gladstone v. The Queen}, [1996] 2 S.C.R. 723, 774 (Can.)).
\item \textsuperscript{125} \textit{Id.}
\item \textsuperscript{126} \textit{Id.} at 1112. The Court stated:

\begin{quote}
[The government’s fiduciary duty] might entail, for example, that governments accommodate the participation of aboriginal peoples in the development of the resources of British Columbia, that the conferral of fee simples for agriculture, and of leases and licences for forestry and mining reflect the prior occupation of aboriginal title lands, that economic barriers to aboriginal uses of their lands (e.g., licensing fees) be somewhat reduced.
\end{quote}

\textit{Id.}
\item \textsuperscript{127} \textit{Id.} at 1113. The Court stated:

\begin{quote}
[T]he fiduciary relationship between the Crown and aboriginal peoples may be satisfied by the involvement of aboriginal peoples in decisions taken with respect to their lands. There is always a duty of consultation. . . . In occasional
“inescapably economic aspect” to conclude that financial “compensation for breaches of fiduciary duty” are an adequate means of the Crown’s meeting its “duty of honour and good faith.”

c. Marshall v. The Queen: Retreating from Sparrow in the Face of Public Opinion

The cases from Van der Peet to Delgamuukw did not completely or even openly attack Sparrow, as the two primary focal points of the post-Sparrow cases—enunciating the burden that an indigenous tribe must meet to establish aboriginal rights and defining aboriginal title—were not major focuses of Sparrow. Sparrow concerned itself primarily with the burdens that government regulators must meet once a tribe establishes aboriginal rights to a natural resource. It was not until 1999 that the Supreme Court of Canada once again took up a case in which the member of an aboriginal tribe claimed aboriginal rights in connection with natural resources, and thus addressed a claim highly similar to that presented in Sparrow.

In Marshall v. The Queen, a Mi’kmaq Indian charged with fishing for eels out of season and without a license in the Province of Nova

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128 Id. at 1113–14. The Court stated:

[A]boriginal title, unlike the aboriginal right to fish for food, has an inescapably economic aspect, particularly when one takes into account the modern uses to which lands held pursuant to aboriginal title can be put. The economic aspect of aboriginal title suggests that compensation is relevant to the question of justification as well . . . . Indeed, compensation for breaches of fiduciary duty are a well-established part of the landscape of aboriginal rights.


In Sparrow, Dickson C.J. and La Forest J., writing for a unanimous Court, outlined the framework for analysing s. 35(1) claims. First, a court must determine whether an applicant has demonstrated that he or she was acting pursuant to an aboriginal right. . . . In Sparrow, however, it was not seriously disputed that the Musqueam had an aboriginal right to fish for food, with the result that it was unnecessary for the Court to answer the question of how the rights recognized and affirmed by s. 35(1) are to be defined.

Scotia claimed that his action was protected as an aboriginal right under a 1760 Treaty of Peace and Friendship.\footnote{131} Because the tribe limited its claim to an assertion of tribal rights under the treaty, the Court did not engage in a direct discussion of the constitutional protection of aboriginal rights, as it had in \textit{Sparrow}.\footnote{132} Nevertheless, the Court’s analysis of the Mi’kmaq’s treaty rights adhered to the spirit of \textit{Sparrow} by interpreting the native rights in the context of the history of relations between indigenous Canadians and those of European descent, and also by rendering an analysis consistent with the \textit{Sparrow} Court’s charge that courts honor and uphold the government’s fiduciary responsibility toward aboriginal peoples.\footnote{133}

It is this perspective that allowed the \textit{Marshall} Court to conclude that, although the language of the Treaty expressly restricted Mi’kmaq trading rights in connection with the products of their hunting, fishing, and gathering efforts to trade with the government, a literal reading of the Treaty would fail to acknowledge its historical context and thus would distort its meaning.\footnote{134} “The subtext of the Mi’kmaq treaties was reconciliation and mutual advantage” of tribal and nontribal interests, the Court observed.\footnote{135} Thus, rather than severely limiting the Mi’kmaq trading rights.

\begin{itemize}
\item \textit{Id.} at 466. The language of the Treaty of Peace and Friendship supports the Court’s view that the Treaty focuses on forging a truce between the British and the Canadian tribes rather than defining permanent limits to the tribal rights to trade in connection with their natural resources:
\end{itemize}
right to trade in their natural resources, the Treaty “affirm[s] the right of the Mi’kmaq people to continue to provide for their own sustenance by taking the products of their hunting, fishing and other gathering activities, and trading for what in 1760 was termed ‘necessaries.’”

“And I [the tribal Chief] do promise for myself and my tribe that I nor they shall not molest any of His Majesty’s subjects or their dependents, in their settlements already made or to be hereafter made or in carrying on their Commerce or in any thing whatever within the Province of His said Majesty or elsewhere . . . .

“That neither I nor any of my tribe shall in any manner entice any of his said Majesty’s troops or soldiers to desert, nor in any manner assist in conveying them away . . . .

“That if any Quarrel or Misunderstanding shall happen between myself and the English or between them and any of my tribe, neither I, nor they shall take any private satisfaction or Revenge . . . .

“That all English prisoners made by myself or my tribe shall be sett at Liberty . . . .

“And I do further promise for myself and my tribe that we will not either directly nor indirectly assist any of the enemies of His most sacred Majesty King George the Second . . . . And I do further engage that we will not traffic, barter or Exchange any Commodities in any manner but with such persons or the managers of such Truck houses as shall be appointed or Established by His Majesty’s Governor at Lunenbourg or Elsewhere in Nova Scotia or Accadia.

“And for the more effectual security of the due performance of this Treaty and every part thereof I do promise and Engage that a certain number of persons of my tribe which shall not be less in number than two prisoners shall on or before September next reside as Hostages at Lunenburg or at such other place or places . . . as shall be appointed for that purpose by His Majesty’s Governor of said Province which Hostages shall be exchanged for a like number of my tribe when requested.”

Id. at 468–69 (quoting Treaty of Peace and Friendship, Gov. Charles Lawrence, March 10, 1760). The italicized language—embedded in a promise to cease involvement in the fighting between the British and the French and preceded and followed by additional promises all of which strive to end hostilities between the tribe and the British—is the provision that the government claimed terminated permanently all aboriginal rights beyond those stated. Id. at 465, 468.

That the Treaty’s intent and proper context was establishing peace is also supported by the Court’s characterization of the historical setting in which the British government sought the Treaty. See id. at 476.

It should be pointed out that the Mi’kmaq were a considerable fighting force in the 18th century. Not only were their raiding parties effective on land, Mi’kmaq were accomplished sailors. . . . The Mi’kmaq, according to the evidence, had seized in the order of 100 European sailing vessels in the years prior to 1760. . . . They were not people to be trifled with. However, by 1760, the British and Mi’kmaq had a mutual self-interest in terminating hostilities and establishing the basis for a stable peace.

Id. at 466–62.
The Court defined “necessaries” to include “food, clothing and housing, supplemented by a few amenities.”\footnote{137} In keeping with \textit{Sparrow}, the Court construed this terminology in a contemporary light, concluding that “necessaries” translated into “a moderate livelihood” that “do[es] not extend to the open-ended accumulation of wealth.”\footnote{138} Mr. Marshall had been “engaged in a small-scale commercial activity to help subsidize or support himself and his common-law spouse.”\footnote{139} Observing that the constitutional test for whether government regulation infringed upon native rights was the same for both aboriginal rights and treaty rights, the Court found a prima facie infringement of the Mi’kmaq’s Treaty right to fish.\footnote{140}

The \textit{Marshall} decision triggered an immediate and violent public reaction, including acts of property destruction and human injury, as nonindigenous members of various natural resource industries feared that the Court’s holding amounted to the Mi’kmaq tribe possessing a limitless right to harvest all natural resources from the sea and land, including minerals and offshore natural gas deposits.\footnote{141} Apparently, this interpretation of \textit{Marshall} was not assuaged by the opinion’s repeated observation that “[t]he [Mi’kmaq] treaty right is a regulated right and can be contained by regulation within its proper limits.”\footnote{142}
Taking advantage of a motion for rehearing filed by an intervenor, the Court issued a new *Marshall* opinion later in 1999 which, while denying the motion, also attempted to eliminate what it termed the “misconceptions about what the [earlier *Marshall*] majority judgment decided and what it did not decide.”

Although the Court reiterated earlier judgments that recognized section 35 of the Constitution Act of 1982 as affording constitutional status to aboriginal rights that had been previously vulnerable to unilateral extinguishment, the Court also reiterated its earlier statements that constitutionally protected aboriginal and treaty rights “are subject to regulation, provided such regulation is shown by the Crown to be justified on conservation or other grounds of public importance.” The Court defined “other grounds of public importance” justifying regulation of an aboriginal right to include “economic and regional fairness, and recognition of the historical reliance upon, and participation in, the fishery by non-aboriginal groups.”

In addition, the Court insisted that its earlier *Marshall* decision addressed only the tribe’s rights in connection with fish and wildlife, which it characterized as “the type of things traditionally ‘gathered’ by the Mi’kmaq in a 1760 aboriginal lifestyle.” Pointing out that no evidence had been presented that trading in logging, mineral gathering, or off-shore natural gas deposits had been contemplated by either party to the 1760 Treaty, the Court assured readers that these activities were well outside the purview of the case. Finally, the Court

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143 *Marshall II* [1999] 3 S.C.R. at 537. The intervenor, the West Nova Fishermen’s Coalition, requested a new trial to allow the Crown to justify its regulatory restrictions on fishing for conservation and other purposes, among other reasons; both the Crown and Mr. Marshall opposed the application. See *id.* at 536–37.

144 *Id.* at 539. The Court further explained that the principles of constitutional protection and justification were not part of the primary discussion in its earlier *Marshall* opinion because neither the Crown nor Mr. Marshall chose to focus their arguments on constitutional rights; instead, both sides focused on the treaty rights in question. *Id.*

145 *Id.* at 562. “In the right circumstances, such objectives are in the interest of all Canadians and, more importantly, the reconciliation of aboriginal societies with the rest of Canadian society may well depend on their successful attainment.” *Id.* (quoting Gladstone v. The Queen, [1996] 2 S.C.R. 723, 775 (Can.)).

146 *Id.* at 548–49. “The September 17, 1999 majority judgment did not rule that the appellant had established a treaty right ‘to gather’ anything and everything physically capable of being gathered. The issues were much narrower and the ruling was much narrower.” *Id.* at 548.

147 *Id.* at 549. The Court stated that:

It is of course open to native communities to assert broader treaty rights in that regard, but if so, the basis for such a claim will have to be established in
cited Delgamuukw to note that the proper interpretation of the Mi’kmaq Treaty might be best achieved through “a process of negotiation and reconciliation that properly considers the complex and competing interests at stake.”

**d. Minister of National Revenue v. Mitchell: Imposing a Nonindigenous Burden on Tribes Attempting to Establish Aboriginal Rights**

In 2001, the Canadian Supreme Court again responded to the so-called liberalism of Sparrow, demonstrating in *Minister of National Revenue v. Mitchell* that the burden to establish a link between modern and aboriginal custom is not necessarily a light one. In *Mitchell*, the Court considered the Mohawk tribe’s practice of transporting goods across the U.S.-Canadian border for purposes of trade. Although the Court began its analysis with an allusion to Sparrow—along with acknowledgments of the Crown’s fiduciary obligation to treat aboriginal peoples fairly and honorably, and the 1982 constitutionalization of aboriginal rights—its analysis never addressed the issues of extinguishment, infringement, or justification, which were much of the focus of the multi-part test set forth in Sparrow. Instead, the *Mitchell* proceedings where the issue is squarely raised on proper historical evidence, as was done in this case in relation to fish and wildlife.

*Id.*


150 *Id.* at 922. In 1988, the Grand Chief of the Mohawk Canadians of Akwesasne, a Mohawk community situated just west of Montreal, crossed the border from the United States into Canada, carrying blankets, bibles, motor oil, food, clothing, and a washing machine. *Id.* He had purchased the goods in the United States and intended them as gifts for the Mohawk community of Tyendinaga as a symbol of the renewal of the historic trading relationship between the two Mohawk communities. *Id.* At the border, the Chief declared the goods but asserted that both aboriginal and treaty rights exempted him from paying duty on them. *Id.*

151 *Id.* at 926–28.

With [the Crown’s] assertion [of sovereignty over aboriginal territories] arose an obligation to treat aboriginal peoples fairly and honourably, and to protect them from exploitation, a duty characterized as “fiduciary” . . . .

. . . [A]boriginal interests and customary laws were presumed to survive the assertion of sovereignty, and were absorbed into the common law as rights, unless (1) they were incompatible with the Crown’s assertion of sovereignty, (2) they were surrendered voluntarily via the treaty process, or (3) the government extinguished them. . . .

The common law status of aboriginal rights rendered them vulnerable to unilateral extinguishment . . . . This situation changed in 1982, when Can-
Court dwelt solely on the issue of whether the tribe had established an aboriginal right. 152

Relying on Van der Peet and Delgamuukw, the Court divided its inquiry into a series of relatively narrow questions about aboriginal practices, including: whether the tribe had established that its ancestral trading practices involved crossing the St. Lawrence River; 153 whether that particular route was integral to Mohawk culture; 154 and whether the tribe had engaged in the practice continuously from a date prior to European settlement until the present. 155 Finding that the tribe had failed to prove adequately any of these facts, 156 the Court reversed the trial court decision finding an aboriginal right held by the Mohawk people to transport goods across the Mohawk

Id.’s constitution was amended to entrench existing aboriginal and treaty rights . . . . Henceforward, aboriginal rights falling within the constitutional protection of s. 35(1) could not be unilaterally abrogated by the government. However, the government retained the jurisdiction to limit aboriginal rights for justifiable reasons, in the pursuit of substantial and compelling public objectives . . . .

Id. (citations omitted).

152 Id. at 926–29 ("What is the Nature of Aboriginal Rights?"); id. at 929–34 ("What is the Aboriginal Right Claimed?"); id. at 934–52 ("Has the Claimed Aboriginal Right Been Established?"). “Because I conclude that Chief Mitchell has not established an aboriginal right, I need not address questions of extinguishment, infringement and justification.” Id. at 926.

153 Id. at 934–35.

[T]he right claimed should be to bring goods across the St. Lawrence River (which always existed [prior to European settlement of Canada and the U.S.] rather than across the border. In modern terms, the two are equivalent.

Properly characterized, then, the right claimed in this case is the right to bring goods across the St. Lawrence River for the purposes of trade.

Id. at 934.

154 Id. at 948–49 ("It is . . . incumbent upon Chief Mitchell in this case to demonstrate not only that personal and community goods were transported across the St. Lawrence River for trade purposes prior to contact, but also that this practice is integral to the Mohawk people.").

155 Mitchell, [2001] 1 S.C.R. at 934 ("Briefly stated, the claimant is required to prove . . . (3) reasonable continuity between the pre-contact practice and the contemporary claim.").

156 Id. at 947 ("I conclude that the claimant has not established an ancestral practice of transporting goods across the St. Lawrence River for the purposes of trade."); id. at 948 ("Even if deference were granted to the trial judge’s finding of pre-contact trade relations between the Mohawks and First Nations north of the St. Lawrence River, the evidence does not establish this northerly trade as a defining feature of the Mohawk culture."); id. at 952 ("If the Mohawks did transport trade goods across the St. Lawrence River for trade, such occasions were few and far between.").
territories in Canada and the northern United States for purposes of trade.157

In general terms, the Mitchell Court illustrates exactly how Van der Peet and other cases following Sparrow have attempted to undermine the spirit of that case and of section 35 of the Constitution Acts of 1982.158 By fragmenting the tribe’s burden of establishing its traditional customs and activities into a series of questions, each of which is evaluated separately, the Court imposed a nonindigenous perspective on the issue of whether a tribe holds aboriginal rights to use its lands and natural resources unencumbered by debilitating regulation.159 It is true that the regulation of borders is integral to a nation’s governmental authority, and that even the collecting of customs, as part of a nation’s control of its borders, may outweigh a tribe’s aboriginal interest in crossing such borders without paying customs.160 But that question is properly the burden of the government defending its

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157 Id. at 924–25. The Court, summarizing the trial court decision, notes that:

At trial . . . McKeown J. declared that Chief Mitchell possesses an existing aboriginal . . . right “to pass and repass freely across what is now the Canada-United States boundary including the right to bring goods from the United States into Canada for personal and community use without having to pay customs duties on those goods. . . . The aboriginal right includes the right to bring these goods from the United States into Canada for noncommercial scale trade with other First Nations.” . . .

McKeown J. accepted that the Mohawks, like other aboriginal societies of North America, were accustomed to the concept of boundaries and paying for the privilege of crossing arbitrary lines established by other peoples. However, he concluded that this did not negate a modern right to cross such boundaries duty-free because it merely constituted regulation of the underlying aboriginal right to bring goods across boundaries freely. The Customs Act did not extinguish this right because it too was merely regulatory.


158 Id. at 939–40.

159 Id. The Court attempted to justify its approach, at least in part, in its discussion of judicial duty insofar as the interpretation of evidence in aboriginal claims cases. “[A]boriginal rights are truly sui generis, and demand a unique approach to the treatment of evidence which accords due weight to the perspective of aboriginal peoples. However, that accommodation must be done in a manner which does not strain “the Canadian legal and constitutional structure.” Id. at 939 (emphasis added) (quoting Delgamuukw v. British Columbia, [1997] 3 S.C.R. 1010, 1066 (Can.)). “There is a boundary that must not be crossed between a sensitive application and a complete abandonment of the rules of evidence. . . . ‘[G]enerous rules of interpretation should not be confused with a vague sense of after-the-fact largesse.” Id. (quoting Marshall v. The Queen, [1999] 3 S.C.R. 456, 473–74 (Can.)).

160 The Court points out that “[i]n the present case, however, the right to trade is only one aspect, and perhaps a peripheral one, of the broader claim advanced by Chief Mitchell: the right to convey goods across an international boundary for the purposes of trade.” Id. at 950.
regulations against an assertion of aboriginal rights. The Court briefly referenced the concept of “sovereign incompatibility,” or the argument brought before the Court by the Crown:

[T]hat s. 35 of the Constitution Act, 1982 extends constitutional protection only to those aboriginal practices, customs and traditions that are compatible with the historical and modern exercise of Crown sovereignty. . . . [Therefore,] any Mohawk practice of cross-border trade, even if established on the evidence, would be barred from recognition under s. 35(1) as incompatible with the Crown’s sovereign interest in regulating its borders.

By fracturing the tribe’s evidence of its aboriginal interest, the Court alleviated the government of the burden of having to justify its regulation inhibiting the free exercise of aboriginal rights.


In November of 2004, the Supreme Court of Canada issued a decision in the case of Taku River Tlingit First Nation v. British Columbia. The case was grounded in a dispute over a mining company’s efforts to construct an access road through the traditional territory of the Taku River Tlingit First Nation. Ultimately, the Court rejected the tribe’s contention that the Province had failed to meet its obligation to consult with and accommodate the tribe in the environmental assessment process required under Canadian law. In reaching this

162 Id.
163 See id.
165 Id. at 554–55, 561–62.
166 Id. at 573. The mine was located at the confluence of the Taku and Tulsequah Rivers, in a remote and undeveloped area of northwestern British Columbia. Id. at 555. Members of the Taku River Tlingit First Nation participated in the statutorily required environmental assessment process, and objected to the mining company’s plan to construct a 160 kilometer road through the tribe’s traditional territory. Id. Tribal concerns included the potential effects of road use on wildlife and on the tribe’s traditional uses of the land; the tribe argued that the road should be approved only after development of a land use strategy, and only in the context of a treaty negotiation. Id. at 555–56. The project assessment director in charge of the environmental assessment responded to these concerns in various ways, but did not satisfy the tribe that all issues had been addressed adequately. Id.
conclusion, however, the Court addressed the governmental responsibility to consult with and accommodate aboriginal peoples, an obligation emanating from the Crown’s sovereign duty. The opinion of the Chief Justice offered a powerful statement affirming the gravity and derivation of this duty:

[T]he principle of the honour of the Crown grounds the Crown’s duty to consult and if indicated accommodate Aboriginal peoples, even prior to proof of asserted Aboriginal rights and title. The duty of honour derives from the Crown’s assertion of sovereignty in the face of prior Aboriginal occupation. It has been enshrined in s. 35(1) of the Constitution Act, 1982, which recognizes and affirms existing Aboriginal rights and titles. . . . In all its dealings with Aboriginal peoples, the Crown must act honourably, in accordance with its historical and future relationship with the Aboriginal peoples in question. The Crown’s honour cannot be interpreted narrowly or technically, but must be given full effect in order to promote the process of reconciliation mandated by s. 35(1).

Followed by citations to Sparrow, Gladstone, and Delgamuukw, this statement revived and crystallized the core sentiment of those opinions and of section 35, and thus may be read as an effort to put into perspective various elements of the cases following Sparrow that may be argued to eviscerate its spirit.

This positive reading of the opinion in Taku River Tlingit First Nation is supported by the Court’s discussion of the scope and applicability of the Crown’s sovereign duty to consult with aboriginal tribes prior to allowing actions that might impact tribal interests. The Court concluded that the consultation requirement encompasses situations where government-approved activity might detrimentally impact land or natural resources to which a tribe has established only potential aboriginal rights and title. The Court reasoned that limiting the consul-

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at 559. In 1998, the Minister of Environment, Lands and Parks and the Minister of Energy and Mines approved the plans. Id. at 560.

167 See, e.g., id. at 563 (“[T]he honour of the Crown placed the Province under a duty to consult with the [tribe] in making the decision to reopen the Tulsequah Chief Mine.”).

168 Id. at 564.

169 Id. at 563–64.


171 Id. at 564–65 (“The obligation to consult does not arise only upon proof of an Aboriginal claim, in order to justify infringement. That understanding of consultation would
tation requirement to situations in which a tribe has acquired formal legal recognition of aboriginal rights or title would deprive the Crown of its role in what the Court termed “the reconciliation process” between the sovereign and the original occupants of the country. 172 The Taku River Tlingit First Nation had established prima facie aboriginal rights and title to the territory under dispute by applying for federal recognition and having its claim accepted for negotiation. 173 The Court coupled that status with the severity of the potential environmental harms of the proposed state action to conclude that the Crown owed the Taku River Tlingit First Nation a level of consultation “significantly deeper than minimal consultation,” along with “a level of responsiveness to [the tribe’s] concerns that can be characterized as accommodation.” 174 Throughout its discussion, the Taku River Tlingit First Nation Court reiterated that its interpretation of the scope and depth of the consultation and accommodation duties were required so as to maintain “the honour of the Crown.” 175 Indeed, even as the Court concluded that the Crown had satisfied its consultation obligation in the instant case, it reminded the state actors that “throughout the permitting, approval and licensing process, as well as in the development of a land use strategy, the Crown will continue to fulfill its honourable duty to consult and, if indicated, accommodate the [Taku River Tlingit First Nation].” 176 On the same day that it handed down Taku River Tlingit First Nation, the Supreme Court of Canada handed down a companion decision, Haida Nation v. British Columbia. 177 This case addressed the Province of British Columbia’s transfer of a tree farm license from one

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172 Id. (“The duty to consult arises when a Crown actor has knowledge, real or constructive, of the potential existence of Aboriginal rights or title and contemplates conduct that might adversely affect them.”).

173 Id. at 566–67. The Court bases its decision of prima facie aboriginal rights and title on the fact that the Crown had accepted the tribe’s title claim for negotiation under its federal land claims policy “on the basis of a preliminary decision as to its validity.” Id. at 566.

174 Id. at 566–68. The Court expresses its decision as an assessment of two factors: the tribe’s case for recognition of its aboriginal rights, and the severity of the potential harm to tribal interests if such aboriginal rights are eventually recognized. See id. It then uses the combined weight of these two factors to determine the level of consultation and accommodation necessary to satisfy the Crown’s sovereign responsibility. See id.

175 Id. at 563–68 (gauging the level of consultation “required by the honour of the Crown”).


private forestry firm to another, an act that would allow the continued harvesting of timber in an area of Haida Gwaii to which the Haida, an indigenous people, claimed aboriginal title.\textsuperscript{178} Like the Taku River Tlingit First Nation, the Haida had not yet acquired legal recognition of their aboriginal title.\textsuperscript{179} Weighing the complexity and the unsettled status of the aboriginal title claim against the prospect of depriving the tribe of irreparable old-growth forests vital to the tribe’s economy and culture, the Court concluded that the government bore a legal duty to consult in good faith with the Haida prior to transferring the tree farm license.\textsuperscript{180} Furthermore, the Court held, such consultation could trigger the governmental responsibility to accommodate Haida concerns about any timber harvesting that the Crown might permit at the conclusion of a meaningful consultation over the license.\textsuperscript{181}

As in \textit{Taku River Tlingit First Nation}, the \textit{Haida Nation} opinion grounded its holding in the honorable treatment required of a sovereign toward the original occupants of its lands, stressing that sovereign honor “is not a mere incantation, but rather a core precept that finds its application in concrete practices.”\textsuperscript{182} The Court described the principle of honor in terms of retribution for the invasion and seizure of another’s homeland, observing that “[t]he historical roots of the principle of the honour of the Crown suggest that it must be understood generously in order to reflect the underlying realities from which it stems.”\textsuperscript{183} Furthermore, the Court claimed that the principle applied to all dealings with aboriginal peoples so as to achieve “‘the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown.’”\textsuperscript{184}

Immediately following its acknowledgment of the Crown’s historical debt, the Court reined in the Crown’s duties toward Canada’s

\textsuperscript{178} Id. at 517–18. The territory under dispute was Queen Charlotte Island, located west of the British Columbia mainland. Id. at 517.

\textsuperscript{179} Id. at 517. The Haida had been claiming title to the islands and the waters surrounding them for over a century, but the claim through which they hoped to acquire legal recognition of that title was still in process at the time of the decision. Id.

\textsuperscript{180} Id. at 519–20.

\textsuperscript{181} Id. at 520. The Court concluded that the private company hoping to receive the license owed no independent duty to consult with the Haida people or accommodate their concerns, although it observed that the private firm could find itself liable for assumed obligations. Id.

\textsuperscript{182} Id. at 522 (“The honour of the Crown is always at stake in its dealings with Aboriginal peoples.”).


\textsuperscript{184} Id. (quoting \textit{Van der Peet}, [1996] 2 S.C.R. at 539).
tribes—and thus somewhat undermined the nobility of the Crown’s honor-based obligations—by determining that the unproven status of the Haida peoples’ aboriginal rights and title “is insufficiently specific for the honour of the Crown to mandate that the Crown act in the Aboriginal group’s best interest, as a fiduciary, in exercising discretionary control over the subject of the right or title.” Still, the Court concluded its discussion of honor by identifying it as the root of the consultation and accommodation obligations, which it considered elements of the Crown’s honor-based duty to exercise honor and integrity in making and applying treaties. In a powerfully worded summation, the Court explained the sovereign position as both sweeping and specific:

Put simply, Canada’s Aboriginal peoples were here when Europeans came, and were never conquered. Many bands reconciled their claims with the sovereignty of the Crown through negotiated treaties. Others, notably in British Columbia, have yet to do so. The potential rights embedded in these claims are protected by s. 35 of the Constitution Act, 1982. The honour of the Crown requires that these rights be determined, recognized and respected. This, in turn, requires the Crown, acting honourably, to participate in processes of negotiation. While this process continues, the honour of the Crown may require it to consult and, where indicated, accommodate Aboriginal interests.

Similarly, the Haida Nation Court viewed the question of how the Crown must deal with tribes holding not yet proven aboriginal interests in land or natural resources as one of sovereign honor. The Court rejected the idea that the issue of sovereign duties should be addressed in the manner of typical law, with the level of obligation

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185 Id. at 523. The Court defines “fiduciary duty” as arising “[w]here the Crown has assumed discretionary control over specific Aboriginal interests,” and observes that its “fulfilment requires that the Crown act with reference to the Aboriginal group’s best interest in exercising discretionary control over the specific Aboriginal interest at stake.” Id.

186 Id. at 522–31. The Court explained the centrality of the treaty obligation to the Crown’s constitutional obligations under section 35, observing that “[t]reaties serve to reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty, and to define Aboriginal rights guaranteed by s. 35 of the Constitution Act, 1982.” Id. at 524.

187 Id. at 525.

188 Id. “The Crown, acting honorably, cannot cavalierly run roughshod over Aboriginal interests where claims affecting these interests are being seriously pursued in the process of treaty negotiation and proof. It must respect these potential, but yet unproven, interests.” Id. at 526.
based on the precise legal status of a tribe and the reconciliation of tribal and non-tribal interests cast as a “final legal remedy in the usual sense.” Instead, the Court explained, the process of fair dealing and accommodation of tribes arose with the Crown’s original assertion of sovereignty and continues beyond formal claim resolution. Acknowledging that the status of aboriginal claims may introduce problems regarding the Crown’s determination of the content or scope of its consultation or accommodation duties, the Court nevertheless concluded that consultation and accommodation prior to final claims resolution is not impossible and may be determined on a case-by-case basis. As in Taku River Tlingit First Nation, the Court explained that the scope and depth of the Crown’s consultation duty may be assessed with reference to two factors: first, whatever preliminary assessment has been completed as to the strength of a tribe’s petition for recognition of its claimed aboriginal rights or title, and second, the gravity of the threat to these potential tribal interests presented by the activity over which consultation is taking place.

In both content and tone, the Haida Nation opinion, like its less detailed companion Taku River Tlingit First Nation, may be read as a pronouncement on the gravity of section 35. The Haida Nation opinion is an affirmation of the protectionist spirit of Sparrow and its progeny, which puts into perspective the reactionary elements of some of those cases. In the Haida Nation Court’s instructions, the scope of the

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190 Id. “To limit reconciliation to the post-proof sphere risks treating reconciliation as a distant legalistic goal, devoid of the ‘meaningful content’ mandated by the ‘solemn commitment’ made by the Crown in recognizing and affirming Aboriginal rights and title . . . .” Id. at 528–29.
191 Id. at 529–31. “Precisely what is required of the government may vary with the strength of the claim and the circumstances. But at a minimum, it must be consistent with the honour of the Crown.” Id. at 531.
192 Id. at 531–36.

At one end of the spectrum lie cases where the claim to title is weak, the Aboriginal right limited, or the potential for infringement minor. In such cases, the only duty on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice . . . .

At the other end of the spectrum lie cases where a strong prima facie case for the claim is established, the right and potential infringement is of high significance to the Aboriginal peoples, and the risk of non-compensable damage is high. In such cases deep consultation, aimed at finding a satisfactory interim solution, may be required.

Id. at 532–33.
193 See id. at 529–31.
Crown’s duty to include indigenous tribes in decision-making where a threat may be presented to potentially recognized aboriginal interests is limited.\textsuperscript{194} Limitations include the Court’s caveat that the consultation requirement is strictly procedural and includes no sovereign obligation to adopt a tribe’s perspective or demands.\textsuperscript{195} Similarly, the Court admonished that where consultation triggers the sovereign duty to accommodate tribal interests, the accommodation process “does not give Aboriginal groups a veto over what can be done with land pending final proof of the claim [to aboriginal rights or title].”\textsuperscript{196} The Court also denied that any of the duties identified in its opinion apply to private parties such as the contractor seeking the forestry license in Haida territory.\textsuperscript{197}

Regardless of these limitations, the Court’s application of the consultation requirement as articulated to the tree farm license under consideration leaves little doubt that \textit{Haida Nation} represents a powerful statement of aboriginal rights.\textsuperscript{198} By rejecting the argument that consultation should arise only in the context of a tree cutting permit because tree farm licenses in and of themselves do not authorize the actual harvesting of timber, the Court verified that the Crown’s sovereign obligation to tribes is broad and meaningful.\textsuperscript{199}

\textbf{B. Australia: The Sovereign Prerogative to Extinguish Aboriginal Land Rights}

Unlike the Supreme Court of Canada, the Australian High Court acknowledged the existence of aboriginal rights to land and natural resources without framing its analysis within a recently promulgated constitutional act, instead detecting native rights in the country’s

\textsuperscript{194} Id.
\textsuperscript{195} \textit{Haida Nation}, [2004] 3 S.C.R. at 532 (“[T]here is no duty to agree; rather, the commitment is to a meaningful process of consultation.”).
\textsuperscript{196} Id. at 535 (“Rather, what is required is a process of balancing interests, of give and take.”).
\textsuperscript{197} Id. at 537–39 (rejecting justification, trust law, and efficiency arguments for third party liability, but pointing out that private parties operating on tribal lands are subject to liability for negligence, breach of contract, or dishonest dealings). In contrast, the Court clarifies that the duties to consult and accommodate are not limited to the federal government, and thus apply to the Province of British Columbia as described in the opinion. Id. at 539–40.
\textsuperscript{198} Id. at 537–40 (discussing consultation and accommodation).
\textsuperscript{199} Id. at 542–47. “The [tree farm license] decision reflects the strategic planning for utilization of the resource. Decisions made during strategic planning may have potentially serious impacts on Aboriginal right and title. . . . If consultation is to be meaningful, it must take place at the stage of granting or renewing Tree Farm Licences.” Id. at 546.
From this, the Australian cases discussed below could be cast as more affirmative examples of the High Court’s confidence in its judicial authority to address an indigenous peoples’ relationship with a sovereign. Echoing the pattern of the Canadian judiciary, however, the Australian High Court followed several opinions upholding the environment-related rights of indigenous peoples with a series of opinions severely curtailing those rights.

1. Judicial Acknowledgments of Aboriginal Land Rights

As in Canada, Australia began the 1990s with a strong judicial statement of aboriginal rights to tribal lands. In 1992, the Australian High Court decided *Mabo v. Queensland*, which recognized a common law form of property rights held by aboriginal inhabitants in their historically occupied lands. Three years later, the Court again addressed the question of aboriginal rights in a second landmark opinion, *Wik Peoples v. Queensland*.

a. *Mabo v. Queensland: Native Title as an Aboriginal Right*

The *Mabo* case examined competing property interests in the Murray Islands, three islands occupied by the Meriam people, an aboriginal tribe of Australia. Several members of the tribe brought the action against the government of Australia in 1982, “claiming that the Crown’s sovereignty over the Islands was subject to the land rights of the Meriam people based upon local custom and traditional native

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200 The court decisions discussed below rely on statutory law, but none frames the opinion as solely or even primarily an interpretation of a statute. Thus, an argument can be made that to a large extent the Australian High Court has relied on its own common law power to define aboriginal rights and sovereign authority. See *Mabo v. Queensland II* (1992) 175 C.L.R. 1, 7–8, 58–63.

201 Id. at 7–8.


203 *Mabo*, 175 C.L.R. at 1 (“[T]he Murray Islands, Mer, Dauar and Waier, were occupied by the Meriam people long before the first European contact with the Islands. The present inhabitants of the Islands are descended from those described in early European reports.”); see also id. at 7 (“Before the annexation of the Islands in 1879 they were occupied by the Meriam people. Individuals held and exercised rights and interests within Meriam society in areas of land on the Islands on behalf of themselves and their family groups.”); id. at 16–17 (Brennan, J.) (“The Murray Islands lie in the Torres Strait . . . . They are the easternmost of the Eastern Islands of the Strait. . . . The people who were in occupation of these Islands before first European contact and who have continued to occupy those Islands to the present day are known as the Meriam people. . . . The Meriam people of today retain a strong sense of affiliation with their forebears and with the society and culture of earlier times. They have a strong sense of identity with their Islands.”).
Among other claims, the plaintiffs requested declarations that they were “(a) owners by custom; (b) holders of traditional native title; [and] (c) holders of usufructuary rights” with respect to their native territory.

Australia’s High Court agreed with the tribe. Distinguishing between “radical or ultimate title to the Murray Islands” and “absolute beneficial ownership of all land in the Murray Islands,” the Court determined that Australian common law recognized “native title,” which preserved “the entitlement of the indigenous inhabitants, in accordance with their laws or customs, to their traditional lands . . . .” The Court defined “native title” as “the interests and rights of indigenous inhabitants in land, whether communal, group or individual, possessed under the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants.” After examining the Meriam culture and its history of land cultivation, the Court concluded that the Meriam people must be recognized as native owners of the islands they occupied due to their advanced and long-term land-based society. As one Justice described this society:

“A declaration that a grant of the said Islands by the [government of Queensland] by way of a deed of grant in trust under the Land Act 1962 as amended . . . without compensation would impair . . . [the plaintiffs’ ownership interests] and would be unlawful in the absence of a law of Queensland which expressly provides for such impairment without the payment of compensation.”

Under the laws or customs of the relevant locality, particular tribes or clans were, either on their own or with others, custodians of the areas of land from which they derived their sustenance and from which they often took their tribal names. Their laws or customs were elaborate and obligatory. The boundaries of their traditional lands were likely to be long-standing and defined. The special relationship between a particular tribe or clan and its land was recognized by other tribes or groups within the relevant local native system and was reflected in differences in dialect over relatively short distances. In different ways and to varying degrees of intensity, they used their homelands for all the purposes of their lives: social, ritual, economic. They identified with them in a way which transcended common law notions of property or possession.\(^{211}\)

The Meriams’ title, according to the Court, was good against all but the sovereign, who bore the authority to extinguish native title by “granting an interest that is wholly or partially inconsistent with a continuing right to enjoy native title.”\(^{212}\) Thus, the Court’s view of Australian aboriginal rights was similar to that of United States Supreme Court Chief Justice Marshall, who in \textit{Johnson v. M’Intosh} recognized a type of title held by Native Americans in tribal territory that was subject only to the U.S. federal government’s right to alienate.\(^{213}\)

basis of the developed relationship between the aboriginal occupants and their environment:

“The evidence shows a subtle and elaborate system highly adapted to the country in which the people led their lives, which provided a stable order of society and was remarkably free from the vagaries of personal whim or influence. . . .”

. . . .

The facts as we know them today do not fit the “absence of law” or “barbarian” theory underpinning the colonial reception of the common law of England.


\(^{211}\) \textit{Id.} at 99–100 (Deane and Gaudron, JJ.).

\(^{212}\) \textit{Id.} at 69 (Brennan, J.). “Thus native title has been extinguished by grants of estates of freehold or of leases, but not necessarily by the grant of lesser interests (e.g., authorities to prospect for minerals).” \textit{Id.}

\(^{213}\) \textit{Johnson v. M’Intosh}, 21 U.S. (8 Wheat.) 543, 587–88 (1823); see \textit{Mabo}, 175 C.L.R. at 32–33 (Brennan, J.) (discussing the discovery concept in terms that conform closely to those set forth in \textit{Johnson}).

As among themselves, the European nations parcellled out the territories newly discovered to the sovereigns of the respective discoverers, provided the
Indeed, several members of the Australian Court referenced *Johnson*, and several referenced additional non-Australian cases in their deliberation over the status of Australian common law on the subject of indigenous peoples’ territorial rights. The Court also discussed Australia’s accession to the International Covenant on Civil and Political Rights, finding the Covenant and the international standards it expresses to exert a “powerful influence” on the Court’s interpretation of Australia’s common law. In these references, the *Mabo* Court acknowledged a universality in the rights of indigenous peoples. Fortified by this universality, perhaps, the *Mabo* Court found the authority to reject certain court precedents that recognized the Crown as having stripped the Meriam people of dominion over their occupied territory. In doing so, it noted that “such a law is unjust and its claim to be part of the common law to be applied in contemporary Australia must be questioned.” The Court also expressed sensitivity toward the integrated nature of indigenous culture, sustenance, religion, and environment.

discovery was confirmed by occupation and provided the indigenous inhabitants were not organized in a society that was united permanently for political action. . . . They recognized the sovereignty of the respective European nations over the territory of “backward peoples” and, by State practice, permitted the acquisition of sovereignty of such territory by occupation rather than by conquest.

*Id.* at 32 (citations omitted); see also *id.* at 43 (observing that “subject to the assertion of ultimate dominion (including the power to convey title by grant) by the State, the “original inhabitants” should be recognized as having “a legal as well as just claim” to retain the occupancy of their traditional lands.” (quoting Gerhardy v. Brown (1985) 159 C.L.R. 70, 149 (Austl.) (quoting *Johnson*, 21 U.S. at 574))); see also *Mabo*, 175 C.L.R. at 135–36 (Dawson, J.) (offering a narrower reading of *Johnson*).

214 See, e.g., *Mabo*, 175 C.L.R. at 43 (Brennan, J.); *id.* at 135, 164–66 (Dawson, J., dissenting); *id.* at 186–90 (Toohey, J.).

215 *Id.* at 42 (Brennan, J.) (“The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights.”).

216 *Id.*

217 *Id.* at 25–31 (summarizing the defendant’s argument, which relied on precedents that equated sovereignty with absolute ownership).

218 *Id.* at 29 (“This Court must now determine whether, by the common law of this country, the rights and interests of the Meriam people of today are to be determined on the footing that their ancestors lost their traditional rights and interests in the land of the Murray Islands on 1 August 1879.”); see also *id.* at 42 (“The fiction by which the rights and interests of indigenous inhabitants in land were treated as non-existent was justified by a policy which has no place in the contemporary law of this country.”).

219 *Id.* at 28–29 (criticizing older cases that perceived the Crown as having assumed all property interests in Australian lands over which it asserted sovereignty, “[a]ccording to
The Australian Parliament responded to *Mabo* with the Native Title Act of 1993, which declared that Australia recognized the rights and interests possessed by indigenous peoples, and established a process through which indigenous communities may claim title to their traditional lands. Consistent with *Mabo*, the 1993 Act defined “native title” as “the communal, group or individual rights and interests of Aboriginal peoples . . . in relation to land or waters, where . . . the Aboriginal peoples . . . by [their traditional] laws and customs, have a connection with the land or waters . . . .” The Act also addressed the *Mabo* decision directly, recognizing it as having asserted that “native title is extinguished by valid government acts that are inconsistent with the continued existence of native title rights and interests, such as the grant of freehold or leasehold estates.” The Act did not, however, settle the question of where the balance lay between Australia’s recognition of environment-rooted, aboriginal, territorial rights and its authority to extinguish such rights through the granting of leaseholds. In 1996, the Court addressed this question in *Wik Peoples v. Queensland*.

b. *Wik v. Queensland*: Affirming *Mabo*

In *Wik*, the Australian High Court examined the aboriginal rights of two indigenous tribes to areas of their traditional lands that had been the subject of pastoral leases granted by the government to non-indigenous lessees. The appellants claimed that such leases did not extinguish their aboriginal title, and that the lessees’ interests had co-existed with those of the indigenous peoples for the duration of the
lease.\textsuperscript{225} If the government had entered leases that extinguished native title, the appellants argued, those leases were illegal and a breach of the sovereign’s fiduciary duty to the tribe as its trustee.\textsuperscript{226} Furthermore, the appellants alleged that the Wik Peoples had continuously and for centuries occupied and maintained a traditional connection with the lands in question, giving them aboriginal title to the lands, which included the lands’ natural resources such as minerals found on or below the surface of such lands.\textsuperscript{227}

Four out of seven members of the High Court agreed that a sovereign grant of a pastoral leasehold did not necessarily extinguish native title to the leased area.\textsuperscript{228} Observing that state actions impacting aboriginal lands must be construed narrowly and against the total extinguishment of native rights, those Justices concluded that the interests of pastoral leaseholders could co-exist with the land uses practiced by the indigenous peoples, such that only an explicit statement of incompatibility in the lease grants could evidence a sovereign intent to permanently terminate native title.\textsuperscript{229} In its willingness to focus on the indigenous peoples’ actual use of their lands, and the ties between that land use and their traditional customs, the \textit{Wik} Court, like the Native Title Act of 1993 and \textit{Mabo}, evidenced its awareness of the value and vulnerability of indigenous cultures’ environmental interests.

\textsuperscript{225} \textit{Id.} at 4–5. The four leases in question spanned the twentieth century. \textit{See id.} at 6–8. None of the leases contained an express reservation in favor of the indigenous tribes, and none expressly extinguished native title. \textit{See id.} at 67–68 (Brennan, J.); \textit{see also Wik Peoples, 187 C.L.R.} at 6–33 (setting forth appellants’ full arguments).

\textsuperscript{226} \textit{Id.} at 4–5.

\textsuperscript{227} \textit{Id.}

\textsuperscript{228} \textit{Id.} at 101–33 (Toohey, J.) (finding that the leases did not necessarily extinguish native title and that the sovereign intent to extinguish title must be clear); \textit{id.} at 133–66 (Gaudron, J.) (analyzing the lease language closely and concluding that it did not state an intent to extinguish native title); \textit{id.} at 167–205 (Gummow, J.) (finding that none of the leases in questions manifested a clear and plain intent to extinguish native title); \textit{id.} at 205–64 (Kirby, J.) (observing that the aboriginal and lessee uses of the land in question were compatible, and thus concluding that native title had not necessarily been extinguished by the sovereign grant). \textit{But see id.} at 88, 97 (Brennan, C.J.) (finding lease language to extinguish native title, and that, once extinguished, title does not revive at the termination of the leasehold; also finding that no fiduciary duty of the Crown obscures its right to extinguish native title); \textit{id.} at 100 (Dawson, J.) (agreeing with opinion of Brennan, C.J.); \textit{id.} at 167 (McHugh, J.) (agreeing with opinion of Brennan, C.J.).

\textsuperscript{229} \textit{See id.} at 202–04 (Toohey, J.).
2. The Australian High Court Retreats

In response to *Wik*, in 1998 Australia amended its Native Title Act. As amended, the Act negated *Wik*’s holding by legislatively extinguishing native title on pastoral lands. The majority of Australia’s High Court also turned against its *Wik* opinion, publishing two cases in 2002 that represent backlash against the rights of indigenous peoples.

a. Western Australia v. Ward: *Expressly Rejecting the Aboriginal View of the Relationship Between Tribe and Environment*

In *Western Australia v. Ward*, the Court addressed the native title claims of certain aboriginal peoples to lands and waters in Western Australia and the Northern Territory. “The government had made the lands available to nonindigenous settlers in the late nineteenth century, primarily for pastoral activities. The tribes sought a declaration of their rights to exclusive possession, occupation, use and enjoyment of the land, waters, and other natural resources of the territory, as well as a declaration of their rights to “‘speak for’” the lands and to protect “‘cultural knowledge’” related to it.

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230 Members of the Yorta Yorta Aboriginal Cmty v. Victoria (1998) 1606 F.C.R., para. 1 (Austl.); see also, e.g., Western Australia v. Ward (2002) 213 C.L.R. 1, 213 (Austl.) (“*Wik* is one of the most controversial decisions given by this Court. It subjected the Court to unprecedented criticism and abuse . . . .”).

231 Native Title Amendment Act, 1998, § 2B (Austl.) (defining “previous exclusive possession act” to include “an exclusive pastoral lease”).


233 See *Ward*, 213 C.L.R. at 22.

In 1994 Ben Ward and others lodged an application on behalf of the Miriwwung and Gajerrong People for a “determination of native title” under the *Native Title Act 1993* (Cth) (the NTA). The application was accepted by the Registrar of Native Titles. It was subsequently joined by two other groups, comprising Cecil Ningarmara and others and Delores Cheinmora and others, on behalf of the Balangarra Peoples. The application engaged the definition of “native title” in s 223 of the NTA. . . .

The land and waters the subject of the application (the determination area) were generally within the region known as the East Kimberley region of north Western Australia and also included adjacent land in the Northern Territory.

*Id.* at 8–9.

234 *Id.* at 72–76 (describing the history of pastoral lease activities).

In a key passage, the Court acknowledged that the relationship between an aboriginal people and its territory is spiritual, quoting an earlier case to note that “‘the fundamental truth about the aboriginals’ relationship to the land is that whatever else it is, it is a religious relationship . . . There is an unquestioned scheme of things in which the spirit ancestors, the people of the clan, particular land and everything that exists on and in it, are organic parts of one indissoluble whole’.”\textsuperscript{236} This sacred symbiosis, the Court explained, is expressed as the tribe’s right and duty to “speak for” its “country,” which amounts to a protective dominion or stewardship over its environment:

“Speaking for” country is bound up with the idea that, at least in some circumstances, others should ask for permission to enter upon country or use it or enjoy its resources, but to focus only on the requirement that others seek permission for some activities would oversimplify the nature of the connection that the phrase seeks to capture.\textsuperscript{237}

The Court rejected the idea that a tribe’s connection with its lands may be measured solely by its ability to bar nonindigenous people from access.\textsuperscript{238} To do so, the Court observed, would impose common law property concepts on peoples who perceived the tribal-land connection “very differently from the common lawyer.”\textsuperscript{239}

The Court’s point in acknowledging its understanding of the aboriginal peoples’ perspective on their traditional environment, however, was not to lay the groundwork for its incorporating this perspective into its deliberation.\textsuperscript{240} Rather, the Court concluded that the Native Title Act required it to translate the spiritual view of the human-land relationship into nonindigenous legal rights and interests, which “requires the fragmentation of an integrated view of the ordering of affairs into rights and interests which are considered apart from

\textsuperscript{236} Id. at 64 (majority opinion) (alteration in original) (quoting Milirrpum v. Nabalco Party, Ltd. (1971) 17 F.L.R. 141, 167 (Austl.)).
\textsuperscript{237} Id. at 64–65; see also id. at 93–94 (discussing further “speaking for country”).
\textsuperscript{238} Id. at 93 (“It is wrong to see Aboriginal connection with land as reflected only in concepts of control of access to it. To speak of Aboriginal connection with ‘country’ in only those terms is to reduce a very complex relationship to a single dimension.”).
\textsuperscript{239} Ward, 213 C.L.R. at 93.
\textsuperscript{240} Id. at 65 (“The difficulty of expressing a relationship between a community or group of Aboriginal people and the land in terms of rights and interests is evident. Yet that is required by the NTA.”).
the duties and obligations which go with them.”

The Court summarized its view of how native title may be proven under the Act:

[T]he rights and interests must have three characteristics: (a) they are rights and interests which are “possessed under the traditional laws acknowledged, and the traditional customs observed”, by the relevant peoples; (b) by those traditional laws and customs, the peoples “have a connection with” the land or waters in question; and (c) the rights and interests must be “recognised by the common law of Australia.”

The Court determined that the Native Title Act requires an initial assessment of the contents of an indigenous people’s traditional laws and customs, and after that, a determination of whether such laws and customs constitute a connection between the tribe and the lands it claimed.

On the question of extinguishment, the Court undermined the requirement that those claiming that native title has been extinguished must demonstrate the Crown’s “clear and plain intention” to do so. Rejecting any subjective element to the inquiry, the Court concluded that the “clear and plain intention” requirement necessitates only an objective comparison of the indigenous and nonindigenous land use rights to determine whether the Crown had granted rights inconsistent with the uses being made of the land by its indigenous inhabitants.

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241 Id. at 65; see also id. at 93–94 (“One of the principal purposes of the NTA was to provide that native title is not able to be extinguished contrary to the Act . . . .”) (citing Native Title Act, 1998, § 223(1), (Austl.)). The appellate court majority read the language “in relation to land and water” to bar evidence of a spiritual connection between a tribe and its traditional territory in determining native title: “[W]e do not think that a right to maintain, protect and prevent the misuse of cultural knowledge is a right in relation to land of the kind that can be the subject of a determination of native title.” Id. at 84 (quoting Western Australia v. Ward (2000) 99 F.C.R. 316, 483). The High Court agreed. See id. at 84.

242 Id. at 66 (quoting Native Title Amendment Act, 1998 § 223(1)).

243 Id. at 85 (“Whether there is a relevant connection depends, in the first instance, upon the content of traditional law and custom and, in the second, upon what is meant by ‘connection’ by those laws and customs.”).

244 Id. at 89 (quoting Western Australia v. The Commonwealth (Native Title Act Case) (1995) 183 C.L.R. 373, 423 (Austl.)).

245 Ward, 213 C.L.R. at 88. The Court endorsed the “adverse dominion” test, described by the lower court in the following terms:

“First, that there be a clear and plain expression of intention by parliament to bring about extinguishment in that manner [grants of pastoral leases and other rights to third parties]; secondly, that there be an act authorised by the legislation which demonstrates the exercise of permanent adverse dominion as contemplated by the legislation; and thirdly, unless the legislation provides
Similarly, in interpreting the Racial Discrimination Act of 1975 (RDA), the Court denied the need for a court considering the durability of native title to take into consideration distinctions between native and non-native views of property and inheritance. “In this respect the RDA operates . . . by reference to an unexpressed declaration that a particular characteristic is irrelevant for the purposes of that legislation,” the Court concluded. In reaching this conclusion, the Court referenced the “complete generality” of the International Convention on the Elimination of All Forms of Racial Discrimination, thus undercutting prior Court references to international instruments that demonstrate the global movement toward the appreciation and protection of indigenous peoples’ rights.

From the above, it may be observed that the Ward Court appeared to endorse the fracturing of legal analyses applicable to a native title claim where such fragmentation benefited the nonindigenous contestant, but endorsed precedents and statutory readings that either glossed over or eliminated elements of such legal analyses where a more holistic examination benefited the nonindigenous contestant. The Court also characterized native title in distinctly nonindigenous terms, calling it a “bundle of rights,” each of which needs to be proven to exist by an aboriginal people claiming them, and each of which could be extin-

the extinguishment arises on the creation of the tenure inconsistent with an aboriginal right, there must be actual use made of the land by the holder of the tenure which is permanently inconsistent with the continued existence of aboriginal title or right and not merely a temporary suspension thereof.”

Id. (quoting Ward v. Western Australia (1998) 159 A.L.R. 483, 508 (Austl.)).

246 Racial Discrimination Act, 1975 (Austl.). Section 7 of the Native Title Act states: “This Act is intended to be read and construed subject to the provisions of the Racial Discrimination Act 1975.” Native Title Act, 1993 § 7(1) (Austl.).

247 Ward, 213 C.L.R. at 105–06.

Because no basis is suggested in the [International Convention on the Elimination of All Forms of Racial Discrimination] or in the RDA for distinguishing between different types of property and inheritance rights, the RDA must be taken to proceed on the basis that different characteristics attaching to the ownership or inheritance of property by persons of a particular race are irrelevant to the question whether the right of persons of that race to own or inherit property is a right of the same kind as the right to own or inherit property enjoyed by persons of another race.

Id. at 105.

248 Id. at 105 (citing Street v. Queensl. Bar Ass’n (1989) 168 C.L.R. 461, 571 (Austl.)).

249 Id. (relying on the fact that the RDA references the International Convention on the Elimination of All Forms of Racial Discrimination in defining the rights on which the RDA operates).
guished individually by the Crown.\textsuperscript{250} Native title rights do not, the Court explained, include cultural traditions or knowledge that was not directly connected with tribal control over access to land or waters.\textsuperscript{251}

b. Members of the Yorta Yorta Aboriginal Community v. Victoria:
Sovereign Extinguishment of Native Title Redefined

In the second 2002 High Court opinion representing backlash against \textit{Mabo} and \textit{Wik}, the Court dealt a blow to the presumption against a sovereign grant of property interests in aboriginal lands as manifesting the Crown’s intent to extinguish native title. In \textit{Members of the Yorta Yorta Aboriginal Community v. Victoria}, the Court reviewed the first native title claim to have gone to trial after the implementation of the 1998 Native Title Act Amendment.\textsuperscript{252} The case involved the Yorta Yorta Aboriginal Community’s application to the Native Title Registrar for a determination of native title in lands and waters located in northern Victoria and southern New South Wales, which the community claimed as traditional Yorta Yorta territory.\textsuperscript{253}

Presuming, perhaps, that the courts would view the Australian government’s duty toward the indigenous community as fiduciary or protective in nature, the Yorta Yorta had submitted as part of its native title determination application a description of the tribe’s relationship with its traditional territories, stressing the invasive and culturally threatening nature of nonindigenous uses of their lands and natural resources:

[I]n the period of nearly 155 years since Europeans first came to the area claimed, there had been “massive alterations in technical, environmental and economic circumstance” . . . . [including] use by the European settlers of land for pastoral purposes, . . . use of forests for timber gathering, and . . . use of water for commercial fishing and irrigation, uses which had led to many plant and animal species which were once prolific becoming extinct or rare. . . . [Additional threats included]

\textsuperscript{250} \textit{Id.} at 3 ("Native title rights and interests are a bundle of rights the individual components of which may be extinguished separately."). Under this view, the Court found that the tribes had failed to establish native title in any minerals or petroleum, and that the tribes’ exclusive right to fish in tidal waters had been extinguished. \textit{Id.} at 212 (McHugh, J., dissenting).

\textsuperscript{251} \textit{Id.} at 209.

\textsuperscript{252} (2002) 214 C.L.R. 422, 431 (Austl.).

\textsuperscript{253} \textit{Id.} at 430–31.
the “impact of depopulation from disease and conflict during the early years of settlement” and . . . the policies of both government and others under which Aboriginal children had been separated from their parents, the [forbidding] of ceremonies and other traditional customs and practices . . . , [the inhibiting of] the use of traditional languages . . . and [the control of] “where and how the Yorta Yorta could live . . . .”

Thus, the tribe contended, its members maintained a traditional relationship with their aboriginal territories, including the observation of native customs and practices “‘in adapted form.’”

Far from responding in the manner of a fiduciary or trustee to the plight of the Yorta Yorta, the Court instead took a formalistic approach in its analysis. Focusing on the idea that aboriginal traditions might necessarily adapt and otherwise evolve as a consequence of European infiltration of tribal lands, the Court observed that once the Crown had asserted sovereignty, there could be no other lawmaking system in the Crown’s territories, so that the only indigenous laws and customs that the Court could recognize as establishing an indigenous connection with territorial lands and waters were pre-European sovereignty laws and customs. In addition, the Court determined that it could only consider those indigenous customs that both dated back to pre-sovereignty laws and “had a continuous existence and vitality since sovereignty.” In short, the Court effectively removed from its purview consideration of the problematic fact that invasive causes, including illegal ones, might destroy an indigenous community’s ability to estab-

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254 Id. at 434–35 (quoting complaint, Yorta Yorta, 214 C.L.R. at 422) (paraphrasing “a description of the Yorta Yorta Aboriginal community which had been prepared by a consultant anthropologist”).

255 Id. at 435 (quoting complaint, Yorta Yorta, 214 C.L.R. at 422). The Yorta Yorta claimed that they could demonstrate the existence of a continuous system of native custom and tradition, regardless of the fact that the system had been changed and adapted due to European settlement. Id.

256 See id. at 443–47.

257 Id. at 443–45. The Court interpreted the Native Title Act as requiring those courts evaluating the connections between a tribe and its lands in the context of a native title claim to count as traditional laws and customs only indigenous laws and customs that existed in the normative rules of the indigenous community before the British Crown’s assertion of sovereignty. Id.

258 Yorta Yorta, 214 C.L.R. at 444.
lish native title.\textsuperscript{259} In this way, the Court reverted to an assimilationist approach to indigenous peoples’ rights.\textsuperscript{260}

Likewise, in its consideration of whether an indigenous people could establish the requisite continuity of its traditions and customs from a date prior to the British Crown’s assertion of sovereignty, the Court took a highly formalistic approach.\textsuperscript{261} The Court stated that, to qualify as evidence of native title, indigenous laws and customs must be found to have been exercised, substantially uninterrupted, since sovereignty, because any interruption would mean that the customs had not been passed down from generation to generation.\textsuperscript{262} Instead, any traditional law or custom that might be traced to pre-sovereign days but had not enjoyed an unbroken history of practice would be the “agreement of a new society of indigenous peoples to acknowledge and observe laws and customs of content similar to, perhaps even identical with, those of an earlier and different society.”\textsuperscript{263} Judging from its characteri-

\textsuperscript{259} See \textit{id.} at 444–45.

\textsuperscript{260} See \textit{id.} Consistent with this approach, the Court points to section 82(1) of the 1998 Native Title Act, which altered the pre-1998 Act by presumptively binding the Court to the rules of evidence. \textit{Id.} at 454. In citing this amendment, the Court undermines the oral evidence of indigenous customs and traditions accepted by the lower court judge at a time prior to the enactment of the 1998 Native Title Act amendments. \textit{See id.} As the Court points out, quoting the lower court judge: “‘[t]he difficulties inherent in proving facts in relation to a time when for the most part the only record of events is oral tradition passed down from one generation to another, cannot be overstated.’” \textit{Id.} at 447–48 (alteration in original) (quoting Members of Yorta Yorta Aboriginal Cmty. v. Victoria (1998) F.C.A. 1606).

\textsuperscript{261} See \textit{id.} at 455–57.

\textsuperscript{262} \textit{Id.} at 456.

\textsuperscript{263} \textit{Id.} In full, the Court stated:

\begin{quote}
[A]cknowledgment and observance of those laws and customs must have continued substantially uninterrupted since sovereignty. Were that not so, the laws and customs acknowledged and observed now could not properly be described as the \textit{traditional} laws and customs of the peoples concerned. That would be so because they would not have been transmitted from generation to generation of the society for which they constituted a normative system giving rise to rights and interests in land as the body of laws and customs which, for each of those generations of that society, was the body of laws and customs which in fact regulated and defined the rights and interest which those peoples had and could exercise in relation to the land or waters concerned. They would be a body of laws and customs originating in the common acceptance by or agreement of a new society of indigenous peoples to acknowledge and observe laws and customs of content similar to, perhaps even identical with, those of an earlier and different society.
\end{quote}

\textit{Id.} This is the formalistic logic of a court bent on rejecting the claims of a culture other than its own. For a contrasting approach, see the dissent of Justices Gaudron and Kirby:
zation of its duties and its undermining of the evidence given in the
court below, it is unsurprising that the Court held that the Yorta Yorta
people had lost their traditional connection with their native lands.\textsuperscript{264}

C. The United States: The Supreme Court’s Aggressive Disassociation of
Native Sovereignty and Tribal Environmental Interests

Through recent decades, the Supreme Court of the United States
has followed as discernible a trend as those observable in the high
courts of Canada and Australia in its opinions addressing the nature of
tribal rights to land or natural resources.\textsuperscript{265} Rather than resorting to
dramatic retreats from tribal protection after attempting to assert sov-
ereign duties to protect tribal environmental interests, however, the
U.S. Supreme Court has worked consciously and steadily to eviscerate
tribal authority in traditional indigenous territories, with majority opin-
ions building upon one another to assert that a tribe’s jurisdiction ex-
ists almost exclusively over its members and not over its land, and only
isolated opinions that maintain a tight focus on treaty language ac-
knowledging the centrality of land and natural resources in tribal iden-
tity.\textsuperscript{266} The shift from territorially based jurisdiction to membership-
based jurisdiction is important in evaluating the environmental rights
of American Indians because it necessarily diminishes tribal control
over its lands and the environmental resources that may both sustain
the tribe and serve as a core element of its culture.

Ordinarily, lack of continuity as a community will provide the foundation
for a conclusion either that current practices are not part of traditional laws
or customs, or that traditional laws and customs are no longer acknowledged
and observed. However, the question whether a community has ceased to ex-
ist is not one that is to be answered solely by reference to external indicia or
the observations of those who are not or were not members of that commu-
nity. The question whether there is or is not continuity is primarily a question
of whether, throughout the period in issue, there have been persons who
have identified themselves and each other as members of the community in
question.

\textit{Id.} at 464.

\textsuperscript{264} \textit{See Yorta Yorta}, 214 C.L.R. at 459 (Gleeson, C.J., Gummow and Hayne, JJ.); \textit{see also id.}
at 468 (McHugh, J.); \textit{id.} at 494 (Callihan, J.). \textit{But see id.} at 466 (Gaudron and Kirby, JJ.,
dissenting).

\textsuperscript{265} \textit{See Worcester v. Georgia}, 31 U.S. (6 Pet.) 515, 540–61 (1832); \textit{Cherokee Nation v.}
Georgia, 30 U.S. (5 Pet.) 1, 15–17 (1831); \textit{Johnson v. M’Intosh}, 21 U.S. (8 Wheat.) 543,
571–92 (1823).

\textsuperscript{266} \textit{See Worcester}, 31 U.S. at 561–62; \textit{Cherokee Nation}, 30 U.S. at 16–20; \textit{Johnson}, 21 U.S. at
572–92.
The early Supreme Court cases of *Johnson v. M’Intosh*, *Cherokee Nation v. Georgia*, and *Worcester v. Georgia*, all authored by then-Chief Justice John Marshall, have served a foundational role in the common law of various nations on several core issues in the area of indigenous peoples’ rights. Indeed, the high courts of both Canada and Australia have cited these cases and claimed to utilize their logic to guide their own decisions on indigenous peoples, making Chief Justice Marshall’s trio of opinions of global consequence in the development of juridical ideas about sovereign-tribe relations. In addition, the modern U.S. Supreme Court has found it necessary to cope with the perspective on tribal sovereignty expressed by Chief Justice Marshall. Thus, it is appropriate to summarize *Johnson* and the Cherokee cases as a preface to discussing the contemporary U.S. Supreme Court’s views on tribal rights in land and natural resources.

1. Chief Justice Marshall’s Seminal Views on Tribal Sovereignty

A primary theme of *Johnson* and the Cherokee cases was the apolitical nature of judicial power, a focus explained by the U.S. Supreme Court’s then-ongoing struggle to establish itself as a separate and substantial branch of the federal government. Read out of context, the opinions may easily be perceived as the Court’s unquestioning assent to the near limitless power of a sovereign to strip indigenous peoples of territorial rights without regard to the dictates of either a judiciary

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267 See *Worcester*, 31 U.S. at 536; *Cherokee Nation*, 30 U.S. at 15; *Johnson*, 21 U.S. at 571.

268 See, e.g., Van der Peet v. The Queen, [1996] 2 S.C.R. 507, 644 (Can.) (McLachlin, J., dissenting) (“In *Johnson v. M’Intosh* Marshall C.J., . . . was . . . of [the] opinion that the rights of Indians in the lands they traditionally occupied prior to European colonization both predated and survived the claims to sovereignty made by various European nations in the territories of the North American continent.”) (quoting Guerin v. The Queen [1984] 2 S.C.R. 335, 377–78 (Can.)); see also Wik Peoples v. Queensland (1996) 187 C.L.R. 1, 214 (Austl.) (Kirby, J.) (citing *Cherokee Nation* to support the observation that “societies [exist] where indigenous peoples have been recognised, in effect, as nations with inherent powers of a limited sovereignty that have never been extinguished.”); Mabo v. Queensland II (1992) 175 C.L.R. 1, 32–33 (Austl.) (referencing *Johnson*); Minister of Nat’l Revenue v. Mitchell, [2001] 1 S.C.R. 911, 994 (Can.) (Binnie, J., concurring) (“The United States has lived with internal tribal self-government within the framework of external relations determined wholly by the United States government without doctrinal difficulties since *Johnson v. M’Intosh* . . . was decided almost 170 years ago.”) (citation omitted)).


270 For a discussion of Justice Marshall’s Indian cases in the context of his struggle to establish the Court’s authority, see LEONARD BAKER, JOHN MARSHALL: A LIFE IN LAW 731–46 (1974).
or morality. As discussed below, the contemporary Supreme Court could be accused of having succumbed to such a reading.

a. Johnson v. M’Intosh: The Court’s Role in Recognizing Tribal Property Rights

The factual basis of Johnson was a title dispute between competing grantees of land in Illinois. The plaintiffs’ claim to the land was based on 1773 and 1775 grants from the Piankeshaw Indians, while the defendant’s claim rested on an 1818 conveyance by the U.S. federal government. The issue before the Court was whether it had the authority to recognize a tribe’s grant of tribal land. The Court held that it did not possess that authority, and in so deciding it addressed both the nature of tribal land rights and the power of the U.S. federal judiciary to apply fundamental concepts of justice to legal questions involving the status of American Indian tribes.

On the issue of tribal property interests, the Chief Justice determined that tribes were imbued with a type of title the Chief Justice termed “occupancy,” which included, at the very least, a right to physically possess Indian territory. In Chief Justice Marshall’s words: “It has never been contended, that the Indian title amounted to nothing. Their right of possession has never been questioned. The claim of government extends to the complete ultimate title, charged with

271 The noticeable judicial tactic of citing Johnson as one means of justifying what might be termed, generally, the less equitable treatment of indigenous peoples, may be limited to the courts. See, e.g., Richard Howitt et al., Resources, Nations and Indigenous Peoples, in Resources, Nations and Indigenous Peoples: Case Studies from Australia, Melanesia and Southeast Asia, supra note 5, at 1, 16 (“In many countries, the relevance of the legal foundations of indigenous sovereignty found in North America are strenuously denied by politicians and lawyers alike . . . .”).
272 Johnson, 21 U.S. at 571–72.
273 Id. at 550–60.
274 Id. at 572 (stating the issue succinctly: “[T]he question is, whether this title can be recognised in the Courts of the United States?); see also id. (“The inquiry, therefore, is, in a great measure, confined to the power of Indians to give, and of private individuals to receive, a title which can be sustained in the Courts of this country.”).
275 Id. at 587–605.
276 Id. at 574. The Court, describing the Indian land rights as a “title of occupancy” stated:

They [the American Indians] were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; but . . . their power to dispose of the soil at their own will, to whomsoever they pleased, was denied . . . .

Id.
this right of possession, and to the exclusive power of acquiring that right.”

In short, Indian title, whatever it encompassed, was subject to the distinct limitation that only the sovereign could acquire it from the tribes, “either by purchase or by conquest.”

Also pertinent to an analysis of the contemporary U.S. Supreme Court’s approach to tribal environmental rights is Johnson’s discussion of judicial power, which Chief Justice Marshall summarized in connection with the property issue before the Court:

As the right of society, to prescribe those rules by which property may be acquired and preserved is not, and cannot be drawn into question; as the title to lands, especially, is and must be admitted to depend entirely on the law of the nation in which they lie; it will be necessary, in pursuing this inquiry, to examine, not singly those principles of abstract justice, which the Creator of all things has impressed on the mind of his creature man, and which are admitted to regulate, in a great degree, the rights of civilized nations, whose perfect independence is acknowledged; but those principles also which our own government has adopted in the particular case, and given us as the rule for our decision.

In this passage, Chief Justice Marshall characterized the federal judiciary as powerless to administer justice in connection with the U.S. federal government’s assertions of sovereignty over tribal territories. He also made clear that regardless of what his own views might dictate, the judicial branch’s authority to judge the treatment by a

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277 Id. at 603.  
278 Johnson, 21 U.S. at 573 (“The exclusion of all other Europeans [under the principle of discovery], necessarily gave to the nation making the discovery the sole right of acquiring the soil from the natives . . . .”).  
279 Id. at 587; see also id. at 588 (“The existence of this power must negative the existence of any right which may conflict with, and control it.”).  
280 Id. at 572.  
281 See id. at 588 (“Conquest gives a title which the Courts of the conqueror cannot deny, whatever the private and speculative opinions of individuals may be, respecting the original justice of the claim which has been successfully asserted.”).
sovereign of the indigenous peoples under its control was, at best, politically unwise for the nascent Supreme Court to assert.\textsuperscript{282}

The conscious restraint discernible in the Chief Justice’s prose on the Court’s authority to address sovereign-tribe relations was underscored by the frankness he exhibited elsewhere in the \textit{Johnson} opinion. For example, in a passage addressing the relationship among European nations vis-à-vis the North American territories, Chief Justice Marshall referred to the European seizure of tribal lands in terms just short of overt moral condemnation:

On the discovery of this immense continent, the great nations of Europe were eager to appropriate to themselves so much of it as they could respectively acquire. Its vast extent offered an ample field to the ambition and enterprise of all; and the character and religion of its inhabitants afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendancy. The potentates of the old world found no difficulty in convincing themselves that they made ample compensation to the inhabitants of the new, by bestowing on them civilization and Christianity, in exchange for unlimited independence.\textsuperscript{283}

Similarly, on the issue of the humane treatment of conquered persons, the Chief Justice offered what might be termed moral advice, noting that:

[H]umanity demands, and a wise policy requires, that the rights of the conquered to property should remain unimpaired; that the new subjects should be governed as equitably as the old, and that confidence in their security should gradually banish the painful sense of being separated from their ancient connexions, and united by force to strangers.\textsuperscript{284}

In such passages, Chief Justice Marshall’s words indicate that he possessed a strong viewpoint on the just status and treatment of the American Indians, but that he was willing to censure himself in the interest of

\textsuperscript{282} See id. at 589 (“It is not for the Courts of this country to question the validity of [the U.S. federal government’s] title [to native-occupied land], or to sustain one which is incompatible with it.”).

\textsuperscript{283} Id. at 572–73.

\textsuperscript{284} Johnson, 21 U.S. at 589.
establishing the role of the Court as that of the apolitical administrator of justice.\textsuperscript{285}

b. Cherokee Nation v. Georgia: \textit{Judicial Limits on Asserting Justice in Connection with Tribal Property Rights}

In \textit{Cherokee Nation}, Chief Justice Marshall reiterated both his view as to the limited authority of the judiciary to apply itself to legal conflicts involving Indian tribes and his contrasting moral convictions about the proper treatment of those tribes.\textsuperscript{286} Opening his opinion with a description of the native Americans as “[a] people once numerous, powerful, and truly independent, found by our ancestors in the quiet and uncontrolled possession of an ample domain . . . [who] have yielded their lands by successive treaties, . . . until they retain no more of their formerly extensive territory than is deemed necessary to their comfortable subsistence.”\textsuperscript{287} Chief Justice Marshall went on to cast the claim before the Court as a plea to preserve the Cherokee nation’s “remnant” of territory, then ended the passage with an abrupt statement of the issue that would dominate his opinion: “Has this court jurisdiction . . . ?”\textsuperscript{288} In this way the Chief Justice placed in context the issue of judicial authority over tribal affairs—it was a crucial matter on which rested profound questions of morality and justice, but ultimately it would be decided through a sterile examination of constitutional language.\textsuperscript{289}

\textsuperscript{285} See Baker, \textit{supra} note 270, at 732.
\textsuperscript{286} 30 U.S. (5 Pet.) 1, 15–20 (1831).
\textsuperscript{287} Id. at 15. The paragraph read in full:

\begin{quote}
If Courts were permitted to indulge their sympathies, a case better calculated to excite them can scarcely be imagined. A people once numerous, powerful, and truly independent, found by our ancestors in the quiet and uncontrolled possession of an ample domain, gradually sinking beneath our superior policy, our arts and our arms, have yielded their lands by successive treaties, each of which contains a solemn guarantee of the residue, until they retain no more of their formerly extensive territory than is deemed necessary to their comfortable subsistence. To preserve this remnant, the present application is made.
\end{quote}

Id.

\textsuperscript{288} Id.
\textsuperscript{289} See id. Briefly stated, the opinion observed that the Constitution extends judicial authority to controversies between U.S. states and foreign states. See id. (“The third article of the constitution describes the extent of the judicial power. The second section closes an enumeration of the cases to which it is extended, with ‘controversies’ ‘between a state or the citizens thereof, and foreign states, citizens, or subjects.’”). Elsewhere, the Court noted that the Constitution references Indian tribes in a way that indicates that tribes are neither
In the course of the short exegesis on constitutional phraseology that made up the bulk of the *Cherokee Nation* opinion, Chief Justice Marshall did manage to characterize the Indian tribes as “domestic dependent nations” over which the U.S. government bore responsibilities akin to that of a guardian. He also noted that the Court might decide questions about the property rights of Indians “in a proper case with proper parties.” In the end, however, the opinion concluded that a dispute between a tribe and a government authority “savours too much of the exercise of political power to be within the proper province of the judicial department.”

c. Worcester v. Georgia: *Tribal Sovereignty as Territorial*

Chief Justice Marshall’s third seminal case on native rights, *Worcester*, focused far more centrally than its predecessors on the nature of tribal authority; like its predecessors, *Worcester* casts that authority as territorial. True to his observation in *Cherokee Nation* that the Court’s jurisdiction encompassed questions of tribal land rights if brought in a form of claim expressly recognized in the Constitution,

U.S. states nor foreign states. See id. at 18 (“[T]hat clause in the eighth section of the third article . . . empowers congress to ‘regulate commerce with foreign nations, and among the several states, and with the Indian tribes.’” (quoting U.S. Const. art. 1, § 8, cl. 3)). Therefore, the Constitution does not create U.S. court jurisdiction over controversies between tribes and U.S. states. See id. at 20 (“[A]n Indian tribe or nation within the United States is not a foreign state in the sense of the constitution, and cannot maintain an action in the courts of the United States.”).

290 Id. at 17. Justice Marshall’s full description of the positions of the U.S. government and Native American tribes reads as follows:

> Though the Indians are acknowledged to have an unquestionable, and, heretofore, unquestioned right to the lands they occupy, until that right shall be extinguished by a voluntary cession to our government; yet it may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They may, more correctly, perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile they are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian.

Id.

291 Id. at 20.

292 *Cherokee Nation*, 30 U.S. at 20. (“The bill requires us to control the legislature of Georgia, and to restrain the exertion of its physical force. The propriety of such an interposition by the court may be well questioned.”)

293 31 U.S. (6 Pet.) 515, 561 (1832); *see* *Cherokee Nation*, 30 U.S. at 17; Johnson v. M’Intosh, 21 U.S. (8 Wheat.) 543, 577–78 (1823).
Chief Justice Marshall’s opinion in *Worcester* addressed several elemental questions on tribal authority over Indian territory.  

First, citing treaties between the federal government and the Cherokees, the Chief Justice characterized the Cherokee Nation as “a sovereign nation [with rights] to govern themselves and all persons who have settled within their territory, free from any right of legislative interference by the several states composing the United States of America.” Even more elemental, Chief Justice Marshall pointed out, were the aboriginal rights that predated the British assertion of sovereignty as among the European colonizers of the North American continent. The principle of discovery, the Chief Justice explained, relegated rights as among the so-called discoverers, “but could not affect the rights of those already in possession, either as aboriginal occupants, or as occupants by virtue of a discovery made before the memory of man.” Thus, Great Britain’s victory over its European rivals “gave [Great Britain] the exclusive right to purchase [U.S. soil], but did not found that right on a denial of the right of the [Native American] possessor to sell.” This perspective, according to the Chief Justice, was “well understood” by the British settlers, who conveyed to the U.S. government “the title which . . . they might rightfully convey, and no more. This was the exclusive right of purchasing such lands as the natives were willing to sell.”

Having established that the original North American settlers did not alter the relationship between the tribes and their territories, Chief Justice Marshall determined that the Revolutionary War and ensuing treaties between the United States and the Cherokees likewise did not strip the tribe of its jurisdiction over its territory. The “relation[ship] was that of a nation claiming and receiving the protection of one more powerful: not that of individuals abandoning their national character,

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294 *Worcester*, 31 U.S. at 561; *see Cherokee Nation*, 30 U.S. at 17. Plaintiff Samuel Worcester was a citizen of the State of Vermont. *Worcester*, 31 U.S. at 536. The State of Georgia convicted him under a state law requiring non-Indians to obtain a state license prior to residing in the Cherokee Nation. *Id.* at 536–39. Thus, the action fell within the Court’s jurisdiction while also encompassing as a central issue the question of a tribe’s jurisdiction over tribal territory. *Id.* at 541, 560.


296 *Id.* at 542–45.

297 *Id.* at 544.

298 *Id.*

299 *Id.* at 545 (“The crown could not be understood to grant what the crown did not affect to claim; nor was it so understood.”).

300 *Id.* at 552–59.
and submitting, as subjects, to the laws of a master.” 301 In the language of the treaties, the Chief Justice found that the U.S. government viewed “the several Indian nations as distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries.” 302 Chief Justice Marshall found further evidence of the government’s perspective on tribal jurisdiction in an 1819 federal statute promoting the conversion of Indian nations from hunters into agriculturalists, a goal designed to encourage the Indians to adopt a fixed, Northern European property-based perspective on their relationship with land. 303

The conclusion of the Court’s exhaustive analysis was to recognize the Cherokee nation as “a distinct community occupying its own territory, with boundaries accurately described.” 304 In short, Worcester firmly established the early U.S. Supreme Court’s recognition of the American Indians as possessing sovereignty that was territorial in nature, with only the voluntary cession of such sovereignty to the federal government as a means of diminishment. 305


Like the Marshall Court, the modern Supreme Court has recognized tribal sovereignty and the centrality of the environment in tribal culture. In the 1979 case of Washington v. Washington State Commercial Passenger Fishing Vessel Ass’n, for example, the Court displayed its sensitivity to the tribal perspective on land and natural resources in the context of interpreting a series of treaties between various tribes and the U.S. government. 306 Under the treaties, the tribes had relinquished their interest in their territories with the exception of their “right of taking fish, at all usual and accustomed grounds and stations . . . in common with all citizens of the Territory.” 307 The main issue before the Court was whether the treaties provided that the Indians merely

302 Id. at 557.
303 See id. ("This act furnishes strong additional evidence of a settled purpose to fix the Indians in their country by giving them security at home.").
304 Id. at 561.
305 See id.
306 See 443 U.S. 658, 661–62 (1979). The opinion lists twenty Indian tribes as parties to six treaties entered into during 1854 and 1855. Id. at 662 & n.2.
shared with non-Indians an equal opportunity to fish in their traditional territories, or whether the treaties secured for the Indians a right to a share of fish necessary to support their subsistence and commercial needs.\footnote{Id. at 662, 675.} In deciding that treaties secured for the Indians a greater interest than the opportunity to compete for fish, the Court made extensive reference to the historical part that anadromous fish played in tribal diet, trade, and social and religious customs, thus acknowledging both the segregability of Indian land and natural resource interests, and the interdependence of environment and culture.\footnote{See id. at 664–69 (discussing the tribes’ “vital and unifying dependence on anadromous fish”).} The Court displayed this sensitivity, however, only in the context of interpreting treaty language.\footnote{Id. at 674–79. “In our view, the purpose and language of the treaties are unambiguous; they secure the Indians’ right to take a share of each run of fish that passes through tribal fishing areas.” Id. at 679.} The aim of its discussion of the tribes’ environment-based culture was on discerning the understanding that the treaty negotiators would have had as to their agreement.\footnote{Id. at 669. To this end, the Court noted: “In sum, it is fair to conclude that when the treaties were negotiated, neither party realized or intended that their agreement would determine whether, and if so how, a resource that had always been thought inexhaustible would be allocated between the native Indians and the incoming settlers when it later became scarce.” Id.} Thus, although the case encompassed Chief Justice Marshall’s perspective on the nature of tribal sovereignty as environmentally focused, it would not serve as an obstacle to more sweeping judicial pronouncements on the nature of Indian jurisdiction that ignored or even denied the environmental element.

Also in the late 1970s, several nonenvironmental cases heralded a shift in the U.S. Supreme Court’s perspective on tribal sovereignty. In \textit{Oliphant v. Suquamish Indian Tribe}, the Court identified tribal jurisdiction in criminal matters as limited to members, and expressly rejected the idea of tribal criminal jurisdiction extending to nonmembers by virtue of a connection between a crime and the tribe’s territory.\footnote{435 U.S. 191, 195 (1978). The opinion is emphatic that its sole focus is criminal case jurisdiction. \textit{See id.} at 195, 212.} Similarly, in \textit{United States v. Wheeler}, the Court limited tribal jurisdiction in criminal cases to tribal members.\footnote{See 435 U.S. 313, 323–26 (1978).} Even in such a focused context as criminal jurisdiction, however, the \textit{Wheeler} opinion acknowledged that...
tribal sovereignty did have territorial elements to it, while the dissent in *Oliphant* went further, insisting that even tribal authority over criminal matters applied to a tribe’s territory and not its membership.\(^{314}\)

In spite of these views accentuating the criminal law focus of *Oliphant* and *Wheeler*,\(^ {315}\) the Court relied on both cases in its 1981 opinion in *Montana v. United States*,\(^ {316}\) which some justices have since regarded as setting the current standard for considerations of American Indian civil law jurisdiction.\(^ {317}\) *Montana* focused on a tribe’s authority to regulate its natural environment.\(^ {318}\) The case’s controversy centered on whether the Crow Indians possessed the authority to prohibit hunting and fishing within their reservation by all nonmembers, or whether the state of Montana possessed the authority to regulate hunting and fishing by non-Indians within the reservation.\(^ {319}\) More specifically, the tribe claimed title to the bed of the Big Horn River, and thus the right to regulate all sports fishing and duck hunting in and on its waters.\(^ {320}\)

First, the Court characterized the ownership of land under navigable waters as an incident of U.S. federal sovereignty that a court will not find to have been conveyed “except because of ‘some international duty or public exigency.’”\(^ {321}\) Then the Court confronted the language of an 1868 treaty which guaranteed the Crow Indians ““abso-

\(^{314}\) *Id.* at 323; *Oliphant*, 435 U.S. at 212 (Marshall, J., dissenting) (“I am of the view that Indian tribes enjoy as a necessary aspect of their retained sovereignty the right to try and punish all persons who commit offenses against tribal law within the reservation.”).

\(^{315}\) See *Wheeler*, 435 U.S. 313; *Oliphant*, 435 U.S. 191.


\(^{318}\) *Montana*, 450 U.S. at 547.

\(^{319}\) *Id.* at 548–49. An 1868 treaty established the Crow Reservation in Montana; through this treaty the federal government agreed that the land ““shall be . . . set apart for the absolute and undisturbed use and occupation’ of the Crow Tribe, and that no non-Indians except agents of the Government ‘shall ever be permitted to pass over, settle upon, or reside in’ the reservation.” *Id.* at 548 (alteration in original) (quoting the Treaty with the Crows art. II, U.S.-Crow Indians, May 7, 1868, 15 Stat. 649, 650). Through subsequent congressional acts, members of the tribe acquired fee in tracts within the reservation, and eventually acquired the right to sell these to non-Indians. *Id.* At the time of the case, non-Indians held approximately twenty-eight percent of the reservation land in fee. *Id.*

\(^{320}\) *Id.* at 550.

\(^{321}\) *Id.* at 552 (quoting United States v. Holt State Bank, 270 U.S. 49, 55 (1926)). In the *Montana* dissent, Justice Blackmun argued that the establishment of the Crow Reservation was, in fact, necessitated by the type of “exigency” under which the federal government could be presumed to have alienated the riverbed of a navigable water. *Id.* at 573–74 (Blackmun, J., dissenting). Justice Blackmun explains that Congress entered the treaty designating Crow land to quiet the tribe’s claims to other territories. *Id.* at 574.
lute and undisturbed use and occupation’” of its Montana reservation land, and also guaranteed that “‘no persons, except [federal government agents] . . . shall ever be permitted to pass over, settle upon, or reside in the [Crow’s] territory.’” The Court determined that these phrases could not be read literally, because a literal reading would make the Crow Indians the owners of the riverbed lying within the boundaries of the reservation. By ignoring the actual treaty language, the Court was able to conclude that the treaty contained nothing that overrode the presumption against the U.S. government’s allocation of ownership of a navigable riverbed.

With regard to the Crow’s claim of authority to regulate non-Indian fishing and hunting throughout the reservation, the Court again relied on treaty language to reach a conclusion against the tribe. Here, however, the Court subjected the treaty to a close, literal reading, noting that “[o]nly Article 5 of that treaty referred to hunting and fishing, and it merely provided that the eight signatory tribes ‘do not surrender the privilege of hunting, fishing, or passing over any of the tracts of country heretofore described.’” The Court denied that this privilege amounted to any authority to regulate hunting and fishing by nonmembers on nonmember-owned land within the Crow’s territory, and pointed out that “after the treaty was signed non-Indians, as well as members of other Indian tribes, undoubtedly hunted and fished within the treaty-designated territory of the Crows.” In short, regardless of language elsewhere in the treaty indicating that the Crow Indians were to exercise nearly absolute control over its land, the Court read the tribe’s hunting and fishing privilege as little more than an opportunity to compete with others for game and fish.

Putting aside the dubious merits of—and inconsistencies among—the Montana Court’s various interpretations of Crow treaty provisions, ultimately the Court relied on the assimilationist policy of the U.S. gov-

322 Id. at 553–54 (majority opinion) (quoting the Treaty with the Crows, supra note 319).
323 See id. at 554–55.
324 Montana, 450 U.S. at 555. As an additional out, the Court decided that even if the treaty language were construed literally so that the tribe owned the riverbed, the United States would have retained a navigational easement in the navigable waters within the reservation. Id.
325 Id. at 557–59.
326 Id. at 558 (quoting the Treaty of Fort Laramie with Sioux art. V, Sept. 17, 1851, 11 Stat. 749, 2 Indian Aff. L. & Treatises 648).
327 Id.
328 See id. at 558–59. In a footnote, the Court hinted that non-Indian hunting and fishing on reservation land could even have impaired the tribe’s privilege. Id. at 558 n.6.
ernment at the time it entered its treaty with the Crow Indians to conclude that Congress could never have intended non-Indian fee holders of land within the Crow Reservation to be subject to tribal regulatory authority insofar as their hunting and fishing practices on their land.\textsuperscript{329} Thus, according to \textit{Montana}, reservation land sold to non-Indians was no longer part of the land reserved for Indian use.\textsuperscript{330} Expanding on this view, the Court concluded by limiting tribal sovereignty generally to power over members of the tribe, except where nonmembers enter consensual relations with a tribe or where territorial regulation is required to protect against a threat to a tribe’s political or economic security.\textsuperscript{331} Non-Indian hunting and fishing on non-Indian-owned reservation land, the Court found, had not been established to “imperil the subsistence or welfare of the Tribe,” and thus was not encompassed within the Crow Indians’ tribal sovereignty.\textsuperscript{332}

In addition to reflecting a high comfort level with ideas like assimilation and the ultimate destruction of tribal government, the \textit{Montana} opinion revealed several clues about the U.S. Supreme Court’s approach to environmental issues in the context of tribal claims. First, the Court’s discussion of riverbed ownership demonstrated its ability to recognize unique property interests based on attributes of the natural environment: if a river is navigable, it is not included in a sovereign’s grant of the land through which it passes.\textsuperscript{333} Furthermore, the Court supported this conclusion by pointing out that the Crow Indians were nomadic buffalo hunters at the time they entered the treaty allocating their Montana land rights, and thus “fishing was not important to their diet or way of life” and so was not included in the treaty’s broad description of tribal rights.\textsuperscript{334} Here the Court demonstrated sensitivity to the relationship between a tribe’s historical practices in connection

\textsuperscript{329} Id. at 558–59. The Court denied that Congress could have intended to allow the tribe to possess regulatory authority over lands within the reservation owned by non-Indians “when an avowed purpose of the allotment policy was the ultimate destruction of tribal government.” \textit{Id.} at 560 n.9.

\textsuperscript{330} Montana, 450 U.S. at 561 (denying that a federal trespass statute defining trespass to include the entering “upon any lands of the United States that are reserved for Indian use, for the purpose of hunting, trapping, or fishing thereon, or for the removal of game, peltries, or fish therefrom,” authorizes tribes to regulate hunting and fishing on land within a reservation owned by a non-Indian (quoting 18 U.S.C. § 1165 (2000))).

\textsuperscript{331} Id. at 563–67 (relying on both United States v. Wheeler, 435 U.S. 313 (1978), and Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978), to stand for more than their holdings on tribal criminal jurisdiction).

\textsuperscript{332} Id. at 566–67.

\textsuperscript{333} Id. at 555.

\textsuperscript{334} Id. at 556–57.
with the environment and its judicially cognizable rights. Doubts as to whether the Court would exhibit such sensitivity if it led to a conclusion favoring tribal sovereignty were suggested by Justice Blackmun, who in dissent disputed the Court’s conclusion on the unimportance of fish in the Crow tribe’s diet.\footnote{Id. at 570 (Blackmun, J., dissenting).}

3. \textit{Lyng v. Northwest Indian Cemetery Protective Ass’n}: Ignoring the Centrality of the Natural Environment to Tribal Culture

In 1988, the U.S. Supreme Court addressed the issue of tribal environmental interests from a very different perspective than that of tribal jurisdiction in \textit{Lyng v. Northwest Indian Cemetery Protective Ass’n}, which analyzed tribal rights over the natural environment in terms of the Free Exercise Clause of the U.S. Constitution’s First Amendment.\footnote{485 U.S. 439, 441–42 (1988).} In rejecting a plea to preserve an untouched area of federal lands used for Native American ritualistic purposes, the opinion offered insight into the Court’s unwillingness to recognize a judicial role in the protection of the environment where it may be crucial to the preservation of tribal culture.\footnote{See id. at 457–58.}

\textit{Lyng} arose by virtue of a United States Forest Service decision to construct a road through national forest land in contravention of its own commissioned environmental impact study, which advised against the road’s completion due to the fact that it “would cause serious and irreparable damage to the sacred areas which are an integral and necessary part of the belief systems and lifeway of Northwest California Indian peoples.”\footnote{Id. at 442–43 (quoting DOROTHEW J. THEODORATUS ET AL., CULTURAL RESOURCES OF THE CHIMNEY ROCK SECTION, GASQUET-ORLEASAN ROAD, SIX RIVERS NATIONAL FOREST 182 (1979)). The Court noted that the Chimney Rock area of Six Rivers National Forest had “historically been used for religious purposes by Yurok, Karok, and Tolowa Indians.” Id. at 442. According to the report, the entire area of untouched environment served a role in tribal “religious conceptualization and practice.” Id. (quoting THEODORATUS, supra at 181). The report also stated that “successful use of the [area] is dependent upon and facilitated by certain qualities of the physical environment, the most important of which are privacy, silence, and an undisturbed natural setting.” Id. (alteration in original) (quoting THEODORATUS, supra, at 181).} In connection with their claims that the Forest Service had violated the First Amendment of the Constitution,\footnote{U.S. Const. amend. I.} the Federal Water Pollution Control Act,\footnote{Federal Water Pollution Control Act, 33 U.S.C. §§ 1251–1387 (2000).} and the National Envi-
Environental Policy Act—under which authority the Forest Service had produced the environmental impact study—the impacted tribes called upon the courts to invoke the government’s trust responsibilities to the tribes in reaching its decision.

At the Supreme Court level, the majority decision ignored the issue of the government’s trust-based obligations, instead focusing all of its attention on interpreting the First Amendment’s Free Exercise Clause as limited to protecting against two types of government action: (1) coercive action that violates religious beliefs, and (2) the denial of rights and benefits on the basis of religious activity. Although the Court granted that the Forest Service’s decision could have “devastating effects” on Indian practices “intimately and inextricably bound up with the unique features of the Chimney Rock area,” and further acknowledged that the native practices taking place in that area “are believed to be critically important in advancing the welfare of the Tribe, and indeed, of mankind itself,” the Court nevertheless upheld the Forest Service project as neither coercive nor a denial of citizen rights and benefits. Instead, the majority characterized the project as one with only “incidental effects . . . which may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs,” thus concluding that “the Constitution simply does not provide a principle that could justify upholding [the tribes’] legal claims.” In short, by maintaining its focus firmly on the limits of the First Amendment, the Court expressed itself as helpless to aid the tribes, even going so far as to observe that “[h]owever much we might wish that it were otherwise, government simply could not operate if it were required to satisfy every citizen’s religious needs and desires.”

In contrast to the majority’s narrow view of its ability to aid a tribe in protecting an area of natural environment identified as key to its re-

342 Lyng, 485 U.S. at 443. The district court concluded that the project “would breach the Government’s trust responsibilities to protect water and fishing rights reserved to the Hoopa Valley Indians.” Id. at 444.
343 See id. at 447–49.
344 See id. at 450–53. The Court did point out that “the Indians themselves were far from unanimous in opposing the . . . road, and it seems less than certain that construction of the road will be so disruptive that it will doom their religion.” Id. at 451 (citation omitted). Still, the Court concluded the passage with an admission that “we can assume that the threat to the efficacy of at least some religious practices is extremely grave.” Id.
345 Id. at 450, 452.
346 Id. at 452.
igious practices, the *Lyng* dissent expressed a view of the Court as both enabled and responsible to address the threat to the survival of a tribe’s culture presented by the government plan to invade an untouched locus of tribal ritual.\(^{347}\) Perhaps the most remarkable element of the dissent was how it established that the majority was cognizant of the Native American perspective on the natural environment and its importance to tribal survival.\(^{348}\) In succinct terms, the dissent explained how tribal religious practices could not be segregated from social, political, and cultural practices, so that an analysis that considered religious aspects of Indian life as a “discrete sphere of activity . . . ‘is in reality an exercise which forces Indian concepts into non-Indian categories.’”\(^{349}\)

The dissent also identified the environment as core to the Indian religious-cultural experience, and stressed that particular locations in the natural world possess particular spiritual properties, so that their destruction could forever terminate particular ceremonies and rituals:

> A pervasive feature of [the Native American] lifestyle is the individual’s relationship with the natural world; this relationship, which can accurately though somewhat incompletely be characterized as one of stewardship, forms the core of what might be called, for want of a better nomenclature, the Indian religious experience. . . . [T]ribal religions regard creation as an ongoing process in which they are morally and religiously obligated to participate. Native Americans fulfill this duty through ceremonies and rituals designed to preserve and stabilize the earth and to protect humankind from disease and other catastrophes. Failure to conduct these ceremonies in the manner and place specified, adherents believe, will result in great harm to the earth and to the people whose welfare depends upon it.\(^{350}\)

\(^{347}\) See *id.* at 473–77 (Brennan, J., dissenting). Justice Brennan criticized the majority for concluding “that even where the Government uses federal land in a manner that threatens the very existence of a Native American religion, the Government is simply not ‘doing’ anything to the practitioners of that faith.” *Id.* at 458.

\(^{348}\) *Lyng*, 485 U.S. at 459.

\(^{349}\) *Id.* (quoting *Theodoratus*, *supra* note 338, at 182).

\(^{350}\) *Id.* at 460 (citation omitted). The dissent also stated:

> The site-specific nature of Indian religious practice derives from the Native American perception that land is itself a sacred, living being. Rituals are performed in prescribed locations not merely as a matter of traditional orthodoxy, but because land, like all other living things, is unique, and specific sites
In this passage and others, the dissent made clear that the discrete area of untouched national forest under dispute was both unique and core to tribal culture, and very possibly necessary for the survival of the rituals that took place there. As the dissent observed, “[t]he land-use decision challenged here will restrain respondents from practicing their religion . . . and the Court’s efforts simply to define away respondents’ injury as nonconstitutional are both unjustified and ultimately unpersuasive.”

4. Montana’s Progeny: Reinforcing the Refusal to Recognize the Interconnectedness of Tribal Sovereignty, Environment, and Cultural Survival

Eight years after its Montana decision, the U.S. Supreme Court returned to its consideration of the nature of tribal jurisdiction, deciding two high-profile cases that amplified Montana’s preference for recognizing tribal jurisdiction as membership-based rather than territorially based, even over environmental matters. The first was the 1989 opinion, Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation, in which the Court addressed whether an Indian nation possessed the authority to ban development within a reservation where some reservation land was owned by nonmembers. The Court followed Brendale in 1993 with South Dakota v. Bourland, in which it held that a government taking of Indian land that opened up such land for the general public’s use also abrogated the tribe’s authority to regulate hunting and fishing on such land.

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Id. at 461 (citations omitted).

351 See id. at 459–61. Similarly, the dissent noted that “respondents have claimed—and proved—that the desecration of the high country will prevent religious leaders from attaining the religious power or medicine indispensable to the success of virtually all their rituals and ceremonies.” Id. at 467.

352 Id. at 465–66.

353 492 U.S. 408, 414 (1989). In framing the issue, the Court acknowledged that the possibility existed, at least in theory, that the authority to zone reservation land, including that owned by nonmembers, might come from the tribe’s “status as an independent sovereign.” Id. at 421–22.

a. Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation: Attrition of Territorial Sovereignty Through Nonmember Ownership of Reservation Land

In *Brendale*, the plurality opinion followed *Montana* in determining that it should interpret treaty language recognizing absolute tribal authority over reservation territory in light of subsequent developments on the reservation, so that the fact that nonmembers had come to own a significant portion of reservation land undermined the treaty’s declarations.\(^{355}\) On the question of the American Indians’ inherent sovereignty as a source of authority to impose zoning regulations throughout their reservations, the plurality determined that any inherent sovereignty a tribe possessed over tribal lands was compromised by its external relations; so that again, a tribe lost its authority to regulate land use on the reservation where such lands were owned by nonmembers.\(^{356}\) In short, the plurality viewed tribal land use jurisdiction as membership-based and not territorial, whatever the nature of that jurisdiction may have been at a time when only tribe members occupied the reservation.\(^{357}\)

In his concurrence, Justice Stevens observed that a tribe’s aboriginal sovereignty included the authority to exclude nonmembers from tribal territory, a power that he construed as including the “lesser power” to regulate tribal land use.\(^{358}\) Justice Stevens focused on the extent to which a tribe had surrendered the power to exclude as determinative on the issue of whether the tribe retained its land use regulatory authority.\(^{359}\) According to Justice Stevens, where the tribe had maintained its power to exclude nonmembers from a defined area of the reservation, the tribe retained its sovereign authority to define the essential character of that area insofar as its access and the exploitation of its natural attributes.\(^{360}\) On the other hand, in an area

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\(^{355}\) *Brendale*, 492 U.S. at 422–23, 432–33; *see* *Montana v. United States*, 450 U.S. 544, 560 (1981). The *Brendale* Court quoted *Montana* in stating that “[i]t defies common sense to suppose that Congress would intend that non-Indians purchasing allotted lands would become subject to tribal jurisdiction when an avowed purpose of the allotment policy was the ultimate destruction of tribal government.” *Brendale*, 492 U.S. at 423 (alteration in original) (quoting *Montana*, 450 U.S. at 560 n.9).


\(^{357}\) *See id.*

\(^{358}\) *Id.* at 433–35 (Stevens, J., concurring).

\(^{359}\) *Id.* at 433.

\(^{360}\) *Id.* at 441. Justice Stevens found that the Yakima had “tak[en] care that the closed area remains an undeveloped refuge of cultural and religious significance, a place where tribal members ‘may camp, hunt, fish, and gather roots and berries in the tradition of
of the reservation where approximately half the land was owned by nonmembers, Justice Stevens concluded that the tribe had lost its sovereign power to define the essential character of the territory through zoning regulation.  

Writing in dissent, Justice Blackmun attempted to revive a judicial perspective on tribal sovereignty over tribal land that predated and was not overridden by *Montana*.

Justice Blackmun claimed that tribal sovereignty always was and remained geographical by nature, and thus applied to all reservation land unless its exercise would be “inconsistent with the overriding interests of the National Government.”

Until *Montana*, Justice Blackmun noted, the Court had never once since the Cherokee cases found tribal sovereignty to be inconsistent with national interests, with the exception of the *Oliphant* decision’s focused finding that tribes maintained no inherent jurisdiction over non-Indians in criminal matters.

Even operating within the test set forth in *Montana*, Justice Blackmun argued that the Yakima Tribe’s power to exercise land use control throughout its reservation should have been upheld, as the power to zone is central to the welfare of any local government, and “[t]his fundamental sovereign power of local governments to control land use is especially vital to Indians, who enjoy a unique historical and cultural connection to the land.”

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their culture.” *Id.* (quoting Amended Zoning Regulations of the Yakima Indian Nation, Resolution No. 1-98-72, § 23 (1972)).

361 *Id.* at 444–47. Justice Stevens appeared to base his decision on considerations of both inherent tribal sovereignty and treaty power:

The Tribe cannot complain that the nonmember seeks to bring a pig into the parlor, for, unlike the closed area, the Tribe no longer possesses the power to determine the basic character of the area. Moreover, it is unlikely that Congress intended to give the Tribe the power to determine the character of an area that is predominantly owned and populated by nonmembers, who represent 80 percent of the population yet lack a voice in tribal governance.

*Id.* at 446–47.

362 See *Brendale*, 492 U.S. at 449–50 (Blackmun, J., dissenting).

363 See *id.* at 450 (quoting Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134, 153 (1980)).


365 *Brendale*, 492 U.S. at 458 (Blackmun, J., dissenting) (citing *FPC v. Tuscarora Indian Nation*, 362 U.S. 99, 142 (1960) (Black, J., dissenting)).
b. South Dakota v. Bourland: Federal Takings as Eviscerating Tribal Regulatory Power

In *South Dakota v. Bourland*, as in *Montana*, the Court considered a tribe’s power to regulate hunting and fishing by non-Indians on lands and waters within the tribe’s reservation. The *Bourland* facts differed from those in *Montana*. In *Bourland*, the area of the reservation subject to the dispute between tribal and state authorities had been taken by the federal government for the construction of a dam, in connection with opening the reservoir area to the general public for recreational purposes. Under its contract with the federal government, the Tribe retained mineral rights, the right to harvest timber, and the right to graze stock in the taken territory.

Post-contract, the Tribe continued to regulate hunting by both members and nonmembers in the impacted areas, and in 1988 announced a plan to ban all hunters but those with licenses issued by the tribe, which prompted the state of South Dakota to file suit seeking to enjoin the Tribe from excluding non-Indian hunters from the territory in question. The Court agreed with the state, finding that the Tribe had lost its treaty-based rights to regulate hunting and fishing by non-Indians in the area taken by the federal government. According to the majority, the government taking abrogated the Tribe’s right to exclude nonmembers from the affected area, and along with it the “lesser included power” of regulating nonmembers’ uses of the land and natural resources of the area.

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367 Id. at 683. Congress had required the Cheyenne River Sioux Tribe to relinquish 104,420 acres of trust lands. Id. The tribe received a total of $10,644,014 in exchange, which “included compensation for the loss of wildlife, the loss of revenue from grazing permits, the costs of negotiating the agreement [with the Departments of the Army and the Interior], and the costs of ‘complete rehabilitation’ of all resident members and the restoration of tribal life.” Id. at 683 n.2 (citing Cheyenne River Act of Sept. 3, 1954, §§ 2, 5, 13, 68 Stat. 1191, 1191–94).
368 Id. at 684. The act through which the government took the Tribe’s land characterized the Tribe’s mining, logging, and grazing rights as “‘access’ rights that were ‘subject, however, to regulations governing the corresponding use by other citizens of the United States.’” Id. (quoting the Cheyenne River Act, 68 Stat. at 1193).
369 Id. at 685.
370 Id. at 687–88.
371 Id. at 688–91 (quoting Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation, 492 U.S. 408, 424 (1989)). The Court stated: *Montana* and *Brendale* establish that when an Indian tribe conveys ownership of its tribal lands to non-Indians, it loses any former right of absolute and exclusive use and occupation of the conveyed lands. The abrogation of this
The Court’s logic revealed a shortcoming in its thinking about native jurisdiction over the reservation environment. Apparently unbeknownst to the Court, a tribe may have a relationship with land that is distinct from its relationship with the flora and fauna occupying the land; a tribe’s relinquishment of exclusive dominion over a particular acreage within a reservation does not necessarily affect the tribe’s regulatory jurisdiction over fish and wildlife of that acreage.\textsuperscript{372} Even from the European-rooted perspective of property law, the taking in \textit{Bourland} did not strip the tribe of all property rights to the area in question.\textsuperscript{373} In fact, the act through which the government took tribal property rights expressly allocated some of those rights—which might be characterized as rights to natural resources—to the Tribe.\textsuperscript{374} The Court’s presumption that the act transformed the prior right to regulate hunting and fishing to a mere privilege to compete with non-members in those activities seems to emerge from the Court’s unsubstantiated ranking of environment-related rights under which all other rights fall below the right to exclude.\textsuperscript{375} As the dissent stated, “The majority supposes that the Tribe’s right to regulate non-Indian hunting and fishing is incidental to and dependent on its treaty right to exclusive use of the area and that the Tribe’s right to regulate was therefore lost when its right to exclusive use was abrogated.”\textsuperscript{376}

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\textit{Id.} at 689. \textsuperscript{372} See \textit{generally} Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172 (1999). \textsuperscript{373} See \textit{Bourland}, 508 U.S. at 689. \textsuperscript{374} \textit{Id.} at 698 (Blackmun, J., dissenting) (“The majority’s analysis focuses on the Tribe’s authority to regulate hunting and fishing under the Fort Laramie Treaty of 1868 with barely a nod acknowledging that the Tribe might retain such authority as an aspect of its inherent sovereignty.” (citation omitted)). \textsuperscript{375} See \textit{id.} at 700. Justice Blackmun stated: \textit{Id.} at 700–01 (emphasis added). Justice Blackmun went on to state: “I find it implausible that the Tribe here would have thought every right subsumed in the Fort Lara-
this distinctly nonindigenous view of the human-environment relationship supports the Court’s conclusion.

5. *Minnesota v. Mille Lacs Band of Chippewa Indians*: The U.S. Court Acknowledges a Distinction Between Usufructuary and Other Land-Related Rights

The dissenting voice in *Bourland* was that of Justice Blackmun’s; ironically, Justice Blackmun was no longer a member of the Court in 1999 when a majority of the bench demonstrated that it could, as he had urged, discern distinct sets of legal interests that may be held in various environmental features of a land area. In *Minnesota v. Mille Lacs Band of Chippewa Indians*, Justice O’Connor wrote for the majority in upholding the Chippewa Indians’ usufructuary rights in land that had been ceded by the tribe.

Like the 1979 case of *Washington State Commercial Passenger Fishing Vessel Ass’n*, *Mille Lacs* rested primarily on the Court’s reading of two nineteenth-century treaties, one of which expressly addressed “[t]he privilege of hunting, fishing, and gathering the wild rice, upon the lands, the rivers and the lakes included in the territory ceded” as a distinct category of interests held by the tribe; the other treaty addressed only the Indians’ “right, title, and interest in, and to, the lands now owned and claimed by them.” In concluding that because the first treaty expressly referenced usufructuary interests those interests comprised a distinct class of environment-related rights, the Court did not establish a willingness to perceive tribal environmental interests from a tribal perspective—the conclusion was simply a prod-

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377 Id. at 698; see *Mille Lacs*, 526 U.S. 172.
378 526 U.S. at 175–76. Justices Stevens, Souter, Ginsburg, and Breyer joined Justice O’Connor’s majority opinion. Id. at 174. Of those, only Justice O’Connor had joined Justice Thomas’s majority opinion in *Bourland*, which perceived the authority to regulate the use of natural resources as subsumed by the authority to exclude others from an area of land. See *Bourland*, 508 U.S. at 681.
379 *Mille Lacs*, 526 U.S. at 177, 184 (quoting the Treaty with the Chippewa, U.S.-Chippewa Indians, July 29, 1837, 7 Stat. 537, and the Treaty with the Chippewa, U.S.-Chippewa Indians, Feb. 22, 1855, 10 Stat. 1165–66); see Washington v. Wash. State Commercial Passenger Fishing Vessel Ass’n, 443 U.S. 658 (1979). The *Mille Lacs* opinion also quotes from President Taylor’s Executive Order of February 6, 1850, which echoes the language of the 1837 Treaty. See *Mille Lacs*, 526 U.S. at 179. Finally, the opinion also quotes certain letters written by government officials that made reference to Indian hunting and fishing rights in lands otherwise ceded by the tribe. See id. at 182 (quoting two 1855 letters written by the governor of the Minnesota Territory, Willis Gorman).
uct of the Court’s straightforward reading of the treaty’s language. In concluding that the second treaty meant usufructuary rights to be untouched by the tribe’s relinquishment of “all right, title, and interest” in the area known as the Territory of Minnesota, however, the Court acknowledged that the tribal perspective on environment-related interests distinguished between title and usufructuary interests. Indeed, although the treaty was silent on usufructuary interests, the Court determined that it simply could not be read to have abrogated those rights. Thus, although the Court maintained a tight focus on the fact that it was expressing historical—as opposed to current—perspectives on the presumptive divisions among the various legal interests that may be held in land and natural resources, the Court nevertheless revealed the ease with which it could adopt an Indian perspective on the environment, if only because “Indian treaties are to be interpreted liberally in favor of the Indians.”

6. Summation of the U.S. Cases: Undermining Tribal Sovereign Authority by Casting Tribal Environmental Interests as Privileges

U.S. Supreme Court decisions from Montana to Bourland have found that tribal interests in land and natural resources have been abrogated by the federal government through various actions that the Court quite comfortably has relied upon as evidence of the evisceration

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380 Mille Lacs, 526 U.S. at 176 (“In the first two articles of the 1837 Treaty, the Chippewa ceded land to the United States . . . . The United States also, in the fifth article of the Treaty, guaranteed to the Chippewa the right to hunt, fish, and gather on the ceded lands . . . .”).

381 Id. at 184 (quoting the Treaty with the Chippewa, 10 Stat. at 1165–66) (observing that the treaty in question, while addressing right, title, and interest in Indian land, “makes no mention of hunting and fishing rights”).

382 See id. at 200–02. The Court stressed that its analysis was only of the treaty in question: “[A]n analysis of the history, purpose, and negotiations of this Treaty leads us to conclude that the Mille Lacs Band did not relinquish their 1837 Treaty rights in the 1855 Treat.” Id. at 202.

383 Id. at 200 (citing Fishing Vessel Ass’n, 443 U.S. at 675–76; Choctaw Nation of Indians v. United States, 318 U.S. 423, 452 (1943)). The Court focused tightly on the fact that its goal was to discern a historical perspective on the relationship between land and usufructuary rights. See id. at 195–96 (discussing the fact that the omissions from a treaty of any mention of usufructuary rights “are telling because the United States treaty drafters [of 1855] had the sophistication and experience to use express language for the abrogation of treaty rights”); see also id. at 198 (“[The treaty’s] silence [on hunting, fishing, and gathering rights] suggests that the Chippewa did not understand the proposed Treaty to abrogate their usufructuary rights . . . . It is difficult to believe that in 1855, the Chippewa would have agreed to relinquish the usufructuary rights they had fought to preserve in 1837 without at least a passing word about the relinquishment.”).
of prior treaty-based rights, at times in spite of the Court’s own acknowledgment that Congress has since repudiated earlier actions designed to eliminate tribal autonomy.\(^{384}\) In addition, regardless of any sense of inherent tribal sovereignty or threats to tribal survival, the majority opinions appear to have relied primarily on treaties as the source of tribal power.\(^{385}\) Indeed, in a 2004 nonenvironmental case, the Court observed outright that it derived its view of “inherent tribal authority upon the sources as they existed at the time the Court issued its decisions. Congressional legislation constituted one such important source. And that source was subject to change.”\(^{386}\)

The two exceptions to the trend against finding that tribal rights remain intact, \textit{Washington} and \textit{Mille Lacs}, stand out among Supreme Court cases for their tight focus on treaty language and on usufructuary rights that imply nothing about tribal sovereign interests in land or in regulating non-Indians.\(^{387}\) Thus, if exceptions, the two cases are limited in scope and precedential value. In general, however, judicial abrogation of treaties has led to the obliteration of tribal authority over

\(^{384}\) See \textit{South Dakota v. Bourland}, 508 U.S. 679, 687 (1993); \textit{Montana v. United States}, 450 U.S. 544, 548 (1981). The best example of the Court’s reliance on congressional attribution of tribal rights that has since fallen into disfavor may be the \textit{Montana} opinion itself, in which the Court pointed to the allotment policies of the early twentieth century as its justification for ignoring the language of prior treaties favoring territorial jurisdiction. See \textit{Montana}, 450 U.S. at 548. The Court appeared to see no problem in its reliance, in spite of the fact that it admitted that “[t]he policy of allotment . . . was, of course, repudiated in 1934 by the Indian Reorganization Act.” \textit{Id.} at 560 n.9. For a reference to past polices that admits them to be problematic, see \textit{United States v. Lara}.

Congress has in fact authorized at different times very different Indian policies (some with beneficial results but many with tragic consequences). Congressional policy, for example, initially favored “Indian removal,” then “assimilation” and the breakup of tribal lands, then protection of the tribal land base (interrupted by a movement toward greater state involvement and “termination” of recognized tribes); and it now seeks greater tribal autonomy within the framework of a “government-to-government relationship” with federal agencies. 541 U.S. 193, 202 (2004).

\(^{385}\) See, \textit{e.g.}, \textit{Bourland}, 508 U.S. at 695 (“[W]e find no evidence in the relevant treaties or statutes that Congress intended to allow the Tribe to assert regulatory jurisdiction over these lands pursuant to inherent sovereignty.”). In \textit{Lara}, the Court at least discussed the preconstitutional roots of congressional authority to legislate in relation to the American Indian tribes. 541 U.S. at 201 (“Congress’ legislative authority would rest in part . . . upon the Constitution’s adoption of preconstitutional powers necessarily inherent in any Federal Government, namely, powers that this Court has described as necessary concomitants of nationality.” (internal quotations omitted)).

\(^{386}\) \textit{Lara}, 541 U.S. at 206.

\(^{387}\) See \textit{Mille Lacs}, 526 U.S. at 177; \textit{Fishing Vessel Ass’n}, 443 U.S. at 664–69; see also infra notes 306–11, 378–83 and accompanying text.
Indian land and natural resources. The lack of judicial constraints has relegated such tribal authority to the category of privilege, at best.\textsuperscript{388}

As for the U.S. Supreme Court’s view on the role of the judiciary in Indian affairs, the Court has followed the teachings of \textit{Johnson} and \textit{Cherokee Nation} closely and literally where such a reading allows it to avoid the issue of the government’s obligations to Indian tribes, but the Court has dismissed the ideals of the early cases as limited to their day when dismissal allows the Court to reach a result contrary to the tribes.\textsuperscript{389} \textit{Johnson} and \textit{Cherokee Nation} both cast the then-nascent, politically insecure Court as limited in its authority to assert the sovereign obligations of the government to tribes; today’s Court, although securely established, clings to these supposed limits to its jurisdiction.\textsuperscript{390} On the other hand, \textit{Johnson} and \textit{Cherokee Nation} both cast tribal jurisdiction as territorial; on this issue, the contemporary Court has no problem asserting that the evolving federal policies toward tribes allow the Court to ignore its seminal precedents and declare tribal jurisdiction to be membership-based.\textsuperscript{391}

\section{II. Commonalities and Distinctions Among the Courts of Canada, Australia, and the United States in Addressing the Environmental Rights of Indigenous Peoples}

The case law emerging in recent decades from the courts of Canada, Australia, and the United States is not consistent in terms of the legislative authority provided to the courts regarding tribal interests in

\textsuperscript{388} Indeed, Justice Thomas has stressed the ephemeral nature of the legal status of privilege in his analyses of tribal environmental rights. See \textit{Mille Lacs}, 526 U.S. at 223 (Thomas, J., dissenting) (“[I]t is doubtful that the so-called ‘conservation necessity’ standard applies in cases, such as this one, where Indians reserved no more than a privilege to hunt, fish, and gather.”).


\textsuperscript{390} See \textit{Cherokee Nation}, 30 U.S. at 20; \textit{Johnson}, 21 U.S. at 588; see also \textit{Lyng} v. Nw. Indian Cemetery Protective Ass’n, 485 U.S. 439, 456–58 (1988). (rejecting the dissent’s idea of developing a common law test to “balanc[e] . . . competing and potentially irreconcilable interests” arising “in the longstanding conflict between two disparate cultures,” because such an approach “would cast the Judiciary in a role that we were never intended to play” (first alteration in original) (quoting \textit{id. at 473} (Brennan, J., dissenting))).

\textsuperscript{391} See \textit{Cherokee Nation}, 30 U.S. at 5; \textit{Johnson}, 21 U.S. at 586; see also \textit{Nevada} v. Hicks, 533 U.S. 353, 361(2001) (“Though tribes are often referred to as ‘sovereign’ entities, it was ‘long ago’ that ‘the Court departed from Chief Justice Marshall’s view that the laws of [a State] can have no force’ within reservation boundaries.” (alteration in original) (citation omitted) (quoting \textit{White Mountain Apache Tribe} v. Bracker, 448 U.S. 136, 141 (1980))).
land or natural resources. The most striking of these varied authorities is Canada’s constitutional provision affirming the rights of its indigenous peoples.\textsuperscript{392} Another inconsistency in these three countries’ case law is the type of interests underlying the cases before the various courts and the corresponding framing of the issues. Canada often addresses competition between native and non-natives in regulated industries such as fishing,\textsuperscript{393} Australia primarily focuses on competing claims to rural territory,\textsuperscript{394} and the United States frames the issues in terms of native and non-native jurisdiction over persons or territory.\textsuperscript{395} These differences require the exercise of caution in any attempt to draw comparisons among the three courts’ cases, particularly about the relative

\textsuperscript{392} See Sparrow v. The Queen, [1990] 1 S.C.R. 1075, 1083 (Can.) (identifying section 35 of the Canadian Constitution as the impetus for the analysis of indigenous rights); supra notes 22–25 and accompanying text. \textit{But see} Delgamuukw v. British Columbia, [1997] 3 S.C.R. 1010, 1080–81 (Can.) (observing that the Canadian Constitution did not create indigenous rights); \textit{Sparrow}, [1990] 1 S.C.R. at 1106 (observing that the Canadian government was bound by sovereign honor and duty, rather than solely by the Constitution); \textit{supra} notes 34, 104 and accompanying text.


\textsuperscript{394} See, \textit{e.g.}, Members of the Yorta Yorta Aboriginal Cmty. v. Victoria (2002) 214 C.L.R. 422, 431 (discussed \textit{supra} note 252 and accompanying text); \textit{Western Australia} v. Ward (2002) 213 C.L.R. 1, 8–9 (discussed \textit{supra} note 233 and accompanying text); Wik Peoples v. Queensland (1996) 187 C.L.R. 1, 4 (discussed \textit{supra} note 224 and accompanying text); Mabo v. Queensland II (1992) 175 C.L.R. 1, 4 (focusing on competing claims to rural territories, discussed \textit{supra} note 201 and accompanying text).

social or moral values reflected in the three judiciaries’ treatment of indigenous peoples.

Nevertheless, certain observations about the role and effectiveness of the common law may be fair to elicit from a consideration of the three lines of cases in juxtaposition. First, it appears that an important factor in any common law court’s consideration of native environmental interests is whether the court is willing to view the human-environment relationship from a tribal perspective. A related factor is whether the courts are willing to perceive land interests and natural resource interests as separate spheres of tribal rights. A second factor that may be outcome-determinative in the common law cases of the three nations is whether a court imposes elements of proof and evidence from an aggressively nonindigenous stance, fracturing such elements into discrete and narrowly focused questions. Finally, and perhaps most importantly, the cases can be divided on the issue of whether the courts consider themselves empowered to acknowledge an overriding sovereign duty to preserve native cultures, and whether they acknowledge a judicial responsibility to bring that sovereign duty to bear as a matter of common law.

A. The Courts’ Willingness to Embrace a Tribal Perspective on the Environment

Decisions from both Canadian and Australian courts that accepted a tribal perspective on the centrality of the environment to tribal identity tended to favor the tribal claims. The leading case among these may be Sparrow v. The Queen, in which the Supreme Court of Canada determined that its constitutional duty to uphold the rights of aboriginals included an obligation to translate the native relationship with the environment into contemporary terms. The first of the Canadian Court’s two Marshall v. The Queen decisions also displayed sensitivity to the tribal perspective in this way, determining that the environmental rights set forth in treaty language should be interpreted in light of contemporary tribal practices. This approach to interpreting aboriginal

396 See infra Part II.A.
397 See infra Part II.B.
398 See infra Part II.C.
399 [1990] 1 S.C.R. 1075, 1099 (discussing how modernization of Musqueam fishing and bartering practices did not eliminate their identification as constitutionally protected aboriginal rights); supra notes 30–31 and accompanying text.
400 [1999] 3 S.C.R. 456, 478 (accepting an updated view of tribal “necessaries” that was not limited to bare subsistence); supra note 133 and accompanying text.
rights transcends the simplistic notion that all tribal customs and activities must be primitive to garner recognition. As when the colonialists first encountered the native occupants of lands to be claimed by European sovereigns, tribes may be sophisticated in their practices and even competitive or superior to the nonindigenous population in their abilities to work with land and natural resources. The approach in Sparrow and the first Marshall decision reflect the obvious truth that tribes, like all cultures, evolve, and that evolution should not necessarily lead to the extinction of a tribe’s identity and rights.

The Sparrow Court also reminded itself that when considering aboriginal rights, it must give due consideration to the sui generis nature of such rights. Canada’s Supreme Court again referenced the sui generis nature of tribal rights in Delgamuukw v. British Columbia, this time in a discussion of aboriginal title. In demonstration of this need for openmindedness when considering the land-related rights of a native people, Delgamuukw accommodated a native perspective on land ownership in its acceptance of aboriginal title as potentially communal in nature.

Similarly, in the Mabo v. Queensland II decision the Australian High Court displayed a willingness to recognize native title as both communal and emerging from the traditional laws of indigenous tribes, in this way embracing a native perspective on the human-environment relationship when considering a tribe’s land rights. The Mabo Court also expressed itself as sensitive to the symbiosis among tribal culture, sustenance, religion, and environment, thus demonstrating its ability to embrace the essence of the relationship between indigenous peoples and the environment, as well as the need for judicial recognition of this core element of tribal culture.

401 See Sparrow, [1990] 1 S.C.R. at 1112 (warning against the application of nonindigenous perspectives on concepts like property to questions of tribal rights); supra notes 41–43 and accompanying text.
402 Delgamuukw v. British Columbia, [1997] 3 S.C.R. 1010, 1080–81 (describing native title as less than fee simple but more than the right to engage in activities recognized as aboriginal rights); supra note 103 and accompanying text.
403 Delgamuukw, [1997] 3 S.C.R. at 1080–81 (describing aboriginal title as an exclusive right to occupy land held by all members of a tribe collectively).
404 See Mabo v. Queensland II (1992) 175 C.L.R. 1, 58–63 (Brennan, J.) (accepting the tribal relationship with territory as communal and as core to tribal culture); supra note 209 and accompanying text.
405 Mabo, 175 C.L.R. at 29 (recognizing the religious, economic, cultural, and other aspects of tribal life tied to its connection with its environment, and criticizing past cases that presumptively deprived aboriginal tribes of territorial rights); supra note 219 and accompanying text.
Both these premises—that the environment is core to indigenous cultures and that common law support of indigenous peoples’ environmental rights is necessary for their cultural survival—are well supported by the decisions from the Canadian, Australian, and U.S. high courts that rejected the tribal perspective as unsuitable for the judiciary of the sovereign to include in its deliberations.\textsuperscript{406} For example, the Canadian Supreme Court in \textit{Van der Peet v. The Queen} refused to adopt a native perspective on tribal rights, and instead insisted that aboriginal rights must be some sort of reconciliation of ancient rights and Crown sovereignty.\textsuperscript{407} The \textit{N.T.C. Smokehouse Ltd. v. The Queen} decision also defined aboriginal rights narrowly, so as to eliminate modern practices.\textsuperscript{408} In Australia, the \textit{Western Australia v. Ward} Court likewise acknowledged, but rejected, the spiritual relationship between tribes and the environment as immaterial to a judicial determination of tribal land rights.\textsuperscript{409} The U.S. Supreme Court decision in \textit{Lyng v. Northwest Indian Cemetery Protective Ass’n}, perhaps more than any other, displayed its cognizance of the crucial connection between tribal cultural survival and legal protection of the natural environment, only to dismiss the tribal perspective as outside its judicial purview.\textsuperscript{410}

A related factor in categorizing a court as sensitive to the indigenous perspective on the environment is whether it is willing to perceive land and various natural resource interests as separate spheres of in-

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\textsuperscript{407} \textit{Van der Peet}, [1996] 2 S.C.R. at 570–71 (limiting aboriginal rights to ancient features of a tribe that gave the tribe its identity); supra note 73 and accompanying text.

\textsuperscript{408} \textit{N.T.C. Smokehouse Ltd. v. The Queen}, [1996] 2 S.C.R. 672, 686–87 (Can.) (defining the tribal right in that case as the right to fish commercially); supra note 85 and accompanying text.

\textsuperscript{409} \textit{Ward}, 213 C.L.R. at 64–65 (acknowledging the tribal perspective on its environment, but rejecting it as outside the Court’s purview in interpreting a contemporary statute); supra notes 236–39 and accompanying text. \textit{Ward} went on to characterize native title as a “bundle of rights,” thus imposing a Eurocentric property construct on the concept of native title. See \textit{Ward}, 213 C.L.R. at 76, 95.

\textsuperscript{410} \textit{Lyng}, 485 U.S. at 452 (recognizing the centrality of the natural environment to tribal culture before declaring itself powerless to address “every citizen’s religious needs and desires.”). The \textit{Lyng} dissent underscored the majority’s awareness of what it was doing. \textit{Id.} at 473 (Brennan, J., dissenting); supra notes 347–52 and accompanying text. Similarly, the dissent in \textit{Brendale} demonstrates that only a minority of U.S. Supreme Court members were willing to accommodate an interpretation of tribal sovereignty consistent with the relationship between tribe and the environment. See \textit{Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation}, 492 U.S. 408, 448–60 (1989) (Blackmun, J., dissenting) (discussing the need for the Court to accept a pre-\textit{Montana} perspective on tribal sovereignty as territorial); supra notes 362–65 and accompanying text.
digienous rights.\textsuperscript{411} The Canadian Supreme Court opinions in \textit{Adams} and \textit{Delgamuukw}, for example, both drew a distinction between aboriginal rights and aboriginal title, allowing that a tribe might establish rights in either realm.\textsuperscript{412} This evidenced the Court’s acknowledgment that a tribe may have judicially cognizable rights to natural resources even when it cannot establish property rights to the territory associated with those natural resources. On a different note, the Canadian Supreme Court’s second \textit{Marshall v. The Queen} decision, perceiving the need to allay the nonindigenous population’s anger, emphasized that the tribal rights upheld in that case applied only to fish and wildlife, not to minerals and other natural resources.\textsuperscript{413} Thus the Court displayed its ability to fracture the various environmental interests a tribe may claim, whether to the benefit or detriment of the tribe.

In similar fashion to the Canadian \textit{Marshall} Court, the U.S. Supreme Court has displayed its sensitivity to the distinctions among land and various natural resource interests in a result-oriented manner.\textsuperscript{414} In \textit{Montana v. United States}, for example, the Court easily segregated interests in land from those in a river traversing that land, with the result that the tribe’s jurisdictional rights were curtailed.\textsuperscript{415} The \textit{Montana} Court also proved itself able to focus closely on a tribe’s historical fishing habits where such scrutiny allowed it to conclude that fishing was not core to the tribe’s culture and thus not within its jurisdiction.\textsuperscript{416} Elsewhere, however, the \textit{Montana} Court was unwilling to segregate land and natural resource rights, so that a tribe’s loss of ownership of certain

\begin{footnotes}
\footnote{\textit{Delgamuukw}, [1997] 3 S.C.R. at 1080–81 (distinguishing between examination of a tribe’s historical activities and its historical relationship with tribal land, and thus defining aboriginal title as a type of aboriginal right that involves a tribe’s historical activities that are closely tied to an identified area of land); \textit{Adams}, [1996] 3 S.C.R. at 118 (identifying aboriginal rights as focused on a tribe’s historical customs and traditions, while aboriginal title focuses on a tribe’s occupation and use of land); supra notes 97, 107–08 and accompanying text.}
\footnote{\textit{Marshall II}, [1999] 3 S.C.R. 533, 548–49 (clarifying that the natural resource rights of the tribe included only the types of natural resources that the tribe had hunted and gathered historically); supra notes 141, 145 and accompanying text.}
\footnote{See \textit{Montana} v. United States, 450 U.S. 544 (1981).}
\footnote{\textit{Id.} at 553 (refusing to read a treaty that guaranteed a tribe absolute and undisturbed use of an area to include in its scope a navigable riverbed due to a presumption against finding that the government had alienated its ownership of navigable waters); supra notes 321–24 and accompanying text.}
\footnote{\textit{Montana}, 450 U.S. at 556 (concluding that a treaty could not have encompassed fishing rights by finding that the tribe had not engaged in subsistence fishing at the time it entered the treaty); supra note 334 and accompanying text.}
\end{footnotes}
lands within its reservation automatically extinguished the tribe’s authority to regulate hunting and fishing on those lands. The Court repeated this subjugation of natural resource regulatory authority to other property rights in *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation* and *South Dakota v. Bourland*, both of which cast a tribe’s authority to regulate land use and natural resource exploitation as somehow obliterated by the tribe’s loss of the property-based right to exclude nonmembers from parts of its reservation.

**B. The Fracturing of Evidentiary Requirements**

The division among cases insofar as the courts’ willingness to accommodate a tribal perspective in considering tribes’ environmental interests also encompasses the patterns and elements of proof and evidence required by the various courts. When courts have fractured the elements of proof that a tribe must meet to establish its territorial claims, they have made the native case more difficult to prove, in part due to differences in native and non-native perspectives on historical facts and proof. Thus, it is no surprise that the *Sparrow* decision, in advancing its overall endorsement of native rights, expressed the prima facie case for aboriginal rights in holistic, unfractured terms. Where the burden shifted to the government to justify its infringement on aboriginal rights, however, the *Sparrow* Court expressly rejected the generalized “public interest” justification. Similarly, the Australian High Court, in its *Wik Peoples v. Queensland* decision favoring the recognition of tribal interests, set forth the rule of interpretation favoring a negative answer to the question of whether

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417 *Montana*, 450 U.S. at 559 (determining that land within a reservation sold to nonmembers was no longer subject to tribal regulation); *supra* notes 333–35 and accompanying text.

418 *South Dakota v. Bourland*, 508 U.S. 679, 689 (1993) (describing regulatory authority as a lesser power than the right to exclude, and thus extinguished when the right to exclude was lost); *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408, 423–25 (1989) (casting inherent tribal sovereignty as extinguished where reservation land was owned by nonmembers); *supra* notes 354–57, 371 and accompanying text.


421 *Sparrow*, [1990] 1 S.C.R. at 1093 (requiring a flexible interpretation of aboriginal rights that favors their acknowledgment and preservation); *supra* notes 29–32 and accompanying text.

422 *Sparrow*, [1990] 1 S.C.R. at 1113 (emphasis omitted) (describing the government justification burden as a heavy one); *supra* notes 21–59 and accompanying text.
government actions could be construed to have extinguished native land rights.\textsuperscript{423}

Canadian decisions that followed \textit{Sparrow} reined in that protribe decision in large part by fracturing the evidence required to establish aboriginal interests. The \textit{Van der Peet} decision, for example, not only narrowed the definition of aboriginal practice to a practice that was both distinct and made the tribe what it was, but also added the temporal requirements that the tribe prove the practice in question to have predated Crown sovereignty and been active through the ensuing years.\textsuperscript{424} \textit{Delgamuukw}, in turn, presented a three-step process for establishing native title, which included the necessity of establishing that the tribe’s use of the land was exclusive,\textsuperscript{425} and the \textit{Minister of National Revenue v. Mitchell} Court relied on it to compel the tribe in that case to satisfy a slew of questions that fractured its aboriginal history.\textsuperscript{426} Indeed, the Australian \textit{Ward} decision openly admitted that requiring a fractured analysis forced the tribe to prove its rights from a nonindigenous perspective, and the \textit{Members of the Yorta Yorta Aboriginal Community v. Victoria} decision, following \textit{Ward}, proved this in its analysis of the history and continuity requirements.\textsuperscript{427}

\textbf{C. The Courts’ Willingness to Recognize Sovereign and Judicial Duties to Protect and Preserve Indigenous Peoples}

Perhaps the most significant element of any common law decision on indigenous peoples’ environmental rights is the court’s willingness to recognize a sovereign obligation and a corresponding judicial duty

\textsuperscript{423} Wik Peoples v. Queensland (1996) 187 C.L.R. 1, 204–05 (favoring the co-existence of tribal territorial rights and pastoral leases because sovereign extinguishment of tribal rights must be construed narrowly); \textit{supra} notes 228–29 and accompanying text.

\textsuperscript{424} \textit{Van der Peet}, [1996] 2 S.C.R. at 554–58 (narrowing the definition of aboriginal rights and defining the burden of establishing such rights as a several step process); \textit{supra} notes 72–76 and accompanying text.

\textsuperscript{425} \textit{Delgamuukw} v. British Columbia, [1997] 3 S.C.R. 1010, 1097 (determining, in the course of setting forth a three-step process for proving aboriginal title, that a key element of a tribe’s claim was its ability to establish its exclusive occupation of its territory at the initial assertion of British sovereignty); \textit{supra} notes 114–19 and accompanying text.

\textsuperscript{426} See \textit{Minister of Nat’l Revenue v. Mitchell}, [2001] 1 S.C.R. 911, 928 (describing questions about ancestral practices of tribe and the continuity of such practices into modern times); \textit{supra} Part I.A.2.d.

\textsuperscript{427} Members of the Yorta Yorta Aboriginal Cmty. v. Victoria (2002) 214 C.L.R. 422, 442 (segregating presovereignty aboriginal customs and laws from evolutions in those customs and laws occurring after the British assertion of sovereignty, see \textit{supra} note 252 and accompanying text); Western Australia v. Ward (2002) 213 C.L.R. 1, 65 (admitting that fragmenting the proof requirements to establish native title requires the adoption of a nonindigenous perspective); \textit{supra} note 240 and accompanying text.
to protect the interests of indigenous peoples.\textsuperscript{428} A number of the decisions coming out of the three countries’ courts appear to accept—without discounting or even questioning—the past actions of government or private parties aimed at obliterating tribal rights. \textit{Montana}, for example, referenced assimilationist policies as having an atrophying effect on the pledges set forth in treaties, seemingly without cognizance of any governmental responsibility toward the American Indians that might warrant the Court’s consideration in evaluating the impact of those discredited policies on prior existing treaties.\textsuperscript{429} Similarly, the \textit{Yorta Yorta} decision observed, with no seeming impact on its analysis, that aggressive and even illegal European infiltrations of native territories could easily hurt the tribes’ ability to establish native title in the courts.\textsuperscript{430}

Going further than simply ignoring the question of whether sovereign duties and tribal rights both predated and survived the development of legislative directives on government-tribe relations, the \textit{Bourland} Court discussed the concept of inherent tribal authority, finding that whatever inherent authority might have existed in the past was undermined by sales of land within the reservation to non-members.\textsuperscript{431} In so easily dismissing the concept of inherent authority, the Court exposed its policy of equating the mingling of indigenous and nonindigenous populations with the extinguishment of tribal authority over tribal land and natural resources.\textsuperscript{432} The \textit{Lyng} majority, however, may be the most overt example of the U.S. Court’s failure to recognize either executive or judicial duties to protect established tribal culture requiring environmental preservation, both in citing but then ignoring the issue of the government’s trust responsibilities toward the American Indians and in openly admitting its disinclination to aid the tribes.\textsuperscript{433}


\textsuperscript{429} See \textit{Montana}, 450 U.S. at 559 (referencing the allotment policy and its goal to destroy tribal government as support for reading a treaty narrowly); \textit{supra} note 329 and accompanying text.

\textsuperscript{430} \textit{Yorta Yorta}, 214 C.L.R. at 454 (determining that illegal and destructive infiltration of native territory established a lack of continuity in tribal customs and vitality); \textit{supra} note 260 and accompanying text.

\textsuperscript{431} \textit{South Dakota v. Bourland}, 508 U.S. 679, 694–98 (1993) (referencing inherent tribal authority as extinguished by the tribe’s loss of ownership of some of its lands); \textit{supra} note 354 and accompanying text.

\textsuperscript{432} See \textit{Bourland}, 508 U.S. at 694–98.

\textsuperscript{433} See \textit{Lyng v. Nw. Indian Cemetery Protective Ass’n}, 485 U.S. 439, 444, 451–52 (1988) (citing the government’s trust responsibility early in the opinion, only to later declare the
While it might be easy to equate a court’s nonacknowledgment of any elemental sovereign duties toward displaced indigenous peoples with judicial policies favoring assimilation and tribal dissolution, that has not always been the case. The Australian High Court in *Mabo*, for example, while similar in tone to the *Lyng* and *Montana* opinions on the issue of the government’s duty toward tribal populations in expressing no sovereignty-based controls over the Crown’s power to extinguish native title, nevertheless rendered an opinion favorable to Australia’s aboriginal tribes.\footnote{Mabo v. Queensland II (1992) 175 C.L.R. 1, 69–71, 76 (defining aboriginal title as freely extinguishable by the sovereign); supra notes 212 and accompanying text.} Alternatively, a court’s acceptance of a sovereign duty to honor the aboriginal heritage of indigenous peoples in its contemporary dealings with tribal issues need not result in judicial decisions protective of tribal rights.\footnote{See Van der Peet v. The Queen, [1996] 2 S.C.R. 507, 548–50 (Can.) (declaring that courts must define aboriginal title narrowly); supra notes 72–74 and accompanying text.} The Canadian case of *Van der Peet*, for example, acknowledged the fiduciary duty of the Canadian sovereign while still regarding its judicial responsibility as being to define aboriginal rights narrowly.\footnote{Van der Peet, [1996] 2 S.C.R. at 548–50.} Similarly, the *Delgamuukw* and *Marshall* decisions both recognized, but limited, the fiduciary obligations owed by the Crown to Canada’s tribes.\footnote{Marshall II, [1999] 3 S.C.R. 533, 562 (limiting tribal rights to natural resources tied to their historical practices, see discussion supra notes 134–37 and accompanying text); Delgamuukw v. British Columbia, [1997] 3 S.C.R. 1010, 1112 (suggesting that the government’s fiduciary obligation toward holders of aboriginal title could be satisfied by requiring their consultation in connection with government projects impacting their land, see discussion supra note 127 and accompanying text).}

Indeed, until recently, *Sparrow* may have stood as the single common law opinion of those discussed above that not only recognized a pre-Constitution, historical obligation on the part of the Canadian government to honor the aboriginal tribes in their cultural practices, but also considered the Court both empowered and duty-bound to construe aboriginal rights liberally.\footnote{See Sparrow v. The Queen, [1990] 1 S.C.R. 1075, 1110 (acknowledging the honor-based duty of the government toward Canada’s tribes, as memorialized in 1982 in the Canadian Constitution); supra note 34 and accompanying text.} *Taku River Tlingit First Nation v. British Columbia* and *Haida Nation v. British Columbia* reinvigorated that essential theme of *Sparrow*, with *Haida Nation* delivering the powerful, succinct message that Canadian sovereign honor “is not a mere incantation, but rather a core precept that finds its application
in concrete practices.”439 It remains to be seen whether these two 2004 cases will emerge as landmark decisions in Canadian or even global jurisprudence on indigenous peoples’ rights.

Conclusion

Court decisions emerging from the high courts of three countries that have in common their northern-European-rooted sovereignties and significant tribal populations are only one source of the evolving perspective on indigenous rights in these countries. Certainly, they are even less an indicator of global trends in the valuing of indigenous cultures and the recognition of the need to protect their environmental interests as a key aspect of their survival. Still, the case law emerging from the high courts of Canada, Australia, and the United States over the past several decades serves to underscore the importance of the judiciary in securing fundamental justice for indigenous peoples, and it illustrates the vulnerability of tribal communities to the still-potent assimilationist tendencies of the dominant cultures.

Canada’s constitutionalization of indigenous rights appears to have empowered that country’s judiciary to assert the sovereign duty to protect aboriginal populations. The post-Sparrow retreat from full-scale judicial championing of aboriginal rights, however, invites a conclusion that even constitutionalization of indigenous peoples’ rights cannot effectively undermine the reticence of common law courts to embrace a nonassimilative perspective when evaluating such rights as against the sovereign. But the Taku River Tlingit First Nation and Haida Nation decisions undercut such a simple conclusion. Even though these two opinions do not stand as total victories for the indigenous interests in dispute, their revival of core principles addressed in Sparrow indicates that the Canadian Supreme Court is maturing in its role in defining the duties of sovereignty and the rights of indigenous peoples to the lands and natural resources with which they have an historical connection.

As a final observation, it is worth reiterating that contemporary cases emanating from the high courts of Australia, Canada and the United States have relied in some part on the jurisprudence of former

U.S. Supreme Court Chief Justice John Marshall to justify their domestic policy on tribal recognition and claims encompassing land and environmental resources. This supports an observation that judicial policy on issues like cultural identity and assimilation has advanced little, and only recently, from where it stood in the early nineteenth century. Perhaps an even stronger message delivered by the modern references to *Johnson v. M‘Intosh* and the Cherokee cases is that the status of indigenous rights remains as heavily influenced by politics today as it did centuries ago, and that the judicial branch remains uncertain of its authority to question the political policy impacting indigenous populations.
GOVERNMENTS AND UNCONSTITUTIONAL TAKINGS: WHEN DO RIGHT-TO-FARM LAWS GO TOO FAR?

TERENCE J. CENTNER*

Abstract: State anti-nuisance laws, known as right-to-farm laws, burden neighboring property owners with nuisances. The purpose of the laws is to protect existing investments by offering an affirmative defense. Activities that are not a nuisance when commenced cannot become a nuisance due to changes in land uses by neighbors. While most state laws involve a lawful exercise of the state’s police powers, a right-to-farm law may set forth protection against nuisances that is so great that it operates to effect a regulatory taking. Judicial rulings that two Iowa right-to-farm laws went too far in reducing neighbors’ constitutionally protected rights augur an opportunity to rethink right-to-farm laws. Rather than relying upon a marketplace economy to protect businesses, a law based upon an economy of nature may be drafted to protect farmland and other natural resources.

Introduction

Every state has adopted right-to-farm legislation that curtails the rights of persons to use nuisance law to secure relief from some situations and activities as listed in Appendix 1.1 A major thrust of the legislation was to protect existing farm investments by reducing actions un-

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nder nuisance law that enjoined agricultural activities.\(^2\) Another objective of the laws was to preserve farmland.\(^3\) With respect to nuisance actions, many of the laws adopted a “coming to the nuisance” concept whereby activities that were not a nuisance when commenced would not become a nuisance due to the changed land uses of neighbors.\(^4\)

The legislation became known as “right-to-farm” laws because the individual laws enabled farmers to continue with their husbandry pursuits rather than enjoining them from farming due to the presence of a nuisance.\(^5\) However, some of the laws go further and apply to non-farming activities, so that the term “anti-nuisance” laws may more appropriately describe their provisions.\(^6\) Moreover, the individualized state right-to-farm laws have diverged into very different laws as legislatures have formulated several approaches to providing protection against nuisance actions.\(^7\)

During the past several years, concern has been expressed that a few right-to-farm laws have been amended to provide too much protection for agricultural pursuits and other activities at the expense of neighboring property owners.\(^8\) While some of the arguments focus on


\(^3\) Margaret Rosso Grossman & Thomas G. Fischer, *Protecting the Right to Farm: Statutory Limits on Nuisance Actions Against the Farmer*, 1983 Wis. L. Rev. 95, 152 (observing that the laws protect farmland by limiting nuisance lawsuits, but do not affect the application of environmental regulations).

\(^4\) Hand, *supra* note 2, at 307 (noting priority in usage is consistent with the coming to the nuisance defense).


\(^7\) Jesse J. Richardson, Jr. & Theodore A. Feitshans, *Nuisance Revisited After Buchanan and Bormann*, 5 Drake J. Agric. L. 121, 128 (2000) (categorizing six different types of right-to-farm laws).

the equity of favoring agriculture over other activities,\(^9\) others raise questions about the burdens being placed on neighboring property owners.\(^{10}\) In 1998, an Iowa right-to-farm law was found to create an easement that constituted an unconstitutional taking of private property.\(^{11}\) More recently, a second Iowa right-to-farm law was found to violate the state’s constitutional clause on inalienable rights.\(^{12}\)

These Iowa cases highlight the conflict between state police power provisions and private property rights.\(^{13}\) As Justice Holmes recognized more than eighty years ago in *Pennsylvania Coal Co. v. Mahon*, “if regulation goes too far it will be recognized as a taking.”\(^{14}\) Under our Fifth Amendment, compensation must be paid whenever private property rights are taken for the public’s use.\(^{15}\) The judicial findings that the Iowa legislature went too far in attempting to preserve farmland\(^{16}\) and in encouraging business activities of an industry important to the state’s economy\(^{17}\) may forebode further restrictions on governmental provisions involving safeguarding and preserving public resources. Alternatively, the Iowa rulings may be an anomaly under the Iowa Constitution.

This article evaluates recent developments concerning right-to-farm legislation. Changes in agricultural production are highlighted to set the stage for analyzing the mechanisms used to limit situations where nuisance law can be employed to enjoin activities and practices. An analysis of two Iowa cases that found right-to-farm laws to be unconstitutional provides three reasons for disagreeing with these judicial pronouncements.\(^{18}\) While the Iowa Constitution may provide distinct protection for private property rights, under the Federal Constitution, an ad hoc, factual inquiry is required to determine whether a law ef-

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\(^9\) J.B. Ruhl, *Farms, Their Environmental Harms, and Environmental Law*, 27 Ecology L.Q. 263, 315 (2000) (noting that environmental law is built on nuisance law such that right-to-farm exceptions to nuisance may unfairly burden neighboring property owners).

\(^{10}\) Terence J. Centner, *Agricultural Nuisances: Qualifying Legislative ‘Right-to-Farm’ Protection Through Qualifying Management Practices*, 19 Land Use Pol’y 259, 265 (2002) (suggesting that right-to-farm laws may go too far if they grant blanket immunity or permit unreasonable expansion).


\(^{13}\) *Id.* at 185; *Bormann*, 584 N.W.2d at 321–22.

\(^{14}\) 260 U.S. 393, 415 (1922).

\(^{15}\) U.S. Const. amend. V. For a review of relevant Supreme Court case law, see Brown v. Legal Found. of Wash., 538 U.S. 216, 233 (2003).

\(^{16}\) *Bormann*, 584 N.W.2d at 321.

\(^{17}\) *Gacke*, 684 N.W.2d at 174–75.

\(^{18}\) See *infra* notes 289–436 and accompanying text.
fects an unconstitutional taking.\textsuperscript{19} Turning to other states’ right-to-farm laws, several projections may be offered in anticipation of further legal challenges.\textsuperscript{20} Safeguards and strategies incorporated in most right-to-farm legislation may be expected to thwart similar constitutional challenges. However, states committed to the preservation of agricultural land might want to consider further action. Drawing upon the economy of nature, an additional right-to-farm law is proposed to protect farmland and other natural resources.

I. Changes in the Countryside

The expansion of nonagricultural uses into the countryside and the corresponding loss of farmland provided justifications for right-to-farm legislation.\textsuperscript{21} While farmland continues to be lost to residential, commercial, and industrial land uses,\textsuperscript{22} an equally pronounced change involves the industrialization of agricultural production.\textsuperscript{23} With economic forces driving producers to consolidate and specialize, our farming population has dwindled to less than two percent of the nation.\textsuperscript{24} Two-thirds of American farms depend on a single commodity or commodity group for fifty percent or more of their total sales.\textsuperscript{25} Farms have grown in size: the largest eight percent of our farms produce fifty-three percent of our nation’s food.\textsuperscript{26}

Especially significant have been the production changes accompanying animal production.\textsuperscript{27} Plentiful supplies of food products have driven

\begin{footnotes}
\item[20] See infra Part IV.
\item[21] See, e.g., Farm Nuisance Suit Act, 740 ILL. COMP. STAT. ANN. 70/1 (West 2002).
\item[22] Am. Farmland Trust, Farming on the Edge: Sprawling Development Threatens America’s Best Farmland (2002), http://www.farmland.org/farmingontheedge/Farming on the Edge.pdf. From 1992–97, the United States converted more than 6 million acres of agricultural land to a more developed use. Id. It has been estimated that our country loses two acres of farmland every minute. Id.
\item[27] See Centner, supra note 23, at 13–47.
\end{footnotes}
down prices paid for meat and poultry products.\textsuperscript{28} Thousands of producers have stopped raising animals and the remaining producers have markedly increased their production.\textsuperscript{29} Production of hogs and poultry has moved indoors, with many producers tied to their markets through production or marketing contracts.\textsuperscript{30} Cattle production often involves large feedlots that finish animals for market.\textsuperscript{31} The industrialization of animal production has noticeably changed our rural environment.\textsuperscript{32} 

Given the small percentage of Americans who live on farms and the conflicts between concentrated animal facilities and other land users, the political landscape has changed.\textsuperscript{33} Nonfarmers are flexing their political muscle to challenge objectionable agricultural activities.\textsuperscript{34}


\textsuperscript{29} See, e.g., Centner, \textit{supra} note 23, at 22–23 (“Since 1960 hog farms have decreased by 92 percent; farms with dairy cows, by 93 percent; poultry operations, by 71 percent; and cattle operations, by 55 percent.”); William D. McBride & Nigel Key, U.S. Dep’t of Agric., \textit{Economic and Structural Relationships in U.S. Hog Production} 5 (2003) (finding that for hog production “between 1994 and 1999, the number of hog farms fell by more than 50 percent”). During the past forty years there has been a marked reduction in the number of farms producing animals. Centner, \textit{supra} note 23, at 22–23.

\textsuperscript{30} See McBride & Key, \textit{supra} note 29, at 25; Janet Perry et al., U.S. Dep’t of Agric., \textit{Broiler Farms’ Organization, Management, and Performance}, 12–14 (1999). “[Eighty-five percent] of the total value of all poultry and egg production” comes from farms with production or marketing contracts with marketing firms. Perry et al., \textit{supra} at 12, 14. Eighty-two percent of feeder pigs and sixty-three percent of finished hogs are produced under contract. McBride & Key, \textit{supra} note 29, at 25.

\textsuperscript{31} Econ. Research Serv., U.S. Dep’t of Agric., \textit{Cattle: Background}, http://www.ers.usda.gov/Briefing/Cattle/Background.htm (last visited Nov. 22, 2005). More than eighty percent of fed cattle come from feedlots with one thousand head or more. \textit{Id}.

\textsuperscript{32} Centner, \textit{supra} note 23, at 74–87.


They have pushed an agenda addressing nuisance, pollution, and food safety issues.\textsuperscript{35}

The lax oversight of agricultural pollution may not be justified given the more demanding environmental provisions prescribed for other businesses and industries.\textsuperscript{36} One highly visible issue has been the contamination of our nation’s waters by agricultural activities.\textsuperscript{37} In 2003, the Environmental Protection Agency amended the point-source provisions of the Clean Water Act to classify more animal production facilities as concentrated animal feeding operations.\textsuperscript{38} These operations


\textsuperscript{36}See Ruhl, supra note 9, at 316–21 (identifying exceptions for farmers).


need to secure a National Pollutant Discharge Elimination System permit, or a corresponding state permit. Federal regulators are finding that ammonia emissions from poultry operations may violate the Comprehensive Environmental Response, Compensation, and Liability Act and the Emergency Planning and Community Right-to-Know Act. Concerns about transgenic crops and food security are leading to proposals to regulate agricultural production.

However, one of the most worrisome problems for animal producers involves a surge of activities by neighbors to address concerns about odors, health, and property values. Neighbors are realizing that their rights are being infringed upon by expanding agricultural operations, and are seeking legislative and legal assistance. Environmental laws, zoning ordinances, health regulations, and nuisance lawsuits are being

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39 40 C.F.R. §§ 122.23(a), 123.25(a) (2004). Exceptions do exist for owners or operators of large concentrated animal feeding operations to secure an exception from the National Pollution Discharge Elimination System permit requirements if they have “no potential to discharge” . . . manure, litter or process wastewater.” 40 C.F.R. § 122.23(d), (f) (2004).


41 42 U.S.C. §§ 11,001–11,050 (2000); see Sierra Club, 299 F. Supp. 2d at 699–701, 711 (concluding that a chicken farm was a facility under the Emergency Planning and Community Right-to-Know Act for which releases of ammonia must be reported).


used to confront objectionable agricultural activities. Furthermore, dissatisfied landowners are attempting to find ways to overcome the major defense offered by right-to-farm laws. They are trying to reinstate nuisance law remedies to resolve conflicts between themselves and property owners protected by statutory provisions.

II. Analyzing the Protection Mechanisms

Right-to-farm laws have been around for nearly twenty-five years. Many state legislatures have amended their laws to address issues of state concern. Some of these changes provide additional support for bothersome activities at the expense of neighboring property owners. This means that current right-to-farm laws approach nuisances very differently than the early laws adopted in the 1980s. Moreover, as courts have observed, the laws can have very different requirements and meanings. Although the laws defy easy categorization, one can observe five significant approaches to anti-nuisance protection. Because these approaches concern affirmative defenses to be used in resolving conflicts, a law may incorporate more than one approach.

45 See Ruhl, supra note 9, at 293–321 (discussing legislation that addresses pollution and problems associated with agricultural production).


47 See Hand, supra note 2, at 297 (noting the addition of state right-to-farm laws in the early 1980s).


50 Rather than protecting farmland and farm operations, many current laws protect businesses and industries. See supra note 48.

51 For instance, a California court noted there were seven requisites for establishing a right-to-farm defense under California’s law, Cal. Civ. Code § 3482.5 (West 1997). See Souza v. Lauppe, 69 Cal. Rptr. 2d 494, 500 (Ct. App. 1997); see also infra notes 231–57 and accompanying text (discussing laws that may involve excessive immunity).

52 For example, a right-to-farm law may incorporate both the coming to the nuisance doctrine and qualifying agricultural practices. See Colo. Rev. Stat. § 35-3.5-102 (2004).
The first approach incorporates a coming to the nuisance doctrine that requires the activity to predate conflicting land uses before the operation qualifies for the law’s protection against nuisance lawsuits.\(^{53}\) Second, some statutes restrain nuisance lawsuits by adopting a statute of limitations whereby persons who fail to file a nuisance lawsuit within a time period are precluded from maintaining a nuisance action.\(^{54}\) A third approach allows operations to expand and adopt production changes.\(^{55}\) Fourth, qualifying management practices are employed to delineate the scope of nuisance protection in some laws.\(^{56}\) Finally, an approach adopted by a few statutes involves expansive immunity that raises questions about the constitutional rights of neighbors.\(^{57}\)

### A. Coming to the Nuisance

The most common approach to providing an anti-nuisance defense is to incorporate a coming to the nuisance doctrine in a right-to-farm law.\(^{58}\) People who elect to move next to objectionable agricultural activities are estopped from using nuisance law to abate the existing activities.\(^{59}\) While legislatures may identify as their purpose encouraging agricultural production and preserving agricultural land,\(^{60}\) the right-to-farm laws limit their protection to operations that preexisted surrounding land uses.\(^{61}\) Legislatures adopting this approach did not intend that right-to-farm laws would accord qualifying property owners

\(^{53}\) Hamilton, \textit{supra} note 5, at 104 (suggesting that the basic premise of right-to-farm laws was to codify the coming to the nuisance doctrine); see Hand, \textit{supra} note 2, at 306–07 (tying right-to-farm laws to the coming to the nuisance doctrine); see also infra Part II.A.

\(^{54}\) See, e.g., MINN. STAT. ANN. § 561.19, subdiv. 2(a) (West 2000 & Supp. 2005); MISS. CODE ANN. § 95-3-29(1) (2004); 3 PA. STAT. ANN. § 954(a) (West 1995 & Supp. 2005); TEX. AGRIC. CODE ANN. § 251.004 (Vernon 2004); see also infra Part II.B.

\(^{55}\) See infra Part II.C.

\(^{56}\) See infra Part II.D.

\(^{57}\) See infra notes 231–87 and accompanying text.

\(^{58}\) See Richardson & Feitshans, \textit{supra} note 7, at 128.

\(^{59}\) \textit{ALA. CODE} § 6-5-127(a) (LexisNexis Supp. 2004); CAL. CIV. CODE § 3482.5(a)(1) (West 1997); GA. CODE ANN. § 41-1-7(c) (1997 & Supp. 2005); 740 ILL. COMP. STAT. ANN. 70/3 (West 2002); IND. CODE ANN. § 32-30-6-9(d) (LexisNexis 2002); NEB. REV. STAT. ANN. § 2-4403 (LexisNexis 2001); VT. STAT. ANN. tit. 12, § 5753 (2002 & Supp. 2005).

\(^{60}\) Farm Nuisance Suit Act, 740 ILL. COMP. STAT. ANN. 70/1 (West 2002) (“It is the declared policy of the state to conserve and protect and encourage the development and improvement of its agricultural land for the production of food and other agricultural products.”).

\(^{61}\) Swedenberg v. Phillips, 562 So. 2d 170, 172–73 (Ala. 1990) (concluding the right-to-farm law did not apply because plaintiffs resided on their property prior to construction of the defendant’s chicken house).
a preference over existing land uses and neighbors. Therefore, the coming to the nuisance approach serves to protect investments.

Requiring the operation to predate other land activities is achieved through different provisions in right-to-farm laws. Often, a right-to-farm law will address changes in nonagricultural land uses that extend into agricultural areas. If there is no change of use next to an operation, the right-to-farm law does not apply. Right-to-farm laws are designed to prevent people from moving near agricultural operations and then using nuisance laws to adversely affect existing operations. Some laws are more direct and say that the operation shall not be a nuisance if it was not a nuisance when it began operating.

Agricultural producers and others do not always appreciate the limitations of right-to-farm laws that incorporate the coming to the nuisance doctrine. Rather than having protection against nuisance actions by their neighbors, they have protection against actions by fu-

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62 Herrin v. Opatut, 281 S.E.2d 575, 577–78 (Ga. 1981) (observing that the Georgia right-to-farm law simply limits the circumstances under which an agricultural operation can be deemed a nuisance).

63 Hamilton, supra note 5, at 104 (noting a desire to “provide some sense of security for farmers making investments” in their operations).

64 IND. CODE ANN. § 32-30-6-9(b) (LexisNexis 2002) (“The general assembly finds that when nonagricultural land uses extend into agricultural areas, agricultural operations often become the subject of nuisance suits. As a result, agricultural operations are sometimes forced to cease operations, and many persons may be discouraged from making investments in farm improvements.”).


66 Herrin, 281 S.E.2d at 577 (listing “urban sprawl” into agricultural areas as justifying a legislative response); Trickett v. Ochs, 838 A.2d 66, 73 (Vt. 2003) (opining that the purpose of the right-to-farm law was to limit nuisance actions by persons moving into traditionally rural areas); Buchanan v. Simplot Feeders Ltd. P’ship, 952 P.2d 610, 614–15 (Wash. 1998) (concluding that the nuisance protection was for cases where urban encroachment occurred in established agricultural areas).

67 740 ILL. COMP. STAT. ANN. 70/3 (West 2002).

No farm or any of its appurtenances shall be or become a private or public nuisance because of any changed conditions in the surrounding area occurring after the farm has been in operation for more than one year, when such farm was not a nuisance at the time it began operation . . . .

Id.

68 See, e.g., Swedenberg v. Phillips, 562 So. 2d 170, 172–73 ( Ala. 1990) (finding the statutory exception to nuisance actions did not apply because the plaintiffs’ use of their property preceded the defendant’s); Wendt v. Kerkhof, 594 N.E.2d 795, 798 (Ind. Ct. App. 1992) (holding the right-to-farm defense inapplicable because the operator commenced the hog operation five years after the plaintiffs had become adjacent landowners); Finlay v. Finlay, 856 P.2d 183, 188–89 (Kan. Ct. App. 1993) (determining that the Kansas right-to-farm defense was not available to a defendant who started a feedlot-type operation).
ture neighbors. After the adoption of right-to-farm laws in the early 1980s, several cases disclose operators failing to recognize this important distinction.

In a Georgia case, *Herrin v. Opatut*, a farmer constructed twenty-six poultry houses in a pasture adjacent to residential homes. The neighbors filed suit against the egg farm to eliminate alleged flies and offensive odors generated by the poultry. They asked that the farm be found a nuisance and the operation be shut down. The defendants claimed that the right-to-farm law offered a defense and moved to dismiss the action. On appeal, the Supreme Court of Georgia found that the property had been and was being used for an agricultural purpose, but the egg farm did not qualify for the right-to-farm statutory defense for two reasons. First, since the egg farm was constructed after the residents had already moved into their homes, it failed to meet the statutory requirement of being in existence for at least one year prior to changed conditions. Second, the alleged nuisance did not arise from changed conditions in the locality: the extension of nonagricultural land uses into existing agricultural areas. Thus, the court found that the anti-nuisance defense was inapplicable.

A pair of Nebraska cases demonstrate a similar result. In *Cline v. Franklin Pork, Inc.*, the court noted that the plaintiffs’ use of their land preceded the defendant’s operation of the pig facility. This meant

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69 See *Trickett*, 838 A.2d at 76 (finding that the plaintiffs’ home had been a residence for nearly two centuries and that the operation of defendants’ apple orchard was therefore not protected by the Vermont right-to-farm law).

70 See, e.g., *Shatto v. McNulty*, 509 N.E.2d 897, 899 (Ind. Ct. App. 1987) (allowing the trier of fact to determine whether changes defeated the right-to-farm defense); *Flansburgh v. Coffey*, 370 N.W.2d 127, 131 (Neb. 1985) (finding the right-to-farm defense did not apply in the absence of changes “in and about the locality” of defendants’ farm) (citation omitted); *Cline*, 361 N.W.2d at 572 (ruling the right-to-farm defense did not apply to neighbors who lived in their house prior to the operation of the new facility); *Mayes v. Tabor*, 334 S.E.2d 489, 491 (N.C. Ct. App. 1985) (observing no support for the right-to-farm defense where the neighboring summer camp had been in existence for sixty years).

71 281 S.E.2d at 576.

72 Id.

73 Id.

74 Id. (considering provisions of the Georgia law that have been subsequently amended).

75 Id. at 577.

76 Id.

77 *Herrin*, 281 S.E.2d at 577–78. The court noted that it is not a change in the facility that causes the nuisance but rather changes in the uses of the surrounding lands. Id. at 578.

78 Id. at 578–79.

79 361 N.W.2d 566, 572 (Neb. 1985).
that the farm operation did not exist prior to a change in surrounding land use, thus the right-to-farm law was not applicable. In *Flansburgh v. Coffey*, the Supreme Court of Nebraska found that the defendant agricultural producer had commenced a new activity that was a nuisance. Therefore, the Nebraska right-to-farm law did not apply.

### B. Statutes of Limitation

In an effort to provide an effective defense for operators, Minnesota, Mississippi, Pennsylvania, and Texas have adopted statutes of limitation that defeat nuisance actions. Under the statutory provisions, neighbors who fail to file a nuisance claim within a stated time period after the commencement of the offensive activity may not successfully maintain the nuisance lawsuit.

A nuisance lawsuit against a poultry business in Pennsylvania, *Horne v. Haladay*, shows how the state’s right-to-farm law serves as a statute of limitations. The business commenced operation in 1993 and added a decomposition building for waste in August 1994; the plaintiffs filed their nuisance lawsuit in November 1995. In finding the nuisance claim barred by the provisions of the right-to-farm law, the court quoted the Pennsylvania statute providing a limitation on public nuisances:

(a) No nuisance action shall be brought against an agricultural operation which has lawfully been in operation for one year or more prior to the date of bringing such action, where the conditions or circumstances complained of as constituting the basis for the nuisance action have existed substantially unchanged since the established date of operation and are normal agricultural operations, or if the physical facilities of such agricultural operations are substantially

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80 *Id.*
81 370 N.W.2d 127, 131 (Neb. 1985).
82 *Id.* at 130–31 (considering Neb. Rev. Stat. §§ 2-4402, -4403 (Reissue 1983)).
84 See sources cited supra note 83.
85 *Horne*, 728 A.2d at 956 (citing 3 PA. STAT. ANN. § 954(a) (1997)).
86 *Id.* at 955.
expanded or substantially altered and the expanded or sub-
stantially altered facility has been in operation for one year
or more prior to the date of bringing such action . . . .

The plaintiff in *Horne* argued that the right-to-farm law was en-
acted to protect existing agricultural operations from the encroach-
ment of residential development. Since the plaintiff’s residential use
of his property predated the poultry operation, the plaintiff felt the
right-to-farm law did not apply. The court noted that the law en-
couraged the development of agricultural land and protected agricul-
tural operations that were conducted in a manner that complied with
federal, state, and local law. The protection involved a defense
against nuisance suits not filed within one year of either the inception
of the operation or a substantial change of operation. The right-to-
farm defense was not conditioned upon whether the agricultural op-
eration predated the neighboring land use.

The distinction between a statute of limitations and a grant of im-
munity from nuisance lawsuits was also observed by a federal district
court in *Overgaard v. Rock County Board of Commissioners*. After acknowl-
edging that the immunity granted by a right-to-farm law might effect an
unconstitutional taking, the court found that the Minnesota right-to-

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87 *Id.* at 956 (quoting 3 Pa. Stat. Ann. § 954(a)).
88 *Id.* at 957.

When nonagricultural land uses extend into agricultural areas, agricultural
operations often become the subject of nuisance suits and ordinances. As a
result, agricultural operations are sometimes forced to cease operations. . . . It
is the purpose of this act to reduce the loss to the Commonwealth of its agricul-
tural resources by limiting the circumstances under which agricultural op-
erations may be the subject matter of nuisance suits and ordinances.

89 *Id.* at 957 (“It is the declared policy of the Commonwealth to conserve and protect
and encourage the development and improvement of its agricultural land for the produc-
90 *Id.*

(b) The provisions of this section shall not affect or defeat the right of any
person, firm or corporation to recover damages for any injuries or damages
sustained by them on account of any agricultural operation or any portion of
an agricultural operation which is conducted in violation of any Federal, State
or local statute or governmental regulation which applies to that agricultural
operation or portion thereof.

*Id.* at 956 (quoting 3 Pa. Stat. Ann. § 954(b)).
91 *Horne*, 728 A.2d at 957.
92 *Id.*
farm act creates a two-year window in which nuisance claims can be brought against agricultural operations.\textsuperscript{94} Because neighboring landowners retain their ability to bring nuisance lawsuits for those two years, there was no unconstitutional deprivation of property rights.\textsuperscript{95} A subsequent case noted that the statutory two-year period is not absolute.\textsuperscript{96} An operation may not constitute a nuisance but may subsequently adopt a new offensive activity that is a nuisance.\textsuperscript{97} The two-year period commences with the introduction of the nuisance activity.\textsuperscript{98}

Texas courts have found the Texas right-to-farm law creates a statute of repose.\textsuperscript{99} “No nuisance action may be brought against an agricultural operation that has lawfully been in operation for one year or more prior to the date on which the action is brought,” provided conditions remain substantially unchanged.\textsuperscript{100} The Texas Supreme Court found that the right-to-farm law gave absolute protection to qualifying agricultural operations after the one-year time period.\textsuperscript{101} The complaining party’s discovery of the conditions creating the nuisance does not matter; rather, the issue is whether the conditions have existed for one year.\textsuperscript{102}

At least three other states considered lawsuits in which the defendants argued that right-to-farm laws should be interpreted as imposing a statute of limitations.\textsuperscript{103} In \textit{Herrin v. Opatut}, the Supreme Court of Georgia declined to read such an expansive interpretation into the state’s law.\textsuperscript{104} The court opined that the Georgia General As-

\textsuperscript{94} Id. at *20 (“An agricultural operation is not and shall not become a private or public nuisance after two years from its established date of operation if the operation was not a nuisance at its established date of operation.” (quoting Minn. Stat. Ann. § 561.19, subdiv. 2(a) (2002))).

\textsuperscript{95} Id. at *21–22 (differentiating the facts from Bormann v. Bd. of Supervisors, 584 N.W.2d 309, 321 (Iowa 1998), cert. denied, 525 U.S. 1172 (1999)).


\textsuperscript{97} See id. at 553 (noting the statutory qualification whereby a two-year period is dependent on the operation not being a nuisance when it was established). If it is shown that an operation was a nuisance when it began, the right-to-farm defense does not apply. Id.

\textsuperscript{98} Id. (citing Minn. Stat. Ann. § 561.19, subdiv. 2(a)).


\textsuperscript{100} Holubec, 111 S.W.3d at 35 (quoting Tex. Agric. Code Ann. § 251.004(a) (Vernon 2004)).

\textsuperscript{101} Id. at 37–38.

\textsuperscript{102} Id. at 38.


\textsuperscript{104} 281 S.E.2d at 577.
sembly had chosen to extend the right-to-farm immunity to limited situations where there was an extension of nonagricultural land uses into agricultural areas.\textsuperscript{105} The court said it was not significant that the agricultural operation had existed for one year prior to the institution of the lawsuit.\textsuperscript{106}

The Idaho Supreme Court found that a right-to-farm law was tailored to address the encroachment of urbanizing areas.\textsuperscript{107} It did not permit the expansion of existing operations; there was therefore an issue of whether the plaintiffs had a viable nuisance action.\textsuperscript{108} Defendants in \textit{Laux v. Chopin Land Associates} argued that the Indiana right-to-farm law established a one-year statute of limitations that provided a defense against a nuisance lawsuit.\textsuperscript{109} They convinced the appellate court to make such a finding,\textsuperscript{110} but upon a motion for rehearing, the court vacated its finding and interpreted the one-year period as referring to changed conditions in the vicinity.\textsuperscript{111} Thus, Georgia, Idaho, and Indiana courts have interpreted their respective right-to-farm statutes as delineating a time period that is part of the coming to the nuisance doctrine, rather than as defining a limited time period for initiating nuisance lawsuits.\textsuperscript{112}

\textbf{C. Expansion, Production Changes, and New Technology}

Firms expand business operations, commence new production activities, and adopt new technology as part of their evolving business

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{105} \textit{Id.} The court went further to note the absurdity of reading the right-to-farm law as a statute of limitations:

\begin{quote}
Taken to its logical conclusion, this line of reasoning would permit the construction of an agricultural facility on vacant land centered in a developed, urban area which, after operating for one year, could never be abated as a nuisance. Clearly, this is not what the legislature sought to protect against.
\end{quote}

\textit{Id.} at 578.

\item \textsuperscript{106} \textit{Id.} at 579.

\item \textsuperscript{107} \textit{Payne}, 900 P.2d at 1355 (considering Idaho Right to Farm Act, \textsc{Idaho Code} §§ 22-4501 to -4504 (1995)).

\item \textsuperscript{108} \textit{Id.}

\item \textsuperscript{109} 550 N.E.2d 100, 101-02 (Ind. Ct. App. 1990) (considering \textsc{Ind. Code} § 34-1-52-4 (1988) (repealed and replaced by \textsc{Ind. Code Ann.} § 32-30-6-9 (LexisNexis 2002))


\item \textsuperscript{111} \textit{Laux}, 550 N.E.2d at 103.

\end{itemize}
\end{footnotesize}
practices. Such changes pose difficult issues under right-to-farm laws. Operators need to be able to make changes while retaining the protection of the right-to-farm law if they are to continue their business. Yet the expansion of an existing agricultural operation may be unfair to neighbors. For example, if a farm commences new livestock production, this may notably alter the environment. Most neighbors believe that they should not have to bear the increased inconvenience generated by expanded operations.

1. Permitted Expansion

While many right-to-farm laws address expansion, their approaches vary. Some do not allow expansion, some allow limited expansion, and a few are generous with allowing changes. The Idaho statute has been interpreted as not offering protection to expanded facilities that altered production inputs thereby causing odors. Evidence that a cattle feedlot had increased the number of cattle fed, increased the quantity of odor-producing feed, and added odoriferous silage supported a conclusion that the defense of the right-to-farm law was inapplicable. In a subsequent Idaho case, the court

113 The agricultural sector has had a two percent average annual rate of growth in output since 1948. V. Eldon Ball et al., Agricultural Productivity Revisited, 79 AMER. J. AGRIC. ECON. 1045, 1062 (1997).

114 See, e.g., Grossman & Fischer, supra note 3, at 127 (noting that many of the early codifications of right-to-farm laws were silent on the effect of changes in farming operations); Hand, supra note 2, at 326 (noting that the laws often did not address the issue of whether neighbors accept the risk accompanying the existing activities or the risk of future activities).

115 See Terence J. Centner, Agricultural Nuisances and the Georgia “Right to Farm” Law, GA. ST. B.J., Sept. 1986, at 19, 24 (suggesting under the Georgia right-to-farm law applicable in 1986 that the addition of poultry houses to a viable operation might be permitted but the construction of new buildings on property without current poultry production would be considered a new facility).

116 See Trickett v. Ochs, 838 A.2d 66, 78 (Vt. 2003) (remanding the conflict so that the defendants could be given an opportunity to eliminate substantial and unreasonable interferences with plaintiffs’ property since the right-to-farm law did not apply).

117 See Finlay v. Finlay, 856 P.2d 183, 188 (Kan. Ct. App. 1993) (concluding that the commencement of a feedlot-type livestock operation changed the use of the defendant’s property); Flansburgh v. Coffey, 370 N.W.2d 127, 130–31 (Neb. 1985) (finding that the right-to-farm law did not apply where the defendants introduced a hog confinement building).


121 Id. at 1354–55.
found that the anti-nuisance defense does not preclude finding the expansion of a hog operation to be a nuisance.\textsuperscript{122}

Other legislatures have recognized that some changes are necessary and have attempted to reconcile the protection.\textsuperscript{123} Missouri allows reasonable expansion, with some guidelines explaining what is reasonable.\textsuperscript{124} Minnesota places a percentage on the amount of expansion that does not qualify for anti-nuisance protection.\textsuperscript{125} Any operation that expands by at least twenty-five percent in the number of a particular kind of animal or livestock located on an agricultural operation would have a new established date of operation.\textsuperscript{126} Impliedly, expansion below twenty-five percent would relate back to the date the operation commenced.\textsuperscript{127}

\textsuperscript{122} Crea v. Crea, 16 P.3d 922, 925 (Idaho 2000).

\textsuperscript{123} See, e.g., CAL. CIV. CODE § 3482.6 (West 1997 & Supp. 2005) (providing that substantial increases in activities do not qualify for the statutory immunity defense); FLA. STAT. ANN. § 823.14(5) (West 2000 & Supp. 2005) (delineating a limitation on the defense if expansion results in more noise, dust, odor, or fumes, and the operation is adjacent to a homestead or business).

\textsuperscript{124} MO. ANN. STAT. § 537.295(1) (West 2000).

An agricultural operation protected pursuant to the provisions of this section may reasonably expand its operation in terms of acres or animal units without losing its protected status so long as all county, state, and federal environmental codes, laws, or regulations are met by the agricultural operation. Reasonable expansion shall not be deemed a public or private nuisance, provided the expansion does not create a substantially adverse effect upon the environment or creates a hazard to public health and safety, or creates a measurably significant difference in environmental pressures upon existing and surrounding neighbors because of increased pollution. Reasonable expansion shall not include complete relocation of a farming operation by the owner within or without the present boundaries of the farming operation; however, reasonable expansion of like kind that presently exists, may occur. If a poultry or livestock operation is to maintain its protected status following a reasonable expansion, the operation must ensure that its waste handling capabilities and facilities meet or exceed minimum recommendations of the University of Missouri extension service for storage, processing, or removal of animal waste.

\textsuperscript{125} MINN. STAT. ANN. § 561.19, subdivs. (1)(b), (2) (West 2000 Supp. 2005).

\textsuperscript{126} Id.

\textsuperscript{127} See id. A Minnesota court found that summary judgment for the defendant was improper because the trial court had not considered evidence concerning the number of animals and its significance as to whether the defendant’s activities constituted an expansion or alteration permitted under the right-to-farm law. Haas v. Tellijohn, No. C1-95-2229, 1996 Minn. App. LEXIS 289, at *2–3 (Ct. App. Mar. 12, 1996).
Some legislatures have attempted to allow unlimited expansion and changes. The Georgia right-to-farm law maintains that the expansion of physical facilities does not alter the established date of the agricultural operation. Under this law, a business may expand exponentially and still qualify for whatever protection was available to the earlier facility. The Pennsylvania law allows expansion or alterations so long as they have been “addressed in a nutrient management plan approved prior to the commencement of such expanded or altered operation.” While this may not be as expansive as the Georgia provision, it allows expansion of animal operations that are often accompanied by egregious odors. Thus, the Georgia and Pennsylvania statutes elicit strong support for protecting expansion under their right-to-farm laws.

2. Production Changes

Like expansion, agricultural operations may be expected to have production changes and adopt new technology. Farming is not static. Changes in market demands may require that new activities occur on the production site. Advances lead to new machinery, altered procedures, and the production of transgenic crops. Producers need to be able to incorporate these inventions, and may need to qualify for the anti-nuisance protection of right-to-farm laws to do so. Vagaries in

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130 See id. No recorded case has addressed a nuisance challenge involving the exponential growth of an agricultural operation in Georgia.
133 See Ga. Code Ann. § 41-1-7(d); 3 Pa. Stat. Ann. § 954(a). The strong support for expansion may raise questions about the infringement of neighbors’ constitutional property rights. See infra Part IV.
134 For example, the inability of an apple grower to rely on a local co-op store led to the addition of new equipment at the farm. Trickett v. Ochs, 838 A.2d 66, 74 (Vt. 2003); see also Ronald Jager, The Fate of Family Farming: Variations on an American Idea 187–91 (2004) (noting the changes in storage of apples at a New Hampshire farm).
135 See, e.g., Jager, supra note 134, at 152–55 (noting the addition of an egg packing and grading room at a New Hampshire farm that processes eggs from other farms); Grossman, supra note 42, at 227–35 (discussing how transgenic crops may constitute a nuisance).
136 See Trickett, 838 A.2d at 68–69, 72–74 (explaining new storage, shipping, and packing equipment was in use, but barring anti-nuisance protection).
markets also may force a producer to make changes in production. The ability to make such changes and retain protection against nuisance lawsuits is essential to American agriculture.

A North Carolina appellate court specifically considered a change in the type of farming operation in *Durham v. Britt*. A farmer had been raising turkeys, but decided to switch to hogs. A neighbor brought a nuisance action claiming there was a fundamental change in the nature of the agricultural activity so that the defendant could not qualify for the defense offered by North Carolina’s right-to-farm law. In responding to defendant’s motion for summary judgment, the court decided that the defense did not apply to production facilities that had fundamentally changed. The legislature intended that the statute apply to activities occurring at an operation when it commenced production; it did not intend to offer a defense for significant changes in the type of operation.

A case from Florida involving a change in the application of poultry manure to hayfields shows a limitation on what changes are protected. The farm had been applying dry manure but changed to wet manure due to a new chicken housing design. In the subsequent lawsuit, the farm argued that it was protected by the Florida right-to-farm law. The court disagreed. Under the right-to-farm law, minor odor changes and minimal degradation of the environment were permitted. However, the law did not protect the operation when substantial degradation has occurred. Right-to-farm laws were not intended to serve “as an unfettered license for farmers to alter the environment of their locale.” The determination of whether the degradation was minor or major was an issue to be resolved by the trial court.

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138 *Id.*

139 *Id.*

140 *Id.* at 2–3.

141 *Id.* at 3–4.

142 *Id.* at 3.


144 *Id.* at 910. It was undisputed that this change resulted in a substantial increase in odors. *Id.*


146 *Pasco County*, 573 So. 2d at 912.

147 *Id.*

148 *Id.*

149 *Id.* at 912.

150 *Id.*
Most right-to-farm statutes do not protect operations that change their production activities.\textsuperscript{151} Because traditional statutes incorporate a coming to the nuisance doctrine, changes at the production facility would cause the nuisance.\textsuperscript{152} Thus, the protection for production changes requires specific statutory provisions altering nuisance laws.

3. Adopting New Technology

Right-to-farm statutes may attempt to include the adoption of new technology within the agricultural operations and activities covered by the law.\textsuperscript{153} Under the definition of a normal agricultural operation, the Pennsylvania law expands the term to include “new activities, practices, equipment and procedures consistent with technological development within the agricultural industry.”\textsuperscript{154} Equipment is defined to include “machinery designed and used for agricultural operations, including, but not limited to, crop dryers, feed grinders, saw mills, hammer mills, refrigeration equipment, bins and related equipment used to store or prepare crops for marketing.”\textsuperscript{155} Under these provisions, producers can adopt new technology without losing the protection of right-to-farm laws.\textsuperscript{156}

The recent Vermont case of \textit{Trickett v. Ochs} typifies the difficulties in balancing equities of allowing a producer to alter an existing agricultural operation.\textsuperscript{157} A farmhouse was sold to persons who had no involvement with the farm, its barn, or other farm buildings.\textsuperscript{158} These farm structures were in close proximity to the farmhouse so that activities in the buildings could easily affect the plaintiffs’ enjoyment of their home.\textsuperscript{159} As the farm adjusted its apple production, it adopted new technology and equipment that interfered with the plaintiffs’ residential use.\textsuperscript{160} The apple producer began waxing apples and stor-

\begin{itemize}
\item \textsuperscript{152} \textit{See supra} Part II.A.
\item \textsuperscript{155} \textit{Id.}
\item \textsuperscript{156} \textit{Id.} \textit{\$\$ 952, 954(a)}.
\item \textsuperscript{157} \textit{See} 838 A.2d 66, 73–77 (Vt. 2003).
\item \textsuperscript{158} \textit{Id.} at 74.
\item \textsuperscript{159} \textit{Id.} Evidence suggested the farmhouse was approximately fifty feet from the nearest farm building. \textit{Id.}
\item \textsuperscript{160} \textit{Id.}
ing them on the farm, and the refrigerated tractor trailer trucks created noise and traffic that interfered with the plaintiffs’ residence.\textsuperscript{161}

The defendants raised the state’s right-to-farm law as a defense against a nuisance lawsuit.\textsuperscript{162} After examining the events associated with the nuisance action, the Supreme Court of Vermont concluded that the right-to-farm law did not apply.\textsuperscript{163} The nuisance did not arise from the urbanization of the area but rather from the altered orchard operations.\textsuperscript{164} The ability of the plaintiffs to enjoy living in their farmhouse needed to be reconciled with the ability of the defendants to make economic use of their farm buildings under the principles of nuisance law.\textsuperscript{165}

D. Qualifying Management Practices

Several states have adopted right-to-farm laws with provisions restricting nuisance protection to operations employing qualifying management practices.\textsuperscript{166} Different nomenclatures regarding the management practices that must be observed are delineated in these laws. Some laws address sound agricultural practices,\textsuperscript{167} others address generally accepted agricultural practices,\textsuperscript{168} and a few simply refer to best management practices.\textsuperscript{169} By tying protection to management practices, right-to-farm laws encourage abstinence from poor husbandry practices that might constitute a nuisance.\textsuperscript{170}

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\begin{footnotesize}
\textsuperscript{161} Id. at 68.
\textsuperscript{163} Trickett, 838 A.2d at 74.
\textsuperscript{164} Id. at 73–74.
\textsuperscript{165} Id. at 77–78.
\textsuperscript{167} E.g., Utah Code Ann. § 78-38-7.
\textsuperscript{169} E.g., Va. Code Ann. § 3.1-22.29.
\textsuperscript{170} See Gill v. LDI, 19 F. Supp. 2d 1188, 1200 (W.D. Wash. 1998) (finding that noncompliance with water quality provisions meant that defendant had not engaged in good practices and therefore the right-to-farm statute did not apply).
\end{footnotesize}
Thus, the laws do not eliminate nuisances but rather provide an incentive for producers to refrain from unreasonable practices that may exacerbate interferences with the enjoyment of property by neighbors.\footnote{171} Protection against nuisance lawsuits conditioned upon reasonable agricultural practices requires producers to abstain from immoderate practices that are often the antitheses of neighborliness and environmental stewardship.\footnote{172}

The meaning of the good practices requirement can be discerned from a Washington case.\footnote{173} In \textit{Gill v. LDI}, the plaintiffs complained that the defendant’s quarrying activities constituted a nuisance.\footnote{174} The defendant claimed its activities qualified as “forest practices” under the state’s right-to-farm law because its rock was being used to build roads.\footnote{175} Without deciding whether the quarrying activities were forestry practices protected by the law, the court considered the statutory precondition that the activities need to be consistent with good forest practices.\footnote{176} Because the defendant had not complied with several water quality laws, it did not meet the requirement of engaging in reasonable practices.\footnote{177} Therefore, the

\footnote{171}{For example, a Florida court noted that the state’s right-to-farm act does not allow farmers to alter the environment of their locale merely because earlier practices were permitted. \textit{Pasco County v. Tampa Farm Serv., Inc.}, 573 So. 2d 909, 912 (Fla. Dist. Ct. App. 1990).}

\footnote{172}{One of the arguments against right-to-farm laws is that they contribute to the degradation of the rural landscape. \textit{Reinert, supra} note 8.}

\footnote{173}{\textit{Gill}, 19 F. Supp. 2d at 1200.}

\footnote{174}{\textit{Id.} (finding that the right-to-farm law did not offer a defense for the defendant’s operations).}


\footnote{176}{\textit{Gill}, 19 F. Supp. 2d at 1200.}

\footnote{177}{\textit{Id.}}

The legislature finds that agricultural activities conducted on farmland and forest practices in urbanizing areas are often subjected to nuisance lawsuits, and that such suits encourage and even force the premature removal of the lands from agricultural uses and timber productions. It is therefore the purpose of RCW 7.48.300 through 7.48.310 and 7.48.905 to provide the agricultural activities conducted on farmland and forest practices be protected from nuisance lawsuits.


\textit{Id.}

\textit{Id.}

\textit{Id.}

affirmative defense of the right-to-farm law was not available to defeat the nuisance allegation.\textsuperscript{178}

The protection offered by right-to-farm laws may be tied to a requirement involving reasonable management practices.\textsuperscript{179} The acknowledgment that activities should be sound, good, reasonable, or acceptable highlights a belief that exceptions to common law nuisance should be narrow.\textsuperscript{180} If a right-to-farm law emasculates too many of the rights of neighboring property owners, it may be more objectionable than common law nuisance.\textsuperscript{181} In crafting anti-nuisance protection, legislatures may attempt to balance the rights of producers and neighbors so that unreasonable activities remain nuisances.\textsuperscript{182}

The employment of management practices as a precondition for protection against nuisance lawsuits presents the issue of who determines whether a practice qualifies for protection. As observed in the \textit{Gill} case, the issue of whether a defendant meets the conditions required for a statutory right-to-farm defense often requires a judicial resolution.\textsuperscript{183} However, it may be possible to have some other party respond to this question before resorting to litigation; two states, Michigan and New York,\textsuperscript{184} involve input from an outside committee or regulatory official to determine whether a management practice meets the legislative qualification.\textsuperscript{185} By drawing on the expertise of statutory designees concerning reasonable practices, the nuisance protection of a

\textsuperscript{178} \textit{Gill}, 19 F. Supp. 2d at 1200.


\textsuperscript{180} This is somewhat analogous to provisions in many right-to-farm laws whereby any nuisance that “results from the negligent, improper, or illegal operation of any such facility or operation” is not accorded a defense. \textit{E.g.}, \textit{Ga. Code Ann.} § 41-1-7(c) (1997 & Supp. 2005).

\textsuperscript{181} See Grossman & Fischer, \textit{supra} note 3, at 162 (noting that a right-to-farm law may be overly broad if it applies to situations where a person fails to comply with environmental laws and regulations).

\textsuperscript{182} See Grossman, \textit{supra} note 42, at 234 n.116 (quoting Reinert, \textit{supra} note 8, at 1736)(observing that right-to-farm laws incorporating a coming to the nuisance doctrine return to the “fault-based origins of nuisance law”).

\textsuperscript{183} See \textit{Gill}, 19 F. Supp. 2d at 1200.

\textsuperscript{184} \textit{Mich. Comp. Laws Ann.} §§ 286.471–.474 (West 2003); \textit{N.Y. Agric. & Mkts. Law} §§ 308, 308-a (McKinney 2004); \textit{see infra} Part II.D.1–2.

right-to-farm law may be less likely to subject neighbors to undeserving activities and operations.\footnote{\begin{tabular}{l}
186 For example, good practices can be very important in reducing odors from animal waste. \textit{See}, \textit{e.g.}, J. Ronald Miner, \textit{Alternatives to Minimize the Environmental Impact of Large Swine Production Units}, 77 J. Animal Sci. 440, 444 (1999); Ronald Sheffield & Robert Bottcher, \textit{N.C. Coop. Extension Serv., AG-589, Understanding Livestock Odors} 13 (1999). \end{tabular}}

One of the potential advantages associated with the regulatory provisions of these two states is that it moves a controversy to an alternative setting.\footnote{\begin{tabular}{l}
187 \textit{Mich. Comp. Laws Ann.} § 286.474(1) (requiring an investigation by the director of the Michigan Department of Agriculture); \textit{N.Y. Agric. \& Mkts. Law} § 308 (requiring the New York Commissioner of Agriculture and Marketing to issue an opinion on whether particular agricultural activities are sound). \end{tabular}} Rather than starting with a lawsuit, complainants report the offensive activity to a governmental designee.\footnote{\begin{tabular}{l}
188 \textit{For example, the Michigan right-to-farm statute provides a procedure whereby persons creating a nuisance are given an opportunity to correct unacceptable practices and qualify for the statutory defense. \textit{Mich. Comp. Laws Ann.} § 286.474(3).} \end{tabular}} When reviewing the complaint, the designee may consider methods to obviate the objectionableness of an activity.\footnote{\begin{tabular}{l}
189 Before resorting to litigation, the complaining party notifies a governmental designee, and there is an opportunity to resolve the dispute without a lawsuit. \textit{See infra} Part D.1–2. \end{tabular}} In this manner, the statutory provisions operate to implement a supplementary dispute resolution procedure.\footnote{\begin{tabular}{l}
190 This alternative resolution procedure may obviate litigation in which most parties incur significant legal expenses and are subjected to stressful proceedings. \textit{See Mich. Comp. Laws Ann.} § 286.474(3); \textit{N.Y. Agric. \& Mkts. Law} § 308. \end{tabular}} This may offer a more efficient and amicable means of resolving nuisance disputes.\footnote{\begin{tabular}{l}
191 \textit{Robert F. Cochran Jr., Professional Rules and ADR: Control of Alternative Dispute Resolution Under the ABA Ethics 2000 Commission Proposal and Other Professional Responsibility Standards}, 28 Fordham Urb. L.J. 895, 899 (2001) (observing that alternative dispute resolution is “especially important in cases in which the parties may have a future relationship”). \end{tabular}}

For neighbors, the major advantage of not using a judicial setting is that the parties are likely to have a better relationship after resolving their controversy.\footnote{\begin{tabular}{l}
192 \textit{Edward A. Dauer, Justice Irrelevant: Speculations on the Causes of ADR}, 74 S. Cal. L. Rev. 83, 86 (2000) (observing that people involved in litigation claims defend their ground and “the whole effect of the process is one that calls forth strategies to win”). \end{tabular}} Litigation under the adversarial system often leads parties to take extreme positions for the purpose of obtaining a better bargaining position, but at the cost of achieving a collaborative resolution.\footnote{\begin{tabular}{l}
193 \textit{Id.} \end{tabular}} By moving the controversy from the courtroom to a regulatory body, the parties may reduce hard feelings and avoid the charged atmosphere that often accompany litigation.\footnote{\begin{tabular}{l}
194 \textit{Id.} \end{tabular}}
1. The Michigan Right to Farm Act

Michigan has established additional regulatory procedures for resolving nuisance complaints against farming operations in the Michigan Right to Farm Act.¹⁹⁵ Farming operations need to conform to “generally accepted agricultural and management practices” to qualify for protection against nuisance lawsuits.¹⁹⁶ These management practices are determined by the Michigan Commission of Agriculture, a bipartisan group of citizens appointed by the governor and confirmed by the state senate.¹⁹⁷ While membership may be expected to be pro-agriculture, the commission must consider information from a broad range of governmental and institutional specialists, experts, and professionals for devising the qualifying practices.¹⁹⁸ The commission must give due consideration to information from agricultural experts so that the qualifying practices will be scientifically based, yet relate to practicalities pertaining to the production process.¹⁹⁹

Under Michigan’s law, nuisance complaints involving a farm or farm operation are filed with the Michigan Department of Agriculture.²⁰⁰ When the departmental director receives a complaint concerning manure, waste products, odors, water pollution, or other enumerated farm problems, the director must notify the local government and make an on-site inspection.²⁰¹ From the inspection, the director makes a determination as to whether the farm is using generally accepted agricultural and management practices.²⁰²

For situations where the source of an operation’s problem is caused by the use of other than generally accepted agricultural and management practices, the farm operator is advised to make changes to resolve the problem.²⁰³ Changes to resolve or abate the problem should be made within thirty days.²⁰⁴ For situations requiring a longer time period for resolving the problem, an implementation plan and

¹⁹⁷ Id. § 285.1.
¹⁹⁸ Id. § 286.472(d).
¹⁹⁹ See id.
²⁰⁰ See id. § 286.474.
²⁰¹ Id. § 286.474(1).
²⁰³ Id. § 286.474(3).
²⁰⁴ Id.
schedule for completion are part of the regulatory procedure addressing the problem.\textsuperscript{205}

Michigan has special provisions for new and expanding livestock production facilities.\textsuperscript{206} The state requires producers to submit a livestock production facility siting request, whereby neighbors and local governments have an opportunity to be involved in the approval process of a new livestock facility.\textsuperscript{207} Successful approval of a facility siting request—with the necessary adoption of generally accepted agricultural and management practices—provides the facility with protection against nuisance lawsuits.\textsuperscript{208} Under this procedure, the state offers encouragement for new livestock facilities by allowing operators to qualify for protection against nuisance lawsuits prior to major investments in new facilities.\textsuperscript{209}

The need for a procedure for the siting of new facilities may be discerned from the arguments presented in \textit{Steffens v. Keeler}.\textsuperscript{210} The defendants purchased a vacant dairy-farm and began to raise pigs.\textsuperscript{211} The farm was in a mixed agricultural-residential area, with an operating dairy-farm adjacent to the defendants’ farm.\textsuperscript{212} Pursuant to the Michigan right-to-farm law, the plaintiffs’ complaint about the pigs resulted in an inspection of the farm by Michigan Department of Agriculture officials.\textsuperscript{213} The farm was found to be not in compliance with generally accepted and recommended livestock waste management practices, but the defendants came into compliance the following year.\textsuperscript{214} Due to compliance, the defendants qualified for the protection afforded by the Michigan right-to-farm law.\textsuperscript{215}

The \textit{Steffens} court also considered the right-to-farm provision concerning changes in land use near farms.\textsuperscript{216} The court found that since the surrounding land was predominantly agricultural, and there was no proof of a change to residential land uses, the defendants were

\begin{itemize}
\item \textsuperscript{205} \textit{Id}.
\item \textsuperscript{206} MDA GAAMPS Site Selection, supra note 179, at 7–8.
\item \textsuperscript{207} \textit{Id} at 15.
\item \textsuperscript{208} Mich. Comp. Laws Ann. § 286.473.
\item \textsuperscript{209} The Michigan law declines to give preference to earlier land uses as under a coming to the nuisance doctrine. \textit{Id}.
\item \textsuperscript{210} 503 N.W.2d 675 (Mich. Ct. App. 1993).
\item \textsuperscript{211} \textit{Id} at 676–77.
\item \textsuperscript{212} \textit{Id} at 677.
\item \textsuperscript{213} \textit{Id}.
\item \textsuperscript{214} \textit{Id}.
\item \textsuperscript{215} \textit{Id} at 678.
\item \textsuperscript{216} 503 N.W.2d at 677.
\end{itemize}
entitled to the statutory defense.\textsuperscript{217} By complying with accepted practices, the court found that the defendants qualified for the defense against the nuisance lawsuit.\textsuperscript{218} Therefore, prior residential land users may need to accept new, acceptable agricultural practices that are a nuisance.\textsuperscript{219} Accordingly, the Michigan right-to-farm law allowed agricultural facilities such as barns to be used for productive uses.\textsuperscript{220}

2. New York’s Right-to-Farm Law

New York’s right-to-farm law offers nuisance protection to producers whose land is in an agricultural district or is used in agricultural production subject to an agricultural assessment.\textsuperscript{221} However, producers must employ sound agricultural practices.\textsuperscript{222} These are practices that are “necessary for the on-farm production, preparation and marketing of agricultural commodities.”\textsuperscript{223} The soundness of a practice is evaluated on a case-by-case basis.\textsuperscript{224}

A challenge that the application of this law effected an unconstitutional taking was considered by a court in Pure Air and Water, Inc. v. Davidsen.\textsuperscript{225} Under New York law, the state Commissioner of Agriculture and Markets analyzes whether a practice is sound.\textsuperscript{226} An opinion that a practice is sound means the defendant can qualify for the statutory defense against nuisance actions.\textsuperscript{227} Thus, New York law does not confer a “blanket authorization of agricultural practices based on location” because people can present proof to overcome the statutory nuisance defense.\textsuperscript{228} Rather than creating an easement, the law provides a defense for qualifying activities in areas of the state where there is a desire to

\textsuperscript{217} Id. at 677–78.
\textsuperscript{218} Id.
\textsuperscript{219} See id. at 677. The residential landowners moved into their home more than two years before the defendants started raising hogs. Id. at 676–77. The court found that the earlier use of plaintiffs’ land was irrelevant. Id. at 677.
\textsuperscript{220} See id.
\textsuperscript{221} N.Y. Agric. & Mkts. Law §§ 303, 306, 308(3) (McKinney 2004).
\textsuperscript{222} Id. § 308(1)(b); see Pure Air & Water, Inc. v. Davidsen, 668 N.Y.S.2d 248, 249 (N.Y. App. Div. 1998) (interpreting the New York statute).
\textsuperscript{223} N.Y. Agric. & Mkts. Law § 308(1)(b).
\textsuperscript{224} Id. § 308(4).
\textsuperscript{225} No. 2690-97 (N.Y. Sup. Ct. May 25, 1999).
\textsuperscript{226} N.Y. Agric. & Mkts. Law § 308(3).
\textsuperscript{227} See id.
\textsuperscript{228} Pure Air & Water, No. 2690-97, slip op. at 9.
protect agricultural lands and farmers.\textsuperscript{229} The court found that this defense did not effect an unconstitutional taking.\textsuperscript{230}

E. Expansive Immunity

A few states have offered extremely favorable dispensation to agriculture by enacting right-to-farm laws that provide general nuisance immunity regardless of who was there first: farmer or neighbor.\textsuperscript{231} Right-to-farm laws that provide a statute of limitations or involve regulatory designees in determining qualifying management practices may offer protection to new activities that are a nuisance.\textsuperscript{232} Another type of expansive law involves provisions allowing farmers to start activities that are offensive to existing neighbors; right-to-farm laws adopted in Iowa, Georgia, and Idaho incorporate this concept.\textsuperscript{233} They allow farmers to commence activities that are incompatible with neighboring land uses.\textsuperscript{234}

The Iowa General Assembly adopted a law concerning incentives for agricultural land preservation that provided immunity from nuisance lawsuits to farms in agricultural areas.\textsuperscript{235} A separate Iowa right-to-farm statute was enacted to provide nuisance immunity to animal feeding operations.\textsuperscript{236} The Georgia right-to-farm law contains language that permits any subsequent expansion of physical facilities or adoption of new technology qualifies for nuisance immunity.\textsuperscript{237}

In Idaho, a separate right-to-farm law focuses on objectionable smoke from crop residue burning.\textsuperscript{238} Economic considerations led the legislature to authorize the activity of agricultural field burning,\textsuperscript{239} with the Idaho Department of Agriculture adopting additional rules

\textsuperscript{229} Id.; see N.Y. Agric. & Mkts. Law §§ 303, 306, 308.
\textsuperscript{230} Pure Air & Water, No. 2690-97, slip op. at 10–11.
\textsuperscript{232} For a discussion of two statutes that attempted to protect new activities, see infra notes 259–87 and accompanying text.
\textsuperscript{235} 1982 Iowa Acts 1245.
\textsuperscript{236} 1995 Iowa Acts 195.
\textsuperscript{237} Ga. Code Ann. § 41-1-7(d).
\textsuperscript{238} Idaho Code Ann. § 22-4803A(6).
\textsuperscript{239} See id. §§ 22-4801, -4803, -4804.
to regulate the activity. However, neighbors continued to find the smoke a nuisance, and after an unfavorable court ruling, the legislature enacted House Bill 391 in 2003. This became known as “Idaho’s Right to Burn Act.” The provisions provide that crop residue burning conducted in accordance with state law “shall not constitute a private or public nuisance or constitute a trespass.” House Bill 391 was challenged in Moon v. North Idaho Farmers Ass’n as an unconstitutional taking. After analyzing the provisions as a regulatory taking, the Idaho Supreme Court declared that Idaho Code section 22-4803A(6) was not offensive to the federal or state takings clauses.

Provisions that offer nuisance immunity to subsequent agricultural activities and practices are quite different from the right-to-farm statutes that embody a coming to the nuisance doctrine. Statutes incorporating the latter approach have extended protection against nuisance lawsuits pursuant to an equitable doctrine that may exist under common law. States interpret the coming to the nuisance doctrine under traditional principles of equity. The prevailing view is that the

240 Idaho Admin. Code r. 02.06.16 (2004).
241 See the notation regarding the lower court’s preliminary injunction in Moon v. North Idaho Farmers Ass’n, 96 P.3d 637, 640 (Idaho 2004).
244 Idaho Code Ann. § 22-4803A(6).
245 96 P.3d 637, 641–46.
246 Id. at 646.
247 See supra Part II.A.
248 See, e.g., N. Ind. Pub. Serv. Co. v. Bolka, 693 N.E.2d 613, 617 (Ind. Ct. App. 1998) (finding that the coming to the nuisance doctrine was not available for defendants with negligent operations); Williams v. Oeder, 659 N.E.2d 379, 382 (Ohio Ct. App. 1995) (concluding that the coming to the nuisance argument is one factor among others that may be relevant in determining the unreasonableness of an operation); E. St. Johns Shingle Co. v. City of Portland, 246 P.2d 554, 564–65 (Or. 1952) (applying the coming to the nuisance doctrine to authorized government functions that existed prior to the plaintiff’s acquisition of property).
doctrine is one of several factors to be considered in determining whether a nuisance exists.\textsuperscript{250}

Priority in the use of property may be an element for special consideration in nuisance disputes.\textsuperscript{251} While priority in use does not grant a property owner the right to continue an offensive activity, it is a factor that one may consider in determining whether to grant relief in a nuisance lawsuit.\textsuperscript{252} People who come to a nuisance may be viewed less favorably than those who claim that a subsequent activity or land use created a nuisance.\textsuperscript{253}

Right-to-farm laws that allow people to adopt activities offensive to existing neighbors do not have an equitable justification, unlike the coming to the nuisance doctrine.\textsuperscript{254} Some other consideration may be needed to justify the enactment of legislation that burdens neighbors with new annoying activities.\textsuperscript{255} The preservation of natural resources, the beneficial use of farmland, and the encouragement of business activities constitute such special considerations.\textsuperscript{256} In other cases, the premature removal of lands from agricultural use and timber production

\textsuperscript{250} 9 Richard R. Powell & Patrick J. Rohan, Powell on Real Property ¶ 64[22], 64-26 to 27 (Michael Allan Wolf ed., 2004); see Captain Soma Boat Line, Inc. v. City of Wisconsin Dells, 255 N.W.2d 441, 445 (Wis. 1977) (noting that plaintiffs are not barred from relief merely because they came to the nuisance); see also Williams, 659 N.E.2d at 382 (finding a jury instruction on coming to the nuisance was appropriate); Abdella v. Smith, 149 N.W.2d 537, 541 (Wis. 1967) (determining that coming to the nuisance is a factor that bears on the question of reasonable use of land).

\textsuperscript{251} See, e.g., Schott v. Appleton Brewery Co., 205 S.W.2d 917, 920 (Mo. 1947) (finding that priority of location was an appropriate factor to consider in declining to provide legal recourse to plaintiffs suing in nuisance); E. St. Johns Shingle Co., 246 P.2d at 566 (finding no nuisance as the plaintiffs knew about the deleterious conditions when they purchased nearby properties).

\textsuperscript{252} See, e.g., Mark v. State ex rel. Dep’t of Fish & Wildlife, 84 P.3d 155, 163 (Or. Ct. App. 2004) (finding that defendants failed to prove that plaintiffs came to the nuisance because plaintiffs lacked the requisite knowledge of the defendants’ offensive activity).

\textsuperscript{253} See, e.g., Kramer v. Sweet, 169 P.2d 892, 896 (Or. 1946) (observing that “the court must take a less favorable view of defendant’s case” under circumstances where the plaintiffs were there first) (citing Conway v. Gampel, 209 N.W. 562 (Mich. 1926)); Mark, 84 P.3d at 163 (quoting Kramer, 169 P.2d at 896).

\textsuperscript{254} See Stanish, supra note 243, at 729–30 (noting that the legislation for crop residue burning did not incorporate the coming to the nuisance doctrine).

\textsuperscript{255} For example, the preservation of important state farmland resources may serve as a basis for special dispensation. See Neil D. Hamilton, Preserving Farmland, Creating Farms, and Feeding Communities: Opportunities to Link Farmland Protection and Community Food Security, 19 N. Ill. U. L. Rev. 657, 661 (1999).

may justify right-to-farm legislation.\textsuperscript{257} However, courts may balance these interests with the protection of neighbors’ constitutional rights.\textsuperscript{258}

III. THE UNCONSTITUTIONALITY OF IOWA RIGHT-TO-FARM LAWS

The Supreme Court of Iowa has found two right-to-farm laws to be unconstitutional because they effect a taking of private property.\textsuperscript{259} The right-to-farm law intended to provide incentives for the preservation of agricultural lands, Iowa Code section 352.11,\textsuperscript{260} was found unconstitutional in \textit{Bormann v. Board of Supervisors}.\textsuperscript{261} The Iowa right-to-farm statute providing nuisance immunity to animal feeding operations, Iowa Code section 657.11,\textsuperscript{262} was found unconstitutional in \textit{Gacke v. Pork Xtra, L.L.C.}.\textsuperscript{263} These decisions suggest that other state right-to-farm laws may be scrutinized to determine whether similar provisions go too far and constitute a taking of private property without just compensation.\textsuperscript{264}

To provide incentives for the preservation of agricultural lands, chapter 352 of the Iowa Code provided a mechanism whereby people could petition to create an “agricultural area.”\textsuperscript{265} Section 352.11(1)(a) provided that farm operations “located in an agricultural area shall not be found to be a nuisance regardless of the established date of opera-

\textsuperscript{258} \textit{See} Stanish, \textit{supra} note 243, at 730.
\textsuperscript{261} 584 N.W.2d at 321.
\textsuperscript{263} 684 N.W.2d at 173.
\textsuperscript{264} \textit{See} Richardson & Feitshans, \textit{supra} note 7, at 135–36 (observing that the \textit{Bormann} result may find a firm foundation in takings laws, although noting that limitations may preclude its adoption in other states). Subsequent to the \textit{Bormann} decision, courts in several states have considered takings challenges. No court has found an unconstitutional taking due to the application of a right-to-farm law. Terence J. Centner, \textit{Anti-nuisance Legislation: Can the Derogation of Common Law Nuisance Be a Taking?}, 30 Envtl. L. Rep. (Envtl. Law Inst.) 10,253, 10,258–60 (2000) (suggesting that the \textit{Bormann} decision should not lead to the demise of the nuisance protection afforded by most right-to-farm laws); \textit{see also} Moon v. N. Idaho Farmers Ass’n, 96 P.3d 637, 649 (Idaho 2004) (finding the Idaho Right to Burn Act did not effect a taking) (citing \textit{Idaho Code Ann.} § 22-4803A (Supp. 2004)); Gillis v. Gratiot County, No. 97-04351-AV, slip op. at 26 (Mich. Cir. Ct., Gratiot County Mar. 31, 1999) (concluding that an easement under the state’s right-to-farm law did not effect an unconstitutional, regulatory taking); Oberg aard v. Rock County Bd. of Comm’rs, No. 02-601 2003 U.S. Dist. LEXIS 13001, at *21–22 (D. Minn. July 25, 2003) (distinguishing the facts from Iowa’s \textit{Bormann} case and finding no taking under a similar Minnesota statute); Pure Air & Water, Inc. v. Dawidsen, No. 2690-97, slip op. at 10–11 (N.Y. Sup. Ct. May 25, 1999) (finding that New York’s right-to-farm law did not operate to create an unconstitutional taking).
\textsuperscript{265} \textit{Iowa Code Ann.} §§ 352.1–11.
tion or expansion of the agricultural activities.

After the approval of an agricultural area in Kossuth County, neighbors challenged its formation. The neighbors argued that the designation of an area where landowners have a right to create a nuisance constituted an unconstitutional per se taking.

The Iowa Supreme Court found that, by extinguishing the rights of neighbors to maintain nuisance lawsuits, section 352.11(1)(a) operated as an easement. The law extinguished prospective rights to maintain lawsuits for noise, odors, and dust, thereby impelling easements upon neighboring properties in and around designated agricultural areas. By categorizing the loss of future nuisance rights as a statutorily-created easement, the court found that the legislative provisions were subject to the just compensation requirements of the Fifth Amendment. Moreover, the court found that section 352.11(1)(a) was unconstitutional as a per se taking. By reaching this conclusion, the court declined to consider the ad hoc, factual inquiries required for regulatory takings.

Subsequently, in Gacke v. Pork Xtra, L.L.C., the Iowa Supreme Court was presented with an argument regarding the constitutionality of a second Iowa right-to-farm law. The plaintiffs complained that the defendant’s hog confinement buildings were a nuisance, and the defendant raised Iowa Code section 657.11 as an affirmative defense. The court struck down the defense, ruling that the right-to-farm law resulted in a taking of the plaintiffs’ property without just compensation.

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266 Id. § 352.11(1)(a).
268 Id.
269 Id. at 315–16 (quoting Churchill v. Burlington Water Co., 62 N.W. 646, 647 (Iowa 1895)).
270 Id. at 321.
271 Id. at 316.
272 Id. at 321–22. The court only considered the physical invasion category of per se takings. Id. at 317.
275 Gacke, 684 N.W.2d at 171.
276 Id. at 173–74.
Iowa Code section 657.11 sought to protect animal agricultural producers “from the costs of defending nuisance suits, which negatively impact upon Iowa’s competitive economic position and discourage persons from entering into animal agricultural production.”\(^{277}\) It was enacted after the General Assembly had balanced competing interests.\(^{278}\) To provide this protection, the section provided that animal feeding operations shall not be found to be a nuisance unless an injury was caused by certain enumerated conditions:

a. The failure to comply with a federal statute or regulation or a state statute or rule which applies to the animal feeding operation.

b. Both of the following:

(1) The animal feeding operation unreasonably and for substantial periods of time interferes with the person’s comfortable use and enjoyment of the person’s life or property.

(2) The animal feeding operation failed to use existing prudent generally accepted management practices reasonable for the operation.\(^{279}\)

The Iowa Supreme Court found that the nuisance defense provided by section 657.11(2) was not distinguishable from that provided by section 352.11(1)(a).\(^{280}\) Thus, the court followed Bormann and found that section 657.11(2) violated the takings clause of the Iowa Constitution.\(^{281}\) However, significant for other states, the Gacke court declined to rule whether section 657.11(2) violated the federal Takings Clause.\(^{282}\) These dicta suggest that the Bormann and Gacke inter-

\(^{277}\) Iowa Code Ann. § 657.11(1).

\(^{278}\) Id.

The purpose of this section is to protect animal agricultural producers who manage their operations according to state and federal requirements from the costs of defending nuisance suits, which negatively impact upon Iowa’s competitive economic position and discourage persons from entering into animal agricultural production. This section is intended to promote the expansion of animal agriculture in this state by protecting persons engaged in the care and feeding of animals. The general assembly has balanced all competing interests and declares its intent to protect and preserve animal agricultural production operations.

\(^{279}\) Id. § 657.11(2).

\(^{280}\) Gacke, 684 N.W.2d at 173.

\(^{281}\) Id. at 173–74.

\(^{282}\) Id. at 174 (noting that the court did not need to address the federal takings issue because it could base its decision on another section of the Iowa Constitution).
pretations of the Iowa right-to-farm laws are based on the Iowa Constitution, and that Bormann is erroneous regarding the court’s finding under the Federal Takings Clause.\textsuperscript{283}

The Gacke court also considered the constitutionality of section 657.11(2) under the inalienable rights clause found in Article I of the Iowa Constitution.\textsuperscript{284} Employing factors considered in evaluating the reasonableness of the statute as an exercise of the state’s police power, the court found that the immunity granted by section 657.11(2) had an oppressive effect on property owners.\textsuperscript{285} Because the property owners in Gacke lived on and invested in their property before the commencement of the nuisance-generating activity, that right-to-farm statute placed a heavy burden on their property rights.\textsuperscript{286} The court felt that, in the absence of any corresponding benefit to neighboring property owners, section 657.11(2) was unreasonable and violated the inalienable rights clause of the Iowa Constitution.\textsuperscript{287}

Federal takings jurisprudence is replete with cases considering the scope of the Fifth Amendment’s protection.\textsuperscript{288} An analysis of case law suggests three reasons for disagreeing with the findings of the

\textsuperscript{283} The Gacke court emphatically stated it was not going to retreat from its earlier pronouncement in Bormann:

The defendant criticizes this holding, arguing that because there was no physical invasion of the plaintiffs’ property—no trespass—a per se takings analysis was inappropriate. Although this court discussed the various scenarios involving trespassory and nontrespassory invasions in Bormann, our ultimate conclusion was simply that the immunity statute created an easement and the appropriation of this property right was a taking. Whether the nuisance easement created by section 657.11(2) is based on a physical invasion of particulates from the confinement facilities or is viewed as a nontrespassory invasion akin to the flying of aircraft over the land, it is a taking under Iowa’s constitution. We decline to retreat from this view.

\textit{Id.} at 173–74.

\textsuperscript{284} \textsc{Iowa Const.\,art. I, § 1 (amended 1998);} \textit{Gacke}, 684 N.W.2d at 179.

\textsuperscript{285} \textit{Gacke}, 684 N.W.2d at 179.

\textsuperscript{286} \textit{Id.} This is quite different from property owners who come to a nuisance. \textit{Id.}

\textsuperscript{287} \textit{Id.} The Idaho Supreme Court was presented with a similar argument in Moon v. North Idaho Farmers Ass’n., 96 P.3d 637, 646 (Idaho 2004). Relying on the presumption of constitutionality, the court found that the restrictions on nuisances in Idaho Code section 22-4803A(6) did not violate the Idaho Constitution. \textit{Id.} at 641, 646; see \textsc{Idaho Const.\,art. I, § 1; Idaho Code Ann. § 22-4803A(6)} (Supp. 2004).

Bormann and Gacke decisions. First, nontrespassory invasions are not physical invasions, and therefore do not constitute a per se taking under the U.S. Constitution. Second, as regulations restricting the use of private property, right-to-farm laws involve legislation that needs to be scrutinized as a regulatory taking. Third, because the Bormann challenge involved a county ordinance within the ambit of state legislation, the ordinance was analogous to a rent control ordinance, and needed to be analyzed as a regulatory taking.

A. No Physical Invasion

The Supreme Court has noted that the Fifth Amendment itself provides the basis for the judicial distinction between physical and regulatory takings. Compensation must be paid whenever the government acquires private property for a public purpose. Thus, compensation must be paid whenever a leasehold is taken that the government occupies for its own purposes. For example, a governmental appropriation of a part of a rooftop for the provision of cable television access constitutes a taking. Similarly, when all economically viable use has been taken by a regulatory restriction, there is a categorical taking for which compensation must be paid.

Pursuant to judicial interpretations of the Fifth Amendment, it is clear that compensation must be paid for physical and categorical takings. However, the Constitution contains no comparable reference regarding governmental regulations that prohibit property owners from making use of their private property. The Supreme Court has

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289 See infra Part III.A–C.
290 See infra Part III.A–C.
291 See infra Part III.A–C.
293 Id. at 322.
295 Id. at 233–34 (quoting Tahoe-Sierra, 535 U.S. at 321–23 (citing Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982))).
298 Id.
found that it is “inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a ‘regulatory taking.’”\textsuperscript{299} Regulations limiting the number of hunting licenses available to landowners,\textsuperscript{300} prohibiting landlords from evicting tenants unwilling to pay a higher rent,\textsuperscript{301} banning uses on portions of an owner’s property,\textsuperscript{302} forbidding the private use of certain airspace,\textsuperscript{303} and taking interest from lawyers’ trust accounts to pay for legal services,\textsuperscript{304} were not found to constitute per se or categorical takings.\textsuperscript{305} Rather, governmentally imposed restrictions on the private use of property must be analyzed as regulatory takings.\textsuperscript{306}

1. The Dichotomy of Per Se and Regulatory Takings

The \textit{Bormann} court acknowledged the dichotomy of per se and regulatory takings, and proceeded to refer to judicial examples of nontrespassory invasions of private property.\textsuperscript{307} The court found that the immunity of Iowa Code section 352.11(1)(a) involved private nuisances creating easements.\textsuperscript{308} As such, the plaintiffs’ challenge was one of inverse condemnation, involving easements that allowed invasions of neighboring properties.\textsuperscript{309} Although the court lacked allegations of a present nuisance,\textsuperscript{310} it concluded that per se takings do not require physical invasions.\textsuperscript{311} Therefore, the court classified the nontrespassory invasion as a per se taking.\textsuperscript{312}

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\textsuperscript{299} Id. at 323.
\textsuperscript{300} Clajon Prod. Corp. v. Petera, 70 F.3d 1566, 1577, 1580 (10th Cir. 1995).
\textsuperscript{302} Id. (citing Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926)).
\textsuperscript{303} Id. (citing Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978)).
\textsuperscript{304} Id. at 232.
\textsuperscript{305} Id.
\textsuperscript{306} See id.
\textsuperscript{308} See \textit{Bormann}, 584 N.W.2d at 314–16.
\textsuperscript{309} Id. at 314–17.
\textsuperscript{310} Id. at 313.
\textsuperscript{311} Id. at 317 (“To constitute a per se taking, the government need not physically invade the surface of the land.”).
\textsuperscript{312} See \textit{id.} at 321.
In Bormann, the court referenced a recognized treatise for its assessment, but failed to recognize that the treatise did not assert that nontrespassory invasions are per se takings. Rather, the treatise noted that government actions that were less than an invasion might constitute a taking, without differentiating between per se and regulatory takings. The court cited judicial examples of nontrespassory invasions of private property, supporting the Bormann court’s conclusion that there was a taking; but, these cited cases were decided prior to the Supreme Court’s clarifying comments regarding per se versus regulatory takings. While the Bormann court acknowledged Lucas v. South Carolina Coastal Council, its assumption that easements were per se takings allowed it to circumvent considerations required for regulatory takings.

While some easements permit physical invasions, other do not. The required dedication of an easement in Nollan v. California Coastal Commission involved a physical invasion because people had a “right to pass to and fro” across the Nollans’ private property. In a similar fashion, increased water runoff could result in the taking of a flowage easement by inverse condemnation. However, not all physical invasions constitute takings. If the government did not intend to invade a protected property interest, or if the invasion is a direct, natural, or probable result of an authorized activity, a plaintiff’s losses might better be addressed under tort law. Moreover, even if the government...
intended to invade a plaintiff’s property, it may not constitute a compensable taking if the invasion does not preempt the owner’s right to enjoy his property for an extended period of time.\footnote{325}

Looking at the facts presented in Bormann, no alleged physical invasion had occurred because there were no allegations or proof of nuisance activities.\footnote{326} Physical invasions of the property that offend the Fifth Amendment generally require the direct invasion of another’s property or the taking of a leasehold.\footnote{327} The government must occupy the property for its own use.\footnote{328} Physical invasions require trespass actions for garnering relief,\footnote{329} such that per se takings occur where the state action requires landowners to submit to the physical occupation of their land.\footnote{330} In the absence of a physical invasion, the Bormann case could not involve a per se taking under federal law.\footnote{331}

2. Nuisances as Regulatory Takings

The Bormann court noted that it was the nuisance immunity that resulted in the taking.\footnote{332} However, immunity to nuisances does not in-

\footnote{325}Ridge Line, 346 F.3d at 1356 (citing S. Pac. Co. v. United States, 58 Ct. Cl. 428 (1923)).

\footnote{326}584 N.W.2d 309, 313 (Iowa 1998) (noting the challenge was a facial one because neighbors had not presented any proof of nuisance), cert. denied, 525 U.S. 1172 (1999).


\footnote{330}See Yee v. City of Escondido, 503 U.S. 519, 527 (1992) (noting that compelled acquiescence is required for a physical taking); see also Guimont v. Clarke, 854 P.2d 1, 12–13 (Wash. 1993) (noting that property owners compelled to suffer a physical invasion or occupation of their properties are entitled to compensation).

\footnote{331}See 584 N.W.2d at 317. Bormann involved the approval of an agricultural area where landowners had a right to create a nuisance. Id. at 313. Although the plaintiffs did not show any physical invasion, the court found that the governmental action created an easement that resulted in a taking. Id. at 316, 321.

\footnote{332}Id. at 313, 321.
volve a physical invasion, but rather addresses a legal defense to qualifying lawsuits.\textsuperscript{333} As defined by the \textit{Restatement (Second) of Torts}, nuisances are nontrespassory invasions of another’s interest in the private use and enjoyment of land.\textsuperscript{334} Right-to-farm laws thus involve nontrespassory invasions that entail the encroachment of another’s interest in the enjoyment of land.\textsuperscript{335} Even when nuisances result in the physical presence of noise, light, and odors on neighboring property, they constitute an interference of enjoyment rather than a physical invasion.\textsuperscript{336} Unless a plaintiff alleges that the damages incurred are unique, special, peculiar, or in some way different from those incurred by others, the inconveniences are not a per se taking.\textsuperscript{337}

The distinction is significant because nontrespassory invasions need to be analyzed as regulatory takings to determine whether the regulation goes too far.\textsuperscript{338} The analysis involves an “‘ad hoc, factual inquir[yn]’,”\textsuperscript{339} recognized in \textit{Penn Central Transportation Co. v. New York}

\textsuperscript{333} \textit{See, e.g.}, Flo-Sun, Inc. v. Kirk, 783 So.2d 1029, 1036 (Fla. 2001) (finding that the Florida right-to-farm law provides a defense to a public nuisance action if the farm operation conforms to generally accepted agricultural and management practices); Holubec v. Bradenberger, 111 S.W.3d 32, 34 (Tex. 2003) (examining the right-to-farm act as an affirmative defense); Vicwood Meridian P’ship v. Skagit Sand & Gravel, 98 P.3d 1277, 1280 (Wash. Ct. App. 2004) (noting that right-to-farm laws throughout the country codify the common law defense of coming to the nuisance).

\textsuperscript{334} \textit{Restatement (Second) of Torts § 821D} (1979).

\textsuperscript{335} \textit{See, e.g.}, \textit{In re Chi. Flood Litig.}, 680 N.E.2d 265, 278 (Ill. 1997) (noting that nuisance involves an invasion in the use and enjoyment of property); Domen Holding Co. v. Aranovich, 802 N.E.2d 135, 139 (N.Y. 2003) (relying on the \textit{Restatement (Second) of Torts § 821D} for determining a nuisance).

\textsuperscript{336} Moon v. N. Idaho Farmers Ass’n, 96 P.3d 637, 643 (Idaho 2004) (finding that the smoke did not result in the loss of access, or of any complete use, and was therefore not a physical taking); \textit{In re Chi. Flood}, 680 N.E.2d at 278 (noting that a private nuisance does not involve a “crass, physical invasion”); Golen v. Union Corp., 718 A.2d 298, 300 n.2 (Pa. Super. Ct. 1998) (recognizing that the physical presence of noise and light may constitute a nuisance although no physical invasion occurs).

\textsuperscript{337} Spiek v. Mich. Dep’t of Transp., 572 N.W.2d 201, 202 (Mich. 1998) (finding that the complaint was insufficient to support a taking because there was no harm differing in kind from the harm suffered by others); \textit{see} Covington v. Jefferson County, 53 P.3d 828, 832 (Idaho 2002) (finding that flies, dust, and disturbing odors did not constitute a physical invasion). \textit{Contra} Ream v. Keen, 838 P.2d 1073, 1074 (Or. 1992) (finding that the deposit of airborne particulates on another’s land constitutes a trespass).


City, known as a “Penn Central inquiry.” Assuming that the regulation does not effect a categorical taking, one must consider the reasons for the regulation. Regulations must advance a legitimate governmental interest, but may adversely affect private property rights.

Applying regulatory takings jurisprudence to the Bormann challenge, it is appropriate to assess whether the elimination of nuisance rights was reasonably related to the preservation of agricultural land in forming the agricultural district. This inquiry would allow the court to determine whether the state had sufficient justification under its police powers for interfering with the plaintiffs’ property rights. For the Gacke challenge, the statute itself said that the Iowa General Assembly had balanced the competing interests before acting “to protect and preserve animal agricultural production operations.” Because the Iowa Supreme Court in Bormann and Gacke accepted the plaintiffs’ arguments that there was a physical invasion, it did not analyze the governmental actions under the factors suggested for regulatory takings.


See Tahoe-Sierra, 535 U.S. at 334; Palazzolo, 533 U.S. at 635. For development exaction cases, a “rough proportionality” test has been employed. Dolan v. City of Tigard, 512 U.S. 374, 391 (1994). Other tests are appropriate for different types of regulatory takings. A circuit court adopted the “substantially advances” test involving a “reasonable relationship” between a legitimate public purpose and the means used to effectuate that purpose. Chevron USA, Inc. v. Bronster, 363 F.3d 846, 855–54 (9th Cir. 2004) (citing City of Monterey v. Del Monte Dunes, 526 U.S. 687, 700–01, 702–03 (1999)). The court also noted the “reasonable relationship” test involves an intermediate level of review that is more stringent than the rational basis test used in the due process context, but less stringent than the “rough proportionality” test used in the context of exactions under the Takings Clause. Id.

This would enable the court to determine whether there is a sufficient nexus between the desired ends and the means employed in the challenged regulation. See Dolan, 512 U.S. at 386 (citing Nollan v. Cal. Coastal Comm’n, 483 U.S. 825, 837 (1987)); see also Cori S. Parobek, Note, Of Farmers’ Takes and Fishes’ Takings: Fifth Amendment Compensation Claims When the Endangered Species Act and Western Water Rights Collide, 27 HARV. ENVTL. L. REV. 177, 200–04 (2003) (summarizing traditional takings jurisprudence to conclude that the judiciary has recently taken a friendlier stance toward property owners and a concomitantly harsher review of the purported government rationales for denigrating property rights).

Tahoe-Sierra, 535 U.S. at 314.

See id. at 324.

See Dolan, 512 U.S. at 385.

See id.


Accepted jurisprudence treats nuisances as invasions of personal interests in land, but not physical invasions, due to the absence of a physical occupation. Moreover, state action involving a condemnation generally requires a weighing of the public interests. Because a nuisance does not result in a crass physical invasion, most courts may be expected to evaluate challenges to right-to-farm laws as regulatory takings. This will require an ad hoc, factual inquiry designed to allow the careful examination and weighing of all relevant circumstances. In declining to make factual inquiries, the Bormann and Gacke courts failed to follow the familiar regulatory takings approach in determining whether the application of a county ordinance and state law resulted in unconstitutional takings.

B. Regulations Restricting the Use of Private Property

Right-to-farm laws are land use regulations that permit nuisance activities if landowners meet the stated statutory conditions. Land

(1978) (noting that the Supreme Court’s decisions have identified several factors that are significant for analyses of regulatory takings).

The Supreme Court of Illinois noted that:

[T]he interference with the use and enjoyment of property must consist of an invasion by something perceptible to the senses. In private nuisance, the typical activity at issue does not result in a crass physical invasion, as in trespass, but rather results in an invasion of another’s use and enjoyment of his or her property.


See, e.g., Agins v. City of Tiburon, 447 U.S. 255, 261 (1980) (analyzing a zoning regulation and finding there was no taking); Leon County v. Gluesenkamp, 873 So. 2d 460, 467 (Fla. Dist. Ct. App. 2004) (concluding that a development moratorium did not constitute a taking).

See In re Chi. Flood, 680 N.E.2d at 278 (reviewing allegations for damages that did not result in the physical invasion of flood waters as nuisances).


Tahoe-Sierra, 535 U.S. at 322 (citing Penn Central, 438 U.S. at 124). Courts may examine the relative benefits and burdens associated with the regulatory action. Bass Enters. Prod. Co. v. United States, 381 F.3d 1360, 1370 (Fed. Cir. 2004); see also supra note 341.

See supra Part II-A–E; see also Souza v. Lauppe, 69 Cal. Rptr. 2d 494, 500 (Ct. App. 1997) (discussing seven requisites for the right-to-farm defense).
owners’ affirmative defenses against nuisance actions mean that right-
to-farm laws may adversely impact the land use options of neighbor-
ing property owners.\textsuperscript{355} In our society, property owners are cognizant
that their use of property may be restricted by various measures en-
acted by governments in legitimate exercises of the government’s po-
lice powers.\textsuperscript{356} Because right-to-farm laws involve interferences with
land use, it is appropriate to treat allegations of takings as regulatory
takings.\textsuperscript{357} Otherwise, considering land use regulations “per se takings
would transform government regulation into a luxury few govern-
ments could afford.”\textsuperscript{358}

\textit{Pennsylvania Coal Co. v. Mahon}\textsuperscript{359} gave birth to our regulatory tak-
ings jurisprudence.\textsuperscript{360} If a governmental “regulation goes too far it
will be recognized as a taking.”\textsuperscript{361} Consideration of whether a regula-
tion goes too far often involves “comparing the value that has been
taken from the [regulated] property with the value that remains in
the property.”\textsuperscript{362} It also involves a determination of whether the regu-
lation adequately advances legitimate governmental interests.\textsuperscript{363} If a
regulation does not substantially advance legitimate interests, it of-
fends the Takings Clause.\textsuperscript{364}

Right-to-farm laws interfere with the common law rights of prop-
erty owners in the vicinity of the nuisance-generating activity. In enact-
ing right-to-farm laws under their reserved police powers, states bal-
ance competing interests before granting a statutory defense to

\textsuperscript{355} See, e.g., Moon v. N. Idaho Farmers Ass’n, 96 P.3d 637, 643 (Idaho 2004) (finding
that the statutory provisions allowed farmers to burn their fields in a manner causing
smoke to interfere with neighbors’ full enjoyment); Parker v. Barefoot, 519 S.E.2d 315, 315
(N.C. 1999) (adopting dissenting opinion below of Martin, J., 502 S.E.2d 42, 48–49 (N.C.
Ct. App. 1998) (upholding the jury’s determination in favor of defendants, and denying
relief to neighbors suffering from odors from an industrial hog production facility)).

Mahon, 260 U.S. 393, 413 (1922)).

\textsuperscript{357} See Tahoe-Sierra, 535 U.S. at 323–24.

\textsuperscript{358} See \textit{id.} at 324.

\textsuperscript{359} 260 U.S. 393.

\textsuperscript{360} Tahoe-Sierra, 535 U.S. at 326 (citing \textit{Mahon}, 260 U.S. at 415).

\textsuperscript{361} \textit{Id.} at 326 (quoting \textit{Mahon}, 260 U.S. at 415); Palazzolo v. Rhode Island, 533 U.S.
606, 617 (2001); \textit{Lucas}, 505 U.S. at 1014; \textit{Yee v. City of Escondido}, 503 U.S. 519, 529
(citing \textit{Mahon}, 260 U.S. at 415).


\textsuperscript{363} Dolan v. City of Tigard, 512 U.S. 374, 385 (1994); Agins v. City of Tiburon, 447 U.S.
255, 260 (1980).

\textsuperscript{364} Tahoe-Sierra, 535 U.S. at 314.
Right-to-Farm Laws as Regulatory Takings

qualifying persons engaged in nuisances. Right-to-farm legislation is a subset of a larger set of governmental laws and regulations that interfere with or change common law rights. An evaluation of restrictions providing moratoria on development, and controlling common law hunting, discloses that limitations on the use of private property need to be analyzed as regulatory takings.

1. The Tahoe-Sierra Moratoria

The U.S. Supreme Court in Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency considered two moratoria that temporarily prohibited property owners from using their land. Because the moratoria involved neither a physical invasion nor the direct appropriation of private property, the Court concluded that they should be analyzed as regulatory takings. The analysis requires the examination of a number of factors including the parcel-as-a-whole. Inquiries of regulatory takings challenges focus “on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole.”

In Tahoe-Sierra, the Court found that its earlier evaluations of regulations in First English Evangelical Lutheran Church v. County of Los Angeles and Lucas v. South Carolina Coastal Council did not address whether either of the moratoria at issue effected a taking. The cate-

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365 See supra notes 61, 175, and infra note 411, for statutes containing policy declarations.
367 See Tahoe-Sierra, 535 U.S. at 311.
368 Clajon Prod. Corp. v. Petera, 70 F.3d 1566, 1576 (10th Cir. 1995).
369 See generally 535 U.S. 302.
370 Id. at 314, 324.
371 Id. at 326–27.
375 Tahoe-Sierra, 535 U.S. at 328–29.
gorical taking rule did not respond to the question of whether a temporary prohibition of any economic use of land produces an unconstitutional taking. In rejecting seven theories that might support a taking, the Court weighed all relevant circumstances and relied on the familiar *Penn Central* approach.

The analysis of the moratoria in *Tahoe-Sierra* is instructive on how takings challenges to right-to-farm laws might be evaluated. Interference with the right of property owners to develop their properties was considered a regulatory taking. Similarly, interferences with the right of property owners to bring nuisance actions need to be evaluated as regulatory takings. The rights destroyed need to be analyzed as part of the property owner’s entire bundle of rights. This “requires careful examination and weighing of all the relevant circumstances.”

As an exercise of the state’s police powers, right-to-farm laws destroy one strand of a property owner’s bundle of rights. They generally abolish nuisance causes of action that have not yet accrued. The owners retain other rights. Thus, an allegation that a particular right-to-farm law effects a taking needs to be examined after weighing all of the relevant factors. By declining to engage in the consideration of pertinent factors, the *Bormann* and *Gacke* courts failed to follow federal takings jurisprudence.

2. Restricting the Common Law Right to Hunt

The finding of the Tenth Circuit Court of Appeals in *Clajon Production Corp. v. Petera* is instructive as a second example of interference with common law rights. The State of Wyoming requires a license to

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376 Id. at 330–31.
377 Id. at 342.
378 Id. at 314.
380 Id. at 335 (quoting Palazzolo v. Rhode Island, 533 U.S. 606, 636 (2001) (O’Connor, J., concurring)).
381 Property owners lose their rights to enjoin nuisances or recover damages.
382 Moon v. N. Idaho Farmers Ass’n, 96 P.3d 637, 645 (Idaho 2004). Many right-to-farm laws do this by incorporating the coming to the nuisance doctrine. Exceptions may exist where right-to-farm laws abolish current rights. These situations require a separate analysis.
383 Property owners retain the ability to make some type of use of their properties. See id.
385 See generally Gacke v. Pork Xtra, L.L.C., 684 N.W.2d 168 (Iowa 2004); Bormann v. Bd. of Supervisors, 584 N.W.2d 309 (Iowa 1998), cert. denied, 525 U.S. 1172 (1999)).
386 70 F.3d 1566 (10th Cir. 1995).
hunt, and directed the Wyoming Game and Fish Commission to promulgate regulations governing hunting. Pursuant to its authority, the Commission established limitations on the number of licenses per animal species that may be issued to landowners. These agency restrictions interfered with the common law right to hunt.

Wyoming ranchers challenged the licensing scheme as constituting a taking of their common law property right to hunt surplus game on their land. The court recognized that the state’s limitations on hunting was an interference with property rights that did not involve a physical taking. Therefore, the court employed a regulatory takings analysis. If the licensing scheme went too far in depriving the ranchers their property rights, it would be a taking.

In analyzing the regulation’s economic effect on the plaintiffs’ properties, the court noted that the properties were still being used for ranching, farming, and other livestock operations. Thus, the licensing scheme did not deny plaintiffs all beneficial use of their property so there was no categorical taking. The court next turned to the issue of whether the regulations advanced a legitimate governmental interest. The regulations advanced the state’s interest in conserving wild game while “affording [its residents] a reasonable opportunity to hunt.” Thus, the court found that the licensing scheme did not result in a taking.

Like the hunting scheme, state right-to-farm laws interfere with the common law. Whereas hunting schemes interfere with the right to hunt wild animals, right-to-farm laws interfere with common law nuisance rights. Like Wyoming’s hunting restrictions, anti-nuisance

389 Id. For example, the regulatory commission “annually determines the types of species available for hunting and the overall number of animals of each species that may be taken.” Clajon, 70 F.3d at 1570.
390 Clajon, 70 F.3d at 1575.
391 Id. at 1576.
392 See id.
393 Id. at 1576–80.
394 Id. at 1576.
395 Id. at 1577.
396 See Clajon, 70 F.3d at 1577.
397 Id. at 1577–79 (citing Agins v. City of Tiburon, 447 U.S. 255, 260 (1980)).
398 Id. at 1579.
399 Id. at 1580.
400 See id. at 1575.
401 Gacke v. Pork Xtra, L.L.C., 684 N.W.2d 168, 175 (Iowa 2004); Bormann v. Bd. of Supervisors, 584 N.W.2d 309, 316 (Iowa 1998), cert. denied, 525 U.S. 1172 (1999)).
provisions do not render properties valueless. Thus, a right-to-farm law does not effect a categorical taking, and therefore needs to be analyzed as a regulatory taking.

Under a government’s exercise of its police power, it may reduce rights of property owners. Because Iowa’s right-to-farm laws operated to reduce the value of the plaintiffs’ properties, there was a need to determine whether the regulations resulted in an unconstitutional regulatory taking. This calls for a Penn Central inquiry. The Iowa Supreme Court never considered the justifications for the anti-nuisance provisions in the Bormann or Gacke challenges. Therefore, the court was not able to determine whether the governmental actions constituted an unconstitutional taking under federal law.

C. Analogy to Rent Control Ordinances

Bormann considered potential nuisances permitted by Iowa Code section 352.11 in areas that were designated as agricultural districts. The Iowa legislature set forth its justifications for the nuisance protection as including the orderly use and development of land and related natural resources, as well as the importance of preserving the state’s finite supply of agricultural land. Agricultural districts may be formed

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402 See Bormann, 584 N.W.2d at 321. The property owners in Bormann were subjected to an easement that left them with a restricted number of land uses due to the activities of their neighbors. Id.
404 See Bormann, 584 N.W.2d at 313.
406 See Gacke, 684 N.W.2d at 173–74; Bormann, 584 N.W.2d at 316–17.
408 Gacke, 684 N.W.2d at 173–74; Bormann, 584 N.W.2d at 316–17.
409 See Gacke, 684 N.W.2d at 174.
410 Iowa Code Ann. § 352.11(1)(a) (West 2001 & Supp. 2005); see Bormann, 584 N.W.2d at 313.
411 The Iowa legislature enumerated its findings in the purpose of the law:

It is the intent of the general assembly and the policy of this state to provide for the orderly use and development of land and related natural resources in Iowa for residential, commercial, industrial, and recreational purposes, preserve private property rights, protect natural and historic resources
whenever an application is presented to and approved by a county board of supervisors.\textsuperscript{412} The agricultural district considered in \textit{Bormann} was adopted pursuant to this state authority.\textsuperscript{413}

Therefore, the \textit{Bormann} challenge involved a governmental determination that it was in the public interest to grant nuisance protection to farm operations within agricultural districts.\textsuperscript{414} Rather than finding that the ordinance created an easement that was a per se taking, the question was whether the county-created easement went too far in denying property owners existing rights under nuisance law.\textsuperscript{415} By approving the formation of the agricultural district, did the county’s action produce an unconstitutional taking?

This governmental procedure of allowing counties to establish agricultural districts is analogous to the adoption of municipal rent control ordinances.\textsuperscript{416} In the furtherance of public welfare, states have enacted statutes that allow local governments to restrict rental activi-

and fragile ecosystems of this state including forests, wetlands, rivers, streams, lakes and their shorelines, aquifers, prairies, and recreational areas to promote the efficient use and conservation of energy resources, to promote the creation and maintenance of wildlife habitat, to consider the protection of soil from wind and water erosion and preserve the availability and use of agricultural land for agricultural production, through processes that emphasize the participation of citizens and local governments.

The general assembly recognizes the importance of preserving the state’s finite supply of agricultural land. Conversion of farmland to urban development, and other nonfarm uses, reduces future food production capabilities and may ultimately undermine agriculture as a major economic activity in Iowa.

It is the intent of the general assembly to provide local citizens and local governments the means by which agricultural land may be protected from nonagricultural development pressures. This may be accomplished by the creation of county land preservation and use plans and policies, adoption of an agricultural land preservation ordinance, or establishment of agricultural areas in which substantial agricultural activities are encouraged, so that land inside these areas or subject to those ordinances is conserved for the production of food, fiber, and livestock, thus assuring the preservation of agriculture as a major factor in the economy of this state.

\textit{Iowa Code Ann.} § 352.1.

\textsuperscript{412} \textit{Id.} § 352.6; \textit{Bormann}, 584 N.W.2d at 313.

\textsuperscript{413} \textit{Bormann}, 584 N.W.2d at 311.

\textsuperscript{414} The state law enumerated the public purposes, while the county board of supervisors considered the evidence and made the determination. \textit{Bormann}, 584 N.W.2d at 313 (citing \textit{Iowa Code} §§ 352.1, 352.6 (1998)).

\textsuperscript{415} Not all easements effect unconstitutional takings. \textit{See supra} notes 319–31 and accompanying text.

ties. Communities are permitted to adopt local ordinances within the ambit of state law in order to further public objectives. As might be expected, rent control has been controversial. Property owners have challenged the provisions as unconstitutional takings of their properties.

Under California’s Mobilehome Residency Law, the City of Escondido adopted an ordinance that set rental rates and required city council approval for any increase. In *Yee v. City of Escondido*, the City was sued by owners of a mobile home park who claimed that the City’s action was a taking. Under the state law and a local ordinance, mobile home park owners could no longer set rents or evict home owners. As petitioners, the park owners argued that home owners were able “to occupy the land indefinitely at a submarket rent.” Petitioners claimed that the benefits accruing to mobile home owners from park owners due to the rent control provisions were “no less than a right of physical occupation of the park owner’s land.”

In analyzing the impacts of the state and local rent control provisions, the *Yee* court found the rental ordinance did not create a physical taking. Park owners were not required to submit to the physical occupation of their land. Therefore, there was no per se taking.

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For example, the California Mobilehome Residency Law was enacted to limit the bases upon which a mobile home park owner could terminate a mobile home owner’s tenancy. *Cal. Civ. Code* §§ 798 to 798.88. Local governments have the authority to regulate the contractual provisions used by park owners. *Id.*

See, e.g., *Yee*, 503 U.S. at 524 (considering a state law allowing communities to adopt rent control ordinances for mobile home parks).


E.g., *Yee*, 503 U.S. at 522–23.


*Yee*, 503 U.S. at 524–25.

Id. at 525.

Id. at 526.

Id. at 527.

Id.

Id. at 531–32.


Id. at 539.
Because the government does not need to "‘pay[] compensation for all economic injuries that [its] regulations entail,’”\textsuperscript{430} the determination of whether a rent control ordinance goes too far involves a regulatory taking analysis.\textsuperscript{431} While rental ordinances have been upheld as valid police power regulations,\textsuperscript{432} it is possible for a rent control ordinance to effect an unconstitutional taking.\textsuperscript{433}

The potential loss of wealth experienced by mobile home park owners under rental ordinances is similar to the potential loss by neighbors under the anti-nuisance provisions of Iowa Code sections 352.11 and 657.11.\textsuperscript{434} Rental ordinances limit the ability of park owners to increase rents and evict tenants, thereby diminishing the value of the real estate.\textsuperscript{435} Iowa Code sections 352.11 and 657.11 prevent landowners from bringing nuisance actions against qualifying farm operations,\textsuperscript{436} thereby diminishing the values of their properties. Since rental ordinances are considered regulatory takings, it follows that anti-nuisance provisions should also be evaluated as regulatory takings.

IV. IMPLICATIONS FOR OTHER STATES’ RIGHT-TO-FARM LAWS

While \textit{Bormann v. Board of Supervisors} and \textit{Gacke v. Pork Xtra, L.L.C.} have no direct effect on other states’ laws, municipal and agricultural interest groups are concerned.\textsuperscript{437} Under their police powers, govern-

\textsuperscript{430} \textit{Id.} at 528–29 (quoting \textit{Loretto v. Teleprompter Manhattan CATV Corp.}, 458 U.S. 419, 440 (1982)).

\textsuperscript{431} \textit{Cashman v. City of Cotati}, 374 F.3d 887, 889 (9th Cir. 2004) (alleging a rent control ordinance effects a regulatory taking), \textit{withdrawn}, 415 F.3d 1027 (9th Cir. 2005); \textit{see also} \textit{Ventura Mobilehome Cmty. Owners Ass’n v. City of San Buenaventura}, 371 F.3d 1046, 1049 (9th Cir. 2004) (citing appellant’s argument that rent and vacancy controls constituted a regulatory taking).


\textsuperscript{433} \textit{Cashman}, 374 F.3d at 896.

\textsuperscript{434} \textit{Compare Yee}, 503 U.S. at 524–25 (examining whether mobile home ordinance affected a taking), \textit{with} \textit{Gacke v. Pork Xtra, L.L.C.}, 684 N.W.2d 168, 171–72 (Iowa 2004) (holding that a right-to-farm law providing nuisance immunity was unconstitutional), \textit{and} \textit{Bormann v. Bd. of Supervisors}, 584 N.W.2d 309, 313 (Iowa 1998) (finding that a right-to-farm law intended to preserve agricultural lands was unconstitutional), \textit{cert. denied}, 525 U.S. 1172 (1999)).

\textsuperscript{435} \textit{Yee}, 503 U.S. at 524–25.

\textsuperscript{436} \textit{Gacke}, 684 N.W.2d at 170–71 (citing \textit{Iowa Code} § 657.11(2) (1999)); \textit{Bormann}, 584 N.W.2d at 313 (citing \textit{Iowa Code} § 352.11(1)(a) (1993)). The \textit{Bormann} plaintiffs, depending on a facial challenge to the ordinance, never presented allegations or proof of a nuisance or lost values. \textit{Bormann}, 584 N.W.2d at 313.

\textsuperscript{437} \textit{See generally} Elisa Paster, \textit{Student Writing, Preservation of Agricultural Lands Through Land Use Planning Tools and Techniques}, 44 NAT. RESOURCES J. 283 (2004) (suggesting that
ments have been active in devising restrictions on the use of property.\footnote{38} If a nontrespassory invasion under a right-to-farm law effects a taking,\footnote{39} What about similar invasions occurring under zoning,\footnote{40} historic preservation,\footnote{41} land use plans,\footnote{42} and other types of laws, regulations, and ordinances? The Iowa decisions suggest that courts may redefine the line between valid exercises of police power and unconstitutional takings.\footnote{43}

While the Gacke decision backed away from finding an unconstitutional taking under the Fifth Amendment, the court did proceed to adhere to its earlier pronouncement that a state right-to-farm law effected an unconstitutional taking under the Iowa Constitution.\footnote{44} Will other states be tempted to recognize a dichotomy between state and federal constitutional protections to hold that laws or regulations valid under the Fifth Amendment are invalid under a state constitu-

land use planning might be paired with other strategies such as right-to-farm laws to help save vital agricultural lands).


\footnote{39} In Bormann, there was no evidence of a current nuisance or a physical invasion of odors or particles. See 584 N.W.2d 309, 313 (Iowa 1998), cert. denied, 525 U.S. 1172 (1999).

\footnote{40} See Brandywine, Inc. v. City of Richmond, 359 F.3d 830, 834 (6th Cir. 2004) (describing plaintiffs’ claim that the enforcement of the zoning scheme resulted in the unconstitutional taking of their property).

\footnote{41} See, e.g., Dist. Intown Props. Ltd. P’ship v. District of Columbia, 198 F.3d 874, 876 (D.C. Cir. 1999) (alleging a taking by the government’s denial of construction permits due to the property’s landmark status).


\footnote{43} This is an objective of the property rights movement. See, e.g., Oliver A. Houck, More Unfinished Stories: Lucas, Atlanta Coalition, and Palila/Sweet Home, 75 U. COLO. L. REV. 331, 343–44 (2004) (suggesting that the movement sought to undermine institutions such as zoning, rent control, workers’ compensation laws, and progressive taxation); Eduardo Moisè Péñalver, Is Land Special? The Unjustified Preference for Landownership in Regulatory Takings Law, 31 ECOLOGY L.Q. 227, 264 (2004) (noting that the movement sought to blunt the force of land use regulations on a person’s ability to “exploit the land as freely and profitably as they have in the past.”); Mark E. Sabath, Note, The Perils of the Property Rights Initiative: Taking Stock of Nevada County’s Measure D, 28 HARV. ENVTL. L. REV. 249, 277 (2004) (rationalizing that property rights legislation takes the place of the judicially crafted takings doctrine to subordinate the public good to the private good).

\footnote{44} Gacke v. Pork Xtra, L.L.C., 684 N.W.2d 168, 174 (Iowa 2004).
States can either continue to adhere to federal takings jurisprudence—as established by the U.S. Supreme Court and circuit courts of appeals—or afford people higher levels of rights under their state constitution.

A. Federal Takings

Right-to-farm laws interfere with the property rights of neighbors. By allowing qualifying property owners to engage in activities that are objectionable, they often interfere with neighbors’ ability to enjoy their properties. The laws may reduce the values of properties in close proximity to nuisance-generating activities. Although some statutes may create an easement, the laws do not involve the occupation of property. No leasehold is taken so there is no physical invasion. Therefore, the right-to-farm laws do not effect a per se taking under the Fifth Amendment.

Right-to-farm laws also do not result in neighboring properties being rendered valueless. Consequently, the laws do not effect a categorical taking. Rather, right-to-farm laws involve a regulatory taking. Issues of whether plaintiffs can prove an unconstitutional taking of their properties will need to be evaluated by employing an ad

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445 See, e.g., Cologne v. Westfarms Assocs., 469 A.2d 1201, 1206 (Conn. 1984) (noting that states are not precluded from affording higher levels of rights than provided by the Federal Constitution); Simmons-Harris v. Goff, 711 N.E.2d 203, 211–12 (Ohio 1999) (finding no reason to conclude that the religion clauses of the Ohio Constitution should be coextensive with similar clauses in the Federal Constitution).
446 For two cases where plaintiffs had to suffer their neighbors’ bothersome activities, see supra note 355.
447 The defense of right-to-farm laws is raised after neighbors sue in nuisance. In many cases, the neighbors initiate a lawsuit due to the diminution of value of their properties by the defendant’s activity. See, e.g., Swedenberg v. Phillips, 562 So. 2d 170, 172–73 (Ala. 1990) (observing that the plaintiffs were concerned about the lower value of their property); Travis v. Preston, 643 N.W.2d 235, 238–40 (Mich. Ct. App. 2002) (considering plaintiffs’ reduced property values and a right-to-farm defense).
449 See supra Part III.A.
450 See supra notes 402–03 and accompanying text.
hoc, factual inquiry as prescribed by the Supreme Court in *Penn Central Transportation Co. v. New York City*.

Federal regulatory takings jurisprudence suggests it is doubtful that other courts will follow the Iowa decisions to find that a right-to-farm law effects a taking. Under state police powers, legislatures are able to take actions aimed at promoting and safeguarding public interests. Nearly all of the interferences caused by right-to-farm laws may be justified by legitimate state interests involving the protection of land resources, viable business operations, and overall state economies. Because each law has distinct provisions and is accompanied by its own justifications, each will require a separate inquiry as to whether it effects a taking. However, several projections can be made concerning each of the five approaches legislatures have taken in delineating their anti-nuisance protection.

Under state laws that employ the traditional right-to-farm doctrine, plaintiffs will not be able to mount successful takings challenges. The coming to the nuisance doctrine is a permissible extension of state law. Legislatures can establish rules whereby persons who move next to a nuisance are estopped from maintaining an action to abate the existing nuisance. Under equitable principles, grounded on a public purpose, legislatures can regulate land uses and future nuisance rights.

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453 See supra notes 289–436 and accompanying text.
454 See *Kelo v. City of New London*, 125 S. Ct. 2655, 2665 (2005) (finding a city’s development plan served a public purpose and satisfied the public use requirement of the Fifth Amendment).
455 See, e.g., supra note 60.
456 See, e.g., supra note 64.
458 See supra Part II.A.
459 The coming to the nuisance doctrine generally is one factor that may be considered in determining whether a land use is reasonable. See *Mark v. State ex rel. Dep’t of Fish & Wildlife*, 84 P.2d 155, 163 (Or. Ct. App. 2004) (finding that the coming to the nuisance doctrine is only one considerations for determining whether an activity is a nuisance); *Captain Soma Boat Line, Inc. v. City of Wisconsin Dells*, 255 N.W.2d 441, 445 (Wis. 1977).
460 This follows an early common law rule that a latter arriving inhabitant must suffer inconveniences from existing properties in the vicinity. *E. St. Johns Shingle Co. v. City of Portland*, 246 P.2d 554, 556 (Or. 1952); see also *Vill. of Wilsonville v. SCA Servs., Inc.*, 426 N.E.2d 824, 835 (Ill. 1981) (noting that coming to the nuisance may “constitute a defense or operate as an estoppel.”).
461 See, e.g., Robert H. Cutting, “*One Man’s Ceiling Is Another Man’s Floor*”: Property Rights as the Double-Edged Sword, 31 ENVT L. 819, 861 (2001) (noting that the traditional police power to regulate land use remains strong).
Right-to-farm laws that provide statutes of limitation have been challenged and have withstood scrutiny.\textsuperscript{462} Statutes of limitation offer predictability and finality that contribute to the orderly administration of justice.\textsuperscript{463} Limitations on the time period for filing nuisance lawsuits protect defendants from stale claims or surprises.\textsuperscript{464} These purposes are important to businesses adopting new activities and technologies because they bring closure to whether the activity or technology can be found to be a nuisance.\textsuperscript{465} Because statutes of limitation provide a window of opportunity for bringing nuisance actions, there is no unconstitutional deprivation of property rights.\textsuperscript{466}

Given the array of different provisions concerning expansion, production changes, and new technology, it is difficult to establish a common projection on whether a statute might produce an unconstitutional taking.\textsuperscript{467} Over time, businesses and their activities change. In deciding to conserve agricultural land and encourage business activities, the legislative dispensation impliedly includes some expansion, adjustments in production, and technological changes.\textsuperscript{468} Right-to-farm laws that extend their protection to minor adjustments of activities should withstand scrutiny.\textsuperscript{469} However, laws that foist significant burdens on neighboring property owners by providing a defense for new

\begin{itemize}
\item \textsuperscript{462} See supra Part II.B.
\item \textsuperscript{463} E.g., Sundance Homes, Inc. v. County of DuPage, 746 N.E.2d 254, 267 (Ill. 2001).
\item \textsuperscript{465} With closure, businesses are assured that investments can be utilized for productive purposes and are given information for gauging further investments. Statutes of limitation for nuisance actions, therefore, help encourage ongoing business activities.
\item \textsuperscript{466} Overgaard v. Rock County Bd. of Comm’rs, No. 02-601, 2003 U.S. Dist. LEXIS 13001, at *21 (D. Minn. July 25, 2003).
\item \textsuperscript{467} See supra Part II.C.
\item \textsuperscript{468} An analogy to a case from Nebraska shows why it should be concluded that a right-to-farm defense should apply for minor adjustments to qualifying properties. In Flansburgh v. Coffey, the court noted that persons residing in rural areas need to expect that their residences will be subjected to normal rural conditions. 370 N.W.2d 127, 131 (Neb. 1985). Similarly, legislatures intended the protection accorded by right-to-farm laws to include normal changes in activities and technology.
\item \textsuperscript{469} Right-to-farm laws are clothed with a presumption of validity so that the burden of proof is on plaintiffs to show an unconstitutional taking. Moon v. N. Idaho Farmers Ass’n, 96 P.3d 637, 641 (Idaho 2004). As noted in the Moon case concerning crop residue burning, governmental actions may involve temporary inconveniences and diminished property rights for neighbors. Id. at 645.
\end{itemize}
nuisance activities may go too far.\textsuperscript{470} Statutes that allow major expansion or extensive changes might produce an unconstitutional taking.

The inclusion of a provision on qualifying management practices serves as a limitation on defendants who qualify for a defense from a nuisance lawsuit.\textsuperscript{471} However, right-to-farm statutes may incorporate a procedure whereby an outside committee or regulatory designee determines whether a management practice meets the legislative qualification.\textsuperscript{472} Lower court decisions in Michigan and New York found that right-to-farm statutes incorporating this procedure did not effect unconstitutional takings.\textsuperscript{473} The decisions suggest that the involvement of a governmental designee in assessing cases on an individual basis may provide a procedure lending support to a valid exercise of a state’s police powers.

A few right-to-farm laws provide expansive immunity whereby property owners may start new offensive activities and retain the statutory defense.\textsuperscript{474} Iowa Code section 657.11 sought to provide such immunity to animal feeding operations.\textsuperscript{475} Under these statutes, neighbors’ existing rights are being denigrated. Challenges to these statutes may result in decisions that the anti-nuisance protection goes too far and effects a regulatory taking.

B. State Takings

Federal takings law does not preclude states from developing different rules concerning takings under their state constitutions.\textsuperscript{476} As shown by the \textit{Gacke} decision, states can afford protection to rights that

\begin{thebibliography}{99}
\item \textsuperscript{470}These are analogous to statutes providing expansive immunity.
\item \textsuperscript{471}See supra Part II.D.
\item \textsuperscript{472}Mich. Comp. Laws Ann. § 286.474 (West 2003); N.Y. Agric. & Mkts. Law § 308 (McKinney 2004).
\item \textsuperscript{474}See supra notes 231–87 and accompanying text.
\end{thebibliography}
are not recognized under the U.S. Constitution.\textsuperscript{477} Property rights are defined by state law.\textsuperscript{478} Moreover, courts may expand physical takings to include particulate noise, odors, and matter.\textsuperscript{479} Since the protection of private property rights is a weighty consideration, a court might decide that a divergence in state and federal constitutional rights is warranted to protect a selected interest.\textsuperscript{480}

V. The Future of Right-to-Farm Laws

State right-to-farm laws were enacted due to dissatisfaction with nuisance law. One objective of the right-to-farm laws was to preserve agricultural land for future generations.\textsuperscript{481} Legislatures also sought to preserve the economic viability of existing business units, most significantly family farms.\textsuperscript{482} Subsequent amendments of some statutes expanded the coverage to protect businesses and qualifying activities,\textsuperscript{483} resulting in more neighbors being adversely affected by properties with nuisance activities.

One of the consequences of the expanded protection may be the overall demise of the justifications for exceptions from nuisance law. While the protection of farmland and family farms has widespread support, there may be less support for the protection of ancillary

\textsuperscript{477} Gacke, 684 N.W.2d at 174.

\textsuperscript{478} Cutting, supra note 461, at 838 (citing Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1027 (1992)).


\textsuperscript{480} See, e.g., In re S.A.J.B., 679 N.W.2d 645, 648 (Iowa 2004) (finding that federal decisions are persuasive but not binding on Iowa courts where claims are based on the Iowa Constitution rather than the Federal Constitution); Racing Ass’n of Cent. Iowa v. Fitzgerald, 675 N.W.2d 1, 6 (Iowa 2004) (concluding that Iowa might apply a rational basis test independently of federal law to reach a dissimilar outcome from those reached by federal courts).

\textsuperscript{481} See, e.g., Hand, supra note 2, at 349–50 (observing that right-to-farm laws may show legislatures attempting to stand up to developers to save agricultural land for future generations).

\textsuperscript{482} See, e.g., Grossman & Fischer, supra note 3, at 126–27 (explaining that a monetary prerequisite for a right-to-farm statute could allow small, family farms to qualify for the defense against nuisance actions); Walker, supra note 1, at 489–90 (noting that the Michigan right-to-farm law was enacted when family farms were being threatened by encroaching development, whereas the 1999 amendment offered protection to industrial-scale feedlots).

\textsuperscript{483} A selected industry may be so significant to a state’s economy that a legislature decides an annoying business practice should be sanctioned. See, e.g., IDAHO CODE ANN. §§ 22-4801 to -4804 (2001 & Supp. 2004) (providing businesses growing crops the right to engage in crop residue burning).
business activities such as feed mills and processing plants. The public may find that widespread interference with common law nuisance is not in its best interest. A court may find that an expansive anti-nuisance provision goes too far in denigrating property interests of neighbors.

The Bormann and Gacke decisions augur an opportunity to rethink right-to-farm laws. Nuisance law and right-to-farm statutes involve personal preferences and incorporate consideration of property rights and investments. Right-to-farm statutes protecting businesses are based on economic factors whereby a legislature makes a conscious choice in allowing some nuisances. Often, neighbors are forced to bear minor negative externalities such as smells, noise, dust, flies, traffic, or light glare.

However, right-to-farm statutes do not need to be based primarily on a marketplace economy. Instead, a right-to-farm law might be written to offer a narrower scope of protection based upon the economy of nature. Rather than providing expansive anti-nuisance protection for businesses, legislatures might seek to define right-to-farm laws as a land preservation tool for protecting farmland and other natural resources. A new right-to-farm paradigm might separate the market

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486 See, e.g., William C. Robinson, Casenote, Right-To-Farm Statute Runs a 'Foul' with the Fifth Amendment’s Taking Clause, 7 MO. ENVT'L. L. & POL’Y REV. 28, 28 (1999) (claiming that one of the advantages of right-to-farm laws is security in making investments in their properties); Stanish, supra note 243, at 729 (noting that right-to-farm laws provide some sense of security to farmers making investments in improving their properties and delineating rights).
490 See Holubec, 111 S.W.3d at 34.
492 See id. (discussing light glare).
economy from the economy of nature, interjecting civic-societal concerns.\textsuperscript{495}

Land consists of systems defined by their function.\textsuperscript{496} In a society governed by rules, land serves everyone, not just its owner.\textsuperscript{497} Because farmland performs important services in its unaltered state, special protection may be advantageous to safeguard it for future generations.\textsuperscript{498} Other lands might deserve special protection to be free of waste and the negative effects of others.\textsuperscript{499} Adopting the assumption that the residents of a state have a special desire to preserve long-term natural resources—including soil fertility and the productivity of land—for future generations, separate right-to-farm laws might be devised to protect farmland.\textsuperscript{500}

The suggested approach is to bifurcate anti-nuisance protection and have one statute offering protection for resources including land, businesses, places, or activities, and a second for protecting farmland.\textsuperscript{501} In a marketplace economy, land, labor, and capital are important to the viability of business enterprises and a state’s total economy.\textsuperscript{502} Under their reserved powers, states may take action to adjust property rights for the benefit of the majority. States may have a desire

\textsuperscript{495} See id. at 429–30; see also Zygmunt J.B. Plater, \textit{Environmental Law and Three Economies: Navigating a Sprawling Field of Study, Practice, and Societal Governance in Which Everything Is Connected to Everything Else}, 23 \textit{Harv. Envtl. L. Rev.} 359, 369 (1999) (discussing the civic-societal economy as one that considers societal concerns that exist beyond the elements of a marketplace economy).

\textsuperscript{496} See Sax, supra note 493, at 1442.

\textsuperscript{497} See Cutting, supra note 461, at 839.

\textsuperscript{498} This might assure proportionality between the needs of the ecosystem and the imposition of burdens on private land uses. Erik C. Martini, Comment, \textit{Wisconsin’s Milldam Act: Drawing New Lessons from an Old Law}, 1998 \textit{Wis. L. Rev.} 1305, 1325 (quoting Sax, supra note 493, at 1454).

\textsuperscript{499} See Cutting, supra note 461, at 833 (citing Sax, supra note 493, at 1445).

\textsuperscript{500} This would involve adding a new right-to-farm law without interfering with existing statutes.

\textsuperscript{501} The farmland protection under such a right-to-farm law would be narrower than existing right-to-farm statutes. Because existing right-to-farm laws would be retained, protected businesses and activities would not be affected by the new statutes. However, if an existing statute is found to be invalid, as occurred in Iowa, farmland would still have protection against nuisance lawsuits under the second right-to-farm law.

\textsuperscript{502} Oregon specifically notes that “[f]arming and forest practices are critical to the economic welfare of this state.” \textit{Or. Rev. Stat.} § 30.933(1) (a) (2003). Many right-to-farm laws acknowledge this tangentially with language noting that it is state policy “to conserve, protect, and encourage the development and improvement of its agricultural land for the production of food and other agricultural products.” \textit{Tex. Agric. Code Ann.} § 251.001 (Vernon 2004).
to assist farmers in passing farms to the next generation and assisting businesses so that they remain competitive in the global marketplace.\textsuperscript{503}

The protection of farmland, however, involves government action of a different character.\textsuperscript{504} In only protecting farmland and necessary accompanying activities, the scope of the governmentally sanctioned immunity is much narrower than a right-to-farm law protecting businesses.\textsuperscript{505} It omits the protection of labor and capital, and emphasizes the natural resource of soil fertility.\textsuperscript{506} While human intervention may be significant in augmenting the productivity of this resource, the emphasis is on the nonhuman, innate properties of the soil.\textsuperscript{507} A right-to-farm law applying exclusively to the long-term conservation and preservation of soil fertility and land productivity would exclude nuisance protection for businesses and farm structures.\textsuperscript{508}

By limiting the anti-nuisance protection to a natural resource, a right-to-farm law reduces the categories of interferences and has a more limited impact on the expectations of neighboring property owners.\textsuperscript{509} These distinctions are important because they affect the economic impact and character of the governmental action, factors prescribed by \textit{Penn Central Transportation Co. v. New York City} for evaluating regulatory takings.\textsuperscript{510} If a right-to-farm law simply protects owners of farmland against nuisance lawsuits, most neighboring property owners should not incur significant economic losses. A majority of the neighboring property owners should be using their properties for

\begin{thebibliography}{99}
\bibitem{503} \textit{E.g.}, \textit{Iowa Code Ann.} § 657.11(1) (West 1998 & Supp. 2005) (noting a need to protect Iowa’s competitive economic position).
\bibitem{505} The anti-nuisance protection would necessarily need to cover the machinery and activities needed for cultivation. Other activities receiving protection would be at the discretion of the legislature. Currently, some right-to-farm laws are premised on a conclusion that protection of off-farm activities such as processing plants and feed mills are necessary to protect farming. Taken to a logical ending, steel mills, tire manufacturing facilities, grocery stores, and petroleum distribution facilities are also important to agriculture. The issue is where to draw the line. The greater the interference with the property rights of neighbors, the greater the likelihood that a court will be called upon to resolve a conflict.
\bibitem{506} The narrower scope of a law based upon the economy of nature would mean that it is less likely to be challenged as a taking. \textit{See Sax, supra} note 493, at 1442.
\bibitem{507} \textit{See id.}
\bibitem{508} \textit{See id.} This would severely limit the facilities that would receive protection against nuisance lawsuits.
\bibitem{509} \textit{See id.} Most owners of farmland expect the land to be employed for agricultural production and anticipate the annoyances that stem from ordinary farm activities.
\end{thebibliography}
compatible agricultural or residential purposes, and anticipate the activities accompanying the use of farmland. Therefore, interferences with investment-backed expectations should be limited.  

   An examination of the character of the government action involves looking at the land, as well as related cultivation and husbandry activities, rather than at a business firm. 512 Existing right-to-farm laws already include consideration of the character of farmland. 513 However, many of the takings challenges have concerned business operations. 514 Under a law based on the economy of nature, private business firms and ancillary business activities would not be protected. 515 Because the protection of farmland and its long-term productivity is based upon preservation of a public resource, a strong public purpose justifies the governmental action.

   **Conclusion**

   Right-to-farm laws may adversely affect property rights of owners who are precluded from employing common law nuisance to garner relief from an offensive activity. Legislatures rationalized the denigration of the rights of neighboring property owners as necessary to support agricultural land uses and business activities important to their economies. 516 Statutes protecting existing activities from nuisance lawsuits by future neighbors incorporate an equitable coming to the nuisance doctrine. However, a few legislatures have adopted right-to-farm law provisions that go further and grant a preference whereby future incompatible activities are protected against nuisance lawsuits. Under a

   **Footnotes**

511 This would especially be true under right-to-farm laws that only provide a defense against nuisances to farmland in an agricultural district. *See N.Y. Agric. & Mkts. Law § 308(3) (McKinney 2004).*

512 *See Loretto, 458 U.S. at 426; see also supra note 339.*

513 This occurs due to a legislative policy of conserving and protecting “the development and improvement of . . . agricultural land for the production of food and other agricultural products.” *Farm Nuisance Suit Act, 740 Ill. Comp. Stat. Ann. 70/1 (West 2002).*


515 *See, e.g., Ind. Code Ann. § 32-30-6-9 (LexisNexis 2002) (delineating protection for agricultural and industrial operations and their appurtenances).*

516 This included a desire to assist farmers in passing their farms to the next generation and helping businesses remain competitive in a global marketplace.
provision protecting future nuisances, the interference with a neighbor’s property rights may be so great that it operates to effect a regulatory taking.

An analysis of right-to-farm laws shows a range of provisions that can protect people against nuisance lawsuits. Because a regulatory taking only occurs when government action goes too far, very few laws approach the threshold distinguishing a valid regulation from an unconstitutional taking. While the Iowa statutes may have crossed this threshold, most right-to-farm laws are valid exercises of the police power. However, if a law approaches this line of demarcation, a legislature may want to consider enacting a second right-to-farm statute based upon an economy of nature. By providing protection against nuisance lawsuits only for farmland and related cultivation and husbandry practices, a state will have greater assurance that its natural resources will be preserved for future generations.
## Appendix 1: State Right-to-Farm Laws

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## Appendix 1: State Right-to-Farm Laws

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SOFTWARE ON SANDY NECK:
PUBLIC ROAD ACCESS RIGHTS,
ENDANGERED SPECIES PROTECTIONS,
AND MUNICIPAL LIABILITY

Jillian K. Mooney*

Abstract: Sandy Neck’s barrier beach in Barnstable, Massachusetts provides critical habitats for piping plovers and other threatened species listed by the Endangered Species Act (ESA) and the Massachusetts Endangered Species Act (MESA). To protect the species, the Town must regulate vehicle access to the beach and the nearby cottages. The cottage owners assert that the regulations amount to a regulatory taking of their access rights to the cottages. This Note proposes alternatives for the Town to protect the threatened species, without working a taking of the cottage owners’ access rights, recommending that the Town apply for an incidental take permit under ESA, eliminate restrictions on guest access, and hire additional pilots to guide cottage owners around piping plovers on the trails leading to the cottages.

Introduction

Sandy Neck is a small peninsula that projects out from the Town of Barnstable on Cape Cod, Massachusetts. There are several summer cottages on Sandy Neck, many located at the end of the peninsula. Piping plovers and diamondback terrapins, which are protected by both the federal and state governments as threatened species, live along the main access routes of Sandy Neck.

* Managing Editor, BOSTON COLLEGE ENVIRONMENTAL AFFAIRS LAW REVIEW, 2005–06. The author would like to thank Aaron Toffler of the Urban Ecology Institute, whose research and suggestions form the backbone of this Note.


4 See Woods Hole Group, supra note 1, at 20–22.
The Town of Barnstable (Town)—pursuant to the federal Endangered Species Act (ESA)\(^5\) and the Massachusetts Endangered Species Act (MESA)\(^6\)—is responsible for protecting the threatened species that live on the town-owned access trails of Sandy Neck. To protect these species adequately, the Town must regulate vehicle use on the trails.\(^7\) However, in regulating vehicle use, the Town restricts the ability of cottage owners to access their cottages.\(^8\) This Note describes the difficult predicament of the Town, suggesting options to avoid one type of taking while preventing another.

Part I of this Note describes the layout of Sandy Neck, and the methods of access available to those who own cottages on the peninsula. Part II reviews ESA and MESA, describes the threatened species living on Sandy Neck, and examines efforts to protect those species through vehicle use limitations. Part III reviews case law concerning the Takings Clause of the Fifth Amendment as it relates to regulatory takings and access restrictions. Finally, Part IV examines the Town of Barnstable’s liability under ESA, MESA, and the Takings Clause. Part IV also provides suggestions for how the Town can limit this liability.

I. Sandy Neck

A. Layout

Sandy Neck Beach is a six-mile long peninsula, extending eastward from the Town of Barnstable, on the north shore of Cape Cod, Massachusetts.\(^9\) The peninsula, which varies in width from about two hundred feet to a half-mile, shelters Barnstable Harbor from Cape Cod Bay.\(^10\) This formation has allowed various types of soils and natural communities to develop, “including migrating sand dunes, fresh and saltwater marshes, bogs and both deciduous and coniferous forests.”\(^11\) The Nature Conservancy considers Sandy Neck one of the best

\(^{7}\) See discussion infra Part II.D.
\(^{9}\) Woods Hole Group, supra note 1, at 4.
\(^{10}\) Id.
\(^{11}\) Id.
barrier beach systems in the northeast eco-region. Consequently, the Massachusetts Executive Office of Environmental Affairs designated Sandy Neck as an Area of Critical Environmental Concern. Sandy Neck’s undisturbed ecology supports wide biodiversity, including at least eight species considered either threatened or of special concern by the Massachusetts Division of Fisheries and Wildlife (Mass. Wildlife). Two of these species are also considered threatened by the United States Fish and Wildlife Service (FWS).

There are fifty-eight cottages on Sandy Neck. About thirty of the cottages are located on the eastern tip of the peninsula, which is commonly known as the “cottage colony.” Most of the cottages are suitable for use in warm weather only; however, some cottage owners have installed insulation and heating to permit year-long use.

Twenty-seven of the cottages are on privately owned land, while the other twenty-three are on land owned by the Town of Barnstable and leased to cottage owners. These twenty-three lots were leased on twenty-year terms, which expired in 2002. Rather than negotiating new ground leases, the Town considered converting some of the land to other uses, such as ecotourism. However, the Town lacked sufficient resources to change the use at that time. Thus, existing leaseholders were granted new leases for five-year terms. The Town may

14 Woods Hole Group, supra note 1, at 12. These species include: bristly foxtail (Setaria geniculata), coastal heathland cutworm (Abagrotis crumbi benjamani), common tern (Sterna hirundo), diamondback terrapin (Malaclemys terrapin), eastern spadefoot toad (Scaphiopus holbrookii), least tern (Sterna antillarum), piping plover (Charadrius melodus), plymouth gentian (Sebatia kennedyana), and thread-leaved sundew (Drosera filiformis). Id.; 321 Mass. Code Regs. 10.90 (2005).
15 See 50 C.F.R. § 17.11 (2004). These species include least tern (Sterna antillarum), and piping plover (Charadrius melodus). Id.
16 Yuan, supra note 2, at 1.
17 See id.
18 See id.
19 Id.
20 Woods Hole Group, supra note 1, at 45.
21 Id.
22 Id.
23 Id.
24 Id.
opt to renew the leases for additional five-year terms in 2007. Pursuant to the lease terms, if a ground lease terminates or expires, the lessee must remove the cottage from the land within 180 days.

B. Boat and Trail Access to the Cottages

As a narrow peninsula, Sandy Neck can be reached by motorboat. However, most boating around Sandy Neck is recreational, and is not a primary means of transport. Dock space is limited on both Sandy Neck and Barnstable Harbor; that which is available is in high demand. Consequently, boaters are not guaranteed to find dock space when traveling to and from Sandy Neck. In addition, daily tides can raise and lower water levels several feet, making boat storage difficult.

The most common way of accessing Sandy Neck is the trail system, which provides pedestrian and Off Road Vehicle (ORV) access to the beach and cottages. The cottages are not accessible by car, though they may be reached by sport-utility vehicles with off-road capabilities. The trail system contains two primary east-west trails. The Beach Trail runs east-west along the beach on the northern side of Sandy Neck. The Marsh Trail—an unimproved trail—runs along the south side of the beach, but north of the Great Marsh. The Beach Trail and the Marsh Trail are connected by four north-south trails: One, Two, Four,
and Five.\textsuperscript{38} Trail One is the westernmost connecting trail, followed by Trails Two, Four, and Five.\textsuperscript{39} Trail Six extends from the eastern end of the Beach Trail approximately one half-mile to the southeast,\textsuperscript{40} providing ORV access to the cottage colony.\textsuperscript{41} In 2001, the Town created a new trail connecting Trails Five and Six.\textsuperscript{42} ORV users can use the new trail to reach Trail Six and the cottage colony without traveling on the Beach Trail.\textsuperscript{43} The Horse Trail runs east to west along the interior of the peninsula, and connects Trails Four and Five.\textsuperscript{44} Use of the Horse Trail is limited to horseback riders and pedestrians.\textsuperscript{45} Although other interior trails exist, they are used so infrequently by vehicles\textsuperscript{46} that they do not appear on the Town’s trail guide.\textsuperscript{47}

The trails are subject to alteration from physical conditions.\textsuperscript{48} Consequently, trail access for ORVs is inconsistent.\textsuperscript{49} High tides and storms can alter the width and extent of trails on a seasonal, or even daily, basis.\textsuperscript{50} The Beach Trail and the Marsh Trail—which provide the only means of reaching the cottage colony from Cape Cod’s mainland\textsuperscript{51}—are frequently closed due to tidal flooding.\textsuperscript{52} In addition, ice creates dangerous driving conditions in the winter that limit trail access.\textsuperscript{53} An Order of Conditions (Order) issued by the Massachusetts Department of Environmental Protection (DEP) regulates vehicle use on Sandy Neck Sunken Forest.

\textsuperscript{38} Id. Trail Three was closed in the early 1980s. Woods Hole Group, supra note 1, at 33.
\textsuperscript{39} Id. Trail One is the westernmost connecting trail, followed by Trails Two, Four, and Five.
\textsuperscript{40} Id. Trail Six extends from the eastern end of the Beach Trail approximately one half-mile to the southeast.
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Neck. The Order restricts vehicle access to the trail system to prevent adverse effects to the habitats of threatened and endangered wildlife.

II. ENDANGERED SPECIES PROTECTION

A. Federal Endangered Species Act

In 1973, Congress enacted the Endangered Species Act (ESA) to address species extinction caused by “economic growth and development untempered by adequate concern for conservation.” ESA provides for the protection and restoration of endangered and threatened species. More important, ESA also provides a means to conserve the ecosystems that sustain endangered species. A species is considered endangered if it “is in danger of extinction throughout all or a significant portion of its range.” A species is threatened if it is “likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.” The Secretary of the Interior (Secretary) must periodically, and at least every five years, revise and publish in the Federal Register a list of all endangered and threatened species. Endangered and threatened species are thus commonly called “listed species.” The United States Fish and Wildlife Service (FWS) administers ESA under the Secretary, and is responsible for protecting over ninety-five percent of the listed species.

ESA prohibits the killing or “taking” of a listed species. A “taking” includes harm to a listed species. FWS defines harm to include acts which cause “significant habitat modification or degradation where [the act] actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or shelter-

55 See id.; discussion infra text accompanying notes 127–56.
57 See id.
58 Id.
59 Id. § 1532(6).
60 Id. § 1532(20).
61 Id. § 1533(c).
65 Id. § 1532(19).
Relying on congressional intent in the legislative history of ESA, the Supreme Court has upheld FWS’s inclusion of habitat modification in the definition of harm.\(^{67}\)

Although ESA does not prohibit the taking of threatened species,\(^{68}\) it requires the Secretary to “issue such regulations as he deems necessary and advisable to provide for the conservation of [threatened] species.”\(^{69}\) The Secretary has the authority to elevate the protection of threatened species such that it meets the level of protection mandated for endangered species.\(^{70}\) Pursuant to this authority, the Secretary has issued a regulation which, with some exceptions, protects threatened species against takings.\(^{71}\)

ESA allows states and private parties to apply for incidental take permits.\(^{72}\) These permits shield permitees from sanctions should they harm a species incidentally in the course of their lawful activity.\(^{73}\) Fines can be as high as twenty-five thousand dollars for civil violations of ESA, and fifty thousand dollars for criminal violations.\(^{74}\) An applicant for an incidental take permit must first submit a Habitat Conservation Plan (HCP) to the Secretary, detailing the effects of the applicant’s taking, efforts to mitigate those effects, and funding available to implement mitigation efforts.\(^{75}\) The applicant’s HCP must also include alternative actions considered, as well as the applicant’s reasons for rejecting those alternatives.\(^{76}\) After a public comment period, the Secretary may grant the incidental take permit if the Secretary finds that “the taking will not

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\(^{66}\) 50 C.F.R. § 17.3 (2004).


\(^{68}\) See 16 U.S.C. § 1538(a).

\(^{69}\) Id. § 1533(d).

\(^{70}\) Id.

\(^{71}\) 50 C.F.R. § 17.31(a). FWS has “established a regime in which the prohibitions established for endangered species are extended automatically to all threatened species by a blanket rule and then withdrawn as appropriate, by special rule for particular species and by permit in particular situations.” Sweet Home Chapter of Cmty. for a Great Or. v. Babbitt, 1 F.3d 1, 5 (D.C. Cir. 1993), rev’d on other grounds, 515 U.S. 687 (1995). This process was upheld against claims that ESA requires FWS “to extend the prohibitions to threatened species on a species-by-species basis and to do so only after making a specific finding that each such extension was ‘necessary and advisable.’” Id. at 3.

\(^{72}\) 16 U.S.C. § 1539(a).

\(^{73}\) See id.

\(^{74}\) Id. § 1540.

\(^{75}\) Id. § 1539(a)(2)(A).

\(^{76}\) Id.
appreciably reduce the likelihood of the survival and recovery of the species in the wild.”

B. Massachusetts Endangered Species Act

MESA is largely similar to its federal counterpart, providing that “no person may take . . . any plant or animal species listed as endangered, threatened or of special concern or listed under the Federal Endangered Species Act.” MESA, like ESA, applies to state and local government entities, as well as individuals. Mass. Wildlife, which administers the MESA, defines the taking of an animal to mean “to harass, harm, pursue, hunt, shoot, hound, kill, trap, capture, collect, process, disrupt the nesting, breeding, feeding or migratory activity or attempt to engage in any such conduct, or to assist such conduct.” The regulations promulgated by Mass. Wildlife provide that any species which regularly occurs within Massachusetts and is “listed as endangered or threatened under the provisions of the Federal Endangered Species Act shall be listed in an equivalent category on the state list.” However, species federally listed as threatened may be listed as endangered under MESA.

MESA designates three classes of protected species: endangered, threatened and of special concerns. Endangered species are those in danger of extinction throughout all or a significant portion of their global or Massachusetts range, as documented by biological research and inventory. Threatened species under MESA are those likely to become endangered “within the foreseeable future throughout all or a significant portion of [their] range and . . . [those] declining or rare as determined by biological research and inventory.” Species of special concern under the MESA are those which have “been documented by biological research and inventory to have suffered a decline that could

77 Id. § 1539(a)(2)(B).
79 16 U.S.C. §§ 1532(13), 1538(a). The ESA also applies to “any officer, employee, agent, department, or instrumentality of the Federal Government.” Id. § 1532(13).
81 Id.
83 Id. at 10.03(4).
84 Id. at 10.03(4).
85 See id. at 10.03(6).
86 Id. at 10.03(6)(a).
87 Id. at 10.03(6)(b).
threaten the species if allowed to continue unchecked,” and those that occur “in such small numbers or with such a restricted distribution or specialized habitat requirements that [they] could easily become threatened within Massachusetts.”

C. Species of Special Concern and Threatened Status on Sandy Neck

Sandy Neck’s “large size, isolation and relatively pristine ecology provide some of the most important habitats for rare and endangered species anywhere in Massachusetts.” Among the threatened species living on Sandy Neck are the piping plover (Charadrius melodus) and the diamondback terrapin (Malaclemys terrapin).

FWS has listed the piping plover living on the Atlantic coastline as a threatened species. Mass. Wildlife also lists the piping plover as threatened. Consequently, both ESA and MESA prohibit any harming or habitat modification of piping plovers on Sandy Neck. Although FWS does not list the diamondback terrapin as a protected species under ESA, Mass. Wildlife lists the species as threatened under MESA. Thus, the diamondback terrapin is also protected from harm and habitat alteration under MESA.

Piping plovers are small shorebirds that nest on coastal beaches. They make their nests, which consist of sand, gravel, and shells, on open sand or in sparse vegetation. Most piping plover nests on Sandy Neck are built near the Beach Trail, east of Trail Two, and particularly east of Trail Five. Piping plovers build nests in Massachusetts from mid-March through May, and nest “from

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89 Id.
90 Woods Hole Group, supra note 1, at 12.
91 Id.
95 See 50 C.F.R. § 17.11.
99 Id.
100 Woods Hole Group, supra note 1, at 20–22.
mid-April through late July.”

101 Town of Plymouth, 6 F. Supp. 2d at 83.
102 Id.
103 Id. “Fledge” refers to a bird’s ability to fly. See id.
104 Id.
105 See Woods Hole Group, supra note 1, at 38.
107 Id.
108 Id.
109 Id.
110 Woods Hole Group, supra note 1, at 20.
111 See Barnstable Conservation Comm’n, supra note 34.
deep, steep-sided ruts.” Consequently, unfledged chicks can be trapped in tire tracks, unable to reach food or to move out of the way of oncoming traffic. Moreover, some chicks stand motionless as ORVs approach, attempting to blend into the sand. In addition, ORVs disturb the piping plovers’ habitats, interrupting feeding, courtship, and nesting. ORVs are also dangerous to terrapins. Female terrapins attempting to nest are often killed on coastal roads. Therefore, adequate measures to protect these threatened species would require a restriction in access to the trails, and thus a restriction in access to the property abutting the trails.

In a situation similar to that on Sandy Neck, FWS received a preliminary injunction to prohibit the Town of Plymouth, Massachusetts, from allowing ORVs to travel on a beach where piping plovers were nesting. The district court found that the Town’s persistent refusal to take adequate precautionary measures to protect plovers created a likelihood that the birds would be killed, and that their nesting and feeding habitats would be adversely modified.

In 2000, Mass. Wildlife applied to FWS for an ESA incidental take permit to limit liability for activities on Massachusetts beaches, including Sandy Neck, that could potentially harm piping plovers. The proposed activities included beach use by pedestrians and motorized recreationists, as well as beach access by vehicles deemed essential for law enforcement, public safety, property maintenance, private property access, and rare species monitoring and management. FWS denied the permit application, and Mass. Wildlife has indicated that it will not reapply. However, Mass. Wildlife offered the Town of Barnstable support should the Town choose to apply directly to FWS for its own incidental take permit. The permit would limit the Town’s liability for harm done to piping plovers on the Sandy Neck trails.

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114 See id.
115 Id.
116 Id.
117 Conn. Dep., supra note 106.
118 Town of Plymouth, 6 F. Supp. 2d at 82.
119 Id. at 91.
121 Id. at 1.
122 Woods Hole Group, supra note 1, at 71 n.1.
123 Id.
124 See supra notes 72–77 and accompanying text.
Therefore, the Town of Barnstable is aware that it must take measures to protect piping plovers and terrapins in order to satisfy federal and state endangered species regulations. Just as the Town of Plymouth needed to limit ORV use near piping plover breeding grounds, the Town of Barnstable must also limit ORV use on Sandy Neck to protect the listed species. Currently, the Barnstable Conservation Commission enforces a Department of Environmental Protection (DEP) Order regulating vehicle use on Sandy Neck. The Order incorporates ESA and MESA guidelines for preventing harm to listed species. Pursuant to the Order, when unfledged piping plovers are present on a section of the Beach Trail, that section is temporarily closed to all vehicles not deemed essential. As a result, the closings prevent recreational beach users and guests of cottage owners from driving ORVs along the Beach Trail.

Furthermore, during temporary closings, essential vehicles are allowed on closed sections of the beach only when travel is necessary. In addition, except for emergencies, travel can occur only during daylight hours, and vehicles must be escorted through the closed areas by a qualified pilot. The Town provides pilots, who are aware of the location of unfledged piping plovers, to guide ORVs away from the piping plovers. Essential vehicles are defined as those necessary for law enforcement, maintenance of public property, monitoring of rare species, vehicles operated by cottage owners, spouses and immediate family of cottage owners, lessees of cottage owners, and contractors providing necessary repairs. While vehicle passes are available for the guests of owners and lessees, these passes are limited to one guest vehicle roundtrip per cottage per week. Access to the Marsh Trail is also restricted to protect the terrapin nests.

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125 See Woods Hole Group, supra note 1, at 71.
126 See supra notes 118–20 and accompanying text.
127 See Woods Hole Group, supra note 1, at 71.
128 DEP, Order, supra note 54.
129 Id. pt. B, Findings, at para. 3.
130 Id. pt. B, Special Conditions of Approval, at para. 3.
131 See id.
132 Id. at para. 6.
133 Id.
135 Id. at para. 6.1.1.
136 Id. at para. 6.1.2.
137 Id. at para. 6.2.1.
traveling east of Trail Two must access the Marsh Trail by Trail Two, and not via Trail One.\textsuperscript{138}

Cottage owners and lessees, in appealing an earlier version of this Order,\textsuperscript{139} asserted easement rights over the trails for access to the cottages.\textsuperscript{140} They further asserted that the restrictions were onerous, describing situations in which families with small children were forced to sleep overnight in their cars; residents were unable to attend evening functions outside of Sandy Neck, including Barnstable Conservation Commission meetings; elderly and ailing residents were unable to coordinate doctor appointments with pilot schedules; and a resident running errands had to wait almost five hours to return home.\textsuperscript{141}

Following this appeal in 1999, several stakeholders met with the Massachusetts Office of Dispute Resolution in an effort to reach a settlement agreement.\textsuperscript{142} The terms of this settlement were to be included in an Order of Conditions issued by the Barnstable Conservation Commission to regulate vehicle use on Sandy Neck.\textsuperscript{143} The final settlement provided for regularly scheduled pilot escorts and less stringent language with regard to essential vehicle access.\textsuperscript{144} In addition, the settlement provided for the construction of the connecting trail between Trails Five and Six to increase access to the eastern tip of the peninsula during peak times when unfledged piping plovers are present.\textsuperscript{145} Residents were permitted to drive on this connecting trail unescorted, provided a passenger walked in front of the vehicle to act as a “monitor,” if traveling before eight o’clock in the morning.\textsuperscript{146} The parties to the settlement agreed to work cooperatively to develop a long-range management plan for Sandy Neck.\textsuperscript{147}

Sandy Neck residents, through the Sandy Neck Colony Association, assert that the Barnstable Conservation Commission did not incorporate all of the settlement terms into the Order of Conditions.\textsuperscript{148} Specifically, the residents assert that the Barnstable Conservation Commission did not incorporate all of the settlement terms into the Order of Conditions.

\textsuperscript{138} Id.
\textsuperscript{141} See Sandy Neck Settlement Agreement, \textit{supra} note 42.
\textsuperscript{142} See Alger, letter, \textit{supra} note 8, at 1.
\textsuperscript{143} See Sandy Neck Settlement Agreement, \textit{supra} note 42.
\textsuperscript{144} See \textit{id}.
\textsuperscript{145} Id.
\textsuperscript{146} Id.
\textsuperscript{147} Id.
\textsuperscript{148} Alger, letter, \textit{supra} note 8, at 2–3.
Commission’s Order denies access between Trails One and Two to all but the owners of the cottages located between those trails.\textsuperscript{149} In addition, the residents assert that all provisions which were agreed to read “should apply” were changed to “shall apply” in the Order.\textsuperscript{150} They believe the altered language places stricter limits on essential vehicle access than was agreed to in the settlement.\textsuperscript{151}

The residents have thus appealed the Order to DEP, requesting cancellation or amendment of the Order with a superseding order.\textsuperscript{152} They are again asserting a right-of-way for all purposes over the Beach Trail or, in the alternative, over the Marsh Trail.\textsuperscript{153} They are arguing that access restrictions, specifically those at night, amount to a taking of both their right-of-way and right of access to their property.\textsuperscript{154} In addition, the residents assert that it is beyond the scope of the Barnstable Conservation Commission to require cottage owners, lessees, and their spouses to travel with monitors, and to limit the number of guests who may travel to the cottages.\textsuperscript{155} Whether such restrictions constitute a compensable property taking is, like most regulatory takings, a “question of degree.”\textsuperscript{156}

\section*{III. Restriction of Access Rights as a Property Taking}

\subsection*{A. Takings Generally}

The Fifth Amendment provides that “private property [may not] be taken for public use, without just compensation.”\textsuperscript{157} The Supreme Court of the United States “has recognized that the ‘Fifth Amendment’s guarantee . . . [is] designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.’”\textsuperscript{158} Permanent physical occupations of property—authorized by the government—are tak-

\textsuperscript{149} Id.
\textsuperscript{150} Id.
\textsuperscript{151} Id. at 3
\textsuperscript{152} Id. at 1.
\textsuperscript{153} Id. at 3.
\textsuperscript{154} Alger, letter, supra note 8, at 3.
\textsuperscript{155} Id. at 4.
\textsuperscript{156} See Pa. Coal Co. v. Mahon, 260 U.S. 393, 416 (1922) (Brandeis, J., dissenting).
\textsuperscript{157} U.S. Const. amend. V.
ings of property, regardless of the public interest served by the physical occupation. Thus, physical occupations require compensation.

B. Regulatory Takings

Government regulation can also be a taking if it “goes too far.” Regulatory takings occur when the regulation deprives a landowner of all economically viable use of his property, or does not substantially advance a legitimate governmental interest. When a court determines that a regulation amounts to a taking, the government has three options for adequately compensating the regulated landowner: maintain the regulation and compensate the owner for a permanent taking; invalidate the regulation and compensate the owner for the taking which occurred while the regulation was in place; or exercise its eminent domain power. Thus, a court’s finding that a regulation creates a taking does not invalidate the regulation; the government has the option of maintaining the regulation, but must compensate the owner.

When a regulation destroys only a portion of the beneficial use of property, a court may find that the government has worked only a partial taking. Generally, the government need not compensate a landowner for a partial taking because some economically viable use of the property remains. In *Keystone Bituminous Coal Ass’n v. DeBenedictis*, the Supreme Court would not vertically sever a piece of land by separating mining from other beneficial uses available to the owner. Similarly, in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, the Court rejected the concept of temporal severance. In *Tahoe-Sierra*, landowners brought a takings claim against the regional planning agency, asserting that a two-year moratoria on development effected a regulatory taking. The Court refused to find a temporary taking.

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159 *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 441 (1982).
160 *Id.*
164 *See* id. at 315.
166 *See* id. at 15 & n.75.
169 *Id.* at 320.
170 *Id.* at 331.
As with a partial taking, the government need not compensate a landowner if the regulation that affects the landowner’s property substantially advances a legitimate governmental interest.\textsuperscript{171} Legitimate governmental interests include protecting the health, safety and welfare of the community.\textsuperscript{172} The Supreme Court has found that the plain language and broad scope of ESA indicate “beyond doubt that Congress intended endangered species to be afforded the highest of priorities.”\textsuperscript{173} Very few cases find “a taking as a result of the impact from the Endangered Species Act.”\textsuperscript{174}

C. Restriction of Access as a Taking

Ownership of land abutting a public road includes an appurtenant right of access to the public road.\textsuperscript{175} Restrictions on a landowner’s ability to access the public road may amount to a taking of this appurtenant right.\textsuperscript{176} Generally, a landowner is entitled to compensation for a limitation on this access right only if the limitation substantially interferes with the landowner’s means of ingress and egress.\textsuperscript{177} Therefore, where a landowner retains a reasonable means of accessing public ways from the property, a limitation of access is not a compensable taking.\textsuperscript{178}

There is little precedent in Massachusetts for takings claims arising from restricted access and loss of convenience. \textit{LaCroix v. Commonwealth} provides some authority.\textsuperscript{179} \textit{LaCroix}, a landowner, sought compensation for a limitation on access created by the Commonwealth’s construction of Route 495.\textsuperscript{180} Prior to construction of Route 495, King Road was \textit{LaCroix}’s primary east-west public way.\textsuperscript{181} \textit{LaCroix} had been able to access King Road by traveling about 1250 feet south on Howard Road, which ran perpendicular from \textit{LaCroix}’s property line to King Road.

\textsuperscript{171} See Agins v. City of Tiburon, 447 U.S. 255, 260 (1980).
\textsuperscript{172} See id.
\textsuperscript{174} Burling, supra note 165, at 19.
\textsuperscript{177} Id. (citing State Dep’t of Highways v. Davis, 626 P.2d at 664).
\textsuperscript{178} Id. (citing Magliochetti v. State, 647 A.2d 1386, 1392 (N.J. 1994)).
\textsuperscript{179} 205 N.E.2d 228, 232 (Mass. 1965).
\textsuperscript{180} Id. at 229–30.
\textsuperscript{181} Id. Route 495 is a limited-access highway running parallel to King Road. Id.
Route 495 crosses Howard Road south of LaCroix’s land and north of King Road. However, Route 495, as a limited-access highway, does not permit access to or from Howard Road. Consequently, Route 495 created a barrier preventing LaCroix from reaching King Road via Howard Road. Although LaCroix retained access to King Road from his property via an alternate route, it was circuitous and several miles long. The court found that “a landowner is not entitled to compensation merely because his access to the public highway system is rendered less convenient, if he still has reasonable and appropriate access to that system after the taking.” The court based this ruling, in part, on the finding that LaCroix “suffered . . . no ‘taking of or injury to . . . [his] easements of access to such public way.’”

Similarly, in Nichols v. Inhabitants of Richmond, a landowner was not entitled to compensation where the destruction of an old road that she used continuously was demolished and replaced with a longer, less convenient route. However, Wine v. Commonwealth held that where access becomes physically impossible during public improvement “such interference is an injury special and peculiar to the use of the premises, and direct and proximate, for which the abutting owner, or others in special cases, is entitled to recover.”

IV. Barnstable’s Lose-Lose Predicament: Liability for Compensable Taking of Access Rights vs. Liability for the Taking of Threatened Species

Pursuant to ESA and the corresponding MESA requirements, the Town of Barnstable must protect the piping plovers and diamondback terrapins on the Sandy Neck trails from harm. To this end, the Town currently enforces a DEP order regulating ORV use on the Sandy Neck trails, as modified by a settlement agreement between the

182 Id.
183 Id.
184 Id. at 230.
185 LaCroix, 205 N.E.2d at 230.
186 Id.
187 Id. at 232.
190 17 N.E.2d 545, 548–49 (Mass. 1938).
Town, Sandy Neck residents, and other stakeholders.\textsuperscript{192} However, pursuant to the settlement agreement, the parties must cooperatively develop a long-term management plan to protect the threatened species on Sandy Neck.\textsuperscript{193}

The residents of Sandy Neck have challenged the current management plan, asserting that the restrictions on their ability to reach their cottages amount to a taking of access rights.\textsuperscript{194} However, if the Town permits increased ORV use along the trails where the threatened species breed, the Town will increase the risk that the species will be harmed in violation of ESA and MESA.\textsuperscript{195} Thus, the Town must balance potential liability for the taking of access rights against the potential liability for the taking of a threatened species.

A. Are the Trail Restrictions on Sandy Neck a Compensable Taking?

The issue for the residents of Sandy Neck is whether the Town’s access restrictions are a compensable taking. To be compensable, the restrictions must: deprive the cottage owners of all economically viable use of their remaining property;\textsuperscript{196} not advance a compelling governmental interest;\textsuperscript{197} or unreasonably restrict the cottage owners’ access to their cottages.\textsuperscript{198}

1. Do the Restrictions Deprive the Cottage Owners of All Economically Viable Use of Their Remaining Property?

During daylight hours, when piping plovers are found on the trails, ORV access may be inconvenient, but is still possible.\textsuperscript{199} The ban on trail access occurs only during a few months of the year for part of each day.\textsuperscript{200} These limitations are similar to limitations on trail access caused by ice, high tides, and storms.\textsuperscript{201} In addition, residents are permitted to use the trails at any time for emergencies.\textsuperscript{202} In short,

\textsuperscript{192} See supra notes 125–56 and accompanying text..
\textsuperscript{193} Sandy Neck Settlement Agreement, supra note 42.
\textsuperscript{194} See Alger, letter, supra note 8.
\textsuperscript{196} See Burling, supra note 165, at 15.
\textsuperscript{197} Agins v. City of Tiburon, 447 U.S. 255, 260 (1980).
\textsuperscript{199} See DEP, Order, supra note 54, pt. B, Special Conditions of Approval, at paras. 4, 6.
\textsuperscript{200} See id. at para. 4.
\textsuperscript{201} See supra notes 48–53 and accompanying text.
\textsuperscript{202} See DEP, Order, supra note 54, pt. B, Special Conditions of Approval, at para. 6.
the restrictions which limit access are themselves limited in scope. As such, the restrictions do not deprive cottage owners of all economic value of their property, and thus do not amount to a taking.\footnote{203 See Agins v. City of Tiburon, 447 U.S. 255, 260 (1980).}

The temporal nature of these restrictions is similar to that in \textit{Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency}, in which the Supreme Court of the United States held that a two-year moratorium on building was not a taking.\footnote{204 535 U.S. 302, 341–42 (2002).} However, the moratorium in \textit{Tahoe-Sierra} had an end date, after which the restrictions would cease.\footnote{205 Id. at 312.} The restrictions on Sandy Neck residents, in contrast, are temporal on a daily basis, but this daily restricted access will occur for an indefinite period.\footnote{206 Under the long term management plan, which the Town and the cottage owners must develop pursuant to their 2000 settlement agreement, the Town will still need to restrict access to some extent. See Sandy Neck Settlement Agreement, \textit{supra} note 42. Consequently, cottage owners on Sandy Neck are likely to challenge the plan as an impermissible form of a temporal taking.}

Given that cottage owners can access their cottages during the daytime and have not been deprived of all economic value of their property, the cottage owners’ likelihood of success on a takings claim against the Town is diminished.\footnote{207 See Tahoe-Sierra, 535 U.S. at 321; Agins, 477 U.S. at 260.} The Supreme Court declined to sever two years’ worth of continuous economic harm in \textit{Tahoe-Sierra}; thus, it is unlikely that a court will sever partial days’ worth of restricted access from the cottage owners’ overall access.\footnote{208 See Tahoe-Sierra, 535 U.S. at 321.} Consequently, the restrictions are only a partial taking and do not merit compensation as a complete taking of access rights.\footnote{209 See Agins, 477 U.S. at 260.}

2. Do the Restrictions Advance a Compelling Governmental Interest?

The Town enforces these restrictions to comply with federal and state requirements under ESA and MESA, respectively.\footnote{210 Endangered Species Act of 1973, 16 U.S.C. § 1532(19) (2004); Massachusetts Endangered Species Act, Mass. Gen. Laws ch. 131A, § 1 (2004).} The restrictions are intended to protect the threatened piping plovers and diamondback terrapins on Sandy Neck.\footnote{211 See discussion \textit{supra} Part II.D.} Thus, the Town is advancing two compelling governmental interests: first, as a landowner, the Town is complying with federal and state laws; second, the Town is protecting
a threatened species. Consequently, the cottage owners are not likely to succeed in asserting that the restrictions do not advance a compelling governmental interest and therefore amount to a compensable taking.

3. Do the Restrictions Unreasonably Restrict the Cottage Owners’ Access to Their Cottages?

In both *LaCroix* and *Nichols*, the landowners’ access to their property became less convenient. However, their access remained available at all times. In contrast, Sandy Neck residents are completely restricted from ingress to and egress from their property for several hours at a time, on a daily basis. The restrictions occur during the summer months, when most cottage owners and renters use their property. In addition, the restrictions occur during non-daylight hours.

Most cottage owners and renters do not use their cottages as permanent residences. Rather, they use the cottages as vacation and weekend homes. Some cottage owners cannot travel to Sandy Neck from their primary homes or places of business before dusk on Friday nights; they are effectively prevented from using their cottages during one of their two weekend nights. All residents using their cottages

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212 Congress, in stating its concern about the rapid decline of species, pursuant to the ESA, indicated that the preservation of threatened and endangered species is a compelling interest for the Federal Government. See Tenn. Valley Auth. v. Hill, 437 U.S. 153, 174 (1978). The Commonwealth of Massachusetts, in adopting the MESA, which is largely similar to ESA, also indicated that the preservation of threatened and endangered species is a compelling interest for the Commonwealth. See Mass. Gen. Laws ch. 131A, § 2. The Town of Barnstable, as a political subunit of the Commonwealth, is appropriately serving this compelling interest of the Commonwealth by attempting to protect both the piping plovers and diamondback terrapins on Sandy Neck. See DEP, Order, supra 54 note at pt. B, Findings, at para. 3.1.

213 See Agins, 447 U.S. at 260.


216 Sandy Neck Settlement Agreement, supra note 42.

217 See Memorandum from Alexander Yuan, to Aaron Toffler, supra note 2, at 2.


219 See Memorandum from Alexander Yuan, to Aaron Toffler, supra note 2, at 1.


221 See id. at ¶ 41. The cottage owners assert that for an out-of-state cottage user to travel to Sandy Neck in time for the last scheduled pilot escort, the cottage user must begin traveling to Sandy Neck “in the middle of the night.” Id.
during summer evenings are also effectively prevented from attending evening events off of Sandy Neck, such as movies and town meetings.\footnote{222} The restrictions do not merely create an inconvenience by increasing the length and distance of residents’ trips;\footnote{223} rather, the restrictions impermissibly render access physically impossible for several hours at time.\footnote{224}

The limits on guest access also indicate a taking of property rights.\footnote{225} A corollary to the right to exclude someone from your property is the right to invite that person onto your property.\footnote{226} By limiting the ability of cottage owners to invite guests to their homes, the restrictions limit the owners’ ability to use and enjoy their homes.

In theory, cottage owners have alternative means of access through pedestrian and boat transportation.\footnote{227} However, boat access is unreliable,\footnote{228} and pedestrian access would require several residents to walk six miles to reach their cottages.\footnote{229} Consequently, neither is a reasonable and appropriate alternative to ORV access.\footnote{230}

The restrictions on the cottage owners’ ability to travel to and from their cottages effectively prevents the owners and their guests from reasonably and appropriately accessing their cottages. Therefore, the cottage owners have a strong argument for compensation based on a taking of access rights.\footnote{231}

In short, the cottage owners are unlikely to succeed on assertions that the regulation of ORV use on the Sandy Neck trails deprives them of all economically viable use of their property, or that it lacks a

\footnote{222} Id. at ¶ 45.
\footnote{225} The restriction is also illogical. Under this restriction, cottage owners who wish to have more than one visitor in one week can instruct an additional visitor to park in the parking lot at the west end of Sandy Neck. Cottage owners can then drive from their cottage to pick up the visitors and later drive the visitor back to the parking lot. The two round trips for visitor pick up and drop off are permissible, as the cottage owner is the driver each time. However, if the visitor had been permitted to drive to the cottage, only one round trip would be necessary.
\footnote{227} See discussion supra Part I.B.
\footnote{228} See supra notes 27–31 and accompanying text.
\footnote{229} See Barnstable Conservation Comm’n, supra note 34.
\footnote{230} See LaCroix v. Commonwealth, 205 N.E.2d 228, 232 (Mass. 1965) (holding that a landowner has not suffered a compensable taking of access if a reasonable and appropriate alternative exists).
\footnote{231} See id.
compelling governmental interest. However, the cottage owners may successfully assert that the regulations go too far in restricting their right of access to their property. Consequentially, the Town will either have to compensate the cottage owners for a permanent taking, or increase the cottage owners’ trail access and compensate them for a temporary taking.

B. Liability Under the Endangered Species Act and the Massachusetts Endangered Species Act

The Town is responsible for the protection of the piping plovers and diamondback terrapins that live and breed on the Sandy Neck trails and surrounding land. If the cottage owners successfully decrease the restrictions on trail access during the piping plovers’ breeding season, the plovers are more likely to be harmed or killed. The Town could be fined as much as twenty-five thousand dollars if a piping plover is harmed. Moreover, FWS and Mass. Wildlife can each bring enforcement proceedings against the Town if the threatened species are not adequately protected.

C. Proposals for the Long-Range Management Plan of Sandy Neck

 Understandably, the Town of Barnstable would like to avoid liability under ESA and MESA, as well as from a regulatory takings claim by the cottage owners and lessees. Likewise, the cottage owners and renters would prefer increased access to their cottages, rather than monetary compensation for reduced access. Consequently, all parties involved would benefit from a plan that protects the listed species, while allowing cottage owners and renters reasonable access to the trails. The following are proposals for the long-term management of Sandy Neck in light of these goals.

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232 See supra Part IV.A.1–2.
234 See supra notes 163–64 and accompanying text.
1. Increased Permissible Access

The residents have a strong basis to assert that the current trail access scheme amounts to a compensable taking by unreasonably restricting ingress to and egress from their property. To limit liability for such a taking, the Town could increase the residents’ ability to use the trails such that any remaining restrictions are not unreasonable. However, the Town must continue to adequately protect the piping plovers and diamondback terrapins.

To avoid liability from either a takings claim or a violation of ESA and MESA, the Town could hire additional pilots to escort essential vehicles during the months when piping plovers typically cause road closures. Enough pilots should be hired such that cottage owners can travel to or depart from their cottages within a reasonable amount of time after scheduling a trip. In addition, pilots should be available for non-daylight hour trips. Although access will still be restricted, the inconvenience to cottage owners will be reasonable, and therefore will not amount to a compensable taking. The cost of hiring additional pilots may offset the costs associated with compensation of cottage owners for a taking, or fines under ESA, and MESA for harm to piping plovers. The Town may also consider increasing the permissible number of guest visitors, or removing guest limitations altogether, as the limitations may unwittingly increase trail use by cottage owners.

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239 See discussion supra Part IV.A.
240 See discussion supra Part IV.A.
242 In United States v. Town of Plymouth, the District Court of Massachusetts found the Town of Plymouth in violation of ESA because it had not taken adequate measures to protect piping plover hatchlings from ORV traffic. 6 F. Supp. 2d at 90–91. The Town of Plymouth had one wildlife specialist to protect the piping plovers on a three-mile barrier beach, similar to Sandy Neck; however, the specialist’s attempts to protect plovers were repeatedly rebuffed by town officials, who did not want to restrict ORV access to the beach. Id. at 91. By hiring several pilots to protect piping plovers from increased ORV traffic, the Town of Barnstable can demonstrate its continuing commitment to protecting plovers, even as it permits increased ORV access.
243 The definition of a reasonable amount of time in this context can be negotiated by the Town and the cottage owners as part of the long-term management plan.
244 LaCroix v. Commonwealth, 205 N.E.2d 228, 229–30 (Mass. 1965).
245 See supra note 225.
2. Town Application for an Incidental Take Permit

In 2000, FWS denied Mass. Wildlife’s application for an incidental take permit for harm to piping plovers in Massachusetts.\textsuperscript{246} The permit would have allowed the incidental taking of piping plovers on Massachusetts beaches, including Sandy Neck.\textsuperscript{247} Despite the denial of the statewide permit, Mass. Wildlife has offered assistance to the Town of Barnstable should the Town apply directly to FWS for an incidental take permit for piping plovers on Sandy Neck.\textsuperscript{248} The Town should accept the state agency’s aid and apply for a permit.

An incidental take permit would limit the Town’s liability for harm to piping plovers on Sandy Neck.\textsuperscript{249} Although incidental take permit applications have stringent requirements for proposed impact and alternative outcome studies,\textsuperscript{250} Mass. Wildlife completed much of this work pursuant to its own application.\textsuperscript{251} Moreover, the Town—pursuant to the 2000 settlement agreement with the Sandy Neck residents—is already required to participate in the drafting of a long-term management plan.\textsuperscript{252} Ideally, any management plan accepted by the stakeholders on Sandy Neck would include an evaluation of the plan’s impact on the piping plovers and diamondback terrapins. Therefore, the Town could easily adapt the management plan for use in an incidental take permit application. Given that the Town already has access to, or is otherwise required to develop, the bulk of the necessary information for a permit application, and would gain substantial protection from liability if FWS granted the permit, the Town should apply for an incidental take permit.

3. Transfer of Road Ownership to the Cottage Owners and Renters

The Town could avoid liability for takings compensation, as well as liability under ESA and MESA, by transferring ownership of the trails to the cottage owners, while reserving an easement for public access. The cottage owners, as the owners of the trails, would then assume responsibility for the protection of the piping plovers on the

\textsuperscript{246} \textit{Mass. Div. of Fisheries and Wildlife, supra} note 120.
\textsuperscript{247} \textit{DEP, Order, supra} note 54.
\textsuperscript{248} \textit{Id.; Woods Hole Group, supra} note 1, at 71 n.1.
\textsuperscript{249} \textsuperscript{See Smith et al., supra} note 62, at 1039.
\textsuperscript{251} \textsuperscript{See Mass. Div. of Fisheries and Wildlife, supra} note 120.
\textsuperscript{252} Sandy Neck Settlement Agreement, \textit{supra} note 42.
The viability of this option depends on the cottage owners’ willingness to accept the transfer of trail ownership. If the cottage owners believe that the Town’s access limitations are more stringent than necessary to adequately protect the listed species on Sandy Neck, they may accept the transfer. If they do so, the cottage owners would need to bring any regulatory takings claims related to threatened species protection against the state and federal government rather than against the Town. However, the cottage owners may be averse to the risk of assuming direct liability for harm to the piping plovers and diamondback terrapins, and may therefore refuse to accept trail ownership. In addition, the transfer may change the status of the trails from public ways to private ways, thereby eliminating the cottage owners’ right of reasonable access to their property.\footnote{See Masterman & Caggiano, \textit{supra} note 176, at 113 (citing State Dep’t of Highways v. Davis, 626 P.2d 661, 664 (Colo. 1981)).}

\textbf{Conclusion}

If the Town of Barnstable limits access to the trails on Sandy Neck, the owners of the Sandy Neck cottages are likely to succeed in a takings claim against the Town based on the restriction of their means of access to and from their cottages. However, if the Town does not take measures to protect the threatened species on Sandy Neck, FWS, as well as Mass. Wildlife will likely succeed in enforcement actions requiring the Town to implement protective measures. FWS and Mass. Wildlife can also fine the Town for any harmed piping plovers or diamondback terrapins. To limit liability to the cottage owners, the Town should hire additional pilots to escort cottage owners on the trails when piping plovers are present. To limit liability under the federal and state endangered species acts, the Town should work with Mass. Wildlife in applying for an incidental take permit from FWS.

WHEN “COMPREHENSIVE” PRESCRIPTIVE EASEMENTS OVERLAP ADVERSE POSSESSION: SHIFTING THEORIES OF “USE” AND “POSSESSION”

WILL SAXE*

Abstract: Human nature dictates that private ownership of land creates conflict among neighbors. In the realm of adverse possession and prescriptive easements, the law intervenes to settle these disputes. Adverse possession quiets conflict by providing the ripened possessor with title in fee simple absolute. In contrast, a prescriptive easement provides the holder with only a right of use. However, there are occasions when a prescriptive easement establishes a right of use so broad and encompassing that it amounts to a grant of de facto possession. Thus, such a “comprehensive prescriptive easement” enables the court to award the equivalent of possession while only requiring proof of mere prescriptive use. This Note examines the problems of comprehensive prescriptive easements, and explores possible solutions where rights of use are the equivalent of possession.

Introduction

Inherent in the private ownership of land is conflict among neighbors and users of real property.1 In the form of both adverse possession and prescriptive easement, the law intervenes to settle these disputes.2 While adverse possession and prescriptive easements are related in many ways, each doctrine has a unique effect on private property rights.3 Adverse possession rewards the possessing party with fee simple absolute and formally severs possession from the original title holder.4 In contrast, prescriptive easements establish only a right of use, as the

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1 See 7 Thompson on Real Property, Thomas Edition § 60.01, at 390 (David A. Thomas ed., 1994).

2 See 7 Thompson on Real Property, supra note 1, § 60.03(b)(6)(i), at 435; 3 Am. Jur. 2d Adverse Possession § 1 (2002).

3 7 Thompson on Real Property, supra note 1, § 60.03(b)(6)(i), at 435.

4 Id.
land owner retains full title of the property. However, there are times when a prescriptive easement may allow such a broad and encompassing use that it grants a de facto right of possession. In what this Note terms a “comprehensive prescriptive easement,” the successful claimant earns a right of possession while only having to prove the right of use associated with the typical prescriptive easement.

This Note addresses the problems of comprehensive prescriptive easements and discusses methods that may counteract granting rights of use equivalent to possession in prescriptive easement cases. Part I provides an analysis of the required elements of adverse possession. Part II examines the necessary components of a successful prescriptive easement claim. Part III introduces the concept and implications of comprehensive prescriptive easements. Lastly, Part IV examines possible judicial adaptations that may diminish the inequity stemming from a comprehensive prescriptive easement’s awarding of de facto possession without having satisfied the more stringent adverse possession requirements.

I. Adverse Possession

Adverse possession, a doctrine grounded in history, allows the ripened possessor to acquire absolute title to property from the original owner. Transferring full title through adverse possession began centuries ago in England. At first, there was no need for remedial doctrines such as adverse possession because ownership of property had no value until it was possessed or seized. As property laws develop-

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5 Id.
6 See infra Part III.
7 See Raab v. Casper, 124 Cal. Rptr. 590, 596 (Ct. App. 1975) (“An exclusive interest labeled ‘easement’ may be so comprehensive as to supply the equivalent of an estate, i.e., ownership.”) (emphasis added).
8 See 3 Am. Jur. 2d Adverse Possession, supra note 2, §§ 1–2 (defining adverse possession “as an actual and visible appropriation of property commenced and continued under a claim of right inconsistent with and hostile to the claim of another”); 10 THOMPSON ON REAL PROPERTY, supra note 1, § 87.01, at 71–74.
9 Jeffrey Evans Stake, The Uneasy Case for Adverse Possession, 89 GEO. L.J. 2419, 2421 (2001). At one time, the original property owner in England had to prove that unripe adverse possession had begun after the coronation of Henry II in order to retrieve possession. 10 THOMPSON ON REAL PROPERTY, supra note 1, § 87.01, at 73. Later, this cut-off point was adjusted to the coronation of Richard I. Lastly, Henry VIII created a statute that fixed a general time limitation of three score years before suit was barred. Id. § 87.01, at 71–74.
10 See 10 THOMPSON ON REAL PROPERTY, supra note 1, § 87.01, at 72 (“If one was dispossessed, if one lost possession, one lost the interest in the land.”).
oped, so did the concept of separating title from possession.\textsuperscript{11} This separation of owner and possessor complicated property ownership and interfered with clear title.\textsuperscript{12} Thus, adverse possession became a method to quiet title by prohibiting the original owner from asserting ownership without consideration of time.\textsuperscript{13}

As with any statute of limitations that benefits the general welfare,\textsuperscript{14} adverse possession is based on fundamental policy considerations—the prevention of “stale claims” and providing repose to the parties.\textsuperscript{15} Originally, English statutes of limitations concerning land ownership served to identify certain points in time prior to which a party could not rely on evidence in support of title.\textsuperscript{16} By 1540, statutes of limitations employed the modern approach of identifying a set period of time after which the original property owner was barred from bringing suit to regain title.\textsuperscript{17} The evolution of the statute of limitations culminated in a 1623 statute that required a twenty-year period of possession for the purposes of quieting title and avoiding suits.\textsuperscript{18} Today, adverse possession under American common law has adopted

\begin{itemize}
\item \textsuperscript{11} See \textit{id.}
\item \textsuperscript{13} \textit{Id.} Generally, adverse possession is not a favored method for quieting title because, among other reasons, the claims are greatly contested, settlement is often impracticable, and with many title companies paying attorney fees through title insurance, there is little incentive to settle. Michael P. O’Connor, \textit{Adverse Possession—Alive and Well in the 1990s}, N.Y. St. B.J., Jan. 1998, at 14, 15.
\item \textsuperscript{14} See \textit{10 Thompson on Real Property}, \textit{supra} note 1, § 87.01, at 86.
\item \textsuperscript{15} Sprankling, \textit{supra} note 12, at 819–20.
\item At some point, however, the true owner’s opportunity to challenge the possessor’s title must end. Delay decreases the availability and reliability of evidence; witnesses die, memories fade and documents are lost. Adjudications premised on such stale evidence are prone to error. Moreover, the possessor is ultimately entitled to “repose,” or freedom from the nagging concern generated by title insecurity.
\item \textit{Id.} at 819; see William B. Stoebuck & Dale A. Whitman, \textit{The Law of Property} 860 (3d ed. 2000) (“If we had no doctrine of adverse possession, we should have to invent something very like it.”).
\item \textsuperscript{16} 16 \textit{Richard R. Powell, Powell on Real Property} § 91.01[1], at 91-4 to 91-5 (Michael Allan Wolf ed., 2000).
\item \textsuperscript{17} \textit{Id.}
\item \textsuperscript{18} \textit{Id.;} see 1623, 21 Jac., c. 16, §§ 1, 2.
\end{itemize}
this twenty-year lapse period. In addition to the common law, most states have passed statutes defining the period of limitation.

Beyond the judicial justifications of quieting title and limiting suits, adverse possession progressed in the United States as a method to promote economic development by encouraging the productive use of land. Under adverse possession, the productive user of land is favored over the idle owner. In addition, the statute of limitations for adverse possession serves to quiet title, thereby encouraging development. For property to successfully develop, security in title must exist. Without security and comfort in title, economic growth is hindered by the expense of securing property; this in turn limits the resources available for development of property. In addition, without the ability to easily secure title, there is less incentive to accumulate private wealth through economic development.

A. Required Elements of Adverse Possession

Several distinct requirements must be met by the possessor in order for adverse possession to ripen and compel the transfer of ti-

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19 10 Thompson on Real Property, supra note 1, § 87.01, at 75.
20 Id.; e.g., Mass. Gen. Laws ch. 260, § 21 (2004). For a compilation of individual state legislation pertaining to adverse possession, see 10 Thompson on Real Property, supra note 1, § 87.01, at 77–86.
21 Paula R. Latovick, Adverse Possession Against the States: The Hornbooks Have It Wrong, 29 U. Mich. J.L. Reform 939, 942 (1996) (“Again, our society’s traditional preference for the development of land appears. If the adverse possessor makes valuable use of land where the true owner does not, the law views the adverse possessor as more socially responsible and thus preferable to the true owner.”); Sprankling, supra note 12, at 874; see Stake, supra note 9, at 2435–36. Sprankling and Stake both examine whether the public policy considerations surrounding adverse possession and land use are environmentally unsound or obsolete. Sprankling, supra note 12, at 884; Stake, supra note 9, at 2435–36. Importantly, legal scholars have begun to question the environmental impact of adverse possession and whether its encouragement of property development is outdated. See John G. Sprankling, The Antiwilderness Bias in American Property Law, 63 U. Chi. L. Rev. 519, 520 (1996) (declaring that “the property law system tends to resolve disputes by preferring wilderness destruction to wilderness preservation”); William G. Ackerman & Shane T. Johnson, Comment, Outlaws of the Past: A Western Perspective on Prescription and Adverse Possession, 31 Land & Water L. Rev. 79, 96 (1996) (“Incentives to render an increased use of land are no longer needed to open frontiers and provide for society.”).
22 Latovick, supra note 21, at 942.
24 See id.
25 Id.
26 Id.
The possessor must show: (1) actual possession that is; (2) hostile or adverse; (3) open and notorious; (4) continuous; and (5) exclusive. Lastly, adverse possession does not ripen until the applicable statute of limitations has been satisfied.

1. Actual Possession

For adverse possession to ripen, there must first be possession under the law of that particular jurisdiction. Generally, the adverse possessor acquires only those lands in his immediate and direct possession. The requisite level of possession is achieved not through casual acts of ownership, but rather through significant acts of dominion that serve as an ouster to the true owner. Actual possession can be demonstrated through a variety of uses and other forms of occupation. Many forms of possession other than the traditional establish-

27 Jesse Dukeminier & James E. Krier, Property 139 (5th ed. 2002); 10 Thompson on Real Property, supra note 1, § 87.01, at 75.
28 Dukeminier & Krier, supra note 27, at 139; see, e.g., Chaney v. State Mineral Bd., 444 So. 2d 105, 108 (La. 1983) (“Stated otherwise, the possessor without title is entitled to be maintained in possession only to the extent of the boundaries within which he proved actual, physical and corporeal possession.” (quoting City of New Orleans v. New Orleans Canal, Inc., 412 So. 2d 975, 982 (La. 1982))).
29 Dukeminier & Krier, supra note 27, at 139 & n.12; see, e.g., Shandaken Reformed Church of Mount Tremper v. Leone, 451 N.Y.S.2d 227, 228 (App. Div. 1982) (“When possession is permissive in its inception, adverse possession will not arise until there is a distinct assertion of a right hostile to the owner and brought home to him.”).
30 Dukeminier & Krier, supra note 27, at 139; see, e.g., Goldman v. Quadrato, 114 A.2d 687, 690 (Conn. 1955) (requiring open possession within adverse possession claims).
31 Dukeminier & Krier, supra note 27, at 139; see, e.g., Iowa R.R. Land Co. v. Blumer, 206 U.S. 482, 484 (1907) (listing continuous possession as a required element for ripened adverse possession).
32 Dukeminier & Krier, supra note 27, at 139; see, e.g., Rutar Farms & Livestock, Inc. v. Fuss, 651 P.2d 1129, 1134 (Wyo. 1982) (finding that possession was not exclusive because neighboring cattle also grazed on the property in question).
34 10 Thompson on Real Property, supra note 1, § 87.05, at 112.
35 Chaney v. State Mineral Bd., 444 So. 2d 105, 108 (La. 1983); see 10 Thompson on Real Property, supra note 1, § 87.05, at 112. One exception to the requirement of actual possession is the doctrine of constructive adverse possession under color of title. See Dukeminier & Krier, supra note 27, at 145–46. Through constructive adverse possession, an adverse possessor holding land under defective title while actually possessing only a certain portion of that parcel can acquire title to the full property once adverse possession ripens. E.g., John T. Clark Realty Co. v. Harris, 2 N.Y.S.2d 137, 141 (App. Div. 1938); see Dukeminier & Krier, supra note 27, at 145–46; 10 Thompson on Real Property, supra note 1, § 87.07, at 123–27.
36 10 Thompson on Real Property, supra note 1, § 87.04, at 99–111.
37 Id. § 87.06, at 120–21.
may be sufficient to satisfy actual possession, such as building structures or enclosures, and cutting timber. However, in determining actual possession, the primary factor is whether the activity in question is consistent with an act that would ordinarily be performed by the true owner for that particular parcel. Thus, the character of the land and its typical uses are of the utmost importance in establishing actual possession.

2. Hostile or Adverse Possession

The requirement of hostile possession is a misnomer. Ill will or malice is not necessary to show that possession is hostile or adverse. Instead, possession must merely be a claim of ownership—commonly called a claim of right—that is adverse to the original title holder. While claim of right is clearly a mandatory element of adverse possession, there are differences among jurisdictions regarding what state of mind is required by the possessor. For example, Georgia,

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38 Id. § 87.04, at 107.
39 Williams v. Rogier, 611 N.E.2d 189, 195 (Ind. Ct. App. 1993) (“For residential land, the presence of permanent improvements such as border fences or buildings which are in place during the entire statutory period can be sufficient to establish adverse possession.”).
40 Robin v. Brown, 162 A. 161, 163 (Pa. 1932) (finding a fence must be of substantial character to be sufficient for adverse possession).
41 See Drennen Land & Timber Co. v. Angell, 475 So. 2d 1166, 1172 (Ala. 1985) (holding that the act of selling timber constituted actual possession because the area was “predominantly timberland”).
42 See Hand v. Stanard, 392 So. 2d 1157, 1160 (Ala. 1980) (“Land need only be used by an adverse possessor in a manner consistent with its nature and character—by such acts as would ordinarily be performed by the true owners of such land in such condition.”).
43 Id. 3 Am. Jur. 2d Adverse Possession, supra note 2, at § 21 (summarizing that adverse possession claims should be viewed in light of the location and nature of the property in question).
44 See 3 Am. Jur. 2d Adverse Possession, supra note 2, at § 43.
45 Id.
46 Calhoun v. Woods, 431 S.E.2d 285, 287 (Va. 1993). Hostile possession is the possessor’s use of the property as his own. See id. In other words, his use must be as if he were in fact the true owner. Id.
47 Margaret Jane Radin, Time, Possession, and Alienation, 64 Wash. U. L.Q. 739, 746–47 (1986) (Noting that “[t]here are three positions that have existed in legal doctrine: (1) state of mind is irrelevant; (2) the required state of mind is, ‘I thought I owned it;’ (3) the required state of mind is, ‘I thought I did not own it [and intended to take it].’ These can roughly be thought of as the objective standard, the good-faith standard, and the aggressive trespass standard.”).
48 E.g., Halpern v. Lacy Inv. Corp., 379 S.E.2d 519, 521 (Ga. 1989) (“We hold that the correct rule is that one must enter upon the land claiming in good faith the right to do so.”).
Iowa and Oregon require that the adverse possessor have a good faith belief in ownership. This is illustrative of a judicial trend in adverse possession law whereby the possessor’s intent has become increasingly important in the court’s eyes. Courts appear less willing to allow adverse possession as a means of rewarding title to the undeserving, knowing trespasser. Regardless of the debate concerning intent, the bottom line when it comes to issues of hostile possession remains that the possessor’s actions must be inconsistent with claims of ownership by the true title holder or any other party.

Frequently, the issue of hostile possession rests on whether the possessor had the permission of the true owner. In fact, adverse possession claims may be thwarted due to a jurisdiction’s reliance on a pre-
umption that possession of another’s property is done with permission of the owner.\textsuperscript{57} Regardless of the type of presumption employed, a successful claim of hostile possession often hinges on whether the possessor is acting as a true owner rather than as a tenant or licensee.\textsuperscript{58}

3. Open and Notorious Possession

In addition to being adverse, the possessor’s actions must be overt actions of ownership that would alert the true title holder to an opposing claim of right.\textsuperscript{59} The public policy reason behind this requirement is to provide notice of the adverse possession to the record title holder,\textsuperscript{60} and, in some cases, even to the general public.\textsuperscript{61} This stems from the fundamental policy argument that the title holder who has notice of another party possessing his land as a true owner, yet fails to act, should be prohibited from later contesting the adverse possessor’s claim of ownership.\textsuperscript{62} In sum, open and notorious adverse possession must be achieved through an unequivocal display of an opposing claim of ownership to the title holder or his agents.\textsuperscript{63}

\textsuperscript{57} Vezey v. Green 35 P.3d 14, 22 (Alaska 2001) (“There is a presumption that one who possesses or uses another’s property does so with the owner’s permission.” (quoting Smith v. Krebs, 768 P.2d 124, 126 (Alaska 1989))).

\textsuperscript{58} See id. at 23.

\textsuperscript{59} 10 \textsc{Thompson on Real Property}, \textit{supra} note 1, § 87.07, at 127–28; see, e.g., Goldman v. Quadrato, 114 A.2d 687, 690 (Conn. 1955).

\textsuperscript{60} Vezey, 35 P.3d at 22; Striefel v. Charles-Keyt-Leaman P’ship, 733 A.2d 984, 990–91 (Me. 1999) (stating that open, visible, and notorious adverse possession is required in order “to provide the true owner with adequate notice that a trespass is occurring, and that the owner’s property rights are in jeopardy”).

\textsuperscript{61} See Marengo Cave Co. v. Ross, 10 N.E.2d 917, 921 (Ind. 1937) (holding that possession “must be so conspicuous that it is generally known and talked of by the public”). This view, however, appears to be an extreme outlook because most issues of open and visible possession are determined based upon whether the record title holder was on notice. See Vezey, 35 P.3d at 22 n.24; Snook v. Bowers, 12 P.3d 771, 783 (Alaska 2000).

\textsuperscript{62} Philbin v. Carr, 129 N.E. 19, 27 (Ind. App. 1920) (stating that when learning of an adverse claim of title, a true owner should protect his title or pursue an act of ejectment).

\textsuperscript{63} Elliot v. West, 665 S.W.2d 683, 691 (Mo. Ct. App. 1984) (“Where, as here, actual knowledge of the record owner is not proved, the claimant must show an occupancy so obvious and well recognized as to be inconsistent with and injurious to the owner’s rights that the law will authorize a presumption from the facts that he had such knowledge.”) (emphasis added); 10 \textsc{Thompson on Real Property}, \textit{supra} note 1, § 87.08, at 131; see, e.g., Alaska Nat’l Bank v. Linck, 559 P.2d 1049, 1053 (Alaska 1977) (finding that the standard of knowledge is based on the constructive knowledge of what a dutiful land owner would have known). Some jurisdictions, however, have required actual knowledge for certain types of adverse possessions claims. See, e.g., Coleman v. Coleman, 459 S.E.2d 166, 168 (Ga. 1995).
4. Continuous Possession

In order for adverse possession to ripen, it must be continuous throughout the entire statutory period. Probably more than any other element of adverse possession, the extent of continuity required depends on the nature and character of the possession and parcel. The level of continuity required by a possessor is determined by evaluating how an “average” owner would use the property. In some cases, even seasonal usage can be considered continuous. For example, in Burkhardt v. Smith the Supreme Court of Wisconsin found that regular use as a summer cottage was enough to establish continuous adverse possession. In contrast, merely intermittent or sporadic usage such as hunting, fishing, or fruit picking will usually not be considered adequately continuous. When examining if a seasonal or similarly occasional use is sufficiently continuous, it is necessary to determine whether there is any indication of abandonment by the possessor. If there is no act of abandonment coupled with the intent to abandon, sufficient seasonal use that comports with the character and nature of the property will be considered continuous.

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66 Id. (quoting Darling v. Ennis, 415 A.2d 228, 230 (Vt. 1980)). Continuity may also be maintained through the doctrine of tacking, where adverse possession is passed from one party to the next in order to achieve the statutory requirements. Thompson on Real Property, supra note 1, § 87.13, at 159. For tacking to be successful, privity between the parties must exist. Id. § 87.13, at 160. For a brief summary of tacking, see id.
67 See Roche v. Town of Fairfield, 442 A.2d 911, 917 (Conn. 1982). “With respect to the manner of continuous possession, ‘[t]he location and condition of the land must be taken into consideration and the alleged acts of ownership must be understood as directed to those circumstances and conditions.’” Id. at 917 n.11 (quoting Benne v. Miller, 50 S.W. 824, 828 (Mo. 1899)).
68 115 N.W.2d 540, 544 (Wis. 1962).
69 Okuna v. Nakahuna, 594 P.2d 128, 132 (Haw. 1979) (“Infrequent visits to the property to pick and gather fruits can hardly be said to constitute continuous possession or even possession at all.”).
70 See Pease v. Whitney, 98 A. 62, 64 (N.H. 1916) (finding a break in farming of land did not necessarily constitute an indication of intent to abandon); Dukeminier & Krier, supra note 27, at 140 n.15.
71 See Pease, 98 A. at 64; Dukeminier & Krier, supra note 27, at 140 n.15.
5. Exclusive Possession

For an adverse possession claim to successfully ripen, the possessor must have sole possession as a true owner would. The policy behind this requirement is that adverse possession must serve as an ouster of the legal title holder. The exclusion of others does not necessarily need to be absolute, but must rather be of the type and character that an average true owner would display.

As can be expected, exclusive possession can be a tough standard to meet. Actions that may appear to most neighbors as those of an exclusive owner may not be sufficient for an adverse possession claim. For example, in Pettis v. Lozier, the Supreme Court of Nebraska held that grazing livestock, planting trees, gardening, and posting “No Trespassing” signs were insufficient to successfully prove exclusive adverse possession. Often, a basic indicator of exclusive possession is the possessor’s forceful halting of actions that originated on the property by outside parties prior to the commencement of adverse possession. In the eyes of the court, such affirmative steps will likely be sufficient to provide the necessary ouster for exclusive adverse possession.

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72 Thompson on Real Property, supra note 1, § 87.09, at 133. Two or more parties cannot adversely possess the same parcel simultaneously and establish exclusive possession from one another. Philbin v. Carr, 129 N.E. 19, 28 (Ind. App. 1920).
74 Philbin 129 N.E. at 28; 10 Thompson on Real Property, supra note 1, § 87.09, at 133.
75 Smith v. Hayden, 772 P.2d 47, 53–54, 57 (Colo. 1989) (finding that the adverse possessor used the property as an average owner by parking cars, storing fuel, and hosting barbeques, while neighbors stored lumber on the parcel and their children played on the land, that use was not sufficient).
76 See Pettis v. Lozier, 349 N.W.2d 372, 374, 376 (Neb. 1984); Dukeminier & Krier, supra note 27, at 140.
77 See Pettis, 349 N.W.2d at 374, 376; Dukeminier & Krier, supra note 27, at 140.
78 349 N.W.2d at 374, 376; Dukeminier & Krier, supra note 27, at 140.
79 See Pettis, 349 N.W.2d at 374; Wiedeman v. James E. Simon Co., 307 N.W.2d 105, 106, 108 (Neb. 1981) (holding possession to be exclusive where possessor ended the dumping of trash on the property). Note that the Supreme Court of Nebraska made this ruling only three years prior to finding that the possessor’s extensive actions in Pettis did not establish exclusivity. See Pettis, 349 N.W.2d at 374. Thus, prohibiting actions that occurred prior to the beginning of adverse possession appears to be fundamental to establishing exclusivity. See id.; Wiedman, 307 N.W.2d at 106, 108.
80 Wiedman, 307 N.W.2d at 106, 108; see Pettis, 349 N.W.2d at 374.
B. Rights Acquired by Adverse Possession: Fee Simple Absolute

Prior to the lapsing of the statutory period, the adverse possessor can be ejected only by the true owner.\textsuperscript{81} Other than the true owner, the adverse possessor is secure in title against all remaining parties.\textsuperscript{82} However, once all the requirements of adverse possession have been met throughout the entire statutory period, the possessor acquires full title in fee simple absolute.\textsuperscript{83} Therefore, ripened adverse possession not only protects the possessor from an act of ejectment by the original owner, it provides security from claims by all parties.\textsuperscript{84} Like any fee simple absolute, the new title is not lost by an abandonment of possession or any other failure to assert title.\textsuperscript{85} Furthermore, the acquisition of title by the adverse possessor operates as a conveyance by warranty deed from the true owner.\textsuperscript{86} In sum, adverse possession results in fee simple absolute, what a buyer would expect to receive in any traditional conveyance.\textsuperscript{87}

II. Prescriptive Easements

An easement is a property right that is broadly defined as “a non-possessory right to enter and use land in the possession of another” without interference from the possessor.\textsuperscript{88} Another definition states that easements are the right to enjoy the land of another.\textsuperscript{89} Prescriptive easements are created through prescriptive use, which the Restatement (Third) of Property (Servitudes) defines as “a use that is adverse

\begin{itemize}
\item \textsuperscript{81} See, \textit{e.g.}, Spring Valley Estates, Inc. v. Cunningham, 510 P.2d 336, 338 (Colo. 1973) (“In other words, from the beginning of his possession period, an adverse possessor has an interest in a given piece of property enforceable against everyone \textit{except} the owner or one claiming through the owner.”).
\item \textsuperscript{82} See \textit{id}.
\item \textsuperscript{83} \textit{id.}; Stryker v. Rasch, 112 P.2d 570, 577 (Wyo. 1941) (stating that “when adverse possession for the statutory period is held, the adverse possessor is vested with full, new and distinct title”). The general rule is that adverse possession does not ripen when the true owner is the state or federal government. Latovich, \textit{supra} note 21, at 939. Despite this sovereign immunity, states in some cases have failed to protect property from adverse possession. \textit{See id.} at 939–40.
\item \textsuperscript{84} Cunningham, 510 P.2d at 338.
\item \textsuperscript{86} Niederhelman v. Niederhelman, 336 S.W.2d 670, 676 (Mo. 1960).
\item \textsuperscript{87} \textit{See Cunningham}, 510 P.2d at 338.
\item \textsuperscript{88} \textit{Restatement (Third) of Prop.: Servitudes} § 1.2(1) (2000); \textit{see} 7 \textit{Thompson on Real Property}, \textit{supra} note 1, § 60.02(b), at 392.
\item \textsuperscript{89} Commercial Wharf E. Condo. Ass’n v. Waterfront Parking Corp., 552 N.E.2d 66, 73 (Mass. 1990) (“An easement is an interest in land which grants to one person the right to use or enjoy land owned by another.”).
\end{itemize}
to the owner of the land or the interest in land against which the servitude is claimed.”

Thus, much like adverse possession, prescriptive easements are born from activities—use as compared to the possession of land—that are without the consent of the true owner. Whether through adverse possession or prescriptive easement, once these activities are sufficient to create a ripened claim, an actual property right in favor of the actor is created without compensation to the original land owner for his severed or reduced property rights.

Like the law of adverse possession, the law of prescriptive easements is grounded in extensive history. At the end of medieval times in England, prescriptive easements were based on a theory of a “lost grant.” Before then, England had applied a statute of limitations that required proof of use stemming back to the coronation of Richard I in 1189. When this task became difficult, the presumption of a lost grant was created in order to easily quiet title; this allowed parties—after a certain period of time elapsed—to presume that longstanding uses of property had been authorized in a deed that was now missing. While this lost grant theory was initially accepted in American courts, it has been replaced by a statute of limitations and an acquisition of property theory. These theories are supported by the principles that productive use of land should be rewarded and repose should be provided to the user by preventing stale claims. Thus, the doctrine of prescriptive

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90 Restatement (Third) of Prop.: Servitudes § 2.16(1). Prescriptive easements have an alternative definition as well: “a use that is made pursuant to the terms of an intended but imperfectly created servitude, or the enjoyment of the benefit of an intended but imperfectly created servitude.” Id. § 2.16(2).

91 See id. § 2.16(2).


93 See Restatement (Third) of Prop.: Servitudes § 2.17 cmt. b; 10 Thompson on Real Property, supra note 1, § 87.01, at 72–74.

94 Restatement (Third) of Prop.: Servitudes § 2.17 cmt. b.


96 Restatement (Third) of Prop.: Servitudes §§ 2.16 cmt. g, 2.17 cmt. b.

97 See id. § 2.17 cmt. b.

98 Id. The acquisitive-prescription theory is particularly compelling:
easements can accomplish many of the same fundamental concerns as adverse possession without fully transferring title. 99

A. Required Elements of Prescriptive Easements

The requirements for a successful easement by prescription are quite similar to those of adverse possession. 100 For a prescriptive easement to ripen, the use must be hostile or adverse, 101 open and notorious, 102 and continuous. 103 In addition, a prescriptive easement does not ripen until the applicable statute of limitations has expired. 104 Lastly, although exclusivity is a factor in forming a prescriptive easement, it is not the same concept as developed in adverse possession law. 105

1. Hostile or Adverse Use

For an easement by prescription to ripen, the use must be adverse or hostile to that of the true owner, thereby indicating a claim of right. 106 A use is considered adverse if it is inconsistent with the desires of the owner to such an extent that, had he known of the use, he would have stopped it. 107 Thus, any indication that the use was somehow subservient or permissive to that of the owner prevents the estab-

Because the uses that create prescriptive rights in these cases are not tortious, the results cannot be explained by statute-of-limitations theory. They can be explained, however, under the theory that use pursuant to an express or implied agreement gives rise to an entitlement, if continued for the prescriptive period.

Id. 99 See id.; Latovick, supra note 21, at 942; Sprankling, supra note 12, at 819.

100 7 Thompson on Real Property, supra note 1, § 60.03(b)(vi), at 438.

101 LaRue v. Kosich, 187 P.2d 642, 646 (Ariz. 1947) (“It is a recognized rule of law that where the use of a private way by a neighbor is by the express or implied permission of the owner, the continued use is not adverse and cannot ripen into a prescriptive right.”).

102 Kayfirst Corp. v. Wash. Terminal Co., 813 F. Supp. 67, 73 (D.D.C. 1993) (“Under District of Columbia law, an easement by prescription will arise only if the claimant’s use of the servient estate is, among other things, open and notorious . . . .”).

103 Baker v. Armstrong, 611 S.W.2d 743, 745 (Ark. 1981) (requiring prescriptive use to be “continuous” for seven years).

104 7 Thompson on Real Property, supra note 1, § 60.03(b)(vi), at 438; see Mass. Gen. Laws ch. 187, § 2 (2004) (“No person shall acquire by adverse use or enjoyment a right or privilege of way or other easement from, in, upon or over the land of another, unless such use or enjoyment is continued uninterruptedly for twenty years.”).


106 See LaRue, 187 P.2d at 646; 7 Thompson on Real Property, supra note 1, § 60.03(b)(vi), at 440.

107 7 Thompson on Real Property, supra note 1, § 60.03(b)(vi), at 440.
lishment of a prescriptive easement because the use is not considered adverse.\textsuperscript{108}

When evaluating the hostile nature of the use in question, a majority of jurisdictions presume that the use is adverse to the wishes of the true owner.\textsuperscript{109} Some states apply a more moderate approach and only presume adversity once the open and continuous requirements are met.\textsuperscript{110} A minority of states have adopted a presumption of permissive use.\textsuperscript{111} Additionally, some states apply a presumption of permissive use depending on distinct variables, such as when parties are related\textsuperscript{112} or the land is wild, unenclosed, and uncultivated.\textsuperscript{113}

Yet a presumption of permissiveness may not be necessary, as courts often aggressively look for indications of permissive use.\textsuperscript{114} For example, in \textit{Chaconas v. Meyers}, the District of Columbia Court of Appeals considered friendly exchanges between the claimant and the owner as evidence that the use was not adverse.\textsuperscript{115} Thus, like adverse possession, proving actions hostile or adverse to the true owner can be a formidable requirement.\textsuperscript{116}

\textsuperscript{108} See Hollis v. Tomlinson, 585 So. 2d 862, 863–64 (Ala. 1991) (finding that the use of a road was not adverse because claimants had asked permission to use on several occasions).

\textsuperscript{109} \textit{Restatement (Third) of Prop.: Servitudes} § 2.16 cmt. g (2000); see \textit{Lunt v. Kitchens}, 260 P.2d 535, 537 (Utah 1953) (“Because of the presumption that the use of another’s land is adverse to him, the owner has the burden to show that the use was under his permission as distinguished from against it.”). For a more extensive summary on presumptions of use for purposes of prescription, see \textit{Restatement (Third) of Prop.: Servitudes} § 2.16 cmt. g; 7 \textit{Thompson on Real Property}, supra note 1, § 60.03(b)(6)(viii), at 441–43. For a limited discussion of presumptions of permission within adverse possession, see supra notes 56–58 and accompanying text.

\textsuperscript{110} See \textit{Chaconas v. Meyers}, 465 A.2d 379, 380 (D.C. 1983); \textit{West v. Smith}, 511 P.2d 1326, 1333 (Idaho 1973) (“The general rule is that proof of open, notorious, continuous, uninterrupted use of the claimed right for the prescriptive period, without evidence as to how the use began, raises the presumption that the use was adverse and under a claim of right.”).

\textsuperscript{111} \textit{Restatement (Third) of Prop.: Servitudes} § 2.16 cmt. g; see, e.g., \textit{West v. Slick}, 326 S.E.2d 601, 610 (N.C. 1985) (“The law presumes that the use of a way over another’s land is permissive or with the owner’s consent unless the contrary appears.” (quoting Dickinson v. Pake, 201 S.E.2d 897, 900 (N.C. 1974))).

\textsuperscript{112} See, e.g., \textit{Martin v. Proctor}, 313 S.E.2d 659, 662 (Va. 1984) (finding that a child’s use of a parent’s land is presumed to be permissive without notice of an unequivocal assertion of ownership).

\textsuperscript{113} 7 \textit{Thompson on Real Property}, supra note 1, § 60.03(b)(6)(viii), at 442–43; see \textit{Carpenter-Union Hills Cemetery Ass’n v. Camp Zoe, Inc.}, 547 S.W.2d 196, 201–02 (Mo. Ct. App. 1977).

\textsuperscript{114} See \textit{Chaconas}, 465 A.2d at 383.

\textsuperscript{115} Id.

\textsuperscript{116} See id.
2. Open and Notorious Use

Open and notorious use is required for prescriptive easements to ripen so that the true owner has notice of the adverse use on his property.\textsuperscript{117} Presumably, armed with the knowledge that his property was at risk, the owner would undertake an action of ejectment.\textsuperscript{118} Like adverse possession, the owner need not actually know of the use; rather, it is only necessary that the use be so open and visible that the title holder is presumed to have the constructive knowledge of a dutiful owner.\textsuperscript{119} The type of use that is considered open and visible to satisfy constructive knowledge depends on the nature and character of the property in question.\textsuperscript{120}

Open and notorious use can be a difficult standard to achieve because seemingly substantial uses may not be sufficiently visible to the diligent owner.\textsuperscript{121} For example, in \textit{Tenn v. 889 Associates}, the Supreme Court of New Hampshire found that the placement of portable air conditioners did not amount to open and visible use, partly due to the fact that they were placed twelve feet or more above the roof of the building.\textsuperscript{122} Likewise, in \textit{Maine Coast Heritage Trust v. Brouillard}, the Supreme Judicial Court of Maine ruled that occasional passage by foot for bird-watching could not be considered open for purposes of establishing a prescriptive easement.\textsuperscript{123}

3. Continuous Use

Like adverse possession, use must be continuous throughout the prescriptive period for a prescriptive easement to ripen.\textsuperscript{124} As expected, the extent of continuity required to establish a prescriptive easement

\textsuperscript{117} See \textit{Restatement (Third) of Prop.: Servitudes} \S 2.17 cmt. h (2000). In fact, this requirement is considered satisfied if the owner has actual knowledge—regardless of whether or not the use is open and notorious. \textit{Id.}

\textsuperscript{118} See \textit{id.}

\textsuperscript{119} Swift v. Kniffen, 706 P.2d 296, 304 (Alaska 1985) (explaining that the adverse user “need not show that the record owner had actual knowledge of the adverse party’s presence. Rather, the owner is charged with knowing what a duly alert owner would have known.”).

\textsuperscript{120} \textit{Id.}


\textsuperscript{122} 500 A.2d at 372.

\textsuperscript{123} 606 A.2d at 200.

easement is highly dependent upon the nature and character of the use itself.\textsuperscript{125} Frequently, the primary concern in evaluating continuity is whether an interruption in use has occurred that significantly interfered with the user.\textsuperscript{126} Yet, like adverse possession, seasonal use can establish continuity in certain circumstances.\textsuperscript{127} For example, in \textit{Ward v. Harper}, the Supreme Court of Virginia held that seasonal use for timber operations in a remote area was sufficient for continuity.\textsuperscript{128} In contrast, in \textit{Veach v. Day}, the Supreme Court of Appeals of West Virginia ruled that using a road only a few times a year for hunting was considered too sporadic to establish continuity.\textsuperscript{129}

4. Issue of Exclusive Use

In deciding on the scope of a prescriptive easement, a court will determine if the easement pertains to public or private rights based upon whether the use is by discrete individuals or by the public as a whole.\textsuperscript{130} For example, in \textit{Burks Brothers of Virginia, Inc. v. Jones}, the Supreme Court of Virginia established many individual private prescriptive easements for access to a mountain trail.\textsuperscript{131} By instituting several private easements instead of one single public easement, the court found each private right independent of the others.\textsuperscript{132} In other words, because each individual user was able to establish an easement without relying on the use of other parties, instituting an easement for the public was not warranted.\textsuperscript{133} In contrast, a public easement is appropriate if an individual’s use is insufficiently exclusive, but when combined with the use and enjoyment of others, compels the recogni-

\textsuperscript{125} See, \textit{e.g.}, \textit{Ward v. Harper}, 360 S.E.2d 179, 182 (Va. 1987) (“In determining continuity, the nature of the easement and the land it serves, as well as the character of the activity must be considered.”).

\textsuperscript{126} Voorhies v. Pratt, 166 N.W. 844, 845 (Mich. 1918) (holding that despite owner’s failed attempts to stop the flow of a drainage easement, there was not a sufficient interruption to find a break in continuity).

\textsuperscript{127} See \textit{Ward}, 360 S.E.2d at 182.

\textsuperscript{128} Id.

\textsuperscript{129} 304 S.E.2d 860, 863 (W. Va. 1983) (stating that the use “must be more than occasional or sporadic” to be continuous).

\textsuperscript{130} See 7 THOMPSON ON REAL PROPERTY, \textit{supra} note 1, § 60.03(b)(6)(v), at 438.

\textsuperscript{131} 349 S.E.2d 134, 139 (Va. 1986).

\textsuperscript{132} \textit{Id.} (“Here, by contrast, there is no evidence of any use by the general public. Each landowner asserted his own right, independent of all others, to use the trail, and no rights were dependent upon the common enjoyment of similar rights by others.”).

\textsuperscript{133} \textit{See id.}
tion of a prescriptive easement.\textsuperscript{134} Private use will not be sufficient to generate a private easement when it is combined with similar public use and there is no private act indicating the assertion of an exclusive individual right.\textsuperscript{135} In sum, the question of whether a public easement exists is often simply answered by examining “the character of the use, namely, whether or not the public, generally, have had the free and unrestricted right [of] use.”\textsuperscript{136} By examining the general character of the use, courts will reward broad communal-like uses with public rights while rewarding narrower individual uses with private rights.\textsuperscript{137}

In addition to being established by multiple private parties, the government can establish a public prescriptive easement.\textsuperscript{138} The Illinois case of \textit{Town of Deer Creek Road District v. Hancock} serves as a prime example of establishing a public easement by government action.\textsuperscript{139} Deer Creek argued that the town had acquired a prescriptive easement for public use of a road located on the Hancock property, despite claims by the Hancocks that the road was used only by their social guests, the occasional hunter, and those who serviced families living on the road.\textsuperscript{140} The town presented evidence that during the prescriptive period, it had undertaken great efforts in maintaining the road, such as digging ditches, building culverts, cutting grass, and plowing snow.\textsuperscript{141} The court found that once a party demonstrates public use, a presumption of a public prescriptive easement exists, which the Hancocks failed to overcome.\textsuperscript{142}

\begin{footnotes}
\footnotetext[134]{See id. ("In such a case, the right of each user of the way is dependent upon the enjoyment of similar rights by others, and no private prescriptive rights will arise.").}
\footnotetext[135]{Simmons v. Perkins, 118 P.2d 740, 744 (Idaho 1941) ("The use of a driveway in common with the owner and the general public, in the absence of some decisive act on the user’s part indicating a separate and exclusive use on his part negatives any presumption of individual right therein in his favor.").}
\footnotetext[137]{See id.; 7 THOMPSON ON REAL PROPERTY, supra note 1, § 60.03(b)(6)(v), at 438 (explaining that the primary test is the nature of the use, not the number of users).}
\footnotetext[138]{See Hancock, 555 N.E.2d at 1147–49. As with adverse possession, sovereign immunity protects government property against the ripening of prescriptive easements. 7 THOMPSON ON REAL PROPERTY, supra note 1, § 60.03(b)(6)(iv), at 437.}
\footnotetext[139]{555 N.E.2d at 1147–49.}
\footnotetext[140]{Id. at 1148.}
\footnotetext[141]{Id. at 1147–48.}
\footnotetext[142]{Id. at 1149–50.}
\end{footnotes}
B. Rights Acquired by Prescriptive Easement: Rights of Use

Unlike adverse possession, a ripened prescriptive easement does not lead to a transfer in title; rather, a prescriptive easement leaves title with the true owner while reserving a use in the property. The title holder remains free to use his property as he wishes, so long as it does not interfere with the easement rights. Even if there is a later transfer of title by the fee simple owner, the easement remains. Examples of rights of use enabled through prescriptive easements include: the rights of way or passage; the right to access water or dispose of waste through pipes; the right to place a mobile home on a neighbor’s land; the right to flood the lands of another; the right to cut timber; and the right of aircraft to intrude into a private party’s airspace. These examples illustrate the central difference between prescription and adverse possession: while a prescriptive easement provides a distinct property right based on use, its holder does not gain full title.

III. The Dilemma of Comprehensive Prescriptive Easements

As is evident by an explanation of their respective requirements, the doctrines of adverse possession and prescriptive easements are quite similar. Yet, as discussed above, a dramatic discrepancy exists in how ripened adverse possession and prescriptive easements affect property rights, with adverse possession resulting in fee simple absolute, while prescriptive easements produce only a right of use. However, in some instances, the right of use provided by a prescriptive easement may be so vast and encompassing that it is the equivalent of

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143 7 THOMPSON ON REAL PROPERTY, supra note 1, § 60.03(b)(6)(i), at 435.
144 Id.
146 See Riddock v. City of Helena, 687 P.2d 1386, 1389 (Mont. 1984) (“Further, prescriptive title once established is not divested by transfer of the servient estate.”).
147 Burks Bros. of Va., Inc. v. Jones, 349 S.E.2d 134, 139 (Va. 1986).
149 Johnson v. Kaster, 637 N.W.2d 174, 177 (Iowa 2001). A more compelling claim may have been adverse possession since placement of the mobile home could be considered possession rather than use. See id. at 182 n.1. The court noted that although “resolution of this case seems to be most appropriate under the doctrine of adverse possession, neither party pursued this theory further than the initial pleadings.” Id.
150 Mueller v. Fruen, 30 N.W. 886, 887 (Minn. 1886).
152 Casanova, supra note 95, at 407–10.
153 7 THOMPSON ON REAL PROPERTY, supra note 1, § 60.03(b)(6)(i), at 435.
154 Id.
fee simple absolute. Thus, a successful claimant of a comprehensive prescriptive easement achieves possession while only having to prove the lesser rights of use associated with a prescriptive easement.

The case of *Raab v. Casper* illustrates how a prescriptive easement can have the same result as adverse possession. In a case of a mistaken property line, the defendants built part of their home, driveway, utility lines, and landscaping on a portion of their neighbor’s property. The trial court had ruled that this amounted to a successful prescriptive easement for use of the driveway, utility lines, and yard. The Court of Appeal of California reversed the holding, finding that the prescriptive easement granted rights equivalent to a transfer in title without having to meet the requirements of adverse possession. The court provided the following reasoning for reversing the earlier finding:

The [trial court’s] judgment declares that defendants are entitled to an easement for roadway and utility lines “together with an easement for the maintenance of lawn, fences, shrubs, fruit trees, and landscaping around the [defendants’] house . . . .” Although adroitly phrased to avoid the language of a grant of title, the last-quoted clause was undoubtedly designed to give defendants unlimited use of the yard around their home. Defendants doubtless did not intend plaintiffs, owners of the nominal servient tenement, to picnic, camp or dig a well in their yard. They doubtless did not intend to own a house on one side of the boundary with an unmarketable yard on the other. *The findings and judgment were designed to exclude plaintiffs from defendants’ domestic establishment, employing the nomenclature of easement but designed to create the practical equivalent of an estate.*

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155 *See* Warsaw v. Chi. Metallic Ceilings, Inc., 188 Cal. Rptr. 563, 568 (Ct. App. 1983), vacated, 676 P.2d 584 (Cal. 1984); Raab v. Casper, 124 Cal. Rptr. 590, 596–97 (Ct. App. 1975). “An exclusive interest labeled ‘easement’ may be so comprehensive as to supply the equivalent of an estate, i.e., ownership.” *Id.* at 596.

156 *See* Warsaw, 188 Cal. Rptr. at 568; Raab, 124 Cal. Rptr. at 596–97.

157 124 Cal. Rptr. at 596–97.

158 *Id.* at 592, 596.

159 *Id.* at 592–93, 596–97.

160 *See id.* at 597. In fact, the possession in question did meet the higher standard for adverse possession with one exception: “The findings recite no exclusivity of use. For that reason alone, they will not support a judgment of adverse possession.” *Id.*

161 *Id.* (emphasis added) (second alteration in original) (citation omitted).
The problematic nature of an easement that grants an all-encompassing use is addressed by Richard R. Powell. Powell clarifies that an easement must only involve a “limited” use. According to Powell, when the use becomes all-encompassing of the property, it ceases to be an easement: “If a conveyance purported to transfer to A an unlimited use or enjoyment of land, it would be in effect a conveyance of ownership to A, not an easement.” Powell identifies the crucial distinction between limited and unlimited uses: an easement can only exclude “the servient owner wholly from some specified uses of the servient land, as for example, the springs of water located thereon.”

The case of Warsaw v. Chicago Metallic Ceilings, Inc. serves as another illustration of the dilemma posed by comprehensive prescriptive easements. Like many prescriptive easement cases, Warsaw involved a conflict among abutting landowners. Both parcels were purchased from a common owner in 1972. The plaintiffs built a commercial building with a driveway—alongside the defendant’s property—so that large trucks could access the loading docks. Shortly after the building became operational, it became clear that the driveway was not large enough to accommodate the trucks in order to access the loading docks without traveling on a vacant portion of defendant’s property. On several occasions, plaintiffs were unsuccessful in attempts to work with the defendant in order to establish mutual easements over each other’s property. In 1979, the defendant began constructing a warehouse on his property, including the portion used by plaintiffs. In an attempt to halt construction, plaintiffs sought and were denied an injunction. However, after completion of the construction, the trial

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163 *Id.*
164 *Id.* Recall that the acquisition of title by the adverse possessor operates as a conveyance by warranty deed from the true owner. *See* Niederhelman *v.* Niederhelman, 336 S.W.2d 670, 676 (Mo. 1960).
165 *3 Powell, supra* note 162, at ¶ 405, at 34-13 to 34-15 (emphasis added). Note that the key distinction is between a whole use of the entire property versus a whole use of some of the property.
166 676 P.2d 584, 586–87 (Cal. 1984).
167 *Id.* at 586; *see, e.g.*, Raab *v.* Casper, 124 Cal. Rptr. 590, 596–97 (Ct. App. 1975).
168 *Warsaw*, 676 P.2d at 586.
169 *Id.*
170 *Id.* at 586–87.
171 *Id.* at 587.
172 *Id.*
court found that the plaintiffs held a prescriptive easement for the use of the trucks and ordered the defendant to remove the portion of the newly constructed building that interfered with the path of that easement.\textsuperscript{174} On appeal, the Court of Appeal of California—in a ruling that was later overturned\textsuperscript{175}—remanded the case, ordering the defendant be provided adequate compensation for the loss of property rights suffered as a result of the prescriptive easement.\textsuperscript{176} In support of its decision, the court explicitly focused on the possessory nature of the easement:

A simple affirmation of the judgment would result in plaintiffs, who are admittedly trespassers, acquiring \textit{practical possession} of a sixteen thousand two hundred fifty (16,250) square foot parcel of defendant’s valuable property free of charge with the added damage to the defendant of the cost of relocating the building.

The doctrines of adverse possession and prescription purely and simply result in one person taking for his own use the private property of another. While the distinction between adverse possession and prescription lies in the fact that in the former fee title is acquired and in the latter simply a right in the land of another, the practical result is that in each case the true owner is divested of the right to make use of his land as he desires. The case at bench presents a classic example of that result.\textsuperscript{177}

While the order for compensation was later vacated for public policy reasons, \textit{Warsaw} stands as another example of how prescriptive easements can culminate in de facto possession.\textsuperscript{178} Thus, the reasoning behind both the \textit{Raab} and \textit{Warsaw} decisions begs the question of how courts should respond when granting a prescriptive easement that would establish a right of use equivalent to ripened adverse possession though the claimant has only satisfied the elements of prescription.\textsuperscript{179}

\textsuperscript{174} \textit{Warsaw}, 676 P.2d at 587.
\textsuperscript{175} Id. at 589.
\textsuperscript{177} Id. (emphasis added).
\textsuperscript{178} See id.
IV. SOME TRADITIONAL AND NOT-SO-TRADITIONAL METHODS TO COUNTERACT COMPREHENSIVE PRESCRIPTIVE EASEMENTS

There are two logical methods to address the problem of comprehensive prescriptive easements: (1) make them harder to attain; or (2) apply tactics of mitigation once they are established. First, this Note examines the application of two variations of the adversity requirement within the doctrines of adverse possession and prescription in some jurisdictions: a good faith requirement and a presumption of permissive use. Through the court’s implementation of the good faith requirement, a presumption of permissive use, or both, the user of land will face a greater burden in seeking a comprehensive prescriptive easement. Second, this Note explores a much more radical alteration of the law of prescriptive easements: providing compensation to the true owner once a comprehensive prescriptive easement is established on his property. Compensation would provide an appropriate form of mitigation for the servient estate title holder suffering from the severe loss in property rights that accompanies a comprehensive prescriptive easement.

A. Impeding the Process of Adversity in Prescription: Arguments for a Good Faith Requirement and Presumption of Permissive Use

Comprehensive prescriptive easements reward the user with a right similar to possession without applying some of the more stringent requirements of adverse possession. For example, prescriptive easement holders obviously must only demonstrate use, and need not demonstrate possession for the prescriptive period. Perhaps a solution to this incongruity between rights gained and elements proved stems from an application of two of the more rigorous adverse possession and prescription requirements employed by various jurisdictions—a good faith belief in the right to use and a presumption of permissive use. This Note proposes that the problem of comprehensive prescriptive ease-
mements—the establishment of rights of possession without proving adverse possession—would be curtailed by slightly modifying the prescriptive easement doctrine to include these two additional elements.\footnote{188 See infra Parts IV.A.1–2.}

1. Good Faith Requirement

By requiring prescriptive users to prove a good faith belief in their right of use, the road to the comprehensive prescriptive easement would become more of an uphill climb.\footnote{189 See Helmholz, supra note 53, at 332.} The major criticism of both the doctrines of adverse possession and prescriptive easements often stems from the principle that they constitute reward for trespass.\footnote{190 See id. at 340–41.} Imposing a good faith requirement—a belief that one’s use is based in right and not trespass—would dampen the court’s obligation to reward such actions of trespass.\footnote{191 See id.}

While the good faith requirement is usually applied only in situations involving constructive possession under color of title in adverse possession,\footnote{192 10 Thompson on Real Property, supra note 1, § 87.15, at 178.} it may be appropriate in limiting the scope of prescriptive easements.\footnote{193 See Helmholz, supra note 53, at 332.} A good faith requirement would serve to identify the truly “innocent” land users who, due to no fault of their own, are deserving of a prescriptive easement.\footnote{194 See id.} In situations of comprehensive prescriptive easements—where rights of use are the equivalent to possession—a good faith requirement would prevent the granting of de facto possession to someone other than the well-intentioned user.\footnote{195 See Raab v. Casper, 124 Cal. Rptr. 590, 596–97 (Ct. App. 1975); Helmholz, supra note 53, at 332.} Only those users who believed their use was one of right and not trespass would be worthy of an all-encompassing grant of near possession.\footnote{196 See Raab, 124 Cal. Rptr. at 596–97; Helmholz, supra note 53, at 332.} In other words, the good faith requirement would accomplish two functions: eliminate many of the claims for comprehensive prescriptive easements and reward those very easements to only the most deserving and innocent claimants.\footnote{197 See Helmholz, supra note 53, at 332.}

Certainly, the good faith requirement has substantial drawbacks.\footnote{198 See Olson, supra note 52, at 1316, 1321.} A good faith requirement for adverse possession or prescrip-
tion may undermine the public policy principles behind the doctrines themselves.  

For example, by impeding prescription, the good faith requirement does not always promote the quieting of title, nor would it always reward the productive use of land.  

The most pressing concern is that the good faith requirement would saddle the courts with the burdensome task of determining the subjective intent of the land user.  

In comparison to the severe consequences suffered by the servient estate holder in comprehensive prescriptive easement cases, the added judicial burden is warranted.  

A more moderate solution is to apply the good faith requirement only to situations involving potential comprehensive prescriptive easements.  

If this tactic is adopted, critics’ concerns of a cumbersome judicial workload would be nullified since the problem is so uncommon that the seldom-encountered burden would not cripple the courts.  

Thus, despite doctrinal and practical concerns, the good faith requirement—or at least the court’s ability to consider intent in a balancing of the equities—may be enough to compensate for the destructive effects of comprehensive prescriptive easements.

2. Presumption of Permissive Use

Another remedy to the dilemma posed by comprehensive prescriptive easements is a presumption of permissive use.  

By mandating a presumption of permissive use when evaluating claims of prescription, those seeking easements will face a tougher evidentiary standard.  

To establish a prescriptive easement, a claimant must prove that the use was adverse to that of the true owner, forming a

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199 Id. at 1321.
200 Id. at 1298. However, recall that some public policy foundations for adverse possession and prescription—such as promoting the development of land—are no longer valid. See supra note 21.
201 See Olson, supra note 52, at 1316.
202 See Raab v. Casper, 124 Cal. Rptr. 590, 596–97 (Ct. App. 1975); Olson, supra note 52, at 1316.
203 See Raab, 124 Cal. Rptr. at 596–97; Olson, supra note 52, at 1316, 1321.
204 See Raab, 124 Cal. Rptr. at 596–97; Olson, supra note 52, at 1316.
206 See Restatement (Third) of Prop.: Servitudes § 2.16 cmt. g; see also, e.g., Slick, 326 S.E.2d at 610–11 (“There must be some evidence accompanying the user which tends to show that the use is hostile in character and tends to repel the inference that it is permissive and with the owner’s consent . . . .” (quoting Dickinson, 201 S.E.2d at 900) (alteration in original)).
claim of right.\textsuperscript{207} When a presumption of permission exists, the claimant must overcome this presumption by presenting evidence that the use was actually adverse to the will of the owner.\textsuperscript{208} As with the requirement for good faith use, the presumption of permission would hinder many of those claiming comprehensive prescriptive easements.\textsuperscript{209} Only those users who could furnish evidence that their use was truly inconsistent with the wishes of the owner would succeed.\textsuperscript{210} Thus, like the good faith requirement, the presumption of permission would enable courts to discard many less compelling claims of adversity while rewarding only worthy parties that demonstrate a use adverse enough to overcome the evidentiary burden.\textsuperscript{211} Furthermore, a presumption of permissive use comports with the view “that Americans are both neighborly and litigious” and therefore would have objected to any unauthorized use of their land.\textsuperscript{212} Lastly, unlike the good faith requirement’s query of subjective intent, the presumption of permission presents no additional burden to the court.\textsuperscript{213} In fact, a presumption of permission may reduce the workload of courts by reducing the need to determine whether an owner has consented to the use in question.\textsuperscript{214} Nevertheless, a presumption of adverse use does advance several public policy objectives.\textsuperscript{215} For example, a presumption of adverse use—and its facilitation of prescription—is conducive to rewarding the productive use of land.\textsuperscript{216} However, as long as courts strictly enforce the open and continuous requirements, a presumption of adversity is not necessary because visible and prolonged use will be noticed and acted upon by the dutiful owner regardless of the presumption.\textsuperscript{217} Conversely, the problem of comprehensive prescriptive easements—and its

\textsuperscript{208} Slick, 326 S.E.2d at 610–11.
\textsuperscript{209} See id. (quoting Dickinson, 201 S.E.2d at 900); Restatement (Third) of Prop.: Servitudes § 2.16 cmt. g.
\textsuperscript{210} See Slick, 326 S.E.2d at 610–11 (quoting Dickinson, 201 S.E.2d at 900); Restatement (Third) of Prop.: Servitudes § 2.16 cmt. g.
\textsuperscript{211} See Slick, 326 S.E.2d at 610–11 (quoting Dickinson, at 900); Restatement (Third) of Prop.: Servitudes § 2.16 cmt. g.
\textsuperscript{212} Restatement (Third) of Prop.: Servitudes § 2.16 cmt. g.
\textsuperscript{213} See Olson, supra note 52, at 1316 (explaining the burden imposed by a good faith requirement).
\textsuperscript{215} Restatement (Third) of Prop.: Servitudes § 2.16 cmt. g.
\textsuperscript{216} See id. Once again, one should consider the argument that encouraging the productive use of land and development in general is no longer a valid public policy objective. See supra note 21.
reward of de facto possession—would be alleviated by the courts establishing a presumption of permissive use, or at the very least, aggressively seeking indications of consent from ownership.  

B. Softening the Impact of Comprehensive Prescriptive Easements: The Argument for Compensation

Both adverse possession and prescriptive easements reward the productive use of land by providing the possessor or user with a solidified property right. Traditionally, nothing within the law of either doctrine provides for the awarding of compensation to the aggrieved land owner. Thus, both adverse possession and prescriptive easements often produce clear winners and losers. While there are certainly strong arguments that compensation should not apply to the average prescriptive easement, this may change when the easement represents a use so comprehensive that it awards de facto possession.

Warsaw v. Chicago Metallic Ceilings, Inc. discusses the argument for compensation in prescriptive easement cases. In affirming the establishment of a prescriptive easement, the Supreme Court of California then addresses the question of whether the land owner was entitled to compensation for the cost of relocating his building to accommodate the easement. In denying compensation, the court found that there was “no basis in law or equity” for requiring the holder of an easement to compensate the owner of the servient property. The foundation for the court’s denial of compensation was two basic tenets of the doctrine of prescriptive easements: to reduce litigation in land disputes and to provide stability to individual prop-

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218 See West v. Slick, 326 S.E.2d 601, 610–11 (N.C. 1985); Chaconas, 465 A.2d at 383; Raab v. Casper, 124 Cal. Rptr. 590, 596–97 (Ct. App. 1975); Restatement (Third) of Prop.: Servitudes § 2.16 cmt. g.

219 See 7 Thompson on Real Property, supra note 1, § 60.03(b) (6) (i), at 435.

220 Singer, supra note 92, at 669–70. However, when the government is the successful party in an adverse possession or prescriptive easement claim, compensation should be required through a “takings” analysis. Kimberly A. Selemba, Comment, The Interplay Between Property Law and Constitutional Law: How the Government (Un)constitutionally “Takes” Land Dirt Cheap, 108 Penn St. L. Rev. 657, 667 (2003).

221 See Singer, supra note 92, at 669–70.

222 See Warsaw v. Chi. Metallic Ceilings, Inc., 676 P.2d 584, 590 (Cal. 1984); Raab, 124 Cal. Rptr. at 596–97. Certainly, similar arguments for and against compensation can be made in cases of adverse possession. However, this Note focuses solely on the applicability of compensation for comprehensive prescriptive easements.

223 See 676 P.2d at 594 (Reynoso, J., dissenting).

224 Id. at 590 (majority opinion).

225 Id.
Thus, the court was reluctant to overturn prescriptive easement jurisprudence by mandating compensation for the use of property.

However, the principle of compensation for prescriptive easements may be more appropriate when, unlike Warsaw, the use in question is comprehensive, nearing full possession of the entire property. In Warsaw, there was no indication that the establishment of the prescriptive easement left the defendant’s property with no alternative commercial use. However, had the easement consumed nearly the entire parcel and resulted in a loss of much of the property’s commercial value—resembling a comprehensive prescriptive easement—valid arguments for mitigation would exist.

In its decision to deny compensation for the easement, the Warsaw court may have incorrectly relied on the underlying principles behind the doctrine of prescriptive easements—to reduce litigation and stabilize property rights. In his dissenting opinion, Justice Reynoso offers support for mitigation because contrary to the goal of reducing litigation, the doctrine of prescriptive easements actually increases litigation by forcing land owners to bring suit when a trespass has occurred. Thus, mitigation can soften the blow suffered by the title holder and reduce further litigation as owners of servient estates are less likely to contest prescriptive easements once compensated. Furthermore, providing compensation would be unlikely to increase

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226 *Id.* The court also emphasized the importance of the fact that the defendants acted with knowledge of the plaintiffs’ continued use of that portion of the property: “[P]laintiffs should not be required to contribute to the cost of relocating encroaching structures which were erected by defendant with full knowledge of plaintiffs’ claim.” *Id.* at 591.

227 See *id.* at 591.


229 See 676 P.2d at 586–87.


231 See 676 P.2d at 590.

232 *Id.* at 594 (Reynoso, J., dissenting) (“First, no litigation was reduced. Society should not be in the business of forcing an owner of land to bring suit when a trespass has occurred. Such a policy increases litigation.”).

233 See *id.*; Cordle, *supra* note 92, at 119.

Compensation would have lessened the reward and punishment aspects in this case, ameliorated [defendant’s] loss and merely required [plaintiff] to pay for its newly acquired property right. If, as the supreme court contends, reward and punishment are not the goals of prescription, it follows that compensation is not only permissible, but appropriate.
litigation because easement disputes are based upon a conflict in property use with compensation only being an afterthought.\textsuperscript{234}

Contrary to the beliefs of the \textit{Warsaw} majority, ordering compensation for an easement would not create instability in property because the newly acquired rights of the easement holder would not be weakened; rather, the holder would merely be required to compensate the title holder.\textsuperscript{235} In his dissent, Justice Reynoso further states that the traditional formation of prescriptive easements may be outdated: “modern society evidences a preference for planned use, not the ad hoc use of a trespasser. It is questionable that in the urban setting of the case at bench, such use by the trespasser is preferred by society.”\textsuperscript{236} This analysis comports with that of other scholars who have suggested that adverse possession—and perhaps also prescription—might be obsolete because of its impact on the environment through encouraging development.\textsuperscript{237}

Compensation for comprehensive prescriptive easements also appears to be a reasonable method of mitigation because it is based on equity.\textsuperscript{238} In \textit{Warsaw}, the Supreme Court of California acknowledged that prescription theory may be outdated, but failed to apply its powers of equity.\textsuperscript{239} However, prior California decisions provided compelling arguments for the application of equity: (1) equity allows for the court to adapt to each case and the new rights and wrongs that arise from it;\textsuperscript{240} (2) equity can be applied without a foundation in

\textsuperscript{234} See Cordle, \textit{supra} note 92, at 119 (“Perhaps the common law rule precluding liability should be reconsidered in light of the maxim, ‘[w]hen the reason of a rule ceases, so should the rule itself.’” (quoting \textsc{Cal. Civ. Code} § 3510 (West 1982))).

\textsuperscript{235} See \textit{Warsaw}, 676 P.2d at 594 (Reynoso, J., dissenting) (“[T]he possession of the easement has in fact been protected; plaintiffs are only required to pay for the easement.”).

\textsuperscript{236} \textit{Id}.

\textsuperscript{237} See \textit{supra} note 21.

\textsuperscript{238} See \textit{Warsaw}, 676 P.2d at 592–93 (Reynoso, J., dissenting); Cordle, \textit{supra} note 92, at 120.

\textsuperscript{239} \textit{Warsaw}, 676 P.2d at 590.

\textsuperscript{240} \textit{In re Estate of Vargas}, 111 Cal. Rptr. 779, 781 (Ct. App. 1974) (“Equity acts ‘in order to meet the requirements of every case, and to satisfy the needs of a progressive social condition, in which new primary rights and duties are constantly arising, and new kinds of wrongs are constantly committed.’” (quoting \textsc{Wuest v. Wuest}, 127 P.2d 934, 937 (Cal. Dist. Ct. App. 1942))); Cordle, \textit{supra} note 92, at 120–21.
precedent;\textsuperscript{241} and (3) equity provides the court with flexibility in dealing with novel claims.\textsuperscript{242}

Thus, while compensating for comprehensive prescriptive easements may be a novel pursuit and stands opposed to centuries of jurisprudence, it appears to be a reasonable method of mitigation.\textsuperscript{243} Compensation would preserve the underlying principles behind prescription while potentially adapting to modern concerns such as environmentally sound land use.\textsuperscript{244} In addition, application of equity would allow for just compensation that adequately balances the rights and the wrongs of both parties in comprehensive prescriptive easement cases.\textsuperscript{245}

\section*{Conclusion}

Adverse possession and prescriptive easements serve to settle land disputes through the redistribution of property rights. A thorough evaluation of their respective requirements reveals many similarities. However, only adverse possession—with the greater evidentiary burden of proving possession—results in a complete transfer of title. Yet, while intended to grant a mere right of use similar to any other easement, the comprehensive prescriptive easement establishes a right of use so vast and encompassing that it awards de facto possession. This new property right is troubling because a comprehensive prescriptive easement rewards the successful claimant with a right of near possession without the application of the more stringent requirements of adverse possession.

Two relatively subtle alterations to the adversity requirement of prescription will lessen the dilemma of comprehensive prescriptive easements. First, rather than being forced to reward trespass, the universal adoption of a good faith requirement will enable courts to grant prescriptive easements to only the “innocent” land users. Sec-

\textsuperscript{241} Times-Mirror Co. v. Superior Court, 44 P.2d 547, 557 (Cal. 1935) (“Equity does not wait upon precedent which exactly squares with the facts in controversy, but will assert itself in those situations where right and justice would be defeated but for its intervention.”); Cordle, \textit{supra} note 92, at 120–21.

\textsuperscript{242} MacFarlane v. Peters, 163 Cal. Rptr. 655, 657 (Ct. App. 1980) (“While sitting in its equitable capacity, a court may avail itself of powers broad, flexible and capable of being expanded to deal with novel cases and conditions.” (citing S. Pac. Co. v. Robinson, 64 P. 572, 573 (Cal. 1901))); Cordle, \textit{supra} note 92, at 120–21.

\textsuperscript{243} \textit{See} Warsaw, 676 P.2d at 594 (Reynoso, J., dissenting).

\textsuperscript{244} \textit{See id.; supra} note 21.

\textsuperscript{245} \textit{See} Warsaw, 676 P.2d at 592–93 (Reynoso, J., dissenting); Cordle, \textit{supra} note 92, at 120–21.
ond, a presumption of permissive use will ensure that the courts award property rights to only the worthy users of land who can prove their use was against the will of the owner. By impeding the process of proving adversity, these two modifications will allow the granting of comprehensive prescriptive easements—and easements in general—to only those parties worthy of gaining a significant new property right.

Finally, once a court grants a comprehensive prescriptive easement, compensating the aggrieved landowner serves as a fair and equitable method for mitigation. While certainly a radical concept within the doctrines of both adverse possession and prescription, compensation for only comprehensive prescriptive easements represents a fair solution that acknowledges the property rights of both parties.

Thus, the adaptations discussed above represent both subtle and radical methods in dealing with the challenge posed by comprehensive prescriptive easements. An assessment of these alternatives reveals both strengths and limitations regarding public policy and practical concerns. At the very least, this examination of comprehensive prescriptive easements may prove useful in forcing courts to acknowledge the inequity of awarding a right of de facto possession while requiring only proof of prescriptive use.
MANUFACTURED NANOMATERIALS: AVOIDING TSCA AND OSHA VIOLATIONS FOR POTENTIALLY HAZARDOUS SUBSTANCES

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Abstract: Public and private spending on nanotechnology research and development continues to increase. At the same time, government agencies around the world are spending millions to assess the potential risks to nanotechnology workers, the public, and the environment. However, innovative and opportunistic manufacturers are not waiting for test results before forging ahead. This Note focuses on the obligation of such manufacturers under the Toxic Substances Control Act (TSCA) to report and/or test nanomaterials for their effects on health, safety, and the environment prior to their release into the stream of commerce. In addition, this Note addresses the duty of manufacturers to protect workers from recognized hazards under the Occupational Safety and Health Act of 1970 (OSH Act).

Introduction

According to the 21st Century Nanotechnology Research and Development Act (Nanotechnology Act), “‘nanotechnology’ means the science and technology that will enable one to understand, measure, manipulate, and manufacture at the atomic, molecular, and supramolecular levels, aimed at creating materials, devices, and systems with fundamentally new molecular organization, properties, and functions.”1 As this definition implies, nanotechnology research and development aims to exploit potentially valuable differences in the physical properties of nanomaterials as compared to their “normalized” bulk-material counterparts.2

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The United States government has been investing aggressively in nanotechnology for some time, spending $982 million on research and development in fiscal year 2005 alone. Several states are seeking to attract a slice of the $3.8 billion that corporations spent on nanotechnology research and development worldwide in 2004.

Amidst all this promise and optimism, however, are growing concerns that the health, safety, and environmental risks of nanomaterials are poorly understood. Preliminary studies of carbon nanotube toxicity, for example, proved quite alarming. The issue drew enough attention in 2004 for *Science Magazine* to name nanotechnology health and environmental regulation as one of seven scientific “Areas to Watch in 2005.”

The most extreme reaction to the perceived risks—short of an outright permanent ban—would be for the government to institute a moratorium on nanotechnology manufacturing until the risks are better understood. More likely, the government will have to apply or adapt existing environmental laws and regulations to meet the chal-

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5 See generally Vicki L. Colvin, *The Potential Environmental Impact of Engineered Nanomaterials*, 21 NATURE BIOTECHNOLOGY 1166 (2003) (outlining potential health, safety, and environmental risks). Dave Kriebel, an epidemiologist at the University of Massachusetts at Lowell, has said of nanomaterials, “[t]he key point of concern is, because these particles are so small, they don’t necessarily follow the same toxicologic principles that we understand.” Carolyn Y. Johnson, *One Million Nanotubes Could Fit Into This Period.*, BOSTON GLOBE, Feb. 15, 2005, at C1.
6 See Chiu-Wing Lam et al., *Pulmonary Toxicity of Single-Wall Carbon Nanotubes in Mice 7 and 90 Days After Intratracheal Instillation*, 77 TOXICOLOGICAL SCI. 126, 126 (2004), available at http://toxsci.oupjournals.org/cgi/reprint/77/1/126 (finding that, after instilling a suspension of nanotubes directly into the lungs of mice, the nanotubes clumped together and stimulated an immune response that resulted in the scarring of lung tissue).
7 See *Areas to Watch in 2005*, 306 SCI. 2014, 2014 (2004) (“[R]egulators in areas from consumer products, workers’ health, and the environment are grappling with how best to ensure health and safety without stifling what is expected to be a major economic engine.”)
lenge of allowing nanomaterials to be produced without significant harm to humans or the environment.\textsuperscript{9} While the universe of potentially applicable health, safety, and environmental statutes is only as limited as the use of nanomaterials themselves, this Note focuses on the presumed toxic nature of some nanomaterials. This Note also examines some of the federal statutory and regulatory issues that would arise for a typical corporation manufacturing nanomaterials in the near-term.\textsuperscript{10}

Part I of this Note provides an overview of nanotechnology. Parts II and III, respectively, describe federal statutes—the Toxic Substances Control Act (TSCA) and the Occupational Safety and Health Act of 1970 (OSH Act)—which take different approaches to mitigating the risks posed by substances of known and unknown toxicity. Part IV assesses the strengths and deficiencies of each statute as applied to nanomaterial manufacturing, and argues that manufacturers should adopt a precautionary approach to releasing their nanoproducts into the stream of commerce, even if certain regulatory hurdles may be overcome by perfunctory compliance with the letter of the law.

I. Nanotechnology Overview

The prefix “nano” “is derived from the Greek word nanos, meaning ‘dwarf’. A nanometre is one thousand millionth of a metre or, in other words, one millimetre equals a million nanometres.”\textsuperscript{11} For purposes of comparison, a flea is about 1 million nanometers (nm); a red blood cell is seven thousand nm; a bacterium is one thousand nm;

\begin{itemize}
  \item \textsuperscript{10} Approximately 80% of the companies pursuing nanotechnology are start-ups. See Global Investment in Nanotechnology by Nations to Rise, supra note 4. This Note is not concerned with so-called molecular nanotechnology (MNT), defined as the “purposeful manipulation of molecules and atoms to construct devices and machines.” Jason Wejnert, Note, Regulatory Mechanisms for Molecular Nanotechnology, 44 Jurimetrics J. 323, 325 (2004). MNT is generally considered to be in the “workbench or proof-of-concept” stage, as opposed to anything likely to be mass-produced anytime soon. Glenn Harlan Reynolds, Nanotechnology and Regulatory Policy: Three Futures, 17 Harv. J.L. & Tech. 179, 180 (2003); see also Paul C. Lin-Easton, Note, It’s Time for Environmentalists to Think Small—Real Small: A Call for the Involvement of Environmental Lawyers in Developing Precautionary Policies for Molecular Nanotechnology, 14 Geo. Int’l Envtl. L. Rev. 107, 109 (2001) (describing the current state of MNT as comparable to “computer and information technology in the 1950s”).
\end{itemize}
and a ball-shaped virus is between sixty and one hundred nm.\textsuperscript{12} Scientists reserve the “nano” prefix for materials that range in size from about 0.2 nm—the atomic level—to about 100 nm, because that range is where different or enhanced properties may be observed.\textsuperscript{13} As experts from the United Kingdom’s Royal Society and Royal Academy of Engineering explain:

The properties of materials can be different at the nanoscale for two main reasons. First, nanomaterials have a relatively larger surface area when compared to the same mass of material produced in a larger form. This can make materials more chemically reactive (in some cases materials that are inert in their larger form are reactive when produced in their nanoscale form), and affect their strength or electrical properties. Second, quantum effects can begin to dominate the behaviour of matter at the nanoscale—particularly at the lower end—affecting the optical, electrical and magnetic behaviour of materials.\textsuperscript{14}

Attempting to understand and exploit properties inherent in nanomaterials is in some sense not new.\textsuperscript{15} “Nanoparticles occur naturally, and have been created for [millennia] . . . as the products of combustion and food cooking.”\textsuperscript{16} Chemists have been making polymers, composed of chains of nanoparticles, for decades.\textsuperscript{17} What has

\textsuperscript{12} Id. One of the more well-known engineered nanoparticles, Carbon 60—also known as a “buckyball”—provides another perspective: “[T]he world is approximately one hundred million times larger than [a soccer ball], which is in turn one hundred million times larger than a buckyball.” THE ROYAL SOC’Y & THE ROYAL ACAD. OF ENG’G, NANOSCIENCE AND NANOTECHNOLOGIES: OPPORTUNITIES AND UNCERTAINTIES 4 (2004), available at http://www.nanotec.org.uk/finalReport.htm [hereinafter ROYAL SOCIETY].

\textsuperscript{13} Id. at vii. The Royal Society goes on to provide a slightly more technical explanation of the reactivity of nanomaterials:

As a particle decreases in size, a greater proportion of atoms are found at the surface compared to those inside. For example, a particle of size 30 nm has 5\% of its atoms on its surface, at 10 nm 20\% of its atoms, and at 3 nm 50\% of its atoms. Thus nanoparticles have a much greater surface area per unit mass compared with larger particles. As growth and catalytic chemical reactions occur at surfaces, this means that a given mass of material in nanoparticulate form will be much more reactive than the same mass of material made up of larger particles.

\textsuperscript{14} Id. at 7 (emphasis added).

\textsuperscript{15} Id. at 5.

\textsuperscript{16} Id. at 6.

\textsuperscript{17} Id. at 5.
changed in recent years is scientists’ ability to investigate, model, and manipulate matter at the nanoscale.\textsuperscript{18} The invention of the scanning tunneling microscope (STM) in 1982, and the atomic force microscope (AFM) in 1986, have enabled scientists to use “nanoscale probes to image a surface with atomic resolution, and [also made scientists] capable of picking up, sliding or dragging atoms or molecules around on surfaces to build rudimentary nanostructures.”\textsuperscript{19} Researchers at all levels of government and academia have used these and other precision tools to investigate a variety of nanostructures, positing and delivering an impressive array of nanotechnology applications.\textsuperscript{20}

A. The Variety of Nanostructures

In addition to exploiting novel properties, scientists aim to understand and make use of subtle structural differences among nanostructures\textsuperscript{21}—differences that can have significant implications for nanomaterial manufacturers and government regulators.\textsuperscript{22} Material properties and behavior differ, for example, depending on whether the nanomaterial is one-, two-, or three-dimensional.\textsuperscript{23} For present purposes, materials of two and three dimensions are of most interest.\textsuperscript{24}

Examples of two-dimensional nanomaterials include nanowires, bipolymers, inorganic nanotubes, and carbon nanotubes (CNTs).\textsuperscript{25} CNTs are extended tubes of rolled graphene sheets that resemble chicken-wire with a unique and promising combination of physical properties.\textsuperscript{26} “With one hundred times the tensile strength of steel, thermal conductivity better than all but the purest diamond, and electrical conductivity similar to copper, but with the ability to carry much

\textsuperscript{18} See id. at 6.
\textsuperscript{19} Royal Society, supra note 12, at 6.
\textsuperscript{20} See id. at 8–13 (describing the variety of nanotechnology applications).
\textsuperscript{22} See Royal Society, supra note 12, at 71.
\textsuperscript{23} See id. at 8–10.
\textsuperscript{24} One-dimensional nanomaterials include thin films, layers, and engineered surfaces which are already widely used in fields such as electronic device manufacturing, chemistry, and engineering. Royal Society, supra note 12, at 8.
\textsuperscript{25} See id. at 9.
\textsuperscript{26} See id. at 8 fig.3.1a. There are two basic types of carbon nanotubes: single-walled, which consist of one tube, and multi-walled, which consist of several concentric tubes. See id. at 8.
higher currents, they seem to be a wonder material." Predictions for the global impact of this nanomaterial from CNT enthusiasts are nothing short of grandiose. For example, some computer memory chip manufacturers are working with CNTs “to deliver a product that will replace all existing forms of memory, such as DRAM, SRAM and flash memory, . . . [and] to enable instant-on computers and to replace the memory in devices such as cell phones, MP3 players, digital cameras, and PDAs . . . .” Some are less enthusiastic about the prospects for CNTs, however, preferring to work with silicon nanowires, which are similar to CNTs but are easier to manufacture, and other more typical semiconductor materials.

The third category of nanomaterials is made up of spherical, three-dimensional “nanoparticles.” Technically, nanoparticles have always existed as natural byproducts of photochemical and volcanic activity. Moreover, humans have been inhaling nanoparticles ever since they began cooking food, and more recently have been breathing in nanopollutants from vehicle exhaust. This Note, however, is concerned only with deliberately manufactured nanoparticles, the human health and safety of which remains an open question.

27 Científica, Nanotubes 12 (2004) (on file with author). As the Científica report notes, “[t]otal global production capacity of multi-walled nanotubes is higher than 99 tons a year and [is] expected to increase to at least 268 tons annually by 2007.” Id. at 9. Global production of single-walled nanotubes is currently estimated at 9000 kilograms per year, and should increase to approximately 27 tons by 2005, and 100 tons by 2008. Id.

28 The executive summary of the Científica report concludes: “Despite an inevitable element of hype, the versatility of nanotubes does suggest that they might one day rank as one of the most important materials ever discovered.” Científica, supra note 27, at 19. Although such claims are premature, CNT already are proving quite versatile. See Nanotechnology Kills Cancer Cells, BBC News, Aug. 2, 2005, http://news.bbc.co.uk/1/hi/health/4734507.stm (reporting how Stanford University researchers recently used coated CNTs to kill cancer cells under laboratory conditions, without harm to surrounding tissue).


31 See EC Risk Assessment, supra note 21, at 18 (discussing distinctions among nanoparticles).

32 Royal Society, supra note 12, at 9.

33 Id.; see Todd Campbell et al., Diesel-Electric Hybrid Buses: Addressing the Technical and Public Health Issues, NATURAL RES. DEF. COUNCIL, Apr. 1999, http://www.nrdc.org/air/transportation/pd-ebus.asp. There is evidence that efforts aimed at reducing larger particulate matter from diesel engines have actually increased the number of harmful ultrafine and nanoparticles in the air, defined as less than 0.1 microns and 0.05 microns in diameter respectively. Id.
One such deliberately manufactured nanoparticle is Carbon 60, also known as buckminsterfullerene or a “buckyball.”\textsuperscript{34} “These are spherical molecules about 1 nm in diameter, comprising 60 carbon atoms arranged as 20 hexagons and 12 pentagons: the configuration of a [soccer ball].”\textsuperscript{35} Research for buckyballs and other “fullerenes” is focused on surface lubrication, drug delivery, and electronic circuit applications.\textsuperscript{36}

Nanoparticles may be \textit{fixed} or \textit{free}, and \textit{coated} or \textit{uncoated}.\textsuperscript{37} Fixed nanoparticles “are embedded in a matrix and cannot move.”\textsuperscript{38} Free nanoparticles, as their name implies, can disperse widely in the environment, and, in some cases, enter living organisms—including humans—and bioaccumulate in tissues and organs.\textsuperscript{39} Coated nanoparticles remain inert for as long as their coating lasts, and thus tend to persist longer in the environment or in the human body than uncoated nanoparticles.\textsuperscript{40} Coated nanoparticles also present classification difficulties for health, safety, and environmental regulators, as the addition of coating to nanoparticles could cause them to behave in novel ways, rendering regulations developed for the original nanoparticles of little use.\textsuperscript{41}

\textbf{B. Current and Future Nanomaterial Applications}

A brief survey of the many uses of nanomaterials should serve to bolster claims that nanotechnology will be “at the heart of America’s ‘next industrial revolution.’”\textsuperscript{42} Current and future uses cut across sev-

\begin{itemize}
\item \textsuperscript{34} See \textbf{Royal Society}, \textit{supra} note 12, at 4, 9–10.
\item \textsuperscript{35} \textit{Id.}
\item \textsuperscript{36} \textit{Id.} at 10. Dendrimers comprise another class of popular deliberately manufactured nanoparticles, defined as “spherical polymeric molecules, formed through a nanoscale hierarchical self-assembly process.” \textit{Id.} Like buckyballs, dendrimers might be used as drug-delivery vehicles in the future, but current applications include use in chemical coatings and inks. \textit{See id.} Of particular interest to environmentalists is some dendrimers’ ability to trap metal ions, which could then be filtered out of contaminated water using ultrafiltration techniques. \textit{Id.}
\item \textsuperscript{37} See \textbf{EC Risk Assessment}, \textit{supra} note 21, at 18.
\item \textsuperscript{38} \textit{Id.} Nanosized transistors, for example, can form part of a millimeter-sized chip and therefore be “fixed.” \textbf{Royal Society}, \textit{supra} note 12, at 35; \textit{see also} \textbf{Infineon Shrinks Transistors with Nanotubes}, \textit{Small Times}, Nov. 23, 2004, http://www.smalltimes.com/document_display.cfm?section_id=29&document_id=8452 [hereinafter \textit{Infineon}] (describing one such CNT-based transistor).
\item \textsuperscript{39} \textbf{EC Risk Assessment}, \textit{supra} note 21, at 18.
\item \textsuperscript{40} \textit{See id.}
\item \textsuperscript{41} \textit{See Hett}, \textit{supra} note 11, at 37.
\end{itemize}
eral disciplines, and include: sunscreens and cosmetics, composites, clays, coatings and surfaces, cutting tools, paints, environmental remediation tools, fuel cells, electronic displays, batteries, semiconductors, fuel additives, chemical catalysts, lubricants, magnetic materials, medical implants, water purification, and military battle suits. This list is by no means comprehensive. As Horst Stormer, Nobel Laureate in Physics, has observed, “‘[n]anotechnology has given us the tools to play with the ultimate toy box of nature: atoms and molecules’ . . . . ‘Everything is made from these, and the possibilities to create new things seem limitless.’” This fact has not been lost on the international community, prompting another physics professor to remark, “‘[e]very nation in the world is looking at nanotechnology as a

43 See Royal Society, supra note 12, at 10–13 (describing current and potential applications of nanomaterials).

44 Nanosized titanium dioxide is currently used in some commercial sunscreens, as these materials are transparent but still absorb and reflect ultraviolet light. Id. at 10; see Jayne Fried, DuPont Buys IP for Nanomaterial Seen as Hot in Cosmetics, Coatings, SMALL TIMES, July 17, 2002, http://www.smalltimes.com/document_display.cfm?section_id=51&document_id=4173. Nanosized iron oxide, on the other hand, has properties that enable it to be used as a pigment in some lipsticks. Royal Society, supra note 12, at 10.

45 One type of nanocomposite incorporates multi-walled CNTs to control conductivity in anti-static packaging. Royal Society, supra note 12, at 10.

46 Nanoengineered titanium dioxide has also been used as a coating for a self-cleaning window that reduces surface tension such that waterdrops roll off so quickly that they take any dust and foreign particles with them. Id. at 10; see Hett, supra note 11, at 34. Researchers have also applied this concept, using silver nanoparticles, to create self-cleaning clothes. See John K. Borchardt, Now, the Ever-Clean Suit, CHRISTIAN SCI. MONITOR, Jan. 13, 2005, at 17.

47 Several researchers have tried pumping reactive nanoparticles into soil to transform heavy pollutants—such as organic solvents or heavy metals—into less harmful substances by means of a chemical reaction. Royal Society, supra note 12, at 11; see Hett, supra note 11, at 27.

48 See Infineon, supra note 38 (“Infineon Technologies AG . . . has created what it’s calling the world’s smallest carbon nanotube-based transistor, another step on the road to seeking a replacement to silicon in microelectronic devices.”).

49 Silver nanoparticles with an antibacterial effect are being tested to determine if they can effectively decontaminate drinking water. Hett, supra note 11, at 27; Royal Society, supra note 12, at 12–13.


future technology that will drive its competitive position in the world economy.”

C. Government and Private Investment in Nanotechnology

The United States government has been investing heavily in nanotechnology research and development for some time, sprouting something of a large nano-bureaucracy along the way. The National Nanotechnology Initiative (NNI) was established in 2001 to coordinate nanotechnology research and development throughout the federal government. In December 2003, Congress passed the 21st Century Nanotechnology Research and Development Act, which formalized the preexisting bureaucratic arrangement under the less formal NNI, established research centers, and appropriated the necessary funds. The Nanoscale Science, Engineering and Technology (NSET) Subcommittee of the National Science and Technology Council’s Committee on Technology is responsible for coordinating the research programs. The National Nanotechnology Coordination Office provides day-to-day technical and administrative support for NSET activity. In the first year of NNI, investment totaled $464 million for six agencies. In fiscal year 2006, eleven agencies are now involved and the funding request has increased to $1.054 billion.

52 Hett, supra note 11, at 6 (quoting Neal Lane, Professor of Physics, Rice University).
54 Roco, supra note 4, at 1; see Nat’l Nanotechnology Initiative, supra note 53. Participating agencies include: the Consumer Product Safety Commission; the Departments of Agriculture, Commerce, Defense, Energy, Homeland Security, Justice, State, Transportation, and Treasury; the National Institutes of Health; Centers for Disease Control and Prevention; the National Institute for Occupational Safety and Health; the Environmental Protection Agency; the Food and Drug Administration; the Intelligence Community; the International Trade Commission; the National Aeronautics and Space Administration; the National Science Foundation; the Nuclear Regulatory Commission; and the Patent and Trademark Office. Nat’l Nanotechnology Initiative, Government Departments and Agencies, http://www.nano.gov/html/gov/home_gov.html (last visited Oct. 27, 2005).
56 See Nat’l Nanotechnology Initiative, supra note 53.
57 Id.
58 NNI STRATEGIC PLAN, supra note 2, at iii.
Not to be outdone, the race is on at the state level to pass favorable legislation\textsuperscript{60} and otherwise to compete to become centers of nanotechnology research and manufacturing.\textsuperscript{61} For example, in early 2005, New York Governor George Pataki announced that over $2.7 billion in private funds had been committed to support semiconductor and nanotechnology research and development in New York State, while Texas Governor Rick Parry unveiled his state’s Nanotechnology Workforce Development Initiative, backed by a $500,000 grant.\textsuperscript{62}

Amidst the fervid interest in nanotechnology, however, are legitimate concerns about the safety of nanomaterials.\textsuperscript{63} The United Kingdom’s Royal Society recommended “that factories and research laboratories treat manufactured nanoparticles and nanotubes as if they were hazardous . . . [and] that the use of free . . . manufactured nanoparticles in environmental applications such as remediation be prohibited until appropriate research has been undertaken.”\textsuperscript{64} A closer look at the science that influenced this conclusion tends to support this precautionary approach.

D. Possible Adverse Health, Safety, and Environmental Impacts of Nanomaterials

Human contact with manufactured nanomaterials may occur in various ways, including skin absorption, inhalation, and ingestion.\textsuperscript{65} For physical harm to occur, a nanomaterial must not only contact or enter the body, but also interact with cells, causing tissue-damaging reactions.\textsuperscript{66} For risk underwriters,
[a] distinction is made as to whether a substance remains outside the body, remains on the surface of the skin or gains access to the body and gets into the bloodstream. Special attention is paid to particularly vulnerable organs such as the brain because foreign substances that are able to penetrate into such sensitive areas are considered to be particularly exposed to product liability.67

1. Skin Absorption

“The top layer of skin consists of calloused cells without blood supply,” which constitutes a semi-permeable barrier.68 Preliminary studies have not settled the question of whether nanoparticles can pass through the skin’s layers and into the bloodstream.69 Nanosized titanium dioxide, currently used in sunscreen, was declared safe for use as an ultraviolet filter by a European safety agency.70 The United States Food and Drug Administration came to a similar conclusion for “micronized”—less than two hundred nm—titanium dioxide in 1999.71 But these two tentative endorsements of one nanosubstance used in cosmetics hardly amounts to conclusive proof that nanoparticles are not capable of being absorbed through the skin, and there have been calls for additional research.72

2. Inhalation

If a nanomaterial is released into the air—in the workplace, for example—it may be inhaled.73 The small size of nanomaterials ensures that inhaling a significant quantity would result in penetration deep into the lung.74 Some studies on laboratory animals have sug-

67 Hett, supra note 11, at 15.
68 Id. at 18.
69 See id.; see also Burt Helm, The Worries over Nano No-Nos, Bus. Week Online, Feb. 23, 2005, http://www.businessweek.com/technology/content/feb2005/tc20050223_6956_tc204.htm (“Scientists fear that if the metallic atoms in these lotions get into the body, they’ll create free radicals and undergo oxidation reactions, literally pulling cells apart in a fashion similar to the way alcohol consumption and cigarette smoking destroy cells.”).
70 Royal Society, supra note 12, at 44.
72 See Royal Society, supra note 12, at 48.
73 Id. at 36.
74 Id. at 42. Nanoparticles are capable of passing through the cell membrane, with the possibility of disrupting key cell functions. Id.
gested that large doses of carbon nanotubes (CNTs) may be irrespirable.\textsuperscript{75} In fact, perceived similarities between CNTs and asbestos fibers have led to concerns about their safety; the Royal Society, for example, has concluded “that there is sufficient concern about possible hazards to those involved in the research and early industrial development of nanotubes to control their exposure.”\textsuperscript{76} Similar concerns have been raised regarding fullerenes, with the most alarming study suggesting that fish may suffer brain damage if exposed to sufficient amounts of fullerenes.\textsuperscript{77} The author of that study warned:

Given the rapid onset of brain lipid peroxidation, it is important from a preventative point of view to further test manufactured nanomaterials before they are used by humans and in industrial applications. If such preventative principles had been applied to compounds such as DDT and polychlorinated biphenyls, significant environmental damage could have been avoided.\textsuperscript{78}

Other researchers share the opinion that precautionary environmental policies ought to be adopted immediately until more is understood about the risks inherent from human contact with nanomaterials.\textsuperscript{79}

\textsuperscript{75} See, e.g., D.B. Warheit et al., \textit{Comparative Pulmonary Toxicity Assessment of Single-Wall Carbon Nanotubes in Rats}, \textit{77 Toxicological Sci.} 117, 117 (2004), available at http://toxisci.oupjournals.org/cgi/content/full/77/1/117. Dr. Warheit’s team instilled single-walled carbon nanotube soot mixture into the trachea of rats, with appropriate control groups included for comparison purposes. \textit{See id.} at 117–18. Fifteen percent of the rats treated with carbon nanotubes suffocated to death within twenty-four hours due to clumping of the nanotubes that obstructed the bronchial passageways. \textit{See id.} at 117. Granulomas and other inflamed-tissue reactions occurred in reaction to the foreign substance. \textit{Id.}

\textsuperscript{76} \textit{Royal Society}, \textit{supra} note 12, at 43. The Royal Society also noted that

\[ \text{[i]t is unlikely that [CNTs] would remain as individual fibres in the air; rather, electrostatic forces probably cause them to clump into masses that are less easily inhaled to the deep lung. However, little is known of their aerodynamic properties and indeed whether they can be present in the air in sufficient numbers to constitute a risk.} \]

\textit{Id.} at 42. The Royal Society concluded, however, that “[g]iven previous experience with asbestos, we believe that nanotubes deserve special toxicological attention.” \textit{Id.} at 43.

\textsuperscript{77} \textit{See generally} Oberdörster, \textit{supra} note 63.

\textsuperscript{78} \textit{Id.} at 1061–62.

\textsuperscript{79} \textit{See EC Risk Assessment}, \textit{supra} note 21, at 107. C. Vyvyan Howard, Head of Research of the Developmental Toxico-Pathology Research Group, unequivocally stated his position:

\[ \text{We are defenceless against the assimilation of nanoparticles by swallowing, inhalation or absorption through the skin. While it is easy to appreciate how this can be harnessed to positive pharmaceutical purposes, there is an urgent need to curb the generation of unnecessary nanoparticles, particularly of the} \]
E. Assessing the Hazard

These safety assessments, which are part of a growing body of research into the health, safety, and environmental impacts of nanomaterials, have captured the attention of NNI. For fiscal year 2006, NNI allocated approximately $81 million for research on the health and environmental aspects of nanoscale materials.\textsuperscript{80} But is that enough to assess the hazards of what the National Science Foundation has estimated could be a trillion-dollar industry by 2015?\textsuperscript{81}

Given the bewildering number of permutations that can occur at the molecular level, no amount may ever be “enough” for risk assessment purposes. Rather, NNI should develop an assessment framework that works reasonably well for most substances. As Dr. Vicki Colvin, Director of the Center for Biological and Environmental Nanotechnology,\textsuperscript{82} has pointed out, “it is far too premature to complete a formal risk assessment for engineered nanomaterials—in fact, it may never be possible with such a broad class of substances.”\textsuperscript{83}

Parts II and III of this Note describe two federal statutes—the Toxic Substances Control Act and the Occupational Safety and Health Act of 1970—which take different approaches to mitigating the risks posed by substances of both known and unknown toxicity.


\textsuperscript{82} Ctr. for Biological and Envtl. Nanotechnology, Center Administration, http://cben.rice.edu/about.cfm?doc_id=5001 (last visited Oct. 27, 2005).

\textsuperscript{83} Colvin, supra note 5, at 1166. Furthermore, Dr. Colvin has also noted that pressing funding managers to focus on potential drawbacks to a trendy technology can be difficult because “‘[t]he immediate payback for research that demonstrates ways of using nanomaterials to cure disease . . . is greater than the reward for uncovering that nanomaterial may cause disease.’” Hett, supra note 11, at 29 (quoting Vicki L. Colvin).
II. The Toxic Substances Control Act

The first policy stated by Congress in the Toxic Substances Control Act (TSCA) is that “adequate data should be developed with respect to the effect of chemical substances and mixtures on health and the environment and that the development of such data should be the responsibility of those who manufacture and those who process such chemical substances and mixtures.”84 But what exactly is a “chemical substance” for TSCA purposes?85

Section 2602(2)(A) provides:

Except as provided in subparagraph (B), the term “chemical substance” means any organic or inorganic substance of a particular molecular identity, including—

(i) any combination of such substances occurring in whole or in part as a result of a chemical reaction or occurring in nature and

(ii) any element or uncombined radical.86

Exactly in accord with congressional intent, this broad definition sweeps in a large number of potentially hazardous substances. In effect, TSCA fills the gap left by other federal environmental statutes, which for the most part do not assess the adverse effects of chemical substances on human health and the environment.87

A. Classification Issues: When Is a Chemical Substance “New”?88

Under section 5(a) of TSCA, anyone who wishes to manufacture or import a “new” chemical substance must file a Premanufacture Notification (PMN) with EPA.88 Specifically, before any new chemical substance is imported or manufactured, or any existing chemical is put to a “significant new use,” PMNs require that EPA be given ninety days notice.89 The burden is on the manufacturer or importer to de-

85 See Wardak, supra note 9, at 3–4.
86 15 U.S.C. § 2602(2)(A). Mixtures, pesticides, tobacco, nuclear materials, and certain food and drugs are among the items exempted from TSCA’s reporting requirements. See id. § 2602 (2)(B).
termine whether or not a substance is new. To determine this, a manufacturer would look first to the TSCA Chemical Substance Inventory (Inventory). The Inventory contains both public and confidential portions; EPA maintains the confidential portion in order to protect proprietary chemical information. If the substance is already listed on the public portion of the Inventory, it is an existing chemical, and the manufacturer is free to begin producing the chemical and has no obligation to submit a PMN pursuant to section 5. If it is not in the public portion of the Inventory, a manufacturer would have to file a Bona Fide Intent to Manufacture with EPA—a process that can take up to thirty days—to determine if the substance is in the confidential portion. Assuming the chemical is not in the Inventory, the manufacturer or importer will have to consider filing a PMN, unless any of a number of statutory exemptions can be invoked.

B. Statutory Exemptions

A number of statutory exemptions to a PMN filing are available. First, exempted completely from TSCA regulation are entire classes of materials that are regulated elsewhere, including: pesticides, tobacco products, nuclear material, firearms and ammunition, food and food additives, drugs and medical devices, and cosmetics. No PMN is required for impurities and by-products without a separate commercial use, nor is a PMN required for “mixtures” that result from combining two chemicals that are already in the Inventory. Other common ex-

90 Griffin, supra note 88, at 11.
91 Id. “There are approximately 75,000 chemical substances, as defined in Section 3 of the TSCA, on the Inventory at this time.” EPA, New Chemicals Program, What Is the TSCA Chemical Substance Inventory?, http://www.epa.gov/opptintr/newchems/inventory.htm (last visited Oct. 20, 2005). Before a chemical would appear in the TSCA Chemical Substance Inventory (Inventory), it probably must be given a Chemical Abstracts Service Registry Number (CASRN). See Wardak, supra note 9, at 10. CASRNs are unique identifying numbers, which are given to virtually every new chemical and are internationally recognized. CAS Registry, http://www.cas.org/EO/egsys.html (last visited Oct. 20, 2005). The Chemical Abstracts Service Registry contains over 26 million organic and inorganic substances and 56 million chemical sequences. Id.
92 See Griffin, supra note 88, at 13.
93 Id.
94 Id. at 13–14.
95 Id. at 14.
96 See Wardak, supra note 9, at 11–12.
98 Griffin, supra note 88, at 15.
emptions include: the Research and Development Exemption (R&D), the Solely-for-Export Exemption, the Low-Volume Exemption, the Low-Release and Exposure Exemption (LoREx), and the Test-Marketing Exemption.99

The R&D and the Test-Marketing exemptions can only be invoked if small quantities of chemicals will be produced.100 R&D activities include synthesis of, or research on, new chemical substances.101 The Low-Volume and LoREx exemptions can only be invoked if the manufacturer intends to produce less than ten thousand kilograms—or about twenty-two thousand pounds—of chemicals per year.102

C. The Premanufacture Notification Process

Assuming the PMN process cannot be circumvented, a chemical manufacturer has a number of potential issues to address.103 TSCA section 5(a) mandates that if a manufacturer is going to produce or import a new chemical, it must notify EPA of its intention to do so ninety days in advance.104 The manufacturer also must provide EPA with “data which the [submitter] . . . believes show[s] that . . . the manufacture, processing, distribution in commerce, use, and disposal of the chemical substance . . . will not present an unreasonable risk of injury to health or the environment.”105 The purpose of submitting a PMN is to give EPA an opportunity to screen the chemical for health and environmental risks.106 If EPA does not use this opportunity to screen the chemicals, the production may go forward despite the lack of testing.107 Most importantly, if a company has no toxicity data for a given chemical, the manufacturer is only required to submit data that already exists elsewhere,108 or may simply rely on information for

99 See Wardak, supra note 9, at 11–12; Lewis & Thunder, supra note 87, at 50.
100 See Griffin, supra note 88, at 15–16.
101 Id. at 16.
102 Id. at 17.
105 Id. § 2604(b) (2)(B).
107 See Applegate et al., supra note 106, at 611.
108 See Griffin, supra note 88, at 23, 28.
chemicals that are structurally analogous to the one being reviewed.\textsuperscript{109}

EPA can also seek to delay production if it finds that additional data is necessary to understand a chemical’s risk-profile.\textsuperscript{110} If in EPA’s estimation the PMN information reveals unreasonable risk, EPA may issue a proposed rule that becomes effective immediately.\textsuperscript{111} EPA may have to go to court to prevent production if it finds that the chemical “may present” an unreasonable risk; however, EPA may act on its own if it finds that the chemical “presents or will present” an unreasonable risk.\textsuperscript{112}

One key advantage to not filing a PMN is that a manufacturer would be exempt from producing or offering studies describing the material’s safety.\textsuperscript{113} If subject to the PMN process, the manufacturer must provide copies of all health and environmental effects test data relating to the substance that are in its possession or control.\textsuperscript{114} The manufacturer must also provide descriptions of all other health and environmental effects data that it knows about or can reasonably ascertain.\textsuperscript{115}

The term “known to or reasonably ascertainable” covers “all information in a person’s possession or control, plus all information that a reasonable person similarly situated might be expected to possess, control, or know.”\textsuperscript{116} The cost and burden to the submitter in obtaining information is considered by EPA in determining whether such information is known or reasonably ascertainable by a manufacturer.\textsuperscript{117} Thus, what is reasonable to a large company with a sizable research budget would not necessarily be reasonable to a small startup.\textsuperscript{118} Regulators have also sought to curb abuse of shell corporation setups by defining “possession or control” to mean “in possession or control of the submitter, or of any subsidiary, partnership . . . [or] parent company.”\textsuperscript{119}

\textsuperscript{109} Id. at 28.
\textsuperscript{110} See 15 U.S.C. § 2604(e).
\textsuperscript{111} See id. § 2605(d).
\textsuperscript{112} Id. § 2604(e)(1)(A), (f); Applegate et al., supra note 106, at 611.
\textsuperscript{113} See 15 U.S.C. § 2604(b); Griffin, supra note 88, at 22.
\textsuperscript{115} Id. § 2604(d)(1)(C).
\textsuperscript{116} Premanufacture Notification, 40 C.F.R. § 720.3(p) (2004).
\textsuperscript{117} Griffin, supra note 88, at 23.
\textsuperscript{118} Id. at 23.
\textsuperscript{119} 40 C.F.R. § 720.3(y).
D. *The Fate of Filed Premanufacture Notifications*

However, despite the ominous statutory language, a closer look at the fate of filed PMNs reveals that being forced to submit a PMN might not be so disagreeable after all. For example, in 1983, the Office of Technology Assessment reported that approximately fifty percent of PMNs included no toxicity information at all, and less than twenty percent provided figures on long-term toxicity.\(^\text{120}\) Three thousand PMNs were filed in 1988; twenty-three hundred in 1995; and fifteen hundred in 1997.\(^\text{121}\) In fiscal year 1987–88, EPA stated that it took no action on ninety percent of PMNs; in 1995, EPA took no action on ninety-eight percent of PMNs.\(^\text{122}\)

E. *The Toxic Substances Control Act Section 8 Reporting Requirements*

Section 8(a) of TSCA requires chemical manufacturers to keep records and make certain reports to EPA.\(^\text{123}\) Section 8(a)(2) specifies that EPA may require reports on a chemical substance containing the substance’s chemical identity, trade name, molecular structure, proposed use, amounts manufactured or processed, resultant by-products, “[a]ll existing data concerning the environmental and health effects of such substance,” the number of persons exposed, and the method of disposal.\(^\text{124}\) In addition, section 8(d) essentially mandates manufacturers, processors, and distributors to provide EPA with access to unpublished studies that EPA would not know about otherwise.\(^\text{125}\)

F. *The Toxic Substances Control Act Section 4 Testing*

In contrast to the screening function of section 5 PMNs, and the information-gathering function of section 8, section 4 allows EPA to require that manufacturers generate new test data in the face of unreasonable risk or substantial human exposure.\(^\text{126}\) After an initial screen of chemical safety based on existing data, if EPA finds that not enough information exists to determine whether a chemical poses an

\(^{120}\) Applegate et al., supra note 106, at 611.

\(^{121}\) Id.

\(^{122}\) Id.


\(^{125}\) Griffin, supra note 88, at 55; see Premanufacture Notification, 40 C.F.R. § 720.3(k)(1).

unreasonable risk, it may list the chemical for testing consideration.\textsuperscript{127} The multi-agency Interagency Testing Committee (ITC) also recommends chemicals for testing through its Priority Testing List (PTL).\textsuperscript{128} If either by its own determination or on recommendation from ITC EPA determines that a chemical needs testing, it may promulgate a formal test rule or enter into a voluntary testing consent agreement with the manufacturer.\textsuperscript{129}

1. When Will EPA Take Action Under the Toxic Substances Control Act Section 4?

Section 4(a)(1)(A) allows EPA to take action if:

(i) [T]he manufacture . . . of a chemical substance . . . may present an unreasonable risk of injury to health or the environment,

(ii) there are insufficient data and experience upon which the effects of such manufacture . . . of such substance . . . on health or the environment can reasonably be determined or predicted, and

(iii) testing of such substance . . . is necessary to develop such data . . . .\textsuperscript{130}

In addition, Congress has enacted the so-called “B-policy” of TSCA testing, which empowers EPA to take action if:

(i) [A] chemical substance or mixture is or will be produced in substantial quantities, and (I) it enters or may reasonably be anticipated to enter the environment in substantial quantities or (II) there is or may be significant or substantial human exposure to such substance or mixture, [and there are insufficient data and a need to develop such data, as in subsection A].\textsuperscript{131}

\textsuperscript{127} \textsc{Griffin}, supra note 88, at 35.

\textsuperscript{128} \textit{See id.} at 36–37; \textit{see, e.g.}, Fifty-Fifth Report of the TSCA Interagency Testing Committee to the Administrator of the Environmental Protection Agency, 70 Fed. Reg. 7364, 7366 (Feb. 11, 2005); Fifty-Fourth Report of the TSCA Interagency Testing Committee to the Administrator of the Environmental Protection Agency, 69 Fed. Reg. 33,528, 33,530 (June 15, 2004). The list may not exceed fifty chemicals at one time, which arguably limits the PTL’s effectiveness and shortens the list of chemicals under serious scrutiny. \textit{See} 15 U.S.C. § 2603(e)(1)(A).

\textsuperscript{129} \textsc{Griffin}, supra note 88, at 35.


\textsuperscript{131} \textit{Id.} § 2603(a)(1)(B).
Both the courts and EPA have struggled to define the basis for an “unreasonable risk” to health, to the indisputable detriment of the TSCA testing regime.

2. Defining “Unreasonable Risk” and “Substantial and Significant Exposure”

The D.C. Circuit Court of Appeals in Chemical Manufacturers Ass’n v. EPA interpreted TSCA to hold EPA to less than the common law’s “preponderance of evidence” test in finding an unreasonable risk under section 4(a)(1)(A)—what the court called a “more-than-theoretical basis” for finding an unreasonable risk.132 As for substantial and significant exposure, in a Fifth Circuit Court of Appeals decision concerning a test rule on the chemical cumene, the court struggled to understand what EPA meant by “substantial” exposure.133 For example, the court analyzed EPA’s stated rationale for when it will make the required findings under subsections A and B of section 4(a)(1) by examining the following language from EPA’s Federal Register notice for a proposed test rule on Chloromethane and Chlorinated Benzenes:

“While there is a need to show a potential for exposure in order to make a Section 4(a)(1)(A) finding, the exposure threshold is much lower than that under Section 4(a)(1)(B). This is because the former . . . finding was intended to focus on those instances where EPA has a scientific basis for suspecting potential toxicity and reflects that the potential for risk to humans may be significant even when the potential for exposure seems small as, for example, when the chemical is discovered to be hazardous at very low levels. In contrast, the 4(a)(1)(B) finding was intended to allow EPA to require testing, not because of suspicions about the chemical’s safety, but because there may be substantial or significant human exposure to a chemical whose hazards have not been explored.”134

132 See Chem. Mfrs. Ass’n v. EPA (CMA I), 859 F.2d 977, 979 (D.C. Cir. 1988) (“The probability of infrequent or even one-time exposure to individuals can warrant a test rule, so long as there is a more-than-theoretical basis for determining that exposure in such doses presents an ‘unreasonable risk of injury to health.’”).


134 Id. at 358 n.20 (quoting Chloromethane and Chlorinated Benzenes Proposed Test Rule, 45 Fed. Reg. 48,524, 48,528 (July 18, 1980)).
The Fifth Circuit, not satisfied with this and other explanations, ultimately remanded the test rule to EPA to refine what is meant by “substantial” exposure to a chemical.\textsuperscript{135}

EPA responded by issuing “TSCA Section 4(a)(1)(B) Final Statement of Policy,” which defines “substantial production” and “substantial release,” in addition to “substantial and significant human exposure.”\textsuperscript{136} “Substantial production” was defined to be a “threshold value of 1 million pounds” for all manufacturers of a chemical.\textsuperscript{137} One million pounds was chosen in part because it “narrows the ‘universe’ of chemicals potentially subject to TSCA section 4 testing . . . to 11 percent of the TSCA inventory.”\textsuperscript{138} EPA defined the human exposure criteria guidelines with respect to three categories of persons affected: the general population, consumers, and workers.\textsuperscript{139} For the general population, exposure to 100,000 people is considered “substantial,” while exposure to a lesser number of people would be considered “significant” if those people were exposed “more directly or on a routine or episodic basis.”\textsuperscript{140} The same framework applies to consumers and workers, except the quantitative threshold for consumers is ten thousand people, while the threshold for workers is one thousand people.\textsuperscript{141} EPA also reserves the right to dispense with the numerical thresholds when necessary, if “additional factors” weigh in favor of testing under the B-policy:

In some cases, however, where the thresholds are not met, it may be more appropriate to use a case-by-case approach for making findings by applying other considerations. . . . [Thus,] EPA may consider “additional factors” for making findings for substances which do not meet the numerical thresholds articulated herein for evaluating existing chemicals under TSCA section 4(a)(1)(B).\textsuperscript{142}

However, although consideration of additional factors gives EPA a certain degree of freedom to order testing under the B-policy, the procedure for ordering testing remains formal and rigid. For example, the

\textsuperscript{135} See id. at 360.
\textsuperscript{137} Id.
\textsuperscript{138} Id. at 28,740.
\textsuperscript{139} Id. at 28,746.
\textsuperscript{140} Id. at 28,746 tbl.1.
\textsuperscript{141} Id.
\textsuperscript{142} TSCA Section 4(a)(1)(B) Final Statement of Policy, 58 Fed. Reg. at 28,746.
plaintiffs in *Physicians Committee for Responsible Medicine v. Leavitt* attempted to prevent EPA from implementing its High Production Volume (HPV) Challenge Program, whereby chemical manufacturers would volunteer to gather data and test certain HPV chemicals. The plaintiffs argued that EPA had a non-discretionary duty to initiate formal rulemaking and testing under the B-policy because EPA had made “de facto . . . findings of substantial production, substantial release and/or substantial human exposure.” The plaintiffs based the contention that the requisite findings had been made on EPA’s unsupported statements published in the *Federal Register* and in presentations to Congress. For example, EPA made the commonsense assertion in the *Federal Register* that “[i]t is generally accepted that chemicals having a high level of production have an increased potential for exposure in comparison to low production volume chemicals.” The *Leavitt* court found, however, that the plaintiffs “proffered no evidence to indicate that the general statements made by EPA were the product of an analysis that in any way approximates, or can be substituted for, the type of analysis that would be required for a formal finding of substantial release and/or substantial exposure.” As a result, the court sided with EPA, preserving EPA’s alternative testing arrangement with industry.

A glance at the “type of analysis required” goes a long way in explaining why EPA would prefer alternative testing arrangements to formal rulemaking. Promulgation of formal test rules is not only

143 See 331 F. Supp. 2d 204, 204 (S.D.N.Y. 2004).
144 Id. at 205.
145 Id. at 205–06.
147 331 F. Supp. 2d at 207.
148 Id.
149 See id. The court explains the quintessentially bureaucratic analysis required:

[Formal proceedings on this issue would normally have involved: (a) the establishment of a workgroup within EPA’s Office of Pollution Prevention and Toxics (“OPPT”) to conduct a review regarding which HPV Program chemicals satisfy the statutory requirements for rulemaking; what data exist to support the making of Section 4 findings and the development of proposed test rules to fill in data gaps for HPV Program chemicals; (b) the presentation of information from the OPPT workgroup to the OPPT Office Director, whose task it would then be to make a recommendation to the Assistant Administrator for the Office of Prevention, Pesticides and Toxics Substances (“OPPTS”), who is the only EPA official (besides the Administrator) authorized to make Section 4 findings . . . .

*Id.*
time-consuming, but expensive. Thus, EPA and industry will often enter into testing consent agreements instead. These agreements are entered into by EPA with individual manufacturers, or groups of manufacturers that have formed consortiums to share costs. A formal test rule would apply to all manufacturers, while a consent agreement can allow testing to commence without having every conceivable constituent involved. In addition, some manufacturers have benefited from taking the lead in suggesting testing methods that EPA has neither the time nor the inclination to oppose aggressively.

G. The Toxic Substances and Control Act Penalties

Section 16 identifies the penalties for TSCA violations. EPA is authorized to impose a civil penalty of up to twenty-five thousand dollars per violation, with each day of violation constituting a separately punishable act. In addition, any person who “knowingly or willfully” violates a TSCA provision may be subject to an additional criminal penalty of twenty-five thousand dollars per day for each violation, imprisonment up to one year, or both.

III. The Occupational Safety and Health Act of 1970

As discussed in Part II, the main function of TSCA is to place a reporting burden on manufacturers and importers of chemical substances. The Occupational Safety and Health Act of 1970 (OSH Act), on the other hand, imposes two broad duties on all employers, regardless of an employer’s line of business.

The first duty, known as the “general duty clause” mandates that each employer “furnish to each of his employees employment and a place of employment which are free from recognized hazards that are

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150 See Applegate et al., supra note 106, at 618 (noting that proposed test rules on glycidols would cost $18 million and estimates for fluoroalkane testing ranged from $4.8 to $9 million).
151 See id. at 619–20. If ITC has recommended a chemical for testing, however, use of voluntary testing consent agreements is unlawful absent a showing that formal testing is not necessary. See Natural Res. Def. Council, Inc. v. EPA, 595 F. Supp. 1255, 1261, 1262 (S.D.N.Y. 1984).
152 See Griffin, supra note 88, at 42.
153 See id. at 42–43.
154 See id. at 46 (noting that some chemical manufacturers have found that a “proactive approach” to negotiations with EPA is “most effective”).
156 Id. § 2615(a).
157 Id. § 2615(b).
causing or are likely to cause death or serious physical harm to his employees.” 158 The general duty clause was enacted to deal with hazards to which no specific standard applies. 159

The second broad duty requires each employer to “comply with occupational safety and health standards promulgated under this chapter,” and enforced by the Occupational Safety and Health Administration (OSHA). 160 The Hazard Communication Standard (HCS)—a worker’s “right-to-know” law—is arguably the most important OSHA regulation:

The purpose of [HCS] is to ensure that the hazards of all chemicals produced or imported are evaluated, and that information concerning their hazards is transmitted to employers and employees. This transmittal of information is to be accomplished by means of comprehensive hazard communication programs, which are to include container labeling and other forms of warning, material safety data sheets and employee training. 161

A. The General Duty Clause

The absence of a chemical-specific OSHA rule does not mean a manufacturer may be lax in its investigation of chemical safety. 162 A manufacturer can receive a citation under OSH Act’s general duty clause for failing to render its workplace free of a recognized hazard. 163 The courts have applied a number of tests to determine whether a hazard is “recognized.” 164

Some courts have held that a hazard is considered “recognized” if in the employer’s industry it is common knowledge, or if the employer had knowledge of the hazardous condition. 165 In National Realty & Construction Co. v. Occupational Safety & Health Review Commission, the D.C.

162 See Rothstein, supra note 159, at 178.
163 See id. at 179.
165 ROTHSTEIN, supra note 159, at 185.
Circuit Court of Appeals held that whether a hazard is recognized by an industry is determined by “the common knowledge of safety experts who are familiar with the circumstances of the industry or activity in question.”\textsuperscript{166} In American Smelting & Refining Co. v. Occupational Safety & Health Review Commission, the Eighth Circuit Court of Appeals held that a recognized hazard is not limited to hazards that are readily detectable by human senses, but also covers hazards that can only be monitored through instrumentation.\textsuperscript{167} Finally, standards developed by the American National Standards Institute may also be used to prove industry recognition.\textsuperscript{168}

An employer’s duty to render the workplace free from recognized hazards extends beyond mere perfunctory compliance with promulgated standards.\textsuperscript{169} The D.C. Circuit has gone as far as to impose a penalty under the general duty clause where a manufacturer knew that compliance with a certain standard for a recognized hazard was inadequate to protect worker safety: “[I]f . . . an employer knows a particular safety standard is inadequate to protect his workers against [a] specific hazard . . . he has a duty under section 5(a)(1) to take whatever measures may be required by the Act . . . to safeguard his workers.”\textsuperscript{170}

B. The Hazard Communication Standard

The primary purpose of the HCS is to ensure that manufacturers seek out and evaluate all the available scientific information on a material, which is then made available to anyone in the stream of commerce.\textsuperscript{171} The starting point for hazard evaluation is two lists of chemicals: “Threshold Limit Values for Chemical Substances and Physical Agents in the Work Environment”, adopted by the American Conference of Governmental Industrial Hygienists (ACGIH); and a list of chemicals created and maintained by OSHA.\textsuperscript{172} This group of chemicals is only the “floor” of the universe of all potentially hazardous

\textsuperscript{166} 489 F.2d at 1265 n.32.
\textsuperscript{167} 501 F.2d 504, 511 (8th Cir. 1974).
\textsuperscript{169} See Rothstein, supra note 159, at 179.
\textsuperscript{171} Silk et al., supra note 161, at 11.
\textsuperscript{172} See id. at 18; see also 29 C.F.R. pt. 1910, subpt. Z (2004).
chemicals, however.\textsuperscript{173} For all other chemicals, the manufacturer is required to determine if a chemical is a physical or a health hazard by conducting tests and searching for relevant scientific studies.\textsuperscript{174} Crucially, the HCS only requires that there be one scientific study addressing a material’s adverse impact to deem it a “health hazard” that demands hazard communication to affected parties.\textsuperscript{175}

A full hazard communication is effected by the combination of three essential components: labeling, a Material Safety Data Sheet (MSDS), and employee training.\textsuperscript{176} The label provides a summary of the chemical’s hazards and warns the employee to take precautions if necessary.\textsuperscript{177} The MSDS is more extensive and has been described as a “one-stop shopping document for the user,” providing information on a chemical’s properties, hazards, and appropriate protective measures.\textsuperscript{178} The final component, employee training, ensures that employees or other handlers understand the risks and precautionary measures identified on the label and MSDS.\textsuperscript{179} This provides assurance that employees actually respond appropriately when confronting a potential or known hazard.\textsuperscript{180}

\textbf{C. Emergency Temporary Standards and Substance-Specific Standards}

OSHA is permitted to adopt an Emergency Temporary Standard (ETS) when it appears “that employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards.”\textsuperscript{181} There must be “more than some possibility” of a grave danger, but absolute certainty is not required.\textsuperscript{182}

\begin{itemize}
  \item \textsuperscript{173} See Silk et al., infra note 161, at 19.
  \item \textsuperscript{174} Id. at 20.
  \item \textsuperscript{175} According to the HCS, “Health hazard” means a chemical for which there is statistically significant evidence based on at least one study conducted in accordance with established scientific principles that acute or chronic health effects may occur in exposed employees. The term “health hazard” includes chemicals which are carcinogens, toxic or highly toxic agents, reproductive toxins, irritants, corrosives, sensitizers . . . and agents which damage the lungs, skin, eyes, or mucous membranes.
  
  \item \textsuperscript{176} See Silk et al., supra note 161, at 12.
  \item \textsuperscript{177} See id. at 13.
  \item \textsuperscript{178} Id.
  \item \textsuperscript{179} See id. at 14.
  \item \textsuperscript{180} See id.
  \item \textsuperscript{181} 29 U.S.C. § 655(c) (2000).
  \item \textsuperscript{182} See Dry Color Mfrs. Ass’n v. Dep’t of Labor, 486 F.2d 98, 104 (3d Cir. 1973).
\end{itemize}
Also, when evidence of harmful effects on humans is not available, evidence from animal studies is permitted to suggest possible carcinogenic effects in humans.\textsuperscript{183}

In addition, an ETS is not subject to the rulemaking requirements of the Administrative Procedure Act due to the presumed immediate, grave danger involved.\textsuperscript{184} An ETS, however, may only be issued for a six-month period; thereafter, a permanent specific standard must be promulgated.\textsuperscript{185} In practice, courts are disinclined to order OSHA to issue an ETS both because of courts’ traditional reluctance to substitute their judgment for that of administrative agencies,\textsuperscript{186} and the diversion of resources from other, arguably more pressing rulemaking that such an order would impose.\textsuperscript{187}

When OSHA does promulgate a specific standard, it has significant leeway to determine the threshold amount of evidence required to trigger rulemaking. In \textit{Industrial Union Department v. American Petroleum Institute}, a case concerning the permissible exposure limit (PEL) of benzene, the Supreme Court explained that:

\begin{quote}
OSHA is not required to support its finding that a significant risk exists with anything approaching scientific certainty. Although the Agency’s findings must be supported by substantial evidence ... a reviewing court [is required] to give OSHA some leeway where its findings must be made on the frontiers of scientific knowledge.
\end{quote}

This holding effectively allows OSHA to err on the side of caution when promulgating a PEL, as long as the standard is supported by a body of “reputable scientific thought.”\textsuperscript{188}

However, as John M. Mendeloff explains, even a cautious approach to promulgating PELs will not always adequately protect worker safety.\textsuperscript{190} Mendeloff argues that there are actually four catego-

\begin{footnotesize}
\begin{enumerate}
\item Rothstein, \textit{supra} note 159, at 53.
\item Id.
\item See Pub. Citizen Health Research Group v. Auchter, 702 F.2d 1150, 1153 (D.C. Cir. 1983) (finding that “the district court impermissibly substituted its evaluation for that of OSHA” in ordering the issuance of an ETS within twenty days).
\item Rothstein, \textit{supra} note 159, at 71.
\item 448 U.S. 607, 656 (1980).
\item Rothstein, \textit{supra} note 159, at 84.
\item See John M. Mendeloff, \textit{The Dilemma of Toxic Substance Regulation: How Overregulation Causes Underregulation at OSHA} 78 (1988) (noting how disease may result even when OSHA has promulgated a PEL).
\end{enumerate}
\end{footnotesize}
ries of occupational diseases that are caused by exposure to toxic substances in the workplace: diseases resulting from exposure that exceed an OSHA PEL; diseases resulting from exposure below an existing OSHA PEL; diseases resulting from exposure to substances for which there is no PEL but for which ACGIH or other groups have proposed exposure limits; or diseases resulting from exposure to existing substances for which neither OSHA nor anyone else has proposed exposure limits.\footnote{Id.}

In part because of this inevitable element of uncertainty, OSHA has significant latitude to determine the methods of compliance with promulgated PELs. OSHA has stated its preference “that engineering and work practice controls be used as the primary method of complying with PEL’s.”\footnote{Identi\textsuperscript{fication, Classification and Regulation of Potential Occupational Carcinogens, 45 Fed. Reg. 5001, 5222 (Jan. 22, 1980) (codified at 29 C.F.R. pt. 1990).} Engineering controls include “material substitution, process or equipment redesign, process or equipment sealing, enclosure, or isolation, local exhaust ventilation, and employee isolation.”\footnote{Id. at 5223.} OSHA specifically disfavors respirators as an engineering control, advising that they be “relied on only as a means of last resort because they simply do not provide a comprehensive and reliable method of employee protection, are uncomfortable and may themselves create safety and health hazards.”\footnote{Id. at 5222.}

IV. The Toxic Substances Control Act, the Occupational Safety and Health Act, and Manufactured Nanomaterials

Part IV considers the intersection of the two federal statutes discussed above—TSCA and OSH Act—with manufactured nanomaterials, paying special attention to the opportunities and pitfalls that await those who choose to mass-produce nanomaterials.

A. The Toxic Substances Control Act and Nanomaterials

Since TSCA principally regulates chemical substances, it is first necessary to ask whether certain nanomaterials are “chemical substances” within the meaning of TSCA. Section 2602(2)(A) sweeps in much of the atomic universe with its expansive definition: “the term ‘chemical substance’ means any organic or inorganic substance of a
particular molecular identity, including—(i) any combination of such substances occurring in whole or in part as a result of a chemical reaction or occurring in nature, and (ii) any element or uncombined radical.” Thus, it seems that most manufactured nanomaterials would be considered chemical substances within the meaning of TSCA.

1. Nanomaterials and Filing a Premanufacture Notification

One issue that needs to be considered is whether a smaller version of an already existing material is “new” for TSCA classification purposes. A manufacturer must look to see if the substance manufactured is already listed in the TSCA Inventory. Listed substances are existing chemicals, for which a manufacturer need not submit a premanufacture notice (PMN).

Before a chemical would appear in the Inventory, it likely would need a unique identifying number from the Chemical Abstracts Service—called a Chemical Abstracts Service Registry Number (CASRN)—which is given to almost every new chemical and is internationally recognized. A number of popular nanomaterials have CASRNs: “carbon buckytubes,” 1333-86-4; “fullerenes, tubular,” 308068-56-6; “carbon fibers, nanotubes,” 308068-63-0. Despite having a CASRN, none of these substances are currently in TSCA’s Inventory.

An interesting problem arises when a manufacturer seeks to make a nanosized version of a chemical already in the Inventory. At present, no mechanism exists to prevent a manufacturer from simply extrapolating toxicity information from the bulk-sized toxicity data on file. However, the very nature of a nanomaterial belies such simple

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196 See Wardak, supra note 9, at 4–5.
197 See supra Part II.A.
198 See supra text accompanying note 91.
199 Griffin, supra note 88, at 11, 13. EPA, however, is in the process of reviewing this policy, so manufacturers should proceed cautiously if a bulk counterpart to a nanomaterial already appears in the Inventory. See Nanoscale Materials; Notice of Public Meeting, 70 Fed. Reg. 24,574 (May 10, 2005) (providing notice of a public meeting to discuss a possible voluntary pilot reporting program for certain existing nanoscale materials).
200 See supra note 91.
201 Wardak, supra note 9, at 10.
202 See id. To be certain that a substance is not already in the public or confidential portions of the Inventory, consultation with EPA is advised. See Griffin, supra note 88, at 14.
203 See Hett, supra note 11, at 36; see also supra text accompanying note 108.
analogy.\textsuperscript{204} The distinguishing feature of nanomaterials is that they do not necessarily behave like their larger counterparts when operating at the nanoscale.\textsuperscript{205} Thus, toxicity data that is on record for bulk-sized titanium dioxide, for example, will not necessarily apply to titanium dioxide nanoparticles.\textsuperscript{206} Theoretically, nothing—besides corporate conscience, fear of product liability lawsuits, and EPA and citizen vigilance—stands in the way of a manufacturer commencing production of a nanosized version of an Inventory chemical with completely novel, inadequately tested, and potentially hazardous properties.

TSCA’s statutory exemptions may provide another route around the PMN requirement for creative CEOs of both the smallest start-ups and the largest multinational corporations.\textsuperscript{207} TSCA’s “solely-for-export” exemption allows a manufacturer to avoid the PMN process if the chemical is produced for exportation only.\textsuperscript{208} Assuming a recipient country did not require extensive health and environmental effects data, a particularly skittish manufacturer could export a nanomaterial while awaiting results from U.S. government-funded health-effects research.\textsuperscript{209}

Alternatively, a manufacturer could seek the protection of TSCA’s Low-Volume Exemption or Low-Release and Exposure Exemption (LoREx) by producing less than ten thousand kilograms per year.\textsuperscript{210} This allows a large company to at least “get in the game” while the research trickles out and investors get more comfortable with nanotechnology and its risks. This strategy also limits liability should nanomaterials turn out to be more harmful than most suspect at the moment.

At the same time, ten thousand kilograms per year might represent one hundred percent of a smaller company’s output. Indeed, currently, very few American companies appear to possess even this capability.\textsuperscript{211} While some American companies have begun construc-

\begin{itemize}
\item \textsuperscript{204} See Hett, \textit{supra} note 11, at 36.
\item \textsuperscript{205} See id.
\item \textsuperscript{206} Id.
\item \textsuperscript{207} See \textit{supra} Part II.B.
\item \textsuperscript{208} See \textit{supra} Part II.B.
\item \textsuperscript{209} See Nat’l Inst. for Occupational Safety & Health, NIOSH Safety & Health Topic: Nanotechnology, \url{http://www.cdc.gov/niosh/topics/nanotech/} (last visited Oct. 23, 2005) (describing the NIOSH Nanotechnology and Health & Safety Research Program as “a five-year multidisciplinary study into the toxicity and health risks associated with occupational nanoparticle exposure”).
\item \textsuperscript{210} See \textit{supra} note 102 and accompanying text.
\end{itemize}
tion on multitonnage capable facilities, Japanese manufacturers have been less reluctant to churn out nanomaterials by the ton.\textsuperscript{212} The National Science Foundation, perhaps conscious of this manufacturing gap, recently announced awards to establish the Center for High Rate Nanomanufacturing at Northeastern University, the Center for Affordable Nanoengineering of Polymer Biomedical Devices at Ohio State University, and the Center for Templated Synthesis and Assembly at the Nanoscale at University of Wisconsin–Madison.\textsuperscript{213}

For companies unable or unwilling to wait for academic and government research to yield helpful results, production of potentially hazardous new nanomaterials will commence after the filing of a PMN.\textsuperscript{214} When filing a PMN, a manufacturer is required to produce all environmental and health effects studies in the manufacturer’s “possession or control,” as well as descriptions of all other health and environmental effects data that the manufacturer knows about or can reasonably ascertain.\textsuperscript{215}

It must be emphasized that submitting a PMN does not require a manufacturer to produce new data or to conduct studies.\textsuperscript{216} Therefore, a manufacturer that proposed to mass-produce fullerenes or carbon nanotubes (CNTs) would not necessarily be forced to test those substances.\textsuperscript{217} However, the manufacturer would be obliged to disclose that large concentrations of fullerenes have been shown to cause brain damage in fish,\textsuperscript{218} or that large quantities of inhaled CNTs cause pulmonary problems and death in lab rats.\textsuperscript{219}

Moreover, while a company can treat a large amount of proprietary information as Confidential Business Information under TSCA, EPA generally will not honor requests to keep health and safety studies confidential.\textsuperscript{220} Thus, if a new nanomanufacturer is set to produce a substance that is sufficiently similar to a nanomaterial that has already been subjected to the PMN process, the new company is permit-

\textsuperscript{212} See id. Frontier Carbon Corp., a Japanese company, can currently manufacture forty tons of fullerenes per year, and expects to increase production to 300 tons by 2007. \textit{Id.}


\textsuperscript{214} See supra Part II.C. (describing the PMN process).


\textsuperscript{216} See Griffin, supra note 88, at 23.

\textsuperscript{217} See id.

\textsuperscript{218} See Oberdörster, supra note 63, at 1060–62.

\textsuperscript{219} See supra note 75.

\textsuperscript{220} See Griffin, supra note 88, at 59.
ted to use the data already on file.\textsuperscript{221} Given the cost of conducting health and safety studies, this loophole offers significant cost savings to the late-coming freerider, and represents a significant penalty for the pioneering company.\textsuperscript{222}

2. Nanomaterials and Section 4 Testing

The recent spike of government and university research into the potential adverse effects of nanomaterials on human health and the environment\textsuperscript{223} could—assuming the results are negative—accelerate a growing perception that nanomaterials may be unsafe. This would prompt EPA to assert its authority under section 4 of TSCA to promulgate test rules or enter into testing consent agreements.\textsuperscript{224} However, EPA is only permitted to force testing under certain conditions.\textsuperscript{225}

One such condition arises when the Interagency Testing Committee (ITC) recommends testing of a material by placing it on its Priority Testing List (PTL).\textsuperscript{226} A check of two recent PTLs, however, showed no chemicals that were obviously nanomaterials.\textsuperscript{227} In fact, both PTLs contain chemicals that were first placed onto the list in 1993, calling into question the speed with which chemicals move on and off the PTL.\textsuperscript{228} Thus, if EPA were to order section 4 testing for nanomaterials, it is more likely that the impetus would come from within EPA than from ITC.\textsuperscript{229}

In order to compel testing of nanomaterials, section 4(a)(1)(A) requires a showing of “unreasonable risk,” while section 4(a)(1)(B)—the B-policy—allows EPA to act in the face of unknown hazards if certain conditions are met.\textsuperscript{230} In order to find an unreasonable risk, EPA

\textsuperscript{221} See \textit{id.} at 23, 28.
\textsuperscript{222} See \textit{Applegate et al.}, supra note 107, at 618 (noting the cost of chemical testing).
\textsuperscript{223} See \textit{supra} Part I.E.
\textsuperscript{225} See \textit{supra} Part II.F. (describing section 4 testing).
\textsuperscript{226} See \textit{Griffin}, \textit{supra} note 88, at 36–37.
\textsuperscript{229} See \textit{Griffin}, \textit{supra} note 88, at 35 (describing EPA’s power to order testing on its own initiative).
must make a showing of potential exposure and be armed with a scientifically justifiable suspicion that the risk to humans may be significant—usually brought on by evidence that the chemical is discovered to be hazardous at very low levels. At present, while there is some hard evidence of potential health hazards from animal studies, the state of research into nanomaterials is probably not robust enough to conclude that they pose an unreasonable risk. As Andrew Maynard of the National Institute for Occupational Safety and Health (NIOSH) has commented, “[n]obody is saying here it’s a minor threat or a major threat—we just don’t know.”

When faced with substances of unknown toxicity with the potential for substantial human exposure, the B-policy can provide justification for ordering chemical studies. However, with the nanomaterial industry in its infancy, very few, if any, manufacturers produce enough nanomaterials to surpass the 1 million pound threshold required for the B-policy to take effect. For example, current combined global production for both single-walled and multi-walled nanotubes is approximately 109 tons. Total global production capacity of multi-walled nanotubes may increase to 268 tons annually by 2007, while production of single-walled nanotubes is expected to reach one hundred tons by 2008. Frontier Carbon, a Japanese corporation funded by Mitsubishi and the first mass-producer of fullerenes in the world, fabricates 40 tons of fullerenes per year and expects to increase production to three hundred tons by 2007. Thus, in the next few years, there very well may be what the layperson would consider a “substantial” amount of nanomaterial production, but from TSCA’s standpoint, the production level does not meet the substantial threshold to merit testing.

Absent any rapid decision to lower the substantial production threshold significantly just for engineered nanomaterials, might EPA

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232 See supra Parts I.D–E.
233 Helm, supra note 69 (quoting Andrew Maynard, Nat’l Inst. of Occupational Safety & Health).
236 See CIENTÍFICA, supra note 27, at 9.
237 Id.
238 See Kelly, supra note 211.
order testing under section 4 anyway? The Final Statement of the B-policy allows EPA to consider “additional factors” for substances that “do not meet the numerical thresholds” set by the B-policy.\textsuperscript{240} Given the high degree of uncertainty surrounding the safety and toxicity of nanomaterials, the impending boom in nanomaterial production, EPA’s apparent inability to respond meaningfully to a filed PMN,\textsuperscript{241} and the complicating factor that a given nanomaterial may behave differently depending on whether it is coated or uncoated, fixed or free, or one-, two-, or three-dimensional, EPA would be well within reason if it decided to order formal test rules for certain engineered nanomaterials in order to ensure a modicum of safety.\textsuperscript{242}

However, the strongest push for testing might—and arguably should—come from the nanomanufacturing industry itself through voluntary testing consent agreements.\textsuperscript{243} First, testing consent agreements allow the manufacturer to circumvent certain reporting, recordkeeping, exportation, penalty, and judicial review requirements otherwise imposed by section 4 testing.\textsuperscript{244} Second, fears of EPA and industry striking a backroom deal without public input and appropriate controls appear to be unfounded.\textsuperscript{245} The public is allowed an opportunity to participate in all phases of the negotiation and implementation of any agreement as “interested parties.”\textsuperscript{246} On the other hand, all signatories waive their right to challenge the consent agreement on the basis that it is not a “rule” under section 4, significantly reducing delays brought on by judicial review.\textsuperscript{247} Finally,

[use of a testing consent agreement in lieu of a formal test rule should not be viewed as indicating any intent to relax the requirements relating to the actual testing conducted on the chemical. The data derived from chemical testing are expected to be of the same quality, regardless of whether the testing results from a rule or a consent agreement. The only

\textsuperscript{240} Id.
\textsuperscript{241} In fiscal year 1995, EPA took no action on ninety-eight percent of filed PMNs. Applegate et al., supra note 106, at 611.
\textsuperscript{242} See discussion supra Part II.F.
\textsuperscript{243} See Royal Society, supra note 12, at 50 (urging industry to test new nanoparticles to minimize human exposure).
\textsuperscript{244} Applegate et al., supra note 106, at 619.
\textsuperscript{245} See Nanoscale Materials, 70 Fed. Reg. 24,574 (May 10, 2005) (providing notice of a public meeting to discuss a possible voluntary pilot reporting program for certain existing nanoscale materials).
\textsuperscript{246} Griffin, supra note 88, at 46.
\textsuperscript{247} Id. at 47.
differences are in the formality of the procedures that lead up to testing.\textsuperscript{248}

If the decision in \textit{Physicians Committee for Responsible Medicine v. Leavitt} is any guide, the courts are beginning to respect EPA’s discretionary authority to seek alternative arrangements to the formal testing scheme.\textsuperscript{249} Indeed, as the U.S. District Court for the Southern District of New York has observed, “negotiation to determine appropriate test protocols as well as other relevant criteria certainly is not only permissible but indeed preferable to blind, often impractical, bureaucratic blundering.”\textsuperscript{250} Thus, nanomaterial manufacturers would do well to heed the advice of veteran chemical companies, who advocate a proactive approach to negotiations and exhort manufacturers to “lead the way” in suggesting testing methods.\textsuperscript{251} The Chemical Manufacturers Association, for one, has gone a step further and is in the midst of a self-imposed, multi-year, \$67 million program of “basic research on the potential carcinogenic, endocrine disruption, and respiratory effects of industrial chemicals.”\textsuperscript{252} In a similar fashion, reliance on government and academic research for health and safety data should decrease as the nanotechnology sector matures and funds suitable research similar to other developed industries.\textsuperscript{253}

\textbf{B. The Occupational Safety and Health Administration and Nanomaterials}

“The National Science Foundation has estimated that 2 million workers will be needed to support nanotechnology industries worldwide within 15 years.”\textsuperscript{254} In the short-term, the Royal Society believes that “[t]he greatest potential for exposure . . . over the next few years will be in the workplace, both in industry and in universities.”\textsuperscript{255} Although NIOSH is in the process of producing a “best practices” document for working with nanomaterials, nanomaterial manufactur-

\begin{align*}
\textsuperscript{248} & \text{Id. at 45.} \\
\textsuperscript{249} & \text{See 331 F. Supp. 2d 204, 208 (S.D.N.Y. 2004); see also supra text accompanying notes 143–48 (discussing \textit{Leavitt}).} \\
\textsuperscript{250} & \text{Natural Res. Def. Council v. EPA, 595 F. Supp. 1255, 1262 (S.D.N.Y. 1984) (holding that negotiated testing agreements were unlawful when ITC recommends a chemical for testing and EPA does not eventually engage in formal rulemaking).} \\
\textsuperscript{251} & \text{See \textit{Griffin}, supra note 88, at 46.} \\
\textsuperscript{252} & \text{APPLEGATE ET AL., supra note 106, at 620.} \\
\textsuperscript{253} & \text{See \textit{id}.} \\
\textsuperscript{255} & \text{ROYAL SOCIETY, supra note 12, at 42.}
\end{align*}
ers still need to be aware of the many OSHA compliance issues which will arise in the production of potentially hazardous nanomaterials.\textsuperscript{256}

Currently, there are no nanomaterial-specific OSHA rules or Permissible Exposure Limits (PELs).\textsuperscript{257} Nor has the American Conference of Governmental Industrial Hygienists (ACGIH) proposed any exposure limits.\textsuperscript{258} But, to borrow John Mendeloff’s rubric, occupational disease may still arise from “exposures from existing substances for which neither OSHA nor anyone else has proposed exposure limits.”\textsuperscript{259} The key is whether a given nanomaterial would be considered a “recognized hazard” within the meaning of the general duty clause.\textsuperscript{260} Since the American National Standards Institute has not yet developed standards,\textsuperscript{261} the issue reduces to whether it is the common knowledge of safety experts in the field that a given nanomaterial is hazardous.\textsuperscript{262}

This test would probably look to official statements from NIOSH for guidance. In this regard, NIOSH has thus far offered only non-committal, conservative statements, like the following from its official website:

\begin{quote}
Occupational health risks associated with manufacturing and using nanomaterials are not yet clearly understood. . . .

. . . .

Workers within nanotechnology-related industries have the potential to be exposed to uniquely engineered materials with
\end{quote}

\begin{footnotes}
\textsuperscript{258}See Press Release, American Conference of Governmental Industrial Hygienists (ACGIH\textsuperscript{®}), ACGIH\textsuperscript{®} Board Ratifies 2005 TLVs\textsuperscript{®} and BEIs\textsuperscript{®}: 2005 TLVs\textsuperscript{®} and BEIs\textsuperscript{®} Substances and Agents Listing, https://www.acgih.org/resources/press/TLV2005list.htm (last visited Oct. 23, 2005) (listing substances with Threshold Limit Values (TLVs) and Biological Exposure Indices (BEIs), but never specifically listing any chemical using the “nano” prefix).
\textsuperscript{259}Mendeloff, supra note 190, at 78.
\end{footnotes}
novel sizes, shapes and physical and chemical properties, at levels far exceeding ambient concentrations. To understand the impact of these exposures on health, and how best to devise appropriate exposure monitoring and control strategies, much research is still needed. Until a clearer picture emerges, the limited evidence available would suggest caution when potential exposures to nanoparticles may occur.\textsuperscript{263}

While accurate, this is not the most helpful statement for a manufacturer producing nanomaterials today—what should they do to protect their workers from injury and their corporation from liability? First, if an employer is in possession of data that unequivocally demonstrates that a particular nanomaterial is “likely to cause death or serious physical harm to . . . employees,” then the employer has a duty to mitigate the threat of that hazard.\textsuperscript{264} Likewise, if a substance shows carcinogenic effects in lab animals, OSHA is empowered to issue an Emergency Temporary Standard under section 6.\textsuperscript{265} Nanomaterials currently pose a unique problem because it is too early for anyone to say with any degree of scientific certainty that occupational exposure to nanomaterials poses a health hazard.\textsuperscript{266} However, it would be disingenuous of anyone, particularly a manufacturer concerned about the potential of product liability lawsuits, to say—in the absence of health effects data to the contrary—that his or her nanomaterial is definitely safe; the literature abounds with cautionary statements that imply the opposite.\textsuperscript{267} Thus, the prudent course of action is to proceed as if the material in question is actually hazardous, obligating the manufacturer to engage in adequate hazard communication.\textsuperscript{268}

Consider, in this respect, the United Kingdom’s response to the Royal Society’s report on nanomaterials:

The Government accepts that chemicals in the form of nanoparticles or nanotubes can exhibit different properties to

\textsuperscript{263} Nat’l Inst. for Occupational Safety & Health, supra note 209.
\textsuperscript{264} 29 U.S.C. § 654(a) (1).
\textsuperscript{266} The HCS regulations define health hazard as “a chemical for which there is statistically significant evidence based on at least one study conducted in accordance with established scientific principles that acute or chronic health effects may occur in exposed employees.” Hazard Communication, 29 C.F.R. § 1910.1200(a) (1) (2004).
\textsuperscript{267} See supra Parts I.D–E.
\textsuperscript{268} See supra Part III.B. (describing HCS).
the bulk form of the chemical; sometimes this is beneficial and sometimes it may be potentially hazardous. The Government also accepts that safety testing on the basis of a larger form of a chemical cannot be used to infer the safety of the nanoparticulate form of the same chemical and that therefore individual regulations within the existing framework will need to be reviewed to reflect the possibility that nanoparticulate material may have greater toxicity than material in the larger size range.\textsuperscript{269}

However, the current practice in preparing information for a Material Safety Data Sheet (MSDS) appears to be precisely what the Royal Society and United Kingdom consider ill-advised.\textsuperscript{270}

The MSDS for titanium dioxide nanopowder, for example, contains the same information as the regular titanium dioxide MSDS.\textsuperscript{271} Even though this information might be wholly inapplicable and inadequate, “the safety data sheet for nano-titanium dioxide powder still recommends that a dust respirator be worn while handling this substance, although such masks are known to offer only limited protection.”\textsuperscript{272}

While referring the user to the safety information for titanium dioxide is somewhat helpful, reliance on the safety measures in place for bulk-sized titanium dioxide are at best misleading, and at worst dangerous. Such reliance could be dangerous because of a fifth category of occupational disease caused by toxic substances that Mendeloff did not specifically identify—diseases resulting from a substance which has been assigned an inappropriate PEL.\textsuperscript{273} A bulk-sized PEL automatically assigned to any nanomaterial is potentially an inappropriate designation. Nevertheless, a manufacturer is entirely within its rights in taking that step under the current OSHA scheme.\textsuperscript{274}


\textsuperscript{270} See supra text accompanying notes 176–80.

\textsuperscript{271} Hett, supra note 11, at 33.

\textsuperscript{272} Id.

\textsuperscript{273} See Mendeloff, supra note 190, at 78; see also supra text accompanying note 191 (describing four categories of occupational disease caused by toxic substances in the workplace).

\textsuperscript{274} The HCS specifically allows a manufacturer the discretion to choose the appropriate PEL by requiring that each material safety data sheet include “[t]he OSHA permissible exposure limit, ACGIH Threshold Limit Value, and any other exposure limit used or recommended by the chemical manufacturer, importer, or employer preparing the material safety data sheet, where available.” Hazard Communication, 29 C.F.R. § 1910. 1200(g)(2)(vi) (2004).
To prevent the widespread use of bulk-sized information for nanomaterial MSDSs, OSHA could attempt to curb the practice by making an example of one manufacturer. OSHA could achieve this by issuing an Emergency Temporary Standard (ETS) under section 6 for a hazardous nanomaterial of its choosing. An ETS is particularly appropriate when dealing with substances of unknown toxicity—as is the case with most nanomaterials—since all that is required is “more than some possibility” of danger; no absolute certainty is required. Moreover, if evidence of a nanomaterial’s carcinogenicity in animals were to surface, OSHA could act immediately to protect humans working with the substance. However, since an ETS is only effective for six months and a permanent standard must be promulgated soon thereafter, OSHA would be more likely to develop nanomaterial-specific PELs than to issue a slew of ETSs in response to adverse health data.

When OSHA does promulgate nano-specific regulations and PELs, it need not be intimidated by the inexact state of research. As the Supreme Court explained, OSHA is entitled to “some leeway where its findings must be made on the frontiers of scientific knowledge.” However, employers should take care that any work practice mandated by OSHA actually protects their workers from known hazards. As the D.C. Circuit Court of Appeals held in UAW v. General Dynamics Land Systems Division: “[I]f . . . an employer knows a particular safety standard is inadequate to protect his workers against [a] specific hazard . . . he has a duty under section 5(a)(1) to take whatever measures may be required by the Act . . . to safeguard his workers.”

Consider in this respect an informational note produced by the United Kingdom’s Health and Safety Executive (HSE). In line with American practice, the HSE note emphasizes the importance of mitigating risk through adequate environmental control measures before resorting to the use of personal protective equipment, such as respira-

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275 See supra Part III.C. (describing ETS procedure).
276 See Dry Color Mfrs. Ass’n v. Dep’t of Labor, 486 F.2d 98, 104 (3d Cir. 1973).
278 See Rothstein, supra note 159, at 53.
280 815 F.2d 1570, 1577 (D.C. Cir. 1987).
tors and facemasks. HSE adds, however, that “[i]f your control measures are based on pre-existing standards then you should ensure that these standards are relevant for nanoparticles. . . . [E]ngineering solutions should be sought, such as containment or effective and appropriate local exhaust ventilation eg [sic] fume cupboards.” If engineering solutions prove ineffective, resorting to personal protective equipment is permissible. However, HSE warns that all respirator filters should be checked with the manufacturer to ensure that they will prevent nanoparticles from passing through. Finally, HSE advises that “[f]or the highest levels of protection, [self-contained breathing apparatus] having a correctly fitted full-face mask and positive demand compressed air supply will be required.”

C. Lessons for the Nanomaterial Manufacturer

Under both TSCA and OSH Act statutory schemes, there is ample opportunity for a nanomaterial to slip virtually unnoticed out of the chemical plant and into the stream of commerce. TSCA currently allows nanomaterial manufacturers to analogize to bulk materials already in the Inventory and to use the test data previously generated. In addition, nano-sized versions of Inventory chemicals technically may be produced without filing a PMN. TSCA also contains a number of statutory exemptions to filing a PMN. Even if a PMN must be filed, EPA may never take action on it.

As for OSH Act, there is a strong argument that nanomaterials would not currently be considered a “recognized” hazard within the meaning of the general duty clause. Current industry practice also seems to condone the use of PELs developed for bulk-sized materials on nanomaterial MSDSs. These MSDSs in turn recommend the use of work practice controls that potentially provide inadequate protec-

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282 See id. at 2; see also supra text accompanying notes 192–94.
283 Health & Safety Executive, supra note 281, at 2.
284 See id.
285 Id.
286 Id.
287 See Griffin, supra note 88, at 23, 28.
288 Id. at 13.
289 See supra Part II.B.
290 See supra Part II.D.
291 See supra Parts III.A, IV.B.
292 See supra text accompanying note 272.
tion against worker inhalation, ingestion, and skin absorption of nanomaterials.293

Nevertheless, while perfunctory compliance with TSCA and OSHA Act provisions is certainly possible and will provide a certain amount of insulation from liability, the risk that a given nanomaterial will turn out to be toxic argues in favor of some form of manufacturer-initiated testing before mass-production.294 The exact level of testing to undertake depends on the individual manufacturer’s tolerance for risk, including the possibility of protracted, costly litigation. The testing arrangements described herein appear to be the most palatable option for the manufacturer interested in protecting workers, the public, and the bottom line.295

Conclusion

Nanotechnology promises untold benefits for the future. But scientific progress with respect to manufactured nanomaterials and their myriad applications may be outpacing appreciation of the environmental, safety, and health risks associated with these materials. TSCA and OSHA Act provide part of the existing regulatory framework that will be used to address and mitigate hazards that may be posed by these substances. A manufacturer that fails to investigate and test the safety of a nanomaterial before its release into the stream of commerce—based on manipulation of statutory exemptions and clever interpretation of statutory language—does more than expose itself to liability, it reveals its lack of concern for the welfare of both its workers and the public.

293 See supra text accompanying notes 271–78.
294 See supra Part IV.A.2.
295 See supra Part IV.A.2.