ARTICLES

YOU CAN CHECK OUT BUT YOU CAN NEVER LEAVE: THE STORY OF SAN REMO HOTEL—THE SUPREME COURT RELEGATES FEDERAL TAKINGS CLAIMS TO STATE COURTS UNDER A RULE INTENDED TO RIPEN THE CLAIMS FOR FEDERAL REVIEW

J. David Breemer

Abstract: On June 20, 2005, the Supreme Court of the United States issued its decision in *San Remo Hotel, L.P. v. City of San Francisco*, holding that property owners with “takings” claims arising under the Fifth Amendment could not obtain federal review after litigating in state court in compliance with the ripeness requirements of *Williamson County Regional Planning Commission v. Hamilton Bank*. The case presented the specific question of whether federal takings claimants could invoke an exception to claim and issue preclusion doctrines under *England v. Louisiana State Board of Medical Examiners* because *Williamson County* forced them to involuntarily litigate in state court. This Article reviews the *San Remo* decision, criticizing the majority’s narrow interpretation of *England* and the result in banishing takings claims to state courts. The Article then explores the *Williamson County* ripeness requirement, and condemns the majority’s decision for failing to explicitly address *Williamson County’s* flaws. Finally, the Article considers whether *San Remo* closes the federal courthouse door to takings claims seeking noncompensatory relief.

THE PUBLIC TRUST DOCTRINE AND NATURAL LAW: EMANATIONS WITHIN A PENUMBRA

George P. Smith II
Michael W. Sweeney
Abstract: In American jurisprudence, the public trust doctrine emerged as a means of protecting certain limited environmental interests, such as coastal waterways and fishing areas, which were preserved for the benefit of the public and distinguished from grants of private ownership. However, modern scholars have called for an expansive application of the public trust doctrine, citing the growing inventory of “changing public needs” in the environmental context, such as the need for improved air and water quality, and the conservation of natural landscape. This Article examines the history and scope of the public trust doctrine to determine how modern resource management fits within the doctrine’s development under the Constitution and common law. Such an examination is incomplete without reviewing the important principles of Natural Law underlying the original doctrine. In the end, the Article concludes that modern trust expansion should be limited within the ancient values of principled economic reasoning.

NOTES

EXCUSES, EXCUSES: THE APPLICATION OF STATUTES OF REPose TO ENVIRONMENTALLY-RELATED INJURIES

Andrew A. Ferrer

Abstract: Injuries resulting from environmental conditions created by improvements to real property have always been commonplace. Across jurisdictions, however, there is some evidence to suggest that defendants may be able to escape liability for certain environmentally-related injuries by invoking statutes of repose. Although statutes of repose may protect defendants from prejudice in court and relieve them of past obligations, they may also prevent injured plaintiffs from obtaining redress in court where their injuries were latent or undiscoverable. This Note explores the nature and purpose of statutes of repose, discusses whether they might be used by defendants during environmental litigation by addressing case law and public policy considerations, and offers suggestions for balancing the interests of plaintiffs and defendants to the extent that statutes of repose are applicable to environmental injuries.

MANDATORY INCLUSIONARY ZONING—THE ANSWER TO THE AFFORDABLE HOUSING PROBLEM

Brian R. Lerman

[pages 383–416]
Abstract: Affordable housing has always been a problem in the United States. Cities and towns originally engaged in forms of discrimination through exclusionary zoning to exclude low-income residents. While many of the social attitudes persist today, the question is how to encourage new affordable housing development. This Note introduces the concept of inclusionary zoning as a successful method for creating affordable housing. The Note examines the constitutional analyses used for land use ordinances. Then, the Note evaluates existing affordable housing programs, distinguishing between the eastern approach and the western approach. The eastern approach—represented by New Jersey, Massachusetts, and Montgomery County, Maryland—is based upon a “fair share” of affordable housing but lacks any planning requirement. The western approach, as illustrated by Oregon and California, is based upon community planning of all necessary elements including affordable housing, and have successfully required affordable housing development. Ultimately, the Note adopts a perspective that mandatory inclusionary zoning in all communities is the best option and should be valid under an impact fee-like analysis.

CIVIL LIABILITY FOR WARTIME ENVIRONMENTAL DAMAGE: ADAPTING THE UNITED NATIONS COMPENSATION COMMISSION FOR THE IRAQ WAR

Keith P. McManus

Abstract: There is little doubt that war has a deleterious effect on the natural environment of battlefields. Customary principles of international law, as well as more formal instruments such as treaties, address wartime environmental protection. An analysis of these mechanisms reveals that they are inadequate to ensure protection and restoration of environmental resources damaged during war. Thus, a mechanism is needed for assessing civil liability against nations for any wartime environmental damage. The United Nations Compensation Commission (UNCC), created to compensate victims of the Persian Gulf War, is a mechanism that if modified could fill this void. This Note focuses on the modifications that could make the UNCC a successful mechanism for assessing civil liability for wartime environmental damage. Further, this Note applies the adapted UNCC to the Iraq War, and examines whether U.S.-led coalition forces should be held civilly liable for damage to Iraq’s natural environment.
Abstract: Water resource management plays a critical role in everything from the viability of individual communities to regional political stability. Nowhere is this more apparent than in the Nile Basin. The Nile Basin Initiative (NBI) is a recent effort to overcome historical clashes over use of the Nile’s waters in order to achieve a basin-wide framework for transboundary cooperation. One element of NBI focuses on community-level action in furtherance of transboundary cooperation, and includes a microgrant program to help achieve its goals. Significantly, however, NBI does not include a microcredit program. This Note argues that, in light of the deep connections between inadequate water resources and the marginalization of women and the poor, NBI should supplement its microgrant program with microcredit programs to further its goals. More broadly, this Note advocates for the use of microcredit programs—which are generally implemented only in the development aid arena—in an environmental context.
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J. David Breemer*

Abstract: On June 20, 2005, the Supreme Court of the United States issued its decision in San Remo Hotel, L.P. v. City of San Francisco, holding that property owners with “ takings ” claims arising under the Fifth Amendment could not obtain federal review after litigating in state court in compliance with the ripeness requirements of Williamson County Regional Planning Commission v. Hamilton Bank. The case presented the specific question of whether federal takings claimants could invoke an exception to claim and issue preclusion doctrines under England v. Louisiana State Board of Medical Examiners because Williamson County forced them to involuntarily litigate in state court. This Article reviews the San Remo decision, criticizing the majority’s narrow interpretation of England and the result in banishing takings claims to state courts. The Article then explores the Williamson County ripeness requirement, and condemns the majority’s decision for failing to explicitly address Williamson County’s flaws. Finally, the Article considers whether San Remo closes the federal courthouse door to takings claims seeking noncompensatory relief.

Introduction

On June 20, 2005, the Supreme Court of the United States issued its decision in San Remo Hotel, L.P. v. City of San Francisco (San Remo IV),

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a case involving the right of private property owners to seek just compensation in federal court for violations of the Takings Clause of the Fifth Amendment. The case seemed to require the Court to return to the ripeness requirements of *Williamson County Regional Planning Commission v. Hamilton Bank* to determine whether they interacted with issue preclusion to strip federal takings claimants of a federal forum for their complaint. In *Williamson County*, the Court held that federal takings claims were unripe until the claimant unsuccessfully sought compensation in state court, indicating that federal review was available upon satisfaction of this ripeness hurdle. Unfortunately, *Williamson County* neglected to explain how compliance with the state procedures requirement would affect traditional jurisdictional doctrines, such as

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4 *Williamson County*, 473 U.S. at 194–97; see DLX, Inc. v. Kentucky, 381 F.3d 511, 518 n.3 (6th Cir. 2004) (noting that *Williamson County* “clearly contemplates that a takings plaintiff who loses her claim in state court will have a day in federal court”).

5 *Wilkinson v. Pitkin County Bd. of County Comm’rs*, 142 F.3d 1319, 1323 (10th Cir. 1998) (“*Williamson . . . does not discuss res judicata and collateral estoppel*”).
claim and issue preclusion, that generally bar federal courts from hearing previously litigated cases.

Confronted with a ripeness rule that seemed to trigger both federal review under *Williamson County* and application of preclusion under the Full Faith and Credit Act, federal courts struggled to identify the circumstances in which they could hear federal takings claims. Without guidance from the Supreme Court on this issue, many lower courts concluded that the preclusion doctrines prevailed. This produced a counter-response in which many courts held that takings plaintiffs could insulate themselves from claim preclusion by expressly reserving their federal takings claims for federal review under *England*

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6 See generally San Remo IV, 125 S. Ct. 2491 (2005). Under claim preclusion, or “res judicata, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action.” *Id.* at 2500 n.16 (quoting Allen v. McCurry, 449 U.S. 90, 94 (1980)). Under issue preclusion, or “collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case.” *Id.*

7 *Williamson County*’s state procedures requirement also triggers jurisdictional problems under the *Rooker-Feldman* doctrine, as well as under preclusion doctrine. See *id.* at 2509 (Rehnquist, C.J., concurring). The *Rooker-Feldman* doctrine refers to *Rooker v. Fidelity Trust Co.* and *District of Columbia Court of Appeals v. Feldman*, two cases in which “state-court losers [brought federal actions] complaining of injuries caused by state-court judgments . . . and inviting district court review and rejection of those judgments.” Exxon Mobil Corp. v. Saudi Basic Indus. Corp., 125 S. Ct. 1517, 1521–22 (2005). In both cases, the Supreme Court held that the district courts lacked jurisdiction “[b]ecause . . . authority to review a state court’s judgment [vests] solely in [the Supreme] Court.” *Id.* at 1526. Prior to *Exxon*, some courts had held that takings claims ripened by state court litigation in compliance with *Williamson County* were precluded from federal courts under *Rooker-Feldman*. See Henry v. Jefferson County Planning Comm’n, 34 F. App’x 92, 96 n.2 (4th Cir. 2002).


9 See DLX, Inc., 381 F.3d at 521–22 (discussing “various ways” in which federal courts have wrestled with the *Williamson County* preclusion problem).

10 See Berger, supra note 3, at 102 (“When property owners follow *Williamson County* and first sue in state court, they are met in some federal circuits with the argument that the state court litigation, far from *ripening* the federal cause of action, instead has *extinguished* it.”); Kidalov & Seamon, supra note 3, at 10–11 (“The district-court route [for litigating a takings claim] may prove fruitless . . . because litigation of the taking claim there ordinarily will be barred by the doctrines of issue or claim preclusion . . . .”); Kovaks, supra note 3 at 18 (“The combination of *Williamson County* and § 1738 [mandating application of the doctrines of preclusion], therefore, effectively precludes adjudication of federal takings claims in federal court.”).
v. Louisiana State Board of Medical Examiners. Nevertheless, in conjunction with issue preclusion principles, Williamson County ultimately generated a strange doctrine that lured takings claimants into state courts with the promise of federal review, only to permanently banish them from federal courts at the moment of ripeness.

No case better illustrates the pernicious nature of the state procedures-preclusion problem than San Remo IV. San Remo did everything it could to secure federal jurisdiction consistent with Williamson County: it unsuccessfully sought just compensation in California state court under a state law takings claim, explicitly reserved its federal takings claims for federal review under England, and did not litigate any federal issues in state court. Nevertheless, the Ninth Circuit Court of Appeals held that San Remo’s ripened claims could not be heard in federal court because the claims were barred by issue preclusion.

The availability of federal courts to hear federal constitutional takings claims has often seemed illusory, because under Williamson County takings plaintiffs must first file in state court . . . before filing a federal claim, and because in deciding that federal claim, preclusive effect must be given to that prior state-court action under [the Full Faith and Credit Act] . . . . The barring of the federal courthouse door to takings litigants seems an unanticipated effect of Williamson County, and one which is unique to the takings context, as other § 1983 plaintiffs do not have the requirement of filing prior state-court actions . . . .

Id.

For commentary criticizing the preclusive effect of the state procedures requirement, see Berger, supra note 3, at 102 (“In Williamson County . . . the Court expanded on the doctrine of ripeness in regulatory taking cases transforming the ripeness doctrine from a minor anomaly into a procedural monster.”); Kidalov & Seamon, supra note 3, at 5 (“The U.S. Supreme Court has developed rules that make it almost impossible for federal courts to remedy violations of the Just Compensation Clause by local land-use agencies.”); Gregory Overstreet, Update on the Continuing and Dramatic Effect of the Ripeness Doctrine on Federal Land Use Litigation, 20 ZONING & PLAN. L. REP. 17, 27 (1997) (state procedures requirement has “dramatic” and “absurd” application); Roberts, Ripeness, supra note 3, at 71 (describing Williamson County’s state procedures requirement as a “fraud or hoax on landowners.”).

11 375 U.S. 411, 420–22 (1964); see DLX, Inc., 381 F.3d at 521–22. See generally infra notes 50–64 and accompanying text.
12 See DLX, Inc., 381 F.3d at 519–21.
14 Id.
15 San Remo Hotel L.P. v. City of San Francisco (San Remo II), 41 P.3d 87, 91 n.1 (Cal. 2002) (“Plaintiffs sought no relief in state court for violation of the Fifth Amendment to the United States Constitution. They explicitly reserved their federal causes of action. As their petition for writ of mandate, as well, rests solely on state law, no federal question has been presented or decided in this case.”).
16 San Remo III, 364 F.3d at 1098–99.
Rather than maturing its claims for federal review, San Remo’s dutiful compliance with *Williamson County* had precluded any federal claim.\(^{17}\)

The Supreme Court’s grant of certiorari in *San Remo IV* seemed destined to clarify the long-standing controversy over the nature of *Williamson County’s* state procedural ripeness requirement and the ability of takings claimants to reserve federal takings claims under *England*.\(^{18}\) Ultimately, the majority decision in *San Remo IV* strictly applied preclusion,\(^{19}\) refused to apply *England* in the takings context,\(^{20}\) and approvingly concluded that San Remo’s federal just compensation claims could never be heard in federal court.\(^{21}\) But the Court failed to pay any meaningful attention to the *Williamson County* requirement that put San Remo in this position.\(^{22}\)

This Article reviews the preclusion and *Williamson County* issues raised by the Supreme Court’s decision, and its consequences for federal takings claimants. Part I reviews the evolution of *Williamson County’s* state procedures rule, specifically exploring the claim and issue preclusion problems it engendered, and the lower courts’ attempt to find a compromise solution in *England*. Part II summarizes the *San Remo* litigation, ending with the opinion by the U.S. Supreme Court. Part III critiques the majority’s refusal to grant a preclusion exception to takings claimants in San Remo’s position. Part IV criticizes the majority’s treatment of *Williamson County’s* state procedures requirement. This section argues that *San Remo IV*’s result in permanently thrusting many takings claimants into state court rests entirely on *Williamson County*’s doctrinally unsupportable ripeness rules. It then questions the majority’s refusal to address *Williamson County* and the concurrences’ objections to the state procedures rule. Finally, Part IV argues that, while *San Remo IV* and *Williamson County* may close the federal courthouse door to many takings claimants, the door remains slightly ajar for some types of claims. The Article concludes that the Court should over-

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\(^{17}\) See *id.* at 1096.


\(^{19}\) See *San Remo IV*, 125 S. Ct. at 2504–06.

\(^{20}\) *Id.* at 2502–04.

\(^{21}\) *Id.* at 2506–07.

\(^{22}\) See *infra* text accompanying notes 202–06.
turn Williamson County’s state procedures requirement or Congress should loosen the Full Faith and Credit Act to allow all federal takings claims to be heard in federal court.

I. THE SETTING: PRECLUSION DOCTRINE STIFLES WILLIAMSON COUNTY’S STATE PROCEDURES REQUIREMENT AND TRIGGERS A BACKLASH IN THE FEDERAL COURTS

In Williamson County Regional Planning Commission v. Hamilton Bank, the Supreme Court of the United States agreed to review a single question: whether a landowner denied the right to complete an approved subdivision was entitled to damages for a temporary regulatory taking.\(^23\) This issue was, however, never reached by the Court. Instead, the Williamson County opinion was concerned only with the procedural question of whether the takings claim was ripe for review.\(^24\) The Court held that it was not, positing two reasons.\(^25\) First, the Court held the claim was premature because the planning commission had not made a final decision on the bank’s development proposal.\(^26\) The Court stressed that no claim was “ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue.”\(^27\)


\(^24\) Id. at 199–200.

\(^25\) Id.

\(^26\) Id. at 186.

\(^27\) Id. The final decision concerning the ripeness rule arose from the fact that courts cannot determine whether the application of land use regulations to a claimant’s property “goes too far” and causes a taking without a concrete idea of what the government has prohibited. Id. at 190–91, 199. The Court explained:

We need not pass upon the merits of petitioners’ arguments, for even if viewed as a question of due process, respondent’s claim is premature. Viewing a regulation that “goes too far” as an invalid exercise of the police power, rather than as a “taking” for which just compensation must be paid, does not resolve the difficult problem of how to define “too far,” that is, how to distinguish the point at which regulation becomes so onerous that it has the same effect as an appropriation of the property through eminent domain or physical possession. As we have noted, resolution of that question depends, in significant part, upon an analysis of the effect the Commission’s application of the zoning ordinance and subdivision regulations had on the value of respondent’s property and investment-backed profit expectations. That effect cannot be measured until a final decision is made as to how the regulations will be applied to respondent’s property.
The Court then articulated and applied a second, more novel ripeness rule. Reasoning from the premise that there is no violation of the Just Compensation Clause until the property owner is denied just compensation, and therefore that a “State’s action . . . is not ‘complete’ until the State fails to provide adequate compensation,” the Court ruled that if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the state procedure and been denied just compensation. Applying this principle, the Court held that the bank’s takings claim was “premature” and “not yet ripe” for federal review until the Bank sought compensation through Tennessee’s inverse condemnation procedures.

At this moment, the *San Remo IV* dispute became inevitable. To understand why, it is necessary to trace the evolution of the state procedures requirement in the federal courts, and particularly, the courts’ struggle to reconcile the rule’s ripeness purpose with the law of claim and issue preclusion.

**A. Claim Preclusion, the State Procedures Requirement, and the Reservation Exception**

The state procedures rule seemed relatively simple in the immediate aftermath of *Williamson County*: federal takings claimants had to raise and lose their just compensation claims in state courts to ripen their federal claims, but once they did, their claims were mature for review in federal court. However, it quickly became apparent that this simple view was inconsistent with—and might not survive—traditional applications of the Full Faith and Credit Act.

The Full Faith and Credit Act requires federal courts to give state court judgments the same effect given to those judgments by the state from which they arise. This means that, “a federal court must give to


28 See *Williamson County*, 473 U.S. at 194.

29 Id. at 195.

30 Id. at 194–95.

31 Id. at 194–97.

32 See id.

33 See DLX, Inc. v. Kentucky, 381 F.3d 511, 519–20 (6th Cir. 2004).

34 28 U.S.C. § 1738 (2000). The Full Faith and Credit Act provides in pertinent part: “Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and
a state-court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered.”35 In short, federal courts are statutorily bound to apply a state’s law of issue preclusion and claim preclusion when confronted with cases previously litigated in state courts.36

Claim preclusion—known as res judicata—is a doctrine that “bars future litigation of claims that were brought or could have been brought in a prior proceeding that resulted in a final judgment on the merits.”37 Issue preclusion, or collateral estoppel, is different from claim preclusion because it bars litigation of any factual or legal issues resolved in a prior proceeding, without respect to whether the claims from which the issues arise were previously litigated.38

On their face, claim and issue preclusion are in tension with Williamson County’s ripeness purposes because, when preclusion controls, prior litigation totally bars subsequent litigation; failed state court litigation does not ready takings claims for federal review, but simply leaves them dead. This outcome is in tension with the apparent intent of Williamson County.39 Nevertheless, as the following section illus-

Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.” Id.

36 See id. at 80–85.
38 See Santini v. Conn. Hazardous Waste Mgmt. Serv., 342 F.3d 118, 127 (2d Cir. 2003) (“Collateral estoppel may preclude the relitigation of an issue that was actually litigated in a previous action, even if the claim in which the issue arises in the subsequent action was not brought and could not have been brought in the previous action whose judgment gives rise to the estoppel.”); RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1982) (“When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.”).
39 See Berger, supra note 3, at 102 (describing the state procedures rule as applied by lower courts as “bizarre” and not “what the Williamson County court intended because it is inherently nonsensical and self-stultifying”); Peter A. Buchsbaum, Should Land Use Be Different? Reflections on Williamson County Regional Planning Board v. Hamilton Bank, in TAKINGS SIDES ON TAKINGS ISSUES, (Roberts, ed., ABA 2002) 471 (“No issue has bedeviled takings law more than ripeness—that is, when is it suitable to bring such a claim in federal court”); Roberts, Ripeness, supra note 3, at 71 (“One understandable reaction to the prong two [state compensation procedures] requirement . . . is that it perpetrates a fraud or hoax on landowners. The courts say: ‘Your suit is not ripe until you seek compensation from the state courts,’” but when the landowner does these things, the court says: Ha ha, now it is too late.)
trates, early federal decisions favored a strict application of preclusion doctrine, effectively barring ripe takings claims from federal court.

1. Claim Preclusion Trumps Ripeness

In a 1992 decision, the Eleventh Circuit Court of Appeals aptly summarized and addressed the claim preclusion problem confronting federal takings plaintiffs and the courts following *Williamson County*:

On the one hand, *Williamson County* requires potential federal court plaintiffs to pursue any available state court remedies that might lead to just compensation . . . . On the other hand, if a litigant brings a takings claim under the relevant state procedure, he runs the risk of being barred from returning to federal court; most state courts recognize res judicata and collateral estoppel doctrines that would require a state court litigant to raise his federal constitutional claims with the state claims, on pain of merger and bar of such federal claims in any attempted future proceeding. Thus, when a would-be federal court litigant ventures to state court to exhaust any potential avenues of obtaining compensation, in order to establish that a taking “without just compensation” has actually occurred as required by *Williamson County*, he finds himself forced to raise the federal law takings claim even though he would prefer to reserve the federal claim for resolution in a section 1983 suit brought in federal court.

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40 See Wilkinson v. Pitkin County Bd. of County Comm’rs, 142 F.3d 1319, 1324 (10th Cir. 1998); Palomar Mobilehome Park Ass’n v. City of San Marcos, 989 F.2d 362, 364–65 (9th Cir. 1993); Peduto v. City of N. Wildwood, 878 F.2d 725, 727–29 (3d Cir. 1989); Rainey Bros. Constr. Co. v. Memphis & Shelby County Bd. of Adjustment, 178 F.3d 1295 (6th Cir. 1999) aff’g 967 F. Supp. 998, 1003–06 (W.D. Tenn. 1997).

41 See Kovacs, supra note 3, at 2 (Williamson County’s state procedures rule, “in combination with preclusion doctrines . . . effectively bars plaintiffs from raising federal takings claims in federal court”).

42 Fields v. Sarasota Manatee Airport Auth., 953 F.2d 1299, 1303 (11th Cir. 1992). One leading commentator put it more derisively:

When property owners follow *Williamson County* and first sue in state court, they are met in some federal circuits with the argument that the state court litigation, far from ripening the federal cause of action, instead has extinguished it. Under these [federal] courts’ reasoning, the state proceedings are res judicata, and thus bar the pursuit of the now-ripened federal action. Thus, the very act of ripening a case also ends it.

- Berger, supra note 3, at 102.
The ultimate result of enforcing preclusion was that federal takings claimants were relegated, against their will, to the state courts.\footnote{Berger, \textit{supra} note 3, at 102.}

Although some courts recognized that rigidly applying preclusion to prevent ripe takings claims from being heard in federal court was “difficult to reconcile [with] the ripeness requirement of \textit{Williamson},”\footnote{\textit{Wilkinson}, 142 F.3d at 1325 n.4; \textit{see} \textit{Fields}, 953 F.2d at 1302–03.} most courts initially refused to recognize any exceptions to preclusion for ripened takings claims.\footnote{\textit{Peduto}, 878 F.2d at 728–29 (rejecting argument that it was “wrong that the procedure outlined in \textit{Williamson} and New Jersey’s [claim preclusion rules] . . . should deny them a federal forum where they may present their federal claims.”); \textit{Rainey Bros Constr. Co.}, 967 F. Supp. at 1004 (“the interaction between \textit{Williamson County} and the Full Faith and Credit Act [preclusion rules] requires that a plaintiff landowner assert his federal claims in the state courts.”).} This trend reached its zenith in the 1998 case of \textit{Wilkinson v. Pitkin County}.\footnote{\textit{See} 142 F.3d at 1324–25.} In \textit{Wilkinson}, the Tenth Circuit Court of Appeals sympathized with takings claimants trying to sue in federal court after they had engaged in the state court litigation required by \textit{Williamson County}, but nevertheless refused to conclude that compliance with \textit{Williamson County} operated as an exception to preclusion:

\begin{quote}
We conclude the \textit{Williamson} ripeness requirement is insufficient to preclude application of res judicata and collateral estoppel principles in this case. As in [another case], the facts set forth in the state court actions are the same facts necessary for a determination of the federal claims. Also, . . . plaintiffs asserted federal claims in the state court proceedings, which were fully adjudicated, (or they could have done so), and the Colorado rules against claim splitting required them to do so.\footnote{\textit{Id.} at 1324–25 (citation omitted).}

Thus, \textit{Wilkinson} and similar cases established that—under normal circumstances—federal claims litigated in state court in accordance with \textit{Williamson County} would be barred from federal court by claim preclusion.\footnote{\textit{See id.}; \textit{Palomar Mobilehome Park Ass’n v. City of San Marcos}, 989 F.2d 362, 362 (9th Cir. 1993).} These early decisions also recognized the tension between this strict application of claim preclusion and the ripeness purposes of \textit{Williamson County}. Plaintiffs and courts looking for a way to reconcile preclusion with \textit{Williamson County}’s apparent intent to allow takings
\end{quote}
claims in federal court soon identified a possible compromise in *England v. Louisiana State Board of Medical Examiners*.

2. The “*England Reservation*” Solution

In *England*, the Supreme Court appeared to establish a method allowing federal litigants with constitutional claims to avoid preclusion when compelled to litigate in state court against their will. The case arose when the State of Louisiana refused to issue would-be chiropractors a license to practice, since they had not fulfilled the educational prerequisites required to practice medicine. The chiropractors sued in federal district court, claiming that the denial of their application violated due process. Deciding that the claims could be resolved under state law depending on whether the state license law properly applied to the chiropractors, the district court invoked the abstention doctrine, directing the plaintiffs to go to state court to definitively resolve the state law issue.

In state court, the chiropractors argued both the state law issues and their federal due process claims. They did so to comply with a prior Supreme Court decision, *Government & Civic Employees Organizing Committee v. Windsor*, which seemed to declare that a state court litigant must raise all claims, including federal constitutional claims. When the state courts held that the statute was properly applied to the chiropractors without violating due process, the chiropractors reasserted their due process claims in federal district court. Applying preclusion principles, the district court held that the claims were barred because the chiropractors had raised them in the prior state court proceedings.

On certiorari, the Supreme Court reversed. The Court expressed concerns that an unwilling state court litigant would be barred from a preferred federal forum, but recognized that some state court litigants might be deemed to “forgo [the] right to return to the District Court”

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50 Id. at 421.
51 Id. at 412–13.
52 Id. at 413.
53 Id.
54 Id. at 413–14.
57 Id. at 414.
58 Id.
59 Id. at 423.
by “freely and without reservation submit[ting] his federal claims for decision by the state courts.” But this basis for preclusion was problematic because Windsor was understood to mean that state court litigants must raise related constitutional claims. If so, then some state court litigants who did not consent to state adjudication of constitutional claims could nevertheless be deemed to have so consented and to have waived their right to district court review out of an effort to comply with Windsor.

To resolve this dilemma, the Court in England clarified that Windsor did not require a state court litigant to actually put the claims before the court; it meant only that a party “must inform those courts what his federal claims are, so that the state statute may be construed ‘in light of’ those claims.” Therefore, “mere compliance with Windsor will not support a conclusion, much less create a presumption, that a litigant has freely and without reservation litigated his federal claims in the state courts and so elected not to return to the District Court.”

However, recognizing that there was still room for confusion, the Court further held that an involuntary state court plaintiff could absolutely preserve federal review by making an express, on the record, reservation of any federal claims for resolution in federal court:

That is, [the plaintiff] may inform the state courts that he is exposing his federal claims there only for the purpose of complying with Windsor, and that he intends, should the state courts hold against him on the question of state law, to return to the District Court for disposition of his federal contentions. . . . When the reservation has been made . . . his right to return will in all events be preserved.

3. Federal Courts Extend England to Takings Claims

Although a few early post-Williamson County courts recognized England as a potential method for takings claimants to avoid claim preclusion, the Eleventh Circuit Court of Appeal’s 1992 decision in Fields v.
Sarasota Manatee Airport Authority was the first appellate decision to thoroughly analyze and accept the technique.\textsuperscript{66}

In \textit{Fields}, the question presented was “whether the district court erred in concluding that Florida collateral estoppel and res judicata principles precluded the federal courts from hearing the homeowners’ federal law takings claim” after state courts had previously rejected the owner’s state law takings claim.\textsuperscript{67} In other words, the court intended to “decide whether the interplay of \textit{England} and \textit{Williamson County} creates an exception to the operation of [claim preclusion].”\textsuperscript{68}

The Eleventh Circuit was not fully convinced that the \textit{England} reservation was applicable in the takings context, because “the \textit{England} process” was technically pertinent to claims that could be filed first in federal court.\textsuperscript{69} Nevertheless, the court concluded that \textit{England} could be legitimately extended to claims that were filed initially in state court, provided that the state action was \textit{involuntary}.\textsuperscript{70}

Applying this conclusion in light of \textit{Williamson County’s} state litigation rule, the \textit{Fields} court held “that would-be federal court litigants who are forced to pursue state court proceedings in order to satisfy exhaustion requirements imposed by federal law incident to a takings clause claim are ‘involuntarily’ in the state courts, and therefore qualify for the [\textit{England}-type] exception to generally applicable res judicata principles.”\textsuperscript{71} Property owners forced by \textit{Williamson County} to file takings claims in state court could avoid claim preclusion in the federal courts by making a “reservation of their federal constitutional claims on the record.”\textsuperscript{72}

Over the next decade, federal courts got in line with \textit{Fields} in viewing the \textit{England} reservation as an exception to the application of claim

\textsuperscript{66} 953 F.2d 1299, 1309 n.10 (11th Cir. 1992).
\textsuperscript{67} \textit{Id.} at 1302. The court had previously decided in \textit{Jennings v. Caddo Parish School Board}, a non-takings case, that a litigant may reserve federal claims for federal review by expressly reserving the federal claims from the state court litigation, the \textit{Fields} court declared that “[t]he application of \textit{Jennings} to the present dispute provides the central issue in this appeal.” \textit{Id.} at 1303.
\textsuperscript{68} \textit{Id.} at 1304.
\textsuperscript{69} \textit{Id.} at 1305.
\textsuperscript{70} \textit{Id.} at 1305–06. For support, the \textit{Fields} court relied on a footnote in \textit{Migra v. Warren City School District Board of Education}—which involved claims originally raised in state court—implying that \textit{England} applied “when a litigant with a federal constitutional claim is involuntarily in state court.” \textit{Id.} at 1306 (citing \textit{Migra}, 465 U.S. 75, 85 n.7 (1984)).
\textsuperscript{71} \textit{Id.} at 1306.
\textsuperscript{72} \textit{Fields}, 953 F.2d at 1309 n.10. Because the plaintiffs in \textit{Fields} had not made a reservation to state court resolution of their federal takings claims when filing in state court, the Eleventh Circuit applied Florida claim preclusion to dismiss their federal takings claim. \textit{Id.}
preclusion to ripened federal takings claims.\textsuperscript{73} Although a few decisions concluded that \textit{England} was inapplicable to takings claims because, unlike the claims in \textit{England}, takings claims could not be raised in federal court in the first instance,\textsuperscript{74} the vast majority followed \textit{Fields} in concluding that the crux of \textit{England} was whether the state court litigant was involuntarily in state court; if so, the \textit{England} reservation was available.\textsuperscript{75} Therefore, takings claimants could reserve their federal claims for federal review—avoiding claim preclusion in federal court—because \textit{Williamson County} gave them no choice but to file in state court.\textsuperscript{76}

\textsuperscript{73} See, e.g., \textit{San Remo III}, 364 F.3d 1088, 1094 (9th Cir. 2004) (“The City does not dispute that the plaintiffs’ \textit{England} reservation was sufficient to avoid the doctrine of claim preclusion.”); \textit{DLX, Inc. v. Kentucky}, 381 F.3d 511, 523 (6th Cir. 2004) (adopting \textit{England} reservation to avoid claim preclusion); \textit{Santini v. Conn. Hazardous Waste Mgmt. Serv.}, 342 F.3d 118, 130 (2d Cir. 2003) (holding that the “state court’s judgment on the state-law claim would not have preclusive effect in the subsequent federal action.”); \textit{Saboff v. St. John’s River Water Mgmt. Dist.}, 200 F.3d 1356, 1359–60 (11th Cir. 2000) (holding that a reservation applies); \textit{Front Royal & Warren County Indus. Park Corp. v. Town of Front Royal}, 135 F.3d 275, 283 (4th Cir. 1998) (adopting an \textit{England} reservation). In rejecting the argument that \textit{England} was only applicable to state court litigants who were in state court by prior abstention at the federal level, the Sixth Circuit explained the fundamental basis for the court’s unwillingness to adopt a crabbed view of \textit{England}: “extension of \textit{England} to unwilling state court litigants is necessary to avoid grave unfairness.” \textit{DLX, Inc.}, 381 F.3d at 523 n.9. \textit{But see} 17A \textit{Charles Alan Wright et al., Federal Practice & Procedure § 4243} (2d ed. 1988 & Supp. 2005) (“The \textit{England} procedure strictly speaking is applicable only if a case was begun in federal court . . . .”).

\textsuperscript{74} \textit{Peduto v. City of N. Wildwood}, 878 F.2d 725, 729 n.5 (3d Cir. 1989) (“[A]s plaintiffs here invoked the jurisdiction of the state court in the first instance, the application of \textit{England} has no relevance here . . . .”); \textit{Fuller Co. v. Ramon I. Gil, Inc.}, 782 F.2d 306, 312 (1st Cir. 1986) (“In order to make an \textit{England} reservation, a litigant must establish its right to have its federal claims adjudicated in a federal forum by properly invoking the jurisdiction of the federal court in the first instance.”); \textit{see also} \textit{Ganz v. City of Belvedere}, 739 F. Supp. 507, 509 (N.D. Cal. 1990) (explaining that plaintiff could retain federal jurisdiction of section 1983 takings claims by filing first in federal court, securing abstention, raising state claims in state court and making an \textit{England} reservation). For further discussion of this argument, see \textit{DLX, Inc.}, 381 F.3d at 531 (Baldock, J., concurring).

\textsuperscript{75} \textit{See supra} notes 67–74.

\textsuperscript{76} \textit{Santini}, 342 F.3d at 130.
By 2005, a clear majority of the circuits and many state courts had recognized that federal takings claimants could use the *England* reservation approach. Other circuits expressed a favorable view of escaping claim preclusion under *England*. However, few of these courts paused to consider whether the *England* reservation would effect application of issue preclusion. The courts were soon compelled to confront this question and the possibility that, when limited to claim preclusion, the *England* approach had no practical effect on federal jurisdiction over takings claims.

B. Issue Preclusion: The Final Barrier Between Federal Takings Claims and Federal Court

The doctrine of issue preclusion presents an independent barrier to federal review of ripe takings cases because it bars relitigation of any factual or legal issues decided in a prior proceeding, regardless of whether claim preclusion applies. Issue preclusion may bar review of a case that involves issues already considered even though the case raises claims entirely different from those raised in a prior proceeding. Therefore, issue preclusion could bar a federal takings case involving issues raised in a prior, *Williamson County*-mandated state court proceeding, even if the federal takings claims were reserved under *England* and never raised in state court:

The requirement of *Williamson County* that a property owner must pursue compensation through available state procedures, such as a state-law inverse condemnation action,

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77 See DLX, Inc., 381 F.3d at 521–22 (“[N]o court has held that where a plaintiff reserves its federal claims in an *England* reservation . . . and does not litigate them in the state courts, that claim preclusion will operate to bar a federal-court action.”).

78 Hallco Texas, Inc. v. McMullen County, 94 SW.3d 735, 739 (2002). The court stated that:

[a] claimant may reserve his federal claims for litigation in federal court by following a three-step procedure: (1) the litigant first files in federal court; (2) the federal court abstains and stays the federal proceedings until the state courts resolve all state-law questions; and (3) the litigant informs the state courts of his intention to return, if necessary, to federal court on his federal constitutional questions after the state-court proceedings are concluded.

• Id.


80 See Santini, 342 F.3d at 127; Restatement (Second) of Judgments § 27 (1982).
before bringing a Fifth Amendment takings claim has created a Catch-22 for takings plaintiffs. Under *Williamson County*, a plaintiff may not bring a Fifth Amendment takings claim without first having unsuccessfully pursued a state-law takings claim. Under traditional notions of collateral estoppel, however, the state court’s adverse judgment will often preclude the plaintiff’s subsequent Fifth Amendment takings claim.  

Thus, as with the claim preclusion controversy, courts had to determine whether issue preclusion would be allowed to trump the intent of *Williamson County*’s state procedures rule and whether *England* was available as an exception.

1. The *Dodd* Paradigm: Issues Litigated in a State Law Action Bar (Almost) All Federal Takings Issues

In *Dodd v. Hood River County* (*Dodd I*), the Ninth Circuit Court of Appeals established that issue preclusion could bar even a ripe federal takings claim that had been properly reserved for federal review during state law takings litigation.  

The Dodds raised and lost state law takings claims in Oregon state court, expressly reserving their federal takings claim for federal review.  

The district court dismissed their attempt to reassert the claims in federal court. On appeal, the Ninth Circuit concluded that the *England* reservation protected the Dodds’ complaint from claim preclusion. However, the court recognized a potential, additional issue preclusion barrier, remanding the case to the district court for a determination of whether the prior state law takings judgment “was an equivalent determination under the federal taking clause so as to invoke the doctrine of issue preclusion.”

When the case returned to the Ninth Circuit, the court more explicitly applied issue preclusion against the Dodds’ claims. The court first rejected the argument that the *England* reservation immunized the Dodds’ complaint from issue preclusion, holding that the

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81 Santini, 342 F.3d at 127.
82 See *Dodd v. Hood River County* (*Dodd II*), 136 F.3d 1219, 1230 (9th Cir. 1998); *Dodd v. Hood River County* (*Dodd I*), 59 F.3d 852, 863 (9th Cir. 1995).
83 *Dodd I*, 59 F.3d at 856–57.
84 *Id.* at 857.
85 *Id.* at 862.
86 *Id.* at 863.
87 *Id.*
reservation only avoided claim preclusion. Issue preclusion therefore applied and operated to bar the Dodds from litigating any legal or factual aspect of their federal takings claim that had already been considered as part of the state court litigation. However, because Oregon takings law did not include diminished “investment-backed expectations” as a regulatory takings test, the state courts could not have actually decided that issue. On this basis, the court concluded that the Dodds could litigate their investment-backed expectations theory in federal court.

Thus, in refusing to allow an exception to issue preclusion for takings claims ripened by state court litigation required by Williamson County, Dodd II closed the window for takings claims in federal courts, leaving only a small crack for those instances in which state takings law fails to incorporate a federal standard. In so doing, Dodd II increased the tension between preclusion doctrine and Williamson County’s apparent intent to allow takings claims in federal court after the required state court litigation. This conflict weighed on the federal courts and commentators. In 2003, the Second Circuit Court of Appeals broke ranks.

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89 Id. at 1227. The court elaborated as follows:

Nor does the Dodds’ previous reservation of this federal takings claim under the doctrine of England . . . prevent operation of the issue preclusion doctrine. Because the Dodds were effectively able to reserve their claim for federal court, . . . the reservation doctrine does not enable them to avoid preclusion of issues actually litigated . . . .

Id. (citations omitted). Applying issue preclusion, the court barred the portion of the Dodds’ federal claim that rested on an alleged denial of all economic use of their property, holding that a sufficiently identical issue was considered and rejected by the Oregon courts. Id. at 1225–26.

90 See id. at 1225–28.

91 See id. at 1228–29.

92 Id. at 1228–29. Ending the Dodds’ fourteen year odyssey through state and federal courts, the Ninth Circuit resolved the investment-backed expectations in the County’s favor. Id. at 1230.

93 For discussion of the extent to which the Dodd II approach would allow takings claimants to escape issue preclusion and decisions recognizing a distinction between state and federal law that might bring a claimant within Dodd II’s narrow window for avoiding preclusion, see Breemer, supra note 3, at 253–57 and accompanying footnotes.

94 See Berger & Kanner, supra note 3, at 687.

95 Santini v. Conn. Hazardous Waste Mgmt. Serv., 342 F.3d 118, 130 (2d Cir. 2003) (“We do not believe that the Supreme Court intended in Williamson County to deprive all property owners in states whose takings jurisprudence generally follows federal law (i.e., those to whom collateral estoppel would apply) of the opportunity to bring Fifth Amendment takings claims in federal court.”); Wilkinson v. Pitkin County Bd. of County Comm’rs, 142 F.3d 1319, 1325 n.4 (10th Cir. 1998) (“It is difficult to reconcile the ripeness requirement of Williamson with the laws of res judicata and collateral estoppel.”).
2. **Santini v. Connecticut Hazardous Waste Management Service**. The Second Circuit Rejects *Dodd I*

In *Santini v. Connecticut Hazardous Waste Management Service*, the Second Circuit Court of Appeals rejected *Dodd I*’s approach to the issue preclusion problem. The Connecticut Waste Management Service (the Service) secretly considered Santini’s land as a site for a nuclear waste dump. When the Service selected Santini’s property as a potential site and made this decision public, Santini sued in Connecticut state courts, alleging that the Service had committed a temporary regulatory taking by destroying his ability to develop, market, and sell previously developable land.

No federal takings claims were litigated in the state proceeding. When the Connecticut Supreme Court rejected Santini’s state takings claims, Santini sued in federal district court, this time raising takings claims under the U.S. Constitution. The Service opposed the court’s jurisdiction largely on claim and issue preclusion grounds. Santini argued that “the unique procedural posture of post-*Williamson County* takings claims requires . . . exceptions to the preclusion doctrines.”

The Second Circuit acknowledged that under an “ordinary” application of issue preclusion, Santini’s federal takings claims would be barred due to the actual litigation of state takings issues in state

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96 See, e.g., Berger & Kanner, *supra* note 3, at 687–90 (decrying application of preclusion to ripe takings claims as “a diabolical trap”); Delaney & Desiderio, *supra* note 3, at 201 (stating that due to preclusion, “the Takings Clause remains a ‘poor relation’ to other protections in the Bill of Rights”); Kanner, *supra* note 27, at 332–33 (asserting that the intersection of *Williamson County* and preclusion shows “constitutional rights of landowners as not quite deserving of a full measure of judicial protection, on par with other constitutional rights.”).

A few isolated commentators found nothing awry in the “Williamson Trap.” *See* Meacham, *supra* note 3, at 257 (“Until and unless . . . just compensation has been denied because a property owner has been denied a full and fair opportunity to litigate her takings claim in state court, a plaintiff’s choice of federal court *can and should* be properly denied . . . .”).

97 *See Santini*, 342 F.3d at 126–30.

98 *Id.* at 127–28.

99 *Id.* at 122.

100 *Id.* at 122–23.

101 *Id.* at 126–27. Under Connecticut law, the federal claims could not be raised in state court until after the state law claims failed. *Id.*

102 *Id.* at 124.

103 *Santini*, 342 F.3d at 126.

104 *Id.*
court. But the court refused to engage in a rigid application of issue preclusion because:

It would be both ironic and unfair if the very procedure that the Supreme Court required Santini to follow before bringing a Fifth Amendment takings claim—a state-court inverse condemnation action—also precluded Santini from ever bringing a Fifth Amendment takings claim. We do not believe that the Supreme Court intended in *Williamson County* to deprive all property owners in states whose takings jurisprudence generally follows federal law (*i.e.*, those to whom collateral estoppel would apply) of the opportunity to bring Fifth Amendment takings claims in federal court.

Resolving to “part ways with most of our sister circuits,” the *Santini* court held that an *England*-type reservation would insulate ripe takings claims from both claim and issue preclusion. This effort created a direct conflict with *Dodd*, which would reemerge in the case of *San Remo Hotel L.P. v. City of San Francisco*.

II. The Story of the San Remo Hotel

A. San Remo IV’s Factual and Procedural History

At its core, the San Remo Hotel is a tale of a federal takings claimant who litigated for twelve years in state and federal forums in an effort to ripen the claim for a federal court—in accordance with the directions of the Supreme Court of the United States and the Ninth Circuit Court of Appeals—but eventually found out that the directions were nothing but a cruel joke, sending the hotel in the exact opposite direction it wanted to go. Instead of guiding the hotel to federal court, the ripeness directions in *Williamson County Regional Planning Commission v. Hamilton Bank* banished the hotel to state court.

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105 Id. at 126–27. The Second Circuit concluded that claim preclusion was inapplicable “because Santini neither brought, nor could have brought, a Fifth Amendment takings claim in the Connecticut state court action . . . .” Id. at 127.
106 Id. at 130.
107 Id. at 128.
108 Id. at 130.
110 See *San Remo III*, 364 F.3d 1088, 1091–94 (9th Cir. 2004).
111 See id. at 1096.
The case began when the hotel sought to convert low cost residential units to tourist use pursuant to the City’s Hotel Conversion Ordinance (HCO). The City agreed to grant a conversion permit, but only if the hotel first paid $567,000. Believing this requirement was “an out-and-out plan of extortion,” prohibited by Nollan v. California Coastal Commission, the hotel’s owners sued the City in federal court, claiming that the fee requirements of the HCO effected an unconstitutional taking of their property, both facially and as-applied. When the initial litigation reached the Ninth Circuit, the court found San Remo’s as-applied takings claim not ripe because the hotel had not sought just compensation in California courts as required by Williamson County. On the facial claims, the court invoked abstention, staying all federal proceedings until San Remo litigated its state law claims—including a claim that the HCO did not apply to the hotel—in state courts.

The hotel then filed a complaint in state court carefully reserving its federal claims under England v. Louisiana State Board of Medical Examiners for later review by the district court. The case appealed to the Supreme Court of California which held that under state law, the heightened scrutiny for exactions evident in Nollan and Dolan v. City of Tigard did not apply to the monetary exaction imposed on San Remo. Applying a more deferential standard, the court rejected San Remo’s state law takings claims. However, the majority, concurring and dissenting justices stressed that San Remo had reserved its federal takings claims for federal review, had not raised such claims in state court, and that no state court had ever addressed those claims.

San Remo then attempted to return to federal court to litigate its unresolved federal takings claims, asserting that the Constitution of

112 Id. at 1092.
113 See San Remo II, 41 P.3d 87, 95 (Cal. 2002).
115 San Remo III, 364 F.3d at 1096–97. The hotel owner’s takings claim relied heavily on Nollan. See id.
116 See San Remo Hotel v. City of San Francisco (San Remo I), 145 F.3d 1095, 1102 (9th Cir. 1998).
117 Id. at 1104–05.
118 See 375 U.S. 411 (1964); San Remo II, 41 P.3d at 91.
120 See San Remo II, 41 P.3d at 100–06 (citing Dolan, 512 U.S. 374 (1994); Nollan, 483 U.S. 825 (1987)).
121 Id. at 106–11.
122 Id. at 91 n.1; id. at 118 (Baxter, J., concurring and dissenting); see id. at 128 (Brown, J., dissenting).
the United States required a more exacting level of scrutiny than California law. The district court, however, held that the prior state court litigation barred renewed federal litigation under the doctrine of issue preclusion. The Ninth Circuit affirmed, concluding that San Remo’s England reservation did not protect it from issue preclusion and refusing to follow Santini in recognizing a general exception to preclusion for takings claimants forced into state court by Williamson County. The U.S. Supreme Court subsequently granted San Remo’s petition for certiorari on the following question: “whether ‘a Fifth Amendment Takings claim [is] barred by issue preclusion based on a judgment denying compensation solely under state law, which was rendered in a state court proceeding that was required to ripen the federal Takings Claim?’”

**B. The Supreme Court Banishes Federal Just Compensation Claims to State Courts**

In an opinion issued on June 20, 2005, the Supreme Court unanimously affirmed the Ninth Circuit Court of Appeal’s application of issue preclusion against San Remo’s claims, refusing to recognize an exception—under England or otherwise—that would allow the claims in federal court after the failed state court litigation. In so doing, the majority neglected to explicitly consider the Williamson County rule driving the preclusion problem, even while its opinion appeared to implicitly endorse that requirement. However, four concurring justices roundly criticized Williamson County and its effect in relegating compensation claims to state courts, while agreeing that San Remo’s compliance with Williamson County triggered preclusion and therefore barred its claims.

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123 See San Remo III, 364 F.3d 1088, 1093 (9th Cir. 2004).
124 Id. at 1094.
125 Id. at 1095–96.
127 Id. at 2491, 2500–07.
128 Id. at 2506.
129 See id. at 2507–10 (Rehnquist, C.J., concurring).
1. The Majority Opinion Part I: Just Compensation Claimants Cannot Invoke the *England* Reservation

According to the majority, *San Remo IV* presented only the “narrow” question of whether the Court should create an exception to the Full Faith and Credit Act, “in order to provide a federal forum for litigants who seek to advance federal takings claims that are not ripe until the entry of a final state judgment denying just compensation.”

Addressing *England*, the majority held that a state court plaintiff could invoke the *England* reservation to preserve federal review only when the plaintiff (1) first properly invokes federal jurisdiction over a federal claim, and (2) the “federal court abstains from deciding [the] federal . . . issue to enable the state courts to address an antecedent state-law issue” that “may moot the federal controversy.”

The Court explained that the *England* reservation was not meant to give state courts “an opportunity to adjudicate an issue that is functionally identical to the federal question” sought to be reserved. The reservation is available where there exists a constitutional attack on “a state statute that can be avoided if a state court construes the statute in a particular manner.” In short, the federal issues must be “distinct” from the state law issues sent to state court.

Based on this understanding, San Remo was theoretically entitled to invoke the *England* reservation only with respect to its facial takings claims. According to the Court, the reservation was possible for the facial claims because those claims were properly filed in federal court and that court had abstained on the claims to allow a state court determination on the issue of the scope of the HCO, which had “the potential of mooting [the] facial challenge” by “overturning the City’s original classification of the . . . Hotel as a ‘residential’ property [subject to the HCO].” Nevertheless, the Court held that San Remo had

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130 Id. at 2501 (majority opinion). More particularly, given the argument presented to the Court by plaintiffs, the issue for resolution was whether federal courts could exercise de novo review over federal takings claims “whenever plaintiffs reserve their claims under *England*,” during the course of prior state court litigation, or otherwise, “regardless of what issues the state court may have decided or how it may have decided them.” Id.

131 Id. at 2502.

132 *San Remo IV*, 125 S. Ct. at 2502.

133 Id. (citing *England v. La. State Bd. of Med. Exam’rs*, 375 U.S. 411, 420 (1964)).

134 Id.; see also id. at 2506 (“Petitioners did not have the right . . . to seek state review of the same substantive issues they sought to reserve. The purpose of the *England* reservation is not to grant plaintiffs a second bite at the apple in their forum of choice.”).

135 Id. at 2503.

136 Id.
effectively waived the reservation for its facial claims by broadening its state law action to include the merits of its facial takings claims.137 Because San Remo “effectively asked the state court to resolve the same federal [takings] issues they asked it to reserve,”138 the England reservation could not protect the facial claims from preclusion.139 As for San Remo’s as-applied claims, the majority held that the England reservation was never available to preserve federal review because those claims were unripe and therefore “never properly before the District Court” in the first place.140

2. Part II: Just Compensation Claimants Have No Right to A Federal Forum

Turning from England, the majority considered San Remo’s more general contention that the Court should recognize a preclusion exception to effectuate Williamson County’s intent to permit takings claims in federal court following compliance with the state procedures requirement.141 The majority rejected this argument as improperly assuming “a right to vindicate . . . federal claims in a federal forum” free from preclusion.142 The majority scolded: “issues actually decided in valid state-court judgments may well deprive plaintiffs of the ‘right’ to have their federal claims relitigated in federal court.”143

As a second reason for rejecting San Remo’s request that the Court create a preclusion exception to effectuate the ripeness promises of Williamson County, the majority asserted that it had no power to articulate exceptions to the Full Faith and Credit Act.144 The power resided in Congress: “Even when the plaintiff’s resort to state court is involuntary and the federal interest in denying finality is robust, we have held

137 Id.
138 San Remo IV, 125 S. Ct. at 2503.
139 Id.
140 Id.
141 Id. at 2504.
142 Id.
143 Id. The majority relied heavily on Allen v. McCurry, 449 U.S. 90 (1980). Id. at 2504–05. The majority read Allen’s application of the Full Faith and Credit Act to close off a federal forum even when the would-be federal “plaintiff would have preferred not to litigate in state court, but was required to do so by statute or prudential rules.” Id. at 2504. In applying this principle against San Remo, the majority dismissed the distinction that, unlike in Allen, San Remo had attempted to invoke the federal court’s jurisdiction as an initial matter. Id. at 2505. The Court found this attempt of no relevant significance for application of Allen because San Remo’s as-applied claims were not ripe when it sought jurisdiction. Id.
144 Id. at 2505.
that Congress “‘must ‘clearly manifest’ its intent to depart from [the Full Faith and Credit Act].’”\textsuperscript{145} Finding that “Congress has not expressed any intent to exempt from the full faith and credit statute federal takings claims,” the majority concluded it could not, and would not, craft its own exception.\textsuperscript{146}

Finally, the majority criticized San Remo’s plea for a preclusion exception as overstating “the reach of Williamson County.”\textsuperscript{147} San Remo was wrong in contending that Williamson County forced all its federal claims into a state court proceeding that would trigger preclusion; San Remo’s facial takings claims were ripe from the start and, therefore, could have been raised directly in federal court.\textsuperscript{148} San Remo also erred in suggesting that Williamson County might be construed to require prior state law takings proceedings to ripen a federal claim in state court, and so combine with preclusion to bar federal claims from both federal and state court.\textsuperscript{149} The majority held that state courts could “simultaneously [hear] a plaintiff’s request for compensation under state law and the claim that, in the alternative, the denial of compensation would violate the Fifth Amendment of the Federal Constitution.”\textsuperscript{150}

The majority did recognize that its strict construction of preclusion would mean “a significant number of plaintiffs will necessarily litigate their federal takings claims in state courts.”\textsuperscript{151} However, the majority considered this result unremarkable and appropriate, because it believed that the “‘final decision’” ripeness rule and other developments predating Williamson County had minimized the federal courts’ role in takings litigation and given state courts more experi-


\textsuperscript{146} Id. The majority specifically stated that, in the absence of a Congressional mandate to the contrary, it would “apply [the] normal assumption that the weighty interest in finality and comity trump the interest in giving losing litigants access to an additional appellate tribunal.” Id.

\textsuperscript{147} Id. at 2506.

\textsuperscript{148} Id.

\textsuperscript{149} Id.

\textsuperscript{150} Id. The majority claimed that “[r]ead ing Williamson County to preclude plaintiffs from raising [federal takings] claims in the alternative [in state court] would erroneously interpret our cases as requiring property owners to ‘resort to piecemeal litigation or otherwise unfair procedures.’” Id. (quoting MacDonald, Sommer & Frates v. County of Yolo, 477 U.S. 340, 350 n.7 (1986)). Interestingly, this same principle could support rejection of Williamson County, but for some reason the majority did not see fit to address Williamson County’s primary effect, its impact on federal litigation, much less conclude that it amounts to an “unfair procedure.” MacDonald, 477 U.S. at 350 n.7.

\textsuperscript{151} San Remo IV, 125 S. Ct. at 2506.
ence in that area.\footnote{Id. (quoting Williamson County Reg’l Planning Comm’n v. Hamilton Bank, 473 U.S. 172, 186 (1985)).} The majority opined that “state courts undoubtedly have more experience than federal courts do in resolving the complex factual, technical, and legal questions related to zoning and land-use regulations.”\footnote{Id. at 2507.} Finally, the majority justified relegation of takings claims to state courts on the basis of a tax case, \emph{Fair Assessment in Real Estate Ass’n v. McNary},\footnote{454 U.S. 100 (1981).} which bars taxpayers from asserting constitutional challenges against “the validity of state tax systems in federal courts.”\footnote{San Remo IV, 125 S. Ct. at 2507 (quoting \emph{Fair Assessment}, 454 U.S. at 116).}

In conclusion, the majority scoffed at San Remo’s claims as “little more than the concern that it is unfair to give preclusive effect to state-court proceedings that are not chosen, but are instead \emph{required} in order to ripen federal takings claims.”\footnote{Id. at 2508.} Even if unfair, the majority noted that the Court was “not free to disregard the full faith and credit statute solely to preserve the availability of a federal forum.”\footnote{Id. (Rehnquist, C.J., concurring).}

3. The Concurring Opinion: \emph{Williamson County} Was Wrong

In a concurrence written by the late Chief Justice Rehnquist—and joined by Justices O’Connor, Kennedy and Thomas—four justices agreed that preclusion barred San Remo’s claims “[w]hatever the reasons for petitioners’ chosen course of litigation in the state courts.”\footnote{Id. (Rehnquist, C.J., concurring).} But in so doing, the concurrence sharply questioned the doctrinal basis and preclusive impacts of \emph{Williamson County}’s state procedures requirement.\footnote{Id. at 2508.}

The concurrence complained that “[i]t is not obvious that either constitutional or prudential principles require claimants to utilize all state compensation procedures before they can bring a federal takings claim.”\footnote{Id.} The concurrence also questioned \emph{Williamson County}’s reliance on \emph{Ruckelshaus v. Monsanto Co.}\footnote{467 U.S. 986 (1984).} and \emph{Parratt v. Taylor}\footnote{451 U.S. 527 (1981).} as precedent for the state procedures requirement.\footnote{San Remo IV, 125 S. Ct. at 2508 n.1 (Rehnquist, C.J., concurring).} The concurrence
additionally recognized that “Williamson County’s state-litigation rule has created some real anomalies . . . “ in combination with preclusion and the Rooker-Feldman doctrine,164 that prevent ripe claims from being heard in federal court.165 This led the concurring justices “to think that the justifications for [Williamson County’s] state-litigation requirement are suspect, while its impact on takings plaintiffs is dramatic.”166 Finally, Chief Justice Rehnquist’s concurrence rejected the majority’s reliance on the Fair Assessment tax case, as there was no “longstanding principle of comity toward state courts” in takings cases that would justify extending Fair Assessment to relegate all just compensation claims to state courts.167

Believing that experience showed Williamson County’s state procedures rule to be “mistaken,”168 and finding no reason “why federal takings claims in particular should be singled out to be confined to state court in the absence of any asserted justification or congressional directive,”169 the concurring justices advocated reconsidering the propriety of the state procedures requirement in a future “appropriate case.”170

III. THE COURT SHOULD NOT HAVE SINGLED OUT JUST COMPENSATION CLAIMANTS AS UNFIT TO INVOCATE ENGLAND OR ANOTHER PRECLUSION EXCEPTION TO OBTAIN A FEDERAL FORUM FOR RIPE CLAIMS

The most startling aspect of the San Remo IV opinion is the majority’s conclusion that ripe federal just compensation claims must now be heard exclusively in state courts because such claims can never avoid preclusion.171 This jurisdictional revolution rests on two dubious conclusions: first, that takings claimants are undeserving of a preclusion exception; and second, that Williamson County v. Hamilton Bank’s state procedures requirement should not be disturbed in requiring

164 Id. at 2508; see supra note 7 (defining the Rooker-Feldman doctrine).
165 San Remo IV, 125 S. Ct. at 2509 (Rehnquist, C.J., concurring).
166 Id. at 2509–10.
167 Id. at 2508–09.
168 Id. at 2507.
169 Id. at 2509.
170 Id. at 2510. The concurrence concluded that San Remo IV was not the appropriate case to consider Williamson County because “no court below has addressed the correctness of Williamson County, neither party has asked us to reconsider it, and resolving the issue could not benefit petitioners.” Id.
171 See supra Part II.
just compensation claims to be filed initially in state court.\textsuperscript{172} The first conclusion is explicit; the second is implicit.\textsuperscript{173} Because the operation of the state procedures requirement is critical to the Supreme Court’s opinion, the majority’s refusal to directly address that requirement is the great puzzle of \textit{San Remo IV}. However, the Court’s thin construction of \textit{England v. Louisiana State Board of Medical Examiners} and its general refusal to create a preclusion exception for takings claimants forced into state court litigation are disturbing in their own right, and worthy of careful consideration.

To usefully explore \textit{San Remo IV’s} construction of preclusion and the role of the \textit{England} reservation, we must be clear about the scope of the Court’s preclusion holding. Although the question presented concerned only issue preclusion and \textit{England}’s ability to shield takings claimants from that doctrine,\textsuperscript{174} the question the Court answered was whether \textit{England} provided an exception to the application of the Full Faith and Credit Act (the Act),\textsuperscript{175} which the \textit{San Remo IV} Court pointedly noted includes both issue and claim preclusion.\textsuperscript{176} \textit{San Remo IV}’s refusal to recognize an \textit{England} exception to the Act for takings claimants is therefore properly construed as a refusal to recognize an exception to either issue preclusion or claim preclusion.\textsuperscript{177}

As noted above, the Court construed \textit{England} to be unavailable to claimants complying with \textit{Williamson County} because it considered the following to be necessary conditions for reservation: proper invocation of the federal court’s jurisdiction prior to state court litigation and application of abstention,\textsuperscript{178} which directs the case to state court to allow that court to decide a state statutory issue that may moot the federal controversy.\textsuperscript{179} Through this interpretation, \textit{England} is no help

\textsuperscript{172} \textit{See San Remo IV,} 125 S. Ct. 2491, 2506–07 (2005); \textit{see also id.} at 2508 (Rehnquist, C.J., concurring) (stating that “once a government entity has reached a final decision with respect to a claimant’s property, the claimant must seek compensation in state court before bringing a federal takings claim in federal court.”); \textit{Stardust Mobile Estates LLC v. City of San Buenaventura,} 142 F. App’x 300, 301 (9th Cir. 2005) (stating that \textit{San Remo IV} declined to “reconsider” the ripeness requirements of \textit{Williamson County}).

\textsuperscript{173} \textit{See San Remo IV,} 125 S. Ct. at 2506–07.

\textsuperscript{174} \textit{See Brief for Petitioner at i, San Remo IV,} 125 S. Ct. 2491 (No. 04-340).

\textsuperscript{175} \textit{San Remo IV,} 125 S. Ct. at 2501.

\textsuperscript{176} \textit{Id.} at 2500.

\textsuperscript{177} Although the Court does not make this point expressly, it does so by result and by stressing—after making clear that \textit{San Remo} could not avoid issue preclusion under \textit{England}—that “[f]ederal courts . . . are not free to disregard 28 U.S.C. § 1738 [the Full Faith and Credit Act].” \textit{Id.} at 2502 (emphasis added); \textit{see also id.} at 2505.

\textsuperscript{178} \textit{See id.} at 2503.

\textsuperscript{179} \textit{See id.} at 2502.
to would-be federal takings claimants because a lack of ripeness prevents the plaintiffs from properly invoking federal jurisdiction in the first instance and their state court litigation does not center on a state statutory issue.\textsuperscript{180} This is an unnecessarily mechanical view of \textit{England} and its application to takings claims.\textsuperscript{181}

\textbf{A. Involuntary State Court Litigation Seems More Important to England Than “Properly Invoking Federal Jurisdiction”}

In \textit{England}, the Court appeared driven to secure a federal forum for all federal claimants that did not freely submit their claims to state court.\textsuperscript{182} The Court’s concern was that federal constitutional plaintiffs could lose federal district court review “without . . . consent and through no fault of [their] own” by being thrust into involuntary state court litigation that would trigger preclusion.\textsuperscript{183} This smacked of unfairness not only because it took the choice of a state forum, and federal preclusion, out of the plaintiff’s hands,\textsuperscript{184} but also because it left only the possibility of Supreme Court review, which the Court considered an inadequate substitute for district court proceedings.\textsuperscript{185}

The \textit{England} reservation seemed designed to respond to the unfairness of precluding district court review based on involuntary state court litigation by allowing plaintiffs to neutralize the preclusive effects of that litigation, thereby regaining the ability to litigate in federal court.\textsuperscript{186} As such, it reflected the Court’s understanding that preclusion is fairly applied only when it results from the litigant’s own choices.\textsuperscript{187} Thus, the \textit{England} Court stressed: “if a party \textit{freely and without reservation} submits his federal claims for decision by the state courts, litigates them there, and has them decided there, then—whether or not he seeks direct review . . . in this Court—he has elected to forgo his right to return

\textsuperscript{180} See \textit{id.} at 2503, 2505.

\textsuperscript{181} See supra Part I.A.3 (discussing cases recognizing the ability of takings claimants to invoke the \textit{England} reservation).

\textsuperscript{182} See 375 U.S. 411, 418 (1964) (expressing desire to craft a rule preventing “procedural \textit{traps} operating to deprive [litigants involuntarily in state court] of their right to a District Court determination of their federal claims.” (emphasis added)); Wicker v. Bd. of Educ. of Knott County, 826 F.2d 442, 446 (6th Cir. 1987) (filing by plaintiff in state court prior to federal court abstention order may utilize \textit{England} reservation).

\textsuperscript{183} \textit{England}, 375 U.S. at 415.

\textsuperscript{184} See \textit{id.}

\textsuperscript{185} Id. at 416.

\textsuperscript{186} See \textit{id.} at 418–20.

\textsuperscript{187} Id. at 417 (“The possibility of appellate review by this Court of a state court determination may not be substituted, \textit{against a party’s wishes}, for his right to litigate his federal claims fully in the federal courts.” (emphasis added)).
to the District Court.”188 Given the Court’s sense that it is fair to apply federal preclusion only to plaintiffs whose own actions trigger preclusion—those who willingly litigate federal issues in state court—the availability of the England reservation seemed to hinge on whether plaintiffs are in state court involuntary, not upon the precise procedural path that got them there.189

It is true that the England Court, in crafting the reservation, referred to a plaintiff who had “properly invoked the [court’s] jurisdiction.”190 But this may reasonably be viewed as nothing more than an innocuous reference to the facts of England. Certainly, it is difficult to view the reference to a plaintiff who “properly” invokes jurisdiction as a mandatory prerequisite to the England reservation—and availability of federal review—when England otherwise appears willing to deny a federal forum only to plaintiffs whose voluntary acts invite preclusion.191 In the post-England case of Migra v. Warren City School District Board of Education, the Court appeared to confirm that the issue of voluntariness was more important than adherence to a precise procedural template—properly invoking jurisdiction in the first instance—when it stated England applies “when a litigant with a federal constitutional claim is involuntarily in state court.”192 Prior to San Remo IV, the federal courts were virtually unanimous in concluding that England’s primary focus was the voluntariness of litigation.193

Given England’s reasoning, prospective federal takings plaintiffs had reason to believe they could invoke the England reservation even though they could not properly invoke federal jurisdiction, and secure abstention.194 Such claimants were, after all, forced to engage in state court takings litigation against their will by Williamson County.195 For this reason, they could be deprived of a federal forum due to “no fault of [their] own,”196 thus implicating the fairness concerns at the heart of

188 Id. at 419 (emphasis added).
190 England, 375 U.S. at 415.
191 See id. at 415–20.
192 Fields, 953 F.2d at 1306; see Migra, 465 U.S. 75, 85 n.7 (1984).
193 See supra notes 70–79 and accompanying text.
194 See supra notes 182–92.
196 England, 375 U.S. at 415.
England. Many federal courts agreed with this reading of England; the San Remo IV Court, however, did not.

B. The State Statutory Issue Requirement Is Not Necessary to England

Although the conclusion that plaintiffs must be able to properly invoke federal jurisdiction probably ended the possibility that federal just compensation claimants could use the England reservation, the Court closed the deal by further noting that England only applies when the would-be federal litigant is sent to state court to litigate a state statutory issue. This proposition appears to have arisen from the understanding that the England reservation operates to preserve federal claims while a state court makes a determination that “may moot the federal controversy.” The San Remo IV Court seems to suggest that a state statutory issue is an indispensable element of this process.

However, it is hardly clear that a statutory issue is always necessary to moot a federal claim; state constitutional protections may also suffice. This is especially true in the takings context where a ruling on a state constitutional takings provision may result in just compensation under state law and thereby moot a federal claim for just compensation. Indeed, the entire point of Williamson County’s state compensation procedures requirement is to provide an opportunity for “the state courts [to] adjust state law to avoid or alter the constitutional question.” Therefore, while England is surely designed to preserve federal claims while state law litigation determines whether they are moot, there is no obvious reason why a state statutory issue must be present. Certainly, England’s language allows more, since it stressed a desire to avoid “questions of [federal] constitutionality on the basis of

197 See, e.g. DLX, Inc. v. Kentucky, 381 F.3d 511, 523–24 (6th Cir. 2004); Santini v. Conn. Hazardous Waste Mgmt. Serv., 342 F.3d 118, 130 (2d Cir. 2003); Fields, 953 F.2d at 1305–06. See generally supra notes 66–72 and accompanying text.
198 See id. at 2501–02.
199 See id. at 2502 (“[t]ypical England cases generally involve federal constitutional challenges to a state statute that can be avoided if a state court construes the statute in a particular manner.” (citing England, 375 U.S. at 420)).
200 See id.
201 See id.
202 See Dodd I, 59 F.3d 852, 860 (9th Cir. 1995).
203 See id. at 860–61.
204 See id. at 860.
205 See Fields, 953 F.2d at 1304–05. But Meacham has argued that England is not applicable to takings claims because “[a]n England reservation works where the state court is deciding the applicability of a statute, as distinguished from the constitutionality of the statute.” Meacham, supra note 3, at 250.
preliminary guesses regarding local law,””206 which can be fairly construed to include local constitutional provisions as well as statutes.207

The San Remo IV Court bolsters its emphasis on a state statute—and its corresponding disregard for state constitutional provisions—by declaring that the federal issues sought to be reserved under England must be “distinct” from the state law issues referred to the state court.208 Yet, the basis for requiring that the state law issue be distinct from the reserved federal issue is also unclear.209 Perhaps the idea is consistent with the England facts;210 but in crafting the England reservation, the Court never said that the reservation depended on a manifest difference between the state and federal issues.211

Moreover, there is no apparent logical basis for imputing a requirement that litigated state court issues be distinct from reserved federal issues in order to warrant England protection. Perhaps one can see such a requirement as a proxy test for whether the federal issues were effectively litigated as part of the prior state court questions. Under this view, if the reserved federal issues are distinct from the state court issues, then it can be presumed that the federal issues were not previously litigated and issue preclusion would not apply. But this amounts to a rule that the England reservation applies when issue preclusion does not. As such, it assumes that England is only available for claim preclusion, an assertion not found in San Remo IV.212

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207 See Fields, 953 F.2d at 1304–05.
208 San Remo IV, 125 S. Ct. 2491, 2502 (2005).
210 See England, 375 U.S. at 413–14. The distinctness of issues is not clearly evident in the facts. Although the England plaintiffs had a state statutory issue in state court—whether the statute applied to them—that was distinct from their federal due process and equal protection issues, the state and federal issues were not litigated separately. Id. “They did not restrict those [state court] proceedings to the question whether the Medical Practice Act applied to chiropractors. They unreservedly submitted for decision, and briefed and argued, their contention that the Act, if applicable to chiropractors, violated the Fourteenth Amendment.” Id. at 413.
211 See id. at 413–15 (implying a distinctness of issues).
212 Some language in the opinion can be read to suggest that the Court views England as potentially available only to neutralize claim preclusion. See, e.g., San Remo IV, 125 S. Ct. at 2503 (“our [England] opinion made it perfectly clear that the effective reservation of a federal claim was dependent on the condition that plaintiffs take no action to broaden the scope of the state court’s review beyond decision of the antecedent state-law issue.”) (emphasis added). This would make sense given the Court’s emphasis on the necessity of distinct federal and state issues, but it is hard to square with England where the Court offered the reservation to plaintiffs who actually raised federal issues in state court, and would
If the *England* reservation provides a shield against both issue and claim preclusion, as *England* indicates,\(^{213}\) then it makes no sense to require distinct state court and reserved issues—to require an absence of issue preclusion—as a prerequisite for the *England* reservation. As an exception to issue preclusion, the *England* reservation is necessarily designed to apply when the state court and federal issues are *not* distinct.\(^ {214}\) So, to say that the state court issues must be distinct from the reserved federal issues, as the Supreme Court’s *San Remo IV* opinion does, is tantamount to saying that the *England* exception is available only when it is not necessary in the first place.

In sum, until *San Remo IV*, the exact factual and procedural circumstances in *England* did not seem necessary to the *England* reservation.\(^ {215}\) Instead, what seemed necessary was involuntary state court litigation that was designed to moot a federal constitutional concern, but which might have the unintended effect of unfairly precluding plaintiffs from litigating their claims in federal court.\(^ {216}\) Under this view, it was reasonable to conclude that the procedural circumstances in *England* were sufficient to trigger the reservation because they implicated the Court’s underlying concerns—fundamental fairness—not because they contained some talismanic force in themselves.\(^ {217}\) When *England* is viewed in this light, federal takings litigants compelled by *Williamson County* to seek compensation in state courts under state law theories, for purposes of mooting a federal claim to compensation, had reason to invoke the *England* reservation.\(^ {218}\)

C. The Court Could Have Recognized an Exception to Preclusion for Takings Claimants

Even if the Court is correct that the *England* framework is not broad enough to include ripe takings claims, the Court could have created a general “*San Remo*” exception to preclusion to effectuate *Williamson County*’s promise that ripe takings claimants may be heard therefore be subject to issue preclusion, except for the fact that the issues were litigated involuntarily. *See England*, 375 U.S. at 417–22.

\(^ {213}\) *See supra* text accompanying note 50; *see also England*, 375 U.S. at 421–22 (“When the reservation has been made, [the involuntary state court litigant’s] right to return [to federal court] will in all events be preserved.” (emphasis added)).

\(^ {214}\) *See England*, 375 U.S. at 413–22.

\(^ {215}\) *See supra* Part II.B.1.

\(^ {216}\) *See supra* Part I.A.3.

\(^ {217}\) *See England*, 375 U.S. at 413–22; *Fields*, 953 F.2d at 1305–06.

\(^ {218}\) *See id.*
in federal court. In refusing this course, the Court claimed that it had no power to craft an exception to the Full Faith and Credit Act without express authorization from Congress. This is extremely puzzling because, even under San Remo IV’s crabbed view of England, it is difficult to conceive of the England reservation as anything but a Court-crafted exception to the Full Faith and Credit Act.

As we have seen, the San Remo IV Court considered England relevant only when plaintiffs with federal constitutional claims and state statutory claims properly invoke a federal court’s jurisdiction, and the court invokes abstention for purposes of allowing a state court to litigate a state law issue that may moot the federal claims. Even in this situation, a strict application of the Full Faith and Credit Act should preclude the plaintiffs from rearguing their federal claims because claim preclusion bars litigation of any claims that “could have been raised” in a prior judicial proceeding, as well as those that are actually raised. Because San Remo IV’s prototypical England plaintiff could raise his federal constitutional claims in the court-mandated state proceeding, an uncompromising application of preclusion—the application approved of in San Remo IV—should bar the return to federal court.

San Remo IV acknowledges, however, that the England Court created a reservation approach that is at least capable of neutralizing preclusion in this situation.

Since the Court created a preclusion exception in England without express Congressional authorization, it is hard to understand why it is powerless to do so in the takings context. This attitude cannot be

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219 See supra notes 66–72 and accompanying text (discussing the Eleventh Circuit Court of Appeal’s recognition of an England-style reservation exception in Fields v. Sarasota Manatee Airport Authority); supra Part I.B.2 (discussing the Second Circuit Court of Appeals’s creation of a “Santini” reservation in Santini v. Connecticut Hazardous Waste Management Service).


222 See San Remo IV, 125 S. Ct. at 2501–03.

223 See supra notes 133–40 and accompanying text.

224 See San Remo IV, 125 S. Ct. at 2500 n.16 (quoting Allen v. McCurry, 449 U.S. 90, 94 (1980)).

225 Propper v. Clark, 337 U.S. 472, 491–92 (1949) (noting that by “sending a fragment of the litigation to a state court, the federal court might find itself blocked by res judicata, with the result that the entire federal controversy would be ousted from the federal courts, where it was placed by Congress.”); see also San Remo IV, 125 S. Ct. at 2502–03, 2507.

226 See San Remo IV, 125 S. Ct. at 2503 (noting that San Remo might have effectively reserved its facial federal claims while litigating a state statutory issue).
plausibly explained by the presence of abstention in *England* since “[a]bstention is [also] a judge-fashioned vehicle . . . .”227 Nor can strict deference to Congress in the takings context and no deference in the *England* context be adequately explained by the inability of takings claimants to properly invoke federal jurisdiction in the first instance, for this disability was also created by the Court.228 One is faced then with the real possibility that the Court refused to recognize a preclusion exception for takings claimants because it did not want to, rather than because it was powerless to do so under *England* or without Congressional authorization.229

Indeed, an argument can be made that the Court was not only able, but obligated to recognize a preclusion exception for federal just compensation claimants. After all, *Williamson County*’s state procedures requirement purports to be a “constitutionally-grounded” ripeness rule that permits a federal claim for compensation to proceed in federal court after state litigation.230 On the other hand, as Justice Douglas stated in his concurring *England* opinion, “*res judicata* is *not* a constitutional principle . . . .”231 Therefore, one might have expected that the nonconstitutional preclusion doctrine must bow to *Williamson County*’s constitutional ripeness doctrine, permitting ripe takings claims in federal court. The *San Remo IV* Court’s opposite decision is confusing because it appears to elevate a statutory principle over a constitutional one.232

Even if one ignores the allegedly constitutional character of *Williamson County*’s state procedures rule—as the *San Remo IV* majority did—it does not follow that deference to Congress requires strict enforcement of the Full Faith and Credit Act. Congress has expressed an intention that federal courts should have jurisdiction to hear all federal questions.233 Congress gave federal courts power to hear federal constitutional questions in part because “federal judges appointed for life are more likely to enforce the constitutional rights of unpopular minorities

227 See *England v. La. State Bd. of Med. Exam’rs*, 375 U.S. 411, 415 (1964) (emphasis added). Because abstention is judicially created, saying that abstention gives the Court power to create a preclusion exception without Congressional blessing is tantamount to saying that the Court gives itself the power.


229 See *England*, 375 U.S. at 411.

230 See *Williamson County*, 473 U.S. at 194–95.


than elected state judges.”

Issues arising under the Takings Clause of the Fifth Amendment have always been considered federal questions, and the San Remo IV Court makes no contrary representations. Therefore, if the San Remo IV Court wanted to proceed by way of deference to Congress, it might have done so by securing federal jurisdiction over federal just compensation questions, not by rigidly applying preclusion. The Court would have effected Congress’s intent to protect individuals—including property owners—from potential state court bias in favor of the local majority.

By turning away from authority and principles that could have justified an England-type exception for takings claimants, the San Remo IV Court has singled out property owners as second-class constitutional claimants. By closing the federal courthouse door, the Court has not only branded takings claims as the only claims unworthy of federal protection, but also has effectively nullified the claimants’ Seventh Amendment right to a jury trial in federal court. Furthermore, by predating England on the jurisdictional posture of the case rather than on the involuntariness of state litigation, the Court has branded takings claims as the only constitutional claims to which the England reservation does not apply.

Although the Supreme Court has admirably declared that the federal takings clause is not a “poor relation” in the constitutional hi-

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235 See San Remo IV, 125 S. Ct. at 2506–07.
236 See id. at 2505.
237 See Steven J. Eagle, Regulatory Takings § 13.5(d), at 1069 (2d ed. 2001) (“The fact that there are . . . more competing interests in their districts also makes [federal judges] more disposed to vindicate the exercises of property rights that do not benefit immediate neighbors.”).
238 Berger & Kanner, supra note 3, at 690 (“That property owners have been singled out [for relegation to state courts] is clear.”); Delaney & Desiderio, supra note 3, at 196 (“the ripeness and abstention doctrines have uniquely denied property owners, unlike the bearers of other constitutional rights, access to the federal courts on their federal claims”).
239 See San Remo IV, 125 S. Ct. at 2501–03.
240 As one federal district court put it:

[It defies logic and common sense to say that all federal Constitutional issues (save taking ones) which are coupled with significant State court questions which are not automatically precluded as unripe, may be preserved by a reservation for a return visit to a federal court, but so-coupled federal taking claims may not because they (unlike the others) are precluded from being brought in the first instance in a federal court. The reason for this court-made distinction . . . just makes no sense.

erarchy, the Court’s failure in San Remo IV to bend preclusion to ensure that takings claims are given as much federal attention as other claims makes a mockery of this sentiment.

IV. San Remo’s Relegation of Claims to State Courts Rests on Williamson County’s Bankrupt State Procedures Requirement

Although the Court’s application of the Full Faith and Credit Act is deserving of criticism, it cannot be blamed for San Remo IV’s startling conclusion that “a significant number of plaintiffs will necessarily litigate their federal takings claims in state courts.” Preclusion is, after all, wholly dependent on prior litigation, and there is only one reason that such prior litigation routinely occurs in the takings context: Williamson County v. Hamilton Bank. Therefore, no matter how strongly the Court interprets the Full Faith and Credit Act or how narrowly it construes England v. Louisiana State Board of Medical Examiners, it cannot be said that this causes takings claims to be relegated to the state courts. That distinction goes entirely to Williamson County: if not for the state procedures requirement, few just compensation claimants would confront preclusion because they would simply avoid state courts.

Consequently, by accepting that federal just compensation claims must be litigated in state courts, the San Remo IV majority appears to affirm that Williamson County requires takings claimants to initially file just compensation claims in state court, while disavowing the idea

244 Id. at 2501 (“The general rule implemented by the full faith and credit statute [is that the] parties should not be permitted to relitigate issues that have been resolved by courts of competent jurisdiction . . . .”).
246 San Remo IV, 125 S. Ct. at 2501–03, 2505–06. Applying tort terminology, one might say that the San Remo IV Court’s strict construction of preclusion may supply a “but-for” cause for the relegation of federal just compensation claims, but Williamson County’s state procedures rule is the proximate cause. See id. at 2501; Williamson County, 473 U.S. at 195.
247 The prevalence of pre-Williamson County federal court takings litigation attests to this proposition. For specific examples of such litigation, see infra note 283 and accompanying text.
248 Hoagland v. Town of Clear Lake, 415 F.3d 693, 699 (7th Cir. 2005) (stating that San Remo IV affirmed that “plaintiffs must take their case for compensation to the state courts” under Williamson County); Starr v. Shucet, No. 1:05CV00026, 2005 WL 1657102, at *3 n.2 (W.D. Va. July 15, 2005) (stating that San Remo “left the holding in Williamson [County]
that compliance with this rule ripens claims for federal adjudication. After all, if state court litigants complying with Williamson County cannot mature their claims for federal review, as San Remo IV dictates, then the state procedures requirement is not the ripeness prerequisite presented by Williamson County; it is simply a “litigate in state court” rule.\(^{249}\)

And yet, the majority never directly expresses these views.\(^{250}\) The opinion fails to explain how a ban on federal review can be reconciled with Williamson County’s premise that state court litigation ripens federal review.\(^{251}\) The majority also does not acknowledge or address the deep conceptual problems with the state procedures requirement it affirms.\(^{252}\) Instead of acknowledging the Williamson County rule driving its opinion, the majority supports the relegation of claims to state courts with factual propositions about superior state court takings experience.\(^{253}\) These propositions are demonstrably incorrect, but to the extent they have any validity, they merely reinforce the need to directly address Williamson County’s state procedures requirement.\(^{254}\)

A. All of San Remo IV’s Roads Lead to Williamson County

1. Williamson County’s Ripeness Doctrine Gave Plaintiffs a Belief They Had a Right to a Federal Forum

The majority’s first basis for approving the relegation of just compensation claims to state courts is a rejection of the notion that just compensation claimants like San Remo have a right to a federal forum.\(^{255}\) In criticizing this idea, the majority acts as if it is dealing with a miscalculation about preclusion.\(^{256}\) This is a straw-man. San Remo IV and other federal takings claimants have been entirely cognizant of po-
tential preclusion barriers to later federal review when they engage in mandated state court litigation. They have nevertheless believed that they had a right to federal review because *Williamson County* seems to promise it, as a matter of constitutional ripeness, following state court litigation. The *Williamson County* Court consistently and repeatedly presented the state procedures requirement as a ripeness barrier—a preliminary step toward obtaining federal review. As the Sixth Circuit Court of Appeals acknowledged shortly before *San Remo IV*, *Williamson County*’s ripeness language creates an “expectation . . . that an unsuccessful state plaintiff will then return to federal court.”

A strict application of preclusion that bars takings claims litigated in accordance with *Williamson County* is inconsistent with the ripeness premises and the promises of the state procedures requirement, as well as the jurisdictional expectations it engenders. Nothing in *Williamson County* indicated that preclusion would trump ripeness under the state procedures rule, stranding claimants in state court. Such a result was “clearly not contemplated by the Court in *Williamson County* . . . .” Therefore, it was entirely reasonable for *San Remo* and other federal just compensation claimants to conclude that they had a right to a federal forum after losing in state court notwithstanding the preclusion doctrine.

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257 See DLX, Inc. v. Kentucky, 381 F.3d 511, 518 n.3 (6th Cir. 2004).
258 See id. (stating that *Williamson County* “clearly contemplates that a takings plaintiff who loses her claim in state court will have a day in federal court”); see also Berger, *supra* note 3, at 104 (explaining that the *Williamson County* Court repeatedly used language indicating that “land use cases can be ripened and then litigated in federal court.”).
259 See *Dodd I*, 59 F.3d 852, 860 (9th Cir. 1995) (“We deem it extremely significant that the *Williamson County* Court characterized the compensation element as an issue of ripeness. The central concern of ripeness is whether the case involves uncertain or contingent future events that may not occur as anticipated, or indeed may not occur at all.”).
260 DLX, 381 F.3d at 521; see also Meacham, *supra* note 3, at 239 (“When the Supreme Court established the ripeness requirement in *Williamson*, it did so in language that suggested that, eventually, a litigant’s taking claim would be heard in federal court.”); Roberts, *Ripeness, supra* note 3, at 39 (“the ripeness label applied to prong two is misleading for it suggests that a claim may be heard in federal court after a state court denies compensation”); Roberts, *Procedural Implications, supra* note 3, at 10,356 (“the *Williamson County* opinion suggested that once the landowner sought compensation in the state court and lost on the merits or was awarded an amount of compensation deemed inadequate, it would then be timely to bring suit in federal court”).
261 See *Dodd I*, 59 F.3d at 861 (“We disagree . . . with the suggestion that *Williamson County* is a thinly-veiled attempt by the Court to eliminate the federal forum for Fifth Amendment taking plaintiffs . . . .”).
262 DLX, 381 F.3d at 523 n.9.
However, in chastising San Remo for asserting a right to a federal forum, the *San Remo IV* majority ignores *Williamson County*’s role in creating an expectation of a federal forum.\(^{264}\) This is remarkable because the ripeness promises in *Williamson County*—followed by lower courts—formed the heart of San Remo’s case.\(^{265}\) San Remo did not simply argue that issue preclusion did not apply, as the majority opinion implies; it contended that *Williamson County*’s ripening effect trumped preclusion.\(^{266}\) San Remo’s first argument in its brief on the merits was that “*Williamson County* was not intended to bar takings claims from the federal courts”\(^{267}\) because under that decision, “takings plaintiffs may ripen their federal takings claims and then pursue them in federal court.”\(^{268}\) The majority’s refusal to address these ripeness arguments seems highly unfair. Furthermore, in the absence of such consideration, the Court’s denial of San Remo’s asserted right to a federal forum is incomplete and unpersuasive.

2. *Williamson County* Has Given State Courts Control of Takings Litigation for Two Decades

The *San Remo IV* majority seeks to support its permanent ban on federal review of just compensation claims with other non-*Williamson County* justifications.\(^{269}\) Most significantly, it asserts that takings claims have been traditionally heard in state courts due to a pre-*Williamson County* “final decision” ripeness rule:

It was settled well before *Williamson County* that “a claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue.” As a consequence, there is scant precedent

\(^{264}\) See *San Remo IV*, 125 S. Ct. 2491, 2506 (2005).

\(^{265}\) See Brief for Petitioner, *supra* note 174, at 10–14. San Remo lists all the instances in *Williamson County* in which the Court stated that the property owner’s federal takings claim in that case was merely premature or not ripe for failure to exhaust state compensation procedures. *Id.* at 11.

\(^{266}\) See *id.* at 12 (“Nothing in the *Williamson County* opinion even suggests that the outcome of state compensation procedures could preclude a federal takings claim . . . . [T]hat result would be inconsistent with this Court’s opinion in *Williamson County.*”).

\(^{267}\) *Id.* at 10 (capitalization removed).

\(^{268}\) *Id.* at 10–11.

for the litigation in federal district court of claims that a state agency has taken property in violation of the Fifth Amendment’s takings clause. To the contrary, most of the cases in our takings jurisprudence, including nearly all of the cases on which petitioners rely, came to us on writs of certiorari from state courts of last resort.270

Both the premises and conclusions of this reasoning are demonstrably false.

First, contrary to the majority opinion, the “final decision” ripeness rule has nothing to do with the modern—post-1985—decline of federal courts in takings litigation.271 Unlike the state procedures requirement, the final decision rule does not require litigation in state court,272 or exhaustion of local administrative remedies; it only requires an administrative land use decision that renders takings issues fit for review.273 Therefore, a final decision cannot trigger application of preclusion doctrines. Rather, assuming a final decision is the only ripeness barrier, a claimant satisfying that requirement may sue immediately in either state or federal court.274

Even putting aside the majority’s reliance on the final decision rule, its conclusion that there is “scant precedent” for federal litigation is patently false as an empirical matter.275 Between June 26, 1978—the date the Court decided Penn Central Transportation Co. v. New York City276 which provided the modern regulatory takings test—and June 28,

270 San Remo IV, 125 S. Ct. at 2506 (emphasis added) (internal citations omitted).
271 See id. (stating final decision rule).
272 Palazzolo v. Rhode Island, 533 U.S. 606, 620 (2001) (finding under the final decision ripeness rule that “once it becomes clear that the agency lacks the discretion to permit any development, or the permissible uses of the property are known to a reasonable degree of certainty, a takings claim is likely to have ripened . . . . [A] landowner may not establish a taking before a land-use authority has the opportunity, using its own reasonable procedures, to decide and explain the reach of a challenged regulation.”).
273 See Williamson County, 473 U.S. at 192–93 (explaining that the final decision requirement is different from and does not require exhaustion of administrative remedies that “result in a[n administrative] judgment whether the [agency’s] actions violated any of [the property owner’s] rights.”).
274 See, e.g., Corn v. City of Lauderdale Lakes, 816 F.2d 1514, 1516 (11th Cir. 1987) (holding that case was easily ripe for federal court review under final decision prong and focusing on ripeness under state compensation procedures requirement).
275 San Remo IV, 125 S. Ct. 2491, 2506 (2005).
276 438 U.S. 104 (1978). In Penn Central, the Court articulated this modern regulatory takings balancing test: “The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. So, too, is the character of the governmental action.” See id. at 124 (citation omitted). For general discussion of the scope of
1985—the date the Court issued \textit{Williamson County}—there were approximately 141 federal district court cases involving federal takings claims against regulation.\footnote{These cases were collated through a Westlaw search of ("just compensation" & taking & "fifth Amendment" & regulat!) in the federal district court opinion, DCT, database.} By contrast, there were just 109 similar state court cases.\footnote{These cases were identified running the search ("just compensation" & taking & "fifth Amendment" & regulat!) in the Westlaw ALLSTATES database.} Federal courts were also central in pre-1978 regulatory takings jurisprudence. In the period between 1922—the year \textit{Pennsylvania Coal v. Mahon} was decided—and 1978, there were approximately 174\footnote{This number was arrived at by running the following search (da(aft 12/11/1922 & bef 6/26/1978) & "just compensation" & taking & "fifth amendment" & regulat!) in the Westlaw DCT database.} more instances of “litigation in federal district court of claims that a state agency has taken property in violation of the Fifth Amendment’s takings clause.”\footnote{San Remo IV, 125 S. Ct. 2491, 2506 (2005).}


only fourteen from state courts.\textsuperscript{284} Even after \textit{Williamson County}, certiorari grants in taking cases from federal courts exceed those from state courts.\textsuperscript{285} To the extent that the Court has recently considered proportionately fewer takings cases from federal courts and more from state courts, this is hardly a result of some natural order in takings litigation; it results from the reality that \textit{Williamson County}'s state procedures rule forces takings claims into the state court system.\textsuperscript{286} The same reality explains why state courts may currently have “more experience” than federal courts in tackling takings claims.\textsuperscript{287} Certainly, \textit{San Remo IV}'s and other takings litigants' protracted and desperate attempts to secure federal review belies any notion that state court experience results from plaintiffs’ preference for such courts.

Therefore, the \textit{San Remo IV} majority’s attempt to support the relegation of just compensation claims on non-\textit{Williamson County} grounds fails miserably. The argument fails not only because the premises and conclusions are easily disproved, but also because the proof of their fallacy magnifies the centrality of \textit{Williamson County}. The historical distribution of federal just compensation claims between state courts and federal courts simply cannot be discussed without considering \textit{Williamson County}'s state procedures requirement; the majority, however, strives to do so to the point of positing transparently false reasoning.\textsuperscript{288}


\textsuperscript{285} Based on the lists provided in notes 283 and 284, it appears that since 1985 the Supreme Court has granted certiorari to seventeen major takings cases from federal courts and only nine from state courts. These lists do not include cases challenging government acts as a violation of the public use requirement of the Takings Clause. \textit{See, e.g.}, Haw. Hous. Auth. v. Midkiff, 467 U.S. 229 (1984).

\textsuperscript{286} \textit{See Williamson County}, 473 U.S. at 194.

\textsuperscript{287} \textit{San Remo IV}, 125 S. Ct. at 2507.

\textsuperscript{288} \textit{See id.}
3. Reliance on *Fair Assessment* Highlights the Effect of *Williamson County*

As a final basis for closing the federal court house door to just compensation claims, the *San Remo IV* majority analogizes to the *Fair Assessment in Real Estate Ass’n v. McNary* tax case.\(^{289}\) In *Fair Assessment*, the Supreme Court held that taxpayers are barred by the principle of comity from asserting that claims for money damages under 28 U.S.C. § 1983 arising from an allegedly unconstitutional administration of a state tax scheme must be heard in state courts.\(^{290}\)

This holding was grounded in precedent—dating back to 1871—recognizing that comity principles prevent federal courts from interfering with state taxation systems by hearing federally-based lawsuits.\(^{291}\) Much of the recent precedent was itself undergirded, if not directly justified, by the 1937 Tax Injunction Act that explicitly barred federal courts from enjoining, suspending, or restraining any state tax where “‘a plain, speedy and efficient remedy may be had in the courts of such State.’”\(^{292}\)

While *Fair Assessment* and its comity principles might support a decision barring federal court takings suits against state taxation schemes, it does not support the total abdication of federal review of just compensation claims. As the *San Remo IV* concurrence explained, “[t]he Court today makes no claim that any such longstanding principle of comity toward state courts in handling federal takings claims existed at the time *Williamson County* was decided, nor that one has since developed.”\(^{293}\) Indeed, the fact is that for eighty years prior to *Williamson County*, no court suggested that comity or any other doctrine should cut back on the federal role in adjudicating just compensation claims.\(^{294}\)

\(^{289}\) See *San Remo IV*, 125 S. Ct. at 2507; *Fair Assessment in Real Estate Ass’n v. McNary*, 454 U.S. 100, 116 (1981).

\(^{290}\) *Fair Assessment*, 454 U.S. at 116.

[W]e hold that taxpayers are barred by the principle of comity from asserting § 1983 actions against the validity of state tax systems in federal courts. Such taxpayers must seek protection of their federal rights by state remedies, provided of course that those remedies are plain, adequate, and complete, and may ultimately seek review of the state decisions in this Court.

*Id.* (citations omitted).

\(^{291}\) See id. at 102 (quoting Dows v. Chicago, 78 U.S. (11 Wall.) 108, 110 (1871)).

\(^{292}\) *Id.* at 103 (quoting 28 U.S.C. § 1341 (Supp IV 1980)).

\(^{293}\) *San Remo IV*, 125 S. Ct. at 2508–09 (Rehnquist, C.J., concurring).

\(^{294}\) See *supra* note 277 (discussing frequency of federal court litigation of takings claims pre-*Williamson County*).
federalism principle warranting the relegation of just compensation claims to state court.295

As a general matter, comity considerations no more warrant the complete denial of federal review of just compensation claims against state and local governments than they justify the denial of federal review of free speech claims against such entities.296 One could say that states are most familiar with the complexities and realities of local restraints on free expression and other official time, place, and manner restrictions, and that adjudication of related conflicts should be left to the states. However, no one has seriously proposed this course of action, likely because it would undermine the incorporation of the First Amendment against the states through the Fourteenth Amendment, and the federal courts’ important role in providing a fair and unbiased forum—insulated from local majoritarian pressure and elected state court judges.297 The same reasons counsel against divesting federal courts of their ability to hear Fifth Amendment just compensation claims against local and state governments.298

The federal courts’ role in takings law has decreased relative to state courts in the last two decades, making the relegation of just compensation claims to these courts perhaps less sudden than relegation of free speech.299 But again, the basis for the federal decline is


296 The San Remo IV concurrence makes a similar point. See San Remo IV, 125 S. Ct. at 2508 (Rehnquist, C.J., concurring).

297 See Eagle, supra note 237, § 13-5(d), at 1069 (“Local judges generally are elected by local voters and tend to associate with the well being of the local electorate. . . . Federal judges tend to have broader outlooks than local judges constrained by ethos and electorate of their communities”); Burt Neuborne, The Myth of Parity, 90 Harv. L. Rev. 1105, 1115–30 (1977) (arguing that federal courts are superior in enforcing federal constitutional rights).

298 See Brian W. Blaesser, Closing the Federal Courthouse Door on Property Owners: The Ripeness and Abstention Doctrines in Section 1983 Land Use Cases, 2 Hofstra Prop. L.J. 73, 74 (1988) (arguing for federal forum for takings claims raised against actions taken under color of state law because of state courts’ “inherent potential for bias” against claimants in such cases (internal quotation marks omitted)); Eagle, supra note 237, § 13-5(d), at 1069 (“The fact that there are apt to be more competing interests in their districts also makes [federal judges] more disposed to vindicate the exercises of property rights that do not benefit immediate neighbors.”); Gregory Overstreet, The Ripeness Doctrine of the Taking Clause: A Survey of Decisions Showing Just How Far Federal Courts Will Go To Avoid Adjudicating Land Use Cases, 10 J. Land Use & Envtl. L. 91, 92–93 (1994) (arguing that “[i]t is extremely important that property owners have access to federal courts” because “[a]n almost certain prejudice is created by having an elected or appointed state judge, sitting in the same local area as the alleged taking, decide the case.”).

299 See supra notes 271–88 and accompanying text.
Therefore, if *Fair Assessment*’s comity principles support granting state courts exclusive control of federal just compensation claims, it is only because *Williamson County*’s state procedures rule has created a de facto and unintentional comity framework favoring those courts.

**B. Williamson County Was a Dead End from the Start**

As the foregoing shows, the majority runs, but it cannot hide from the reality that its relegation of federal just compensation claims to state courts ultimately rests on and assumes the validity of *Williamson County*’s state procedures requirement. It is important, then, to briefly reexamine that rule. According to the *Williamson County* Court, the requirement that federal just compensation litigants sue in state courts arises from: (1) the text of the Takings Clause, specifically the just compensation portion; (2) *Ruckelshaus v. Monsanto Co.*; and (3) *Parratt v. Taylor*. A basic examination of these premises shows that they do not have the effect imagined in *Williamson County* and that they are an entirely insupportable basis for relegating takings claims to state courts.

1. Three Reasons, Three Strikes

a. **Strike One: The Claim to Federal Just Compensation Accrues at the Time of the Taking**

   The first and most important basis for the state procedures requirement was the Court’s understanding that the Takings Clause can be violated only after a state court denies compensation. The fundamental principle underlying this conclusion—that an action for a taking exists only if the challenged invasion of private property occurs “without just compensation”—is not controversial, but the conclusion that compensation can be deemed lacking only after state court litigation is dubious.

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300 See *Williamson County*, 473 U.S. 172.
301 See *San Remo IV*, 125 S. Ct. at 2508 (Rehnquist, C.J., concurring).
304 See *Williamson County*, 473 U.S. at 194–97.
305 See id. at 194.
306 See Berger & Kanner, *supra* note 3, at 694 (“There is nothing in either logic or the language of the Fifth Amendment that requires municipal nonpayment [of compensation] to be certified by a state court before it is complete.”); Buchsbaum, *supra* note 39, at 473–
Certainly, nothing in the text of the Takings Clause requires one to interpret “without just compensation” to mean “without a state court ordering compensation.” Indeed, it is just as plausible to find compensation lacking when the responsible local entity fails to pay at the time of the alleged taking.

In fact, the Supreme Court has repeatedly recognized over many years that the right to compensation, as well as the government’s duty to pay, accrues at the time of the challenged taking. For instance, in United States v. Dickinson, the Court declared: “the land was taken when it was taken and an obligation to pay for it then arose.” Then, in 1980, the Court in United States v. Clarke repeated that “the usual rule is that the time of the invasion constitutes the act of taking, and ‘[i]t is that event which gives rise to the claim for compensation . . . .’” In First English Evangelical Lutheran Church v. County of Los Angeles, the Court established that the same principles applied in the regulatory takings context.

The text of the Takings Clause is, therefore, at least as amenable to the theory that a property owner is “without just compensation” at the moment the government invades property without a guarantee of compensation, as it is to Williamson County’s idea that compensation is absent only after a state court affirms the lack of compensation. However, if just compensation can be said to be constitutionally absent at the time of the alleged taking, then a federal claim should be

74 (arguing that the suggestion that the government has not acted “illegally until you ask for compensation and then it is denied,” is false); Roberts, Ripeness, supra note 3, at 72 (“The language of the Fifth Amendment does not dictate this [state procedures] rule.”).

307 Buchsbaum, supra note 39, at 473; Berger & Kanner, supra note 3, at 695–96 (The Fifth Amendment “does not say ‘nor shall private property be taken for public use without just compensation as finally determined by suing the municipal defendant in state court.’”).

308 Brief Amici Curiae Elizabeth J. Neumont in Support of Petitioners at 8, San Remo IV, 125 S. Ct. 2491 (2005) (No. 04-340); Kassouni, supra note 3, at 43 (“[I]t makes little sense to require property owners to seek just compensation from the courts, as opposed to the governmental entity which imposed the regulation.”).


310 Dickinson, 331 U.S. at 751.


312 482 U.S. 304, 315 (1987) (holding that the constitutional right to just compensation accrues as soon as private property has been taken).

ripe at that time and *Williamson County* is wrong in requiring state court litigation.\(^{314}\)

The notion that a state court must deny compensation before a claimant can be said to be “without just compensation” is not only unnecessary under the Takings Clause and inconsistent with the Court’s traditional concept for the timing of a just compensation obligation, but is also illogical. After all, the local government, not the state, is sued for compensation in a typical § 1983 takings action.\(^{315}\) This reality reaffirms the correctness of the pre-*Williamson County* understanding that a claim for compensation accrues when the local government engages in an uncompensated taking, not after a state court subsequently denies compensation.\(^{316}\)

Ultimately, there is no textual reason for construing the Just Compensation Clause to mandate state court litigation as a condition for federal ripeness. Furthermore, the state court litigation requirement cannot be recast as an exhaustion of local remedies principle.\(^{317}\) The requirement simply exists without any plausible doctrinal basis.

b. *Strike Two*: Monsanto’s Holding Does Not Support a Ripeness Rule Requiring State Court Litigation

The *Williamson County* Court attempted to shore up the state procedures requirement with an analogy to *Monsanto*.\(^{318}\) This basis, however, is no sounder than the court’s reliance on the text of the Takings Clause.

The *Williamson County* Court declared that *Monsanto* established that “[i]f the government has provided an adequate process for obtaining compensation, and if resort to that process ‘yield[s] just compensation,’ then the property owner ‘has no claim against the Government’ for a taking.”\(^{319}\) In the opinion of the *Williamson County*

\(^{314}\) Brief Amici Curiae, *supra* note 308, at 8 ("In asserting that a property owner’s monetary claim under the Just Compensation Clause does not accrue ‘until just compensation has been denied’ by the state judicial system,” *Williamson County* deviated sharply from the traditional understanding of that Clause.” (quoting *Williamson County*, 473 U.S. at 195 n.13)).

\(^{315}\) See Berger & Kanner, *supra* note 3, at 695.

\(^{316}\) See *First English*, 482 U.S. at 315; Clarke, 445 U.S. at 258.


\(^{319}\) *Williamson County*, 473 U.S. at 194–95 (second alteration in original) (quoting *Monsanto*, 467 U.S. at 1013, 1018 n.21).
Court, *Monsanto* applied the foregoing principle to hold that “takings claims against the Federal Government are premature until the property owner has availed itself of the process [for seeking compensation] provided by the Tucker Act.” Analogizing to these premises, *Williamson County* concluded that “if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation.”

If one accepts *Williamson County*’s interpretation of *Monsanto*, that case may seem to support the state procedures requirement. However, *Monsanto* does not stand for the propositions that the *Williamson County* Court claims and, consequently, cannot justify the state litigation requirement.

Unlike *Williamson County*, *Monsanto* did not involve a federal claim for just compensation; it involved a claim for injunctive and declaratory relief. *Monsanto* held that, regardless of whether or not the challenged acts caused a taking, the plaintiff was not entitled to injunctive relief. *Monsanto*’s rejection of injunctive relief is inapposite to the *Williamson County* issue of whether federal just compensation claims are premature and unripe in federal court prior to state court litigation: “[T]he [Monsanto] company’s request for equitable relief . . . was not merely premature, it was not available at all. In other words, there was nothing the company could do to ‘ripen’ its claim for equitable relief; that claim simply had no merit, period.”

The problems with *Williamson County*’s reliance on *Monsanto* are even more troubling because *Monsanto* merely held that takings claims against the federal government must be raised as just compensation claims under the Tucker Act. This Tucker Act requirement is nothing like requiring takings claimants to file just compensation claims in state court before going to federal court. A claim under the Tucker Act is the assertion of a mature federal claim for compensation, not a ripeness prerequisite designed to ready the claim for a later tribunal. Accordingly:

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320 Id. at 195 (citing *Monsanto*, 467 U.S. at 1016–20).
321 Id.
322 See *Williamson County*, 473 U.S. at 194–95 (interpreting *Monsanto*).
323 See id.; *Monsanto*, 467 U.S. 986.
324 See 467 U.S. at 1020.
325 Brief Amici Curiae, supra note 308, at 12.
326 See *Williamson County*, 473 U.S. at 195; *Monsanto*, 467 U.S. at 1020.
327 See *Monsanto*, 467 U.S. at 1020.
If Williamson County were correct that [under Monsanto] a property owner must “avail[] itself of the process provided by the Tucker Act” before pursuing its claim for just compensation, then it would be the rule that a property owner must essentially bring a Tucker Act suit before bringing a Tucker Act suit. In other words, an owner’s Tucker Act suit . . . would be “premature” until the property owner had brought a Tucker Act suit for just compensation. Obviously, this reductio ad absurdum deserves no respect . . . .

Therefore, the Williamson County Court’s reliance on Monsanto was unfortunate and entirely unjustified.

c. Strike Three: The Limited Postdeprivation Remedy Available in the Procedural Due Process Context Has No Application to Takings Claims

Williamson County’s final basis for the state procedures requirement is Parratt, a 1981 procedural due process decision. This justification fares no better than the analogy to Monsanto.

In Parratt, the Court determined that a prisoner’s complaint alleging the negligent loss by prison officials of a hobby kit constituted an actionable “deprivation” of property under 42 U.S.C. § 1983. The Court also concluded that there was no constitutional due process violation until the plaintiff took advantage of an adequate postdeprivation remedy provided by Nebraska’s tort claims statute.

The Parratt Court declared that a “state’s action is not complete [in causing a constitutional injury] unless or until the state fails to provide an adequate postdeprivation remedy for the property loss.” In Williamson County, the Court extended this reasoning to just compensation claims to support the state procedures prerequisite. There is no logical basis for doing so. Parratt’s holding—that no procedural due process violation occurs until the plaintiff utilizes a postdeprivation process—applies only in the context of “a random and unauthorized act by a state employee.” Such a random act makes a

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328 Brief for Amici Curiae, supra note 308, at 12 (third alteration in original) (quoting Williamson County, 473 U.S. at 195).
330 Parratt, 451 U.S. at 544.
331 Id. at 544–45.
333 Williamson County, 473 U.S. at 195.
predeprivation hearing “impossible or impracticable.”

Parratt’s postdeprivation remedy requirement is not intended to apply where “deprivation of property is effected pursuant to an established state policy or procedure, [since here] the State could provide predeprivation process.”

The “established policy” exception to Parratt renders it irrelevant in the takings context because a regulatory taking of private property is always effected pursuant to an established policy or procedure. If interference with private property occurs by a government agent’s random act and without the blessing of established policy, it is a “tort, not a taking.”

Since a taking always flows from an established policy, predeprivation process is always possible; it therefore makes no sense to apply Parratt’s postdeprivation remedial requirement to takings. Not only is predeprivation process possible, it routinely occurs before most regulatory takings. A local regulatory agency typically conducts hearings resulting in findings and a decision arguably depriving a property owner of a protected property interest and definitely making no provision for compensation. Therefore, applying Parratt’s postdeprivation remedial analysis to takings claims is not just inconsistent with Parratt’s premise that predeprivation process must be impossible; it also puts federal takings claimants into the unparalleled position of having to go through both a predeprivation and postdeprivation process to prosecute their claim.

Nothing in Parratt requires this. In fact, if there is

335 Williamson County, 473 U.S. at 195.
336 Id. at 195 n.14; see also Evers v. County of Custer, 745 F.2d 1196, 1202 n.6 (9th Cir. 1984) (“Parratt . . . does not apply to cases in which the deprivation of property is effected pursuant to a state procedure and the government is therefore in a position to provide for predeprivation process.” (citing Hudson, 468 U.S. 517)).
337 See Ridge Line, Inc. v. United States, 346 F.3d 1346, 1355 (Fed. Cir. 2003) (“[A] property loss compensable as a taking only results when the government intends to invade a protected property interest or the asserted invasion is the ‘direct, natural, or probable result of an authorized activity and not the incidental or consequential injury inflicted by the action.’” (quoting Columbia Basin Orchard v. United States, 538 F.2d 865, 870 (1976))).
338 Brief for Amici Curiae, supra note 308, at 13 n.7.
339 See, e.g., Parratt, 451 U.S. at 541; LaSalle Nat’l Bank v. County of Lake, 579 F. Supp. 8, 10–11 (N.D. Ill. 1984) (rejecting a postdeprivation remedy defense to government’s refusal to provide sewer service to prospective developers because of established policy exception).
341 See Parratt, 451 U.S. at 541.
342 See generally id.
adequate predeprivation process, procedural due process doctrine is inapplicable. 343

If a property owner has a complaint after predeprivation process, it is one of a substantive nature. 344 Parratt’s procedural due process, postdeprivation remedy is also inapplicable in this situation. 345 Since takings claimants can and do receive predeprivation process, but allege the loss of a property right despite such process, Parratt should be inapplicable to takings claims whether one looks at the just compensation element through a procedural or substantive lens. 346

2. The Court Didn’t “Understand This Case” and Wouldn’t Ask for Help

There is a simple, but startling explanation for the lack of any foundation for Williamson County’s state procedures requirement: the author of the opinion did not understand the dispositive issues at the time they were being decided and the Court signed onto the opinion without adequate briefing. 347 The revelation as to the late Justice Blackmun’s lack of understanding about the issues in Williamson County are found in his recently released Williamson County notes. In the margin of one paper, Justice Blackmun has inscribed in handwriting: “I am not sure I fully understand this case.” 348 The notes further indicate that his confusion extended to the critical issue of the timing of a violation of the Just Compensation Clause. 349 Justice Blackmun was apparently


344 See Parratt, 451 U.S. at 546; Augustine v. Doe, 740 F.2d 322, 327 (5th Cir. 1984) (“[W]hen a plaintiff alleges that state action has violated an independent substantive right, he asserts that the action itself is unconstitutional. If so, his rights are violated no matter what process precedes, accompanies, or follows the unconstitutional action.”).

345 Smith v. City of Fontana, 818 F.2d 1411, 1415 (9th Cir. 1987) (“Actions which violate . . . specific substantive protections of the Bill of Rights lie outside the scope of Parratt because the constitutional violation is complete at the moment the action or deprivation occurs, rather than at the time the state fails to provide requisite procedural safeguards surrounding the action.”).

346 See Parratt, 451 U.S. at 541; Tomkins v. Vill. of Tinley Park, 566 F. Supp. 70, 77 (N.D. Ill. 1983) (holding Parratt inapplicable to a takings claim because plaintiff was asserting a “substantive constitutional guarantee: the right not to have her property seized with the active participation of the government and without just compensation.”).


348 Box 69, Harry A. Blackmun Papers, Manuscript Division, Library of Congress, Washington, D.C.

349 Id.
struggling with the question of whether the Just Compensation Clause was violated either at the time of the taking, which would mean an action accrued at that point, or after a court denies a claim for monetary damages—as Williamson County ultimately held.350

Briefing on the pertinent issues would have likely clarified the critical issue for Justice Blackmun and the rest of the Court. However, in Williamson County, there was almost no briefing by the parties on the merits of a state procedures requirement or the premises underlying the rule.351 The only question presented was whether the government “must pay money damages to a landowner whose property allegedly has been ‘taken’ temporarily by the application of government regulations.”352 Given this question, the parties and amici curiae focused their briefing almost entirely on whether the Constitution required damages for temporary regulatory takings.353 In the Williamson County opinion, the Court twice acknowledged that the parties’ briefing extended only to the issue of compensation for temporary takings.354

Only the Solicitor General of the United States argued that ripeness barriers might defeat Hamilton Bank’s claim.355 Rightly believing that such issues were not before the Court, Hamilton Bank responded with a few sentences.356 In short, the Court concocted and adopted the state procedures ripeness requirement “out of the blue” without a full understanding of their correctness and without seeking or receiving adequate briefing.357

350 Id.
351 Williamson County, 473 U.S. at 175, 185.
352 Id. at 185.
353 See id. at 174. The attorneys general of nineteen states and territories, together with the National Association of Counties, the City of New York, and the City of St. Petersburg, Florida joined the petitioner in urging the Court to reverse the judgment rendered in favor of the property owner “on the ground that a temporary regulatory interference with an investor’s profit expectation does not constitute a ‘taking’ . . . or, alternatively, on the ground that even if [it] does . . . , the Just Compensation Clause does not require money damages as recompense.” Id. at 174–75. On the other side, four professional and public-interest organizations filed amicus curiae briefs urging the Court to affirm the temporary takings judgment to establish that regulation which effectively wipes out a property’s value is a taking for public use, requiring money damages under the Just Compensation Clause. See id. at 174 n.8.
354 Id. at 175, 185.
355 See Brief for Amici Curiae, supra note 308, at 1; Brief for the United States as Amicus Curiae Supporting Petitioners at 10, Williamson County, 473 U.S. 172 (No. 84-4); Kanner, supra note 27, at 330.
356 Kanner, supra note 27, at 327.
357 Id.
In any event, the state procedures portion of *Williamson County* was not even necessary to the result in that case.\(^{358}\) The *Williamson County* Court had already held that the property owners’ claim was unripe for lack of a final decision; it could have decided the case on this basis alone.\(^{359}\) However, in what might be considered the most influential dicta in all of takings law, the Court posited that ripeness also required the filing of a just compensation claim in state court.\(^{360}\) The result was predictable: a constitutional rule—that federal claims for just compensation ripen by state court litigation—that lacks the authority of precedent or logic, that is at odds with other doctrines, such as preclusion and *Rooker-Feldman*, and which has accordingly generated a federal jurisdictional mess of titanic proportions.\(^{361}\) Now, thanks to *San Remo IV*, the irredeemably flawed and unnecessary state procedures requirement has conspired with preclusion to make federal claims for just compensation federally homeless.

3. Why the Silence?

What is particularly jarring about *San Remo IV*’s revolutionary outcome is that the majority refused to expressly clarify its position on the nature or role of the state procedures requirement underlying that outcome.\(^{362}\) The majority never acknowledges or counters the concurrence’s criticism of the requirement.\(^{363}\) Indeed, the opinion never even directly states that *Williamson County* requires state court litigation or mentions that the state procedures requirement was crafted as a ripeness rule.\(^{364}\) The majority breaks its silence on *Williamson County* only once, to clarify that a federal takings claim may be raised in state court as an initial matter without prior state court litigation.\(^{365}\) While this clarifies some confusion about what is allowed in a state court action, it does not address why the claimants are in state court to begin with and why they cannot go to federal court afterwards.

Why is the majority so reticent on these fundamental *Williamson County* questions? Given the extent to which its decision hinges on the operation of *Williamson County*, one expects some confirmation or dis-

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\(^{358}\) See *Williamson County*, 473 U.S. at 194–95.

\(^{359}\) See id. at 192–93.

\(^{360}\) Id. at 194–95.

\(^{361}\) See id.

\(^{362}\) See generally *San Remo IV*, 125 S. Ct. 2491 (2005).

\(^{363}\) See id. at 2508 (Rehnquist, C.J., concurring).

\(^{364}\) See generally id.

\(^{365}\) Id. at 2506 (majority opinion).
cussion of that decision and is unsettled at its absence. The obvious and most plausible explanation for the silence is that the majority—or some of its members—considered *Williamson County* to be beyond the scope of the question presented. Indeed, the question presented by San Remo’s petition did not directly challenge *Williamson County*’s state procedures requirement. At oral argument, San Remo’s counsel reiterated that the hotel had not asked the Court to reconsider *Williamson County*, to which Justice O’Connor replied: “Maybe you should have.”

Nevertheless, the Court’s desire to stay within, or close to, the boundaries of the issue preclusion question is not a fully satisfying answer to its silence on *Williamson County* because the majority could have discussed its understanding of the origin, parameters, and effects of the state procedures rule without actually deciding its correctness. This would have maintained fidelity to the question presented and imbued the decision with more legitimacy. A more complete blackout on *Williamson County* makes sense only if one or more of the majority justices thought the state procedures ripeness requirement was incorrect, but also believed that the preclusion question at hand did not permit even a restrained discussion of that rule. A justice in this position might logically seek to avoid any commentary that could be construed as approving *Williamson County*, or as impliedly rejecting the concurrence’s views on the shortcomings of the case. Such a justice would accept the unavoidable affirmative effects on *Williamson County* arising from enforcement of preclusion, as long they were wholly im-

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367 See *San Remo IV*, 125 S. Ct. at 2501 n.18 (“We did not grant certiorari on many of the issues discussed by the parties and *amici*.”); id. at 2510 (Rehnquist, C.J., concurring) (“[N]o court below has addressed the correctness of *Williamson County*, neither party has asked us to reconsider it, and resolving the issue could not benefit petitioners.”).

368 See *Williamson County*, 473 U.S. at 194–97. With respect to preclusion, San Remo’s petition for certiorari asked whether “a Fifth Amendment Takings claim [is] barred by issue preclusion based on a judgment denying compensation solely under state law, which was rendered in a state court proceeding that was required to ripen the federal Takings claim?” Brief for Petitioner, *supra* note 174, at i.


370 The sole question on which the Court granted certiorari concerned the applicability of issue preclusion to San Remo’s takings claims. See *San Remo IV*, 125 S. Ct. at 2501. But in deciding the case, the Court reframed the issue as “whether we should create an [*Eng-land-type*] exception to the full faith and credit statute,” which includes issue and claim preclusion. *Id.* at 2500, 2501; 28 U.S.C. § 1738 (2000). Therefore, in answering its own question in the negative, the Court affirmed both types of preclusion in the takings context, and went beyond the scope of the question presented.
licit and bereft of any supporting discussion that might make it more difficult for a future court to overturn Williamson County.371

However, if such a hypothetical majority justice does not exist—if all majority justices were satisfied with Williamson County—as the majority decision implies, then the majority’s refusal to discuss the state procedures requirement and its role in the San Remo IV result is truly troubling. In this case, the majority may be viewed as the judicial equivalent of a referee who hides the ball because he knows it won’t bounce. That is, one might easily conclude that the majority purposefully ignored Williamson County and its ripeness aspect because to engage these concepts is to recognize, as the concurrence did, that they are both doctrinally unsound and incapable of legitimately relegating takings claims to state court. If this is the case, then San Remo IV is the worst sort of result-oriented decisionmaking.372

C. Federal Takings Litigation After San Remo IV

Whatever its purpose, the majority’s silence on Williamson County leaves the state procedures requirement intact to the extent it requires takings claimants to seek just compensation in state court.373 Because the Court recognizes that federal just compensation claims can be immediately raised in the mandated state court action, and because claim preclusion bars all claims that could have been raised in prior litigation, the denial of an England-type exception for takings claimants ensures that many will never have recourse in federal court.374

However, it would be a mistake to conclude that San Remo IV closes the federal courthouse door to all federal takings claims. Williamson County arose from, and focuses on, a takings claim seeking the remedy of monetary compensation.375 In crafting the state proce-

371 Of the justices in the majority, Justice Scalia seems the most likely candidate for the described role. The problem is that, at oral argument, Justice Scalia did not seem disturbed by the possibility that state courts would serve as the exclusive forum for just compensation claims provided the claimants could resort to the Supreme Court. See Transcript, supra note 369, at 24:21–25 (stating that it was “perfectly fine” and not “strange” to leave “it to the State court to make these decisions,” but expressing concern that the claimants might be barred from the Supreme Court).

372 This very charge has been leveled at Williamson County itself. See Kanner, supra note 27, at 331 (“[O]ne . . . gets the unshakable impression that the Williamson County opinion was a manifestation of a syndrome known to appellate lawyers as ‘Have opinion; need case.’”).

373 See supra text accompanying note 360.

374 See San Remo IV, 125 S. Ct. at 2501–06.

375 Williamson County, 473 U.S. at 182–83.
dures rule, the *Williamson County* Court was concerned only with ripening claims for just compensation: "if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation."\(^{376}\) Therefore, when the *Williamson County* Court states that “The nature of the constitutional right . . . requires that a property owner utilize procedures for obtaining compensation,”\(^{377}\) the right the Court may be referring to is the right to monetary compensation. In *First English*, the Court stated that “one seeking compensation” must follow *Williamson County’s* state procedures requirement.\(^{378}\) Accordingly, it is reasonable to conclude that the state procedures requirement applies only when the relief sought is compensatory.\(^{379}\) In *San Remo IV*, the majority expressly approved this reading in concluding that San Remo’s facial claims could be brought directly in federal court, avoiding preclusion, because they “requested relief distinct from the provision of ‘just compensation’ . . .”\(^{380}\)

Under *Lingle v. Chevron U.S.A. Inc.*\(^{381}\) takings claimants can no longer invoke the same facial noncompensation claims raised by *San Remo IV* for purposes of securing federal jurisdiction or otherwise.\(^{382}\) Those claims related to whether the challenged regulation caused takings by failing to substantially advance a legitimate state interest,\(^{383}\) and the *Lingle* Court rejected this substantial advancement test as a takings standard two weeks prior to *San Remo IV*.\(^{384}\) Takings claimants, however, may seek noncompensatory relief under other takings theories and, in this way, secure direct federal review of their claims.\(^{385}\) There is no reason to believe that such actions must arise from facial

\(^{376}\) *Id.* at 195 (emphasis added).

\(^{377}\) *Id.* at 195, n.13.

\(^{378}\) *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 312 n.6 (1987) (emphasis added).

\(^{379}\) See, e.g., *San Remo IV*, 125 S. Ct. at 2506 (noting that San Remo’s facial claims were ripe in federal court without compliance with the state procedures rule because those claims did not seek monetary compensation); *First English*, 482 U.S. at 312.

\(^{380}\) *San Remo IV*, 125 S. Ct. at 2506.

\(^{381}\) 125 S. Ct. 2074 (2005).

\(^{382}\) See *San Remo IV*, 125 S. Ct. at 2506 n.25.


\(^{384}\) See *Lingle*, 125 S. Ct. at 2085–86.

\(^{385}\) See Abraham, *supra* note 3, at 125–26 (noting that the state procedures ripeness rule may not apply when a property owner seeks “damages or restoration of property “ rather than just compensation).
challenges. In noting that San Remo’s failure to substantially advance claims would have been cognizable in federal court, the San Remo IV Court focused on the nature of the relief requested, not their facial quality.\(^{386}\) Moreover, the Court has acknowledged that a declaratory relief action in an as-applied challenge is “no different in substance from a facial challenge to an allegedly unconstitutional statute or zoning ordinance—which we would assuredly not require to be brought in state courts.”\(^{387}\)

Claims for noncompensatory relief are most likely to be accepted where compensation cannot be practically provided,\(^{388}\) or where the taking is prospective.\(^{389}\) However, these circumstances might include relatively common exaction cases where the government proposes to take money or real property as a condition of a permit. When a property restriction, “rather than burdening real or physical property, requires a direct transfer of funds” declaratory relief is a proper remedy.\(^{390}\) Property owners challenging a monetary exaction may be able to seek declaratory relief and thus obtain a federal forum.

More generally, as long as a property owner challenges an exaction prior to accepting the permit—prior to the taking—declaratory relief should be an available remedy, regardless of the character of the exaction. In Nollan v. California Coastal Commission, the leading exaction takings case, the plaintiffs sought\(^{391}\)—and the Court provided—the equivalent of declaratory relief in holding that permit conditions

\(^{386}\) See San Remo IV, 125 S. Ct. at 2506.


\(^{388}\) E. Enters. v. Apfel, 524 U.S. 498, 520–22 (1998) (holding that injunctive and declaratory relief was available where monetary compensation was unavailable as a practical matter); Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59, 71 n.15 (1978) (stating that the Declaratory Judgment Act “allows individuals threatened with a taking to seek a declaration of the constitutionality of the disputed governmental action before potentially uncompensable damages are sustained.”).

\(^{389}\) See, e.g., Bd. of Managers of Soho Int’l Arts Condo. v. City of New York, 75 USPQ.2d 1025, 1037 (S.D. N.Y. 2005) (declaring that a contemplated future act would be a taking requiring just compensation, and that only the issue of compensatory damages was not ripe because the taking had not occurred).

\(^{390}\) See, e.g., E. Enters., 524 U.S. at 521 (quoting In re Chateaugay Corp., 53 F.3d 478, 493 (2d Cir. 1995)).

\(^{391}\) 483 U.S. 825 (1987). The Nollans prosecuted their takings claim by filing a petition for writ of administrative mandamus, which only provides invalidation as a remedy. See id. at 829.
affected a taking.\textsuperscript{392} Since such relief is “distinct from the provision of ‘just compensation,’” exaction litigants may be able to sue in federal court after \textit{San Remo IV}.\textsuperscript{393} Even litigants with facial \textit{Penn Central} or \textit{Lucas v. South Carolina Coastal Council} claims may be able to secure federal jurisdiction by seeking declaratory relief.\textsuperscript{394} No Supreme Court precedent directly forecloses this proposal.\textsuperscript{395}

However, even if some takings claims make it into federal court under a noncompensatory relief exception or otherwise, the reality is that after \textit{San Remo IV}, many as-applied claimants suffering the most severe restrictions on their property rights will not be able to seek the federal constitutional compensatory remedy in federal court. The Court did not have to leave these claimants in this position.\textsuperscript{396} Confronted with \textit{Williamson County}’s patent misconceptions and intent to ripen claims, the Court could have loosened the state procedures requirement to put just compensation claims on equal footing with noncompensatory takings claims and other constitutional guarantees when it comes to the availability of a federal forum. For instance, the Court might have concluded that the San Remo Hotel plaintiffs misinterpreted the state procedures requirement to mandate state court procedures, when all it actually required was an administrative request

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\textsuperscript{392} See \textit{id.} at 841–42 (reversing the California courts’ denial of the writ of administrative mandamus and declaring “if it wants an easement across the Nollans’ property, it must pay for it.”).

\textsuperscript{393} See 125 S. Ct. at 2506.


\textsuperscript{395} Although \textit{First English} held that states must provide a compensatory remedy for regulatory takings that have occurred, it did not hold that plaintiffs are barred from seeking other forms of relief. See \textit{First English}, 482 U.S. 304, 321 (1987). \textit{Monsanto} held that plaintiffs raising takings claims against the United States must seek compensatory relief under the Tucker Act and therefore cannot sue for injunctive or declaratory relief, but said nothing about the propriety of non-compensatory takings claims against a local or state agency. See \textit{Monsanto}, 467 U.S. 986, 1016–19 (1984). Moreover, the Court has never rejected the concept that “regulation that goes so far that it has the same effect as a taking by eminent domain is an invalid exercise of the police power, violative of the Due Process Clause of the Fourteenth Amendment.” \textit{Williamson County Reg’l Planning Comm’n v. Hamilton Bank}, 473 U.S. 172, 197 (1985) (“The remedy . . . under [this] theory, is not ‘just compensation,’ but invalidation of the regulation, and if authorized and appropriate, actual damages.”).

\textsuperscript{396} See Michael C. Dorf, \textit{The Case of the Half-Million Dollar Typo: The Supreme Court Traps Property Owners in a Catch-22}, FINDLAW LEGAL COMMENTARY, June 22, 2005, http://writ.news.findlaw.com/dorf/20050622.html (“[H]aving fashioned the \textit{Williamson County} requirement in the first place, the Court could also, if it so chose, weaken it . . . .”).
for compensation.\textsuperscript{397} Or, the Court may have found some other way to relax the state procedures rule.\textsuperscript{398} The majority, however, remained silent and implicitly converted the state procedures ripeness prerequisite into a permanent barrier to federal court review.

Thanks to \textit{San Remo IV} and \textit{Williamson County}, the Court has gone far toward making the Just Compensation Clause the first provision to be effectively unincorporated from the Fourteenth Amendment. This is surely an ironic and ill-suited end for the first constitutional provision to be enforced against the states.\textsuperscript{399} Even more disappointing than the abdication of a federal role in securing property rights against overzealous state action is the fact that it was accomplished by indirection. The Fifth Amendment deserves more respect.\textsuperscript{400}

\textbf{Conclusion}

\textit{Williamson County v. Hamilton Bank} was a mistake from the start. Although that decision said “go to state court first, but if you lose, you are welcome in federal courts,” it did not explain how that rule interacted with a federal preclusion doctrine that said “if you’ve been in state court, you must stay there.” Because \textit{Williamson County} did not intend to preclude takings claims from federal court, the rigid application of well-known preclusion rules to bar ripe takings claims seems unnecessary. The lower courts deserve credit for accepting the \textit{England v. Louisiana State Board of Medical Examiners} reservation as a vehicle for allowing takings claims to proceed in federal court after the state court litigation, as envisioned by \textit{Williamson County}. The final expression of that compromise in \textit{Santini v. Connecticut Hazardous Waste Management Service} was a plausible and fair, even if inefficient, way to

\textsuperscript{397} This possibility was suggested by the late Chief Justice Rehnquist at oral argument in \textit{San Remo IV}. See Transcript, supra note 369, at 23:14–17 (“Do you think \textit{Williamson County} by its terms spoke of going to State court and—rather than just a State administrative proceeding?”).

\textsuperscript{398} See Dorf, supra note 396.

The Court might have weakened \textit{Williamson County} by saying . . . [a] federal court defendant may demand that a plaintiff bringing an as-applied Takings Claim first provide the state authorities with an opportunity to pay just compensation. But a defendant who so demands thereby waives the ability to use the state court judgment later to preclude litigation of the federal issue in federal court.

\textit{Id.}

\textsuperscript{399} See Chi., Burlington & Quincy R.R. Co. v. Chicago, 166 U.S. 226, 234 (1897).

\textsuperscript{400} See generally Ely, supra note 242.
reconcile preclusion with *Williamson County’s* promise of eventual federal review for federal just compensation claimants.

In refusing to recognize an *England*-type exception to preclusion in the takings context, the *San Remo IV* Court elevated the Full Faith and Credit Act over *Williamson County’s* constitutionally-grounded ripeness promise that just compensation claims are proper in federal court after state court litigation. In effect, *San Remo IV* affirmed the state procedures requirement as requiring completion of state court compensation procedures—and the unsupportable basis for that requirement—while ignoring the fundamental ripening purpose of the rule. Therefore, despite the majority’s contrary assurances, *San Remo IV* is “radical” for both its result—divesting federal courts of their ability to hear just compensation claims arising under the Fifth Amendment—and for its refusal to address *Williamson County* or its ripeness premises.

*San Remo IV* may not have gone as far in closing off the federal forum as it may first appear, but damage has been done. Federal just compensation claimants, unlike other constitutional litigants, have been reduced to lurking around the federal courthouse doors, hat in hand, hoping for some judge to take pity on them by accepting their declaratory relief claims or by finding state remedies inadequate. They are in such straits not because of some legitimate constitutional anomaly, but mostly because the Court engaged in shoddy jurisprudence in *Williamson County* and then failed to summon the courage to

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401 See *San Remo*, 125 S. Ct. 2491, 2506 (2005) (“It is hardly a radical notion to recognize that, as a practical matter, a significant number of plaintiffs will necessarily litigate their federal takings claims in state courts.”).

402 See *supra* notes 378–95 and accompanying text.

403 As Professor Kanner has put it:

> Judges would do well to understand that landowners seeking relief in their courts are not some sort of enemy, but rather their fellow American citizens invoking the protection of the Bill of Rights. They are entitled to better treatment than the back-of-the-hand dismissal of their vital interests that they have had to endure thus far in so many of these cases. If nothing else, they are entitled to be told plainly and as expeditiously as any other litigants whether they won or lost on the merits, without having to run a decade-long administrative and litigational obstacle course, menaced throughout by the likelihood that eventually, through a process of judicial nitpicking (in which with the benefit of hindsight, little if anything seems to satisfy the judges), they may be told at the end that the run was for naught and they must start all over again.

Kanner, *supra* note 27, at 352.
clean up its own mess in *San Remo IV.* The Court has provided no acceptable justification for maintaining this situation. Therefore, it should overturn *Williamson County*’s state procedures requirement at the first opportunity. If it will not act, then Congress should amend the Full Faith and Credit Act to create an exception to the takings preclusion trap laid by *Williamson County.*

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404 See *supra* Part IV.B.
THE PUBLIC TRUST DOCTRINE AND
NATURAL LAW: EMANATIONS
WITHIN A PENUMBRA

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Abstract: In American jurisprudence, the public trust doctrine emerged as a means of protecting certain limited environmental interests, such as coastal waterways and fishing areas, which were preserved for the benefit of the public and distinguished from grants of private ownership. However, modern scholars have called for an expansive application of the public trust doctrine, citing the growing inventory of “changing public needs” in the environmental context, such as the need for improved air and water quality, and the conservation of natural landscape. This Article examines the history and scope of the public trust doctrine to determine how modern resource management fits within the doctrine’s development under the Constitution and common law. Such an examination is incomplete without reviewing the important principles of Natural Law underlying the original doctrine. In the end, the Article concludes that modern trust expansion should be limited within the ancient values of principled economic reasoning.

Introduction

Joseph Sax once commented, “Of all the concepts known to American law, only the public trust doctrine seems to have the breadth and substantive content which might make it useful as a tool of general application for citizens seeking to develop a comprehensive legal approach to resource management problems.”1

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For centuries, people have utilized some version of this doctrine by preserving portions of the environment for the greater public good, recognizing that the air, water, and seashores were “common to all by natural law.” This act of public preservation is administered by the state on behalf of its populace and seeks to protect natural resources for the benefit of the community at large.

Early American jurisprudence applied this concept to certain limited interests, such as coastal waterways and fishing areas, which were preserved for the benefit of the public and distinguished from grants of private ownership. This has been termed by some as the “classic list of protected [public] interests.” And yet, the doctrine has been cited in response to a growing inventory of “changing public needs” in the environmental context, such as the need for improved air and water quality, and the conservation of natural landscape.

Indeed, the Sax vision is a call to arms for environmentalists to utilize the public trust doctrine as a sword for greater judicial protection and a shield from property rights advocates. But, given the wide array of public interests and competing public rights, should the public trust doctrine be used as such a vehicle for expansive environmental protection?

This Article will examine the history and scope of the public trust doctrine to determine how Sax’s vision for resource management fits...
within the doctrine’s development under the Constitution and common law—most notably, how does the influence of Natural Law relate to the function of the public trust doctrine. Once this historical assessment is complete, the Article will shift to an examination of modern public trust application in the environmental and land use arenas and test whether it should be used to expand its traditional coverage under the Natural Law perspective. Although the tenets of the Natural Law are penumbral, they nonetheless provide a foundational bearing—or direction—for legitimizing the application of the public trust doctrine and, as the case may be, restraining its application. In a very real way, then, this doctrine is an emanation within a penumbra, but one that is validated because of this very relationship. It can be correctly thought of as having a yin-yang—or positive-negative—relationship with the Natural Law. Although this relationship may also be seen as tenuous, it is far better than unbridled, subjective judicial activism which has no guideposts at all for its voracious appetite.

The thesis of this Article is that rather than continuing to expand the broad reach of the public trust doctrine in the present design of a crazy patch-work quilt, its expansion should be both measured and restrained by the “common good.” Applying this standard—which seeks to balance the legitimate expectations and real interests of individual property owners with the need for enhanced public resource preservation—will normally result in validating the legitimate economic interests of the property owners.

The proposed balancing test is both informed and shaped by the Natural Law. A primary tenet of its recognition and protection of “individual goods” or rights, such as property ownership, is measured against the “common good.” It is for the states to manage the directions that the public trust takes in modern society. In setting the framework for analysis of issues resolving trust expansion, the Natural Law template or test of reasoned balance can be a vade mecum or guide for both legislators and judges confronted by this challenging issue.

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7 See Wilkinson, supra note 1, at 426 n.6 (“The public trust doctrine derives from constitutional, statutory, and common-law sources, and has been applied in various contexts to resources other than watercourses navigable for the purposes of title, including wildlife, federal public lands, and drinking water.”).

I. DIGGING FOR THE ANCIENT ROOTS OF THE PUBLIC TRUST

As this Article ventures to examine the breadth of the public trust in American jurisprudence, it is important to investigate the doctrine’s historical underpinnings and the purposes which it serves. The American rule of law regarding property rights and the public trust is premised upon an inherited line of reasoning from ancient Roman law and English common law.

Tracing the public trust concept back to its original roots, most scholars look to the Institutes of Justinian, a body of Roman civil law assembled in approximately 530 A.D. This text articulated the “nearly universal notion” that watercourses should be protected from complete private acquisition in order to preserve the lifelines of communal existence. Under a remarkable philosophy of natural resource preservation, the Romans implemented a concept of “common property” and extended public protection to the air, rivers, sea, and seashores, which were unsuited for private ownership and dedicated to the use of the general public. “[While] it remains unclear whether this represented true Roman practice or mere Justinian aspiration,” scholars believe the introduction of this public trust concept resonated throughout medieval Europe, infiltrating its common law system.

The English common law system, which directly influenced American thinking on the public trust, made practical use of these communal concepts. In particular, the English system provided a

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9 As Justice Antonin Scalia points out, this is an important process with respect to any legal rule. Antonin Scalia, Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 7 (Amy Gutman ed., 1997). Understanding that a legal principle made in one case will be followed in another is “an absolute prerequisite to common-law lawmaking.” Id.

10 See Wilkinson, supra note 1, at 428–39.

11 See Johnson, supra note 2, at 491–92, 491 n.26; Wilkinson, supra note 1, at 429.

12 Wilkinson, supra note 1, at 430.

13 See Johnson, supra note 2, at 491 (quoting Sax, supra note 1, at 475). Specifically, Byzantine law stated: “[b]y natural law, common to all these: the air, running water, the sea, and therefore the seashores.” J. Inst. 2.1.1–6 (Thomas trans.); see Ryan, supra note 5, at 481.

14 See Ryan, supra note 5, at 481. It is also important to realize that these concepts extended beyond the borders of Europe. Wilkinson, supra note 1, at 429. In the Far East, the protection of water uses on behalf of the greater public was recognized before the birth of Christ. Id. Additionally, similar traditions were recognized in ancient Africa where people “enjoyed the right to fish the sea, with its creeks and arms and navigable rivers within the tides.” Id. (citing T.O. Elias, NIGERIAN LAND LAW 48 (1971)). In this respect, the concept of the public trust is internationally recognized.

15 See Wilkinson, supra note 1, at 430–31.
sensible framework that emphasized the need to balance community interests with private ownership rights. Consequently, English common law distinguished between property that was transferable to private individuals, *jus privatum*, and property that was held in trust for the public, *jus publicum*.17

In many respects, the English view of public ownership was somewhat restrictive when compared to more generous forms of public resource sharing.18 Such a distinction is easily seen when comparing the English view with the more liberal sharing philosophy of the medieval French, who extended public ownership to other natural resources and placed less emphasis on private ownership rights: “[T]he public highways and byways, running water and springs, meadows, pastures, forest, heaths and rocks . . . are not to be held by lords, . . . nor are they to be maintained . . . in any other way than that their people may always be able to use them.”19 Nonetheless, the English system remained firmly within the original spirit of public trust, as it favored the ancient public right to access navigable waterways.20

Following the Revolutionary War, public trust principles surfaced in the American legal system as well.21 The demand for these principles was not surprising, given the importance of navigable waterways at the country’s beginning and the inherited influence of English common law.22 The navigable waterways were a central feature of early public policy, and political leaders understood their significance.

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16 Id.
17 Id.; see George P. Smith II, Restricting the Concept of the Free Seas: Modern Maritime Law Re-evaluated 14–20 (1980) (discussing the historical origins of these two theories). See generally Arnold L. Lum, How Goes the Public Trust Doctrine: Is the Common Law Shaping Environmental Policy?, NAT. RESOURCES & ENV’T, Fall 2003, at 73.
18 See Wilkinson, supra note 1, at 430–31.
19 Id. at 429 n.22 (quoting Joseph L. Sax, Liberating the Public Trust Doctrine from Its Historical Shackles, 14 U.C. DAVIS L. REV. 185, 189 (1980) (citing M. Bloch, French Rural History 183 (1966))).
20 Id. at 430. The need for this public right was premised upon public demand. For example, the beds and banks of the navigable rivers were commonly used by the populace for anchoring and mooring. Id. at 430 n.29. Moreover, the waterways were utilized for other activities, such as commerce and fishing. Id. at 431–33. The public’s need for substantial use of these navigable waterways dictated the establishment of a public right. Such an established right was a powerful tool, as it prevailed over any corresponding private property right. See id. at 430 n.29.
22 Wilkinson, supra note 1, at 431.
in economic terms. Among others, Thomas Jefferson imagined the great benefits that watercourses could provide to commerce as he commissioned the Lewis and Clark expedition to “explore the river Missouri, from its mouth to its source.” Early efforts were made to provide public access to waterways for commercial benefit, and their preservation was viewed as a “unifying factor” in the country’s effort to facilitate trade and “establish[] communication lines among the states.” Moreover, Congress implemented resource legislation that administered rules of water trafficking.

Because of the “intrinsic importance” of this resource legislation, the Supreme Court of the United States moved quickly to resolve a number of constitutional issues related to watercourse regulation. For example, early questions were raised regarding western states’ ownership rights to the lands beneath the waterways. The Court concluded that submerged lands passed by implication to the states at the time of statehood under a principle of “equal footing.” Additionally, the Court examined the scope of Congressional authority under the Commerce Clause and determined that Congress still maintained the power to regulate waterways despite a state’s right to title.

From this rich history regarding governmental control of the waterways, the public trust doctrine officially emerged as an instrument of federal common law to preserve the public’s interest in free navigation and fishing. In Illinois Central Railroad Co. v. Illinois, the Supreme Court declared that the nature of a state’s title to submerged

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23 See id. at 431–39. Watercourse transportation caught the eye of business entrepreneurs. Id. at 434–35. The rivers furnished routes that avoided both dense forests and expensive road construction. Id. Moreover, the need for fishing served both commercial and subsistence purposes. Id. at 431–34.

24 Id. at 437 (citing P. Cutright, A History of the Lewis and Clark Journals 12 (1976) (quoting Thomas Jefferson)).

25 Id.

26 Id. at 437–38 (quoting Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824)) (“[T]he power over commerce, including navigation, was one of the primary objects for which the people of America adopted their government, and must have been contemplated in forming it.”). Professor Wilkinson identifies four other constitutional provisions which emphasize Congress’s paramount concern for the public use of waterways: the Tonnage Duty Clause; the Import-Export Clause; the Ports and Vessels Clause; and the Admiralty Clause. Id. at 437 n.53.

27 See id. at 439.

28 Wilkinson, supra note 1, at 439–40.

29 Id. at 443–45.

30 Id. at 449.

lands is different from that it holds in other lands.\textsuperscript{32} “It is a title held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein . . . .”\textsuperscript{33} In this regard, the Supreme Court placed an affirmative duty on states to assist with protecting the people’s common law right to access waterways.\textsuperscript{34}

Although the Supreme Court has never expressly stated so, the concept of the public trust and the resulting affirmative duties seem to emanate from the Constitution.\textsuperscript{35} While other interpretations of the public trust source exist, this is the most reasonable explanation considering the “heavy overlay of constitutional doctrine” concerning watercourse regulation.\textsuperscript{36}

Commerce Clause decisions have consistently highlighted the Framers’ concern for free trade and navigation, and the Court has cast

\textsuperscript{32} 146 U.S. 387, 452 (1892).

\textsuperscript{33} Id. While Illinois Central allows for the severance of lands from the public trust, it is seen as an exception, not the norm, to the rule of inalienability—with no presumption that a mere conveyance of lands within the public trust affects such a severance. A. Dan Tarlock, Law of Water Rights and Resources § 8.22 (Marie-Joy Paredes & Susan Mauerci eds., 17th release 2005). Any state action which creates a severance may not impair the state’s overall ability to fulfill trust purposes. Id.

\textsuperscript{34} See Wilkinson, supra note 1, at 453–55. It has been argued that the core of the Illinois Central case is more properly concerned with the Contract Clause of the Constitution of the United States—with the reserved powers doctrine being used to reduce the ambit of the Clause itself. Douglas L. Grant, Underpinnings of the Public Trust Doctrine: Lessons from Illinois Central Railroad, 33 Ariz. St. L.J. 849, 851 (2001). Thus construed, the public trust doctrine should be placed within the broader doctrine of reserved powers, the source of which is commonly found in constitutional provisions on “legislative power” that is supported ultimately by creditable democratic political theory. Id.

Illinois Central has also been considered to be an ill-reasoned decision—with the public trust analysis being more correctly seen as dictum and “as persuasive, rather than mandatory, authority”—because it lacks a foundation both in the Constitution and the federal common law. Furthermore, the case relies on a misreading of the scope of state power, since “state regulatory power is not lost upon a transfer of property rights to a private entity.” Eric Pearson, Illinois Central and the Public Trust Doctrine in State Law, 15 Va. Env'tl. L.J. 713, 740 (1996).

Rather than assessing the validity or invalidity of the public trust doctrine in Illinois Central, it is suggested that the case be assessed by probing the “standard narrative” of the case itself. See Joseph D. Kearney & Thomas W. Merrill, The Origins of the American Public Trust Doctrine: What Really Happened in Illinois Central, 71 U. Chi. L. Rev. 799, 803 (2004). This dramatically reveals a rich political history and shows corruption, most probably, by the railroad in getting the Illinois state legislature to pass the Lake Front Act of 1869. See id. at 803–04. This Act, which was repealed in 1873, granted the entire Chicago lakefront, including the lake bed, of over one thousand acres to a private entity, Illinois Central, for use and development. See id.

\textsuperscript{35} See Wilkinson, supra note 1, at 458–59.

\textsuperscript{36} Id. at 458.
a constitutional flavor on both state and federal obligations regarding watercourse preservation. Since the Illinois Central decision, the public trust doctrine has flourished as a national value, inherited from an ancient script of human reason and shaped by the words and spirit of the Constitution.

But how far should the public trust extend? The traditional “zone of public trust rights” encompasses only navigable waterways. The significance of the Constitution is that it sets boundaries and a context for state courts and legislatures who must devise remedies for future public trust applications. Thus, it is important to explore the basic constitutional values underlying the public trust doctrine to determine its appropriate reach.

II. THE NATURAL LAW, THE CONSTITUTION, AND THE PUBLIC TRUST

Whenever a doctrine is said to lie within the basic precepts of the Constitution of the United States, caution must be taken in embracing the validity of the argument. This country is rooted in the ideals and values that are carefully scripted in the words of the Constitution, and as one Newsweek writer has noted: “Words matter. . . . [T]he Founding Fathers felt obligated to spell out their reasons for declar-

37 See Victor John Yannacone, Jr., Agricultural Lands, Fertile Soils, Popular Sovereignty, the Trust Doctrine, Environmental Impact Assessment and the Natural Law, 51 N.D. L. Rev. 615, 627–29 (1975). The Court first cast its constitutional light on the principle of public trust in Martin v. Waddell “when it construed the early colonial charters as reaffirming public rights.” Id. at 629 (citing Martin v. Waddell, 41 U.S. (16 Pet.) 367 (1842)). The Court would later state in Illinois Central that there was no such thing as an “irrevocable conveyance of property,” as it violated the public trust. Id. Finally, in Shivley v. Bowlby, the Court “extended the English common law trust doctrine to a major river in Oregon” and “recognized the trust doctrine as a basic element of equitable jurisprudence.” Id. (citing Shivley v. Bowlby, 152 U.S. 1 (1894)).


39 See Wilkinson, supra note 1, at 464. The creation and regulation of property rights within state boundaries is an important power left to the states. See Archer et al., supra note 38, at 7.

40 See Scalia, supra note 9, at 37–47. Original meaning is a concept that brings strength and stability to the Constitution. Id. at 47. Doctrines that are “found” within the Constitution run the risk of bringing new meaning to its once “rock-solid, unchanging” text. Id. “If the courts are free to write the Constitution anew, they will, by God, write it the way the majority wants . . . . By trying to make the Constitution do everything that needs doing from age to age, we shall have caused it to do nothing at all.” Id.
ing independence from England, out of what Thomas Jefferson called a ‘decent respect to the opinions of mankind.’”

This thought is particularly meaningful, since it describes the Framers’ desire to put into words those laws that embrace a greater “common good,” reached through a process of rational thinking. Thus, any analysis regarding the public trust should begin with the Framers’ intention and the words of the Constitution.

Despite the skepticism amongst modern constitutional scholars who reject any Natural Law meaning within the Constitution, the Natural Law elements of the Constitution still matter. The natural rights of human beings are directly referenced within the text that has been referred to as “that anchor, that rock, that unchanging institution that forms the American polity.” For the purposes of evaluating the public trust, two important sections of the Constitution appear relevant:

“The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”

“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”

One reason for James Madison’s submission of the Ninth Amendment was to clarify that an individual’s rights were not limited

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42 See infra notes 51–59 and accompanying text. This is especially important because the public trust doctrine was adopted in Illinois Central based upon constitutional values. See Wilkinson, supra note 1, at 453–55.
44 Justice Antonin Scalia, Remarks at The Catholic University of America: A Theory of Constitution Interpretation (Oct. 18, 1996), available at http://www.courttv.com/archive/legaldocs/rights/scalia.html. Ironically, Justice Scalia rejects the use of Natural Law in interpreting the Constitution. Id. While he adamantly supports interpreting the Constitution according to its text, he characterizes the use of Natural Law as an unworkable method of interpretation because of its vulnerability to subjective interpretation. Id.
45 See Yannacone, supra note 37, at 617–18 (quoting U.S. CONST. amend. IX, X).
46 Id. at 618 (quoting U.S. CONST. amend. IX (emphasis added)).
47 Id. (quoting U.S. CONST. amend. X (emphasis added)).
to the enumerated rights listed in the preceding eight amendments. As a matter of fact, the Ninth Amendment was adopted as a “source of substantive rights” allocated to all citizens by the hand of God “to preserve the existence and dignity of human beings in a free society.”

This recognition of a “higher law political philosophy” is crucial to understanding the thinking of the Framers.

Indeed, references to Natural Law authority dominated early writings and served as the imprint of the country’s constitutional soul. In property law terms, the Framers in the Natural Law tradition viewed “God as the ultimate holder in fee simple, with men and women holding possessory, but defeasible, interests in life.” Moreover, Natural Law is premised upon the notion that men have a “duty

48 See James Madison, Address Before the First Congress (June 8, 1789), in THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS 56 (Neil H. Cogan ed., 1997) (“I conclude from this view of the subject, that it will be proper in itself, and highly politic, for the tranquility of the public mind, and the stability of the government, that we should offer something, in the form I have proposed, to be incorporated in the system of government, as a declaration of the rights of the people.”); see also Yannacone, supra note 37, at 653 (“Historically, the ninth amendment was included in the Bill of Rights to nullify the argument that the enumerated rights set forth in the preceding eight amendments were intended to be the only rights protected.”).

49 See Yannacone, supra note 37, at 653.

50 See, e.g., Rice, supra note 8, at 22–23. As Professor Charles Rice describes, the Natural Law philosophy is more than an aspiration or theory, it is a workable solution, for all humans, in responding to the day’s challenging issues. See id. at 23. Moreover, it exceeds the role of a philosophical background to the Constitution—it is an objective standard that can be measured through reasoned reflection similar to that of the common law. See id. at 27. Finally, it serves as a standard for both citizens and states in the creation of new laws. See id. at 30. The Ten Commandments and other prescriptions of the divine law address specifically how to apply the Natural Law. Id. at 28.

51 One needs to look no further than the words and deeds of the most influential leaders in early American history. Alexander Hamilton once noted: “The sacred rights of mankind are not to be rummaged for, among old parchments, or musty records. They are written, as with a sun beam, in the whole volume of human nature, by the hand of the divinity itself; and can never be erased or obscured by mortal power.” Alexander Hamilton, The Farmer Refuted, in 1 THE FOUNDERS’ CONSTITUTION 90, 91 (Philip B. Kurland & Ralph Lerner eds., 1987); see also Douglas W. Kmiec, America’s “Culture War”—The Sinister Denial of Virtue and the Decline of Natural Law, 13 ST. LOUIS U. PUB. L. REV 183, 188 (1993). Perhaps the most convincing evidence of the higher law political philosophy is Thomas Jefferson’s Declaration of Independence, which makes numerous references to man’s unalienable rights as bestowed by the “Creator.” THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). “The fact is that the Declaration is the best possible condensation of the natural law—common law doctrines as they were developed and expounded in England and America for hundreds of years prior to the American Revolution.” Clarence E. Manion, The Natural Law Philosophy of Founding Fathers, 1 NAT. L. INST. PROC. 3, 16 (1949).

to preserve [them]selves” while maintaining “a correlative right to be free in the performance of that duty.”

Considering this Natural Law template, it is proper to examine the public trust doctrine within its constitutional framework. It is clear that the Natural Law duty to preserve one’s self and duty to others can carry conflicting messages. On the one hand, it seems as if Natural Law promotes the protection of individual rights, such as the right of a property owner to be free in excluding others. At the same time, there seems to be a “common good” that takes priority over all other “individual goods.”

As has been observed, “[t]he human law cannot rightly be directed toward the merely private welfare of one or some of the members of the community.” This “natural tension” is played out within the Constitution’s text as well. For example, the Takings Clause prohibits the government from forcing some individuals to bear burdens which should be rightfully “borne by the public as a whole.” Yet, the language of the Ninth and Tenth Amendments refers to rights and powers that are retained by the “people,” such as the fundamental right of the populace to preserve natural resources. The end result is a Constitution that not only emphasizes individual property rights, but also recognizes the right of “sovereign people” to collectively “determine the highest and best use of land and natural resources.”

Such a balanced approach seems appealing on its face, but difficult to effectuate. Throughout the history of American jurisprudence, this balance has been difficult to maintain as both property and the police power—exercised on behalf of the people—are “indeterminate concepts whose interpretations change over time and from place to place.” As a result, many of the Supreme Court of the United States decisions that have attempted to solve the tension be-

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53 Id. at 651 (emphasis omitted).
54 See Yannacone, supra note 37, at 649 (“The ancient controversy over the nature of law (ius)—whether ius quia iustum (the law is that which is just) or ius quia iussum (the law is that which is commanded)—is more than a mere etymological quibble.”).
55 See Rice, supra note 8, at 56.
56 Id.
57 Id. at 57.
59 See Yannacone, supra note 37, at 618.
60 Id.
tween these two elements have been viewed as “incoherent” or “categorical.”

The public trust doctrine is no stranger to this tension. The doctrine emerged on the idea that title to a state’s land under navigable waters could never be surrendered irrevocably to private interests. Illinois Central Railroad Co. v. United States was a significant blow to a private railroad company that sought to capitalize through the state’s absolute grant of title by controlling a substantial part of the waterfront on Lake Michigan. Despite the Constitution’s strong recognition of individual property rights, it was clear “that the Court conceived of a general [public] trust [principle] that applied to all states” at all times.

Can such a decision that creates “public trust” rights be justified? If so, how far can a state government go in mandating public access to natural resources or restricting a private landowner’s rights? The best answer lies within the text of the Constitution and its Natural Law principles.

Marcus Tullius Cicero once stated that law was “the highest reason, implanted in Nature, which commands what ought to be done and forbids the opposite.” Without a doubt, the greatest feature of Natural Law is that it attempts to find the right answers through ra-

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62 Id.
63 See Archer et al., supra note 38, at 177 (referencing the existence of historical conflict between public and private interests with respect to the public trust doctrine).
65 See Wilkinson, supra note 1, at 452–53.
66 See Yannacone, supra note 37, at 618.
67 See Wilkinson, supra note 1, at 454.
68 Douglas W. Kmiec, Inserting the Last Remaining Pieces into the Takings Puzzle, Wm. & Mary L. Rev. 995, 998 n.16 (1997) (quoting Marcus Tullius Cicero, Laws—Book I, reprinted in The Great Legal Philosophers: Selected Readings in Jurisprudence 42, 44 (Clarence Morris ed., 1959)). Marcus Tullius Cicero (c. 106–43 B.C.), one of the greatest orators and philosophers of politics in ancient Rome, believed that many of the difficulties experienced in the Roman Republic could be attributed to the corruption and lack of virtuous character amongst political leaders. Edward Clayton, Cicero (c. 106–43 B.C.), ch. 3 Cicero’s Thought, The Internet Encyclopedia of Philosophy (2005), http://www.utm.edu/research/iep/c/cicero.htm. Cicero believed “virtuosity” had been the main attribute to success in the earlier days of Roman history. Id. Corruption was particularly rampant in the Senate where social status, fame, wealth, and power took priority. Id. Cicero hoped that leaders would self-reform their lack of commitment to individual virtue and then pass legislation enforcing similar standards. Id. Unfortunately, most Romans were more interested in practical matters of the law—such as governance and military strategy—than they were in Cicero’s virtuous philosophy. Id. In 27 B.C., the Roman Republic was dissolved and the Senate conferred great powers to Caesar Augustus. Id.
tional thought and reflection, just as the Common Law has done for hundreds of years.\textsuperscript{69}

Coming to a rational conclusion with competing constitutional values can be difficult, but the task must be undertaken.\textsuperscript{70} The “common good” is an aspect of Natural Law that would seemingly answer the question at hand. Saint Thomas Aquinas, Natural Law’s greatest proponent, “makes it clear that the human law is not some arbitrary imposition,” but a rule of reason for the “common good” that remains an integral “part of God’s design.”\textsuperscript{71} Whether the “common good” favors private property interests or public interests is a matter of Natural Law application and rational deduction. Professor Charles Rice, a Natural Law scholar, describes Natural Law as a “rule of reason, promulgated by God in man’s nature, whereby man can discern how he should act.”\textsuperscript{72} In essence, God has instilled “a certain, knowable nature into man to follow if he is to achieve his final end, which is eternal happiness with God in heaven.”\textsuperscript{73}

The first major premise of Natural Law is that good should be done and evil should be avoided.\textsuperscript{74} People can determine what is good by examining their natural inclinations, which includes seeking

\textsuperscript{69} See Kmiec, supra note 52, at 650. Professor Kmiec explains appropriately that the common law is “the gradual exposition of natural law in context and over time.” For an in depth explanation of this concept, see DOUGLAS W. KMIEC & STEPHEN B. PRESSER, THE HISTORY, PHILOSOPHY AND STRUCTURE OF THE AMERICAN CONSTITUTION 122–26 (1998). “The Common Law thought pattern” has consisted traditionally of three elements: “[the] law of God, [the] law of nature, and [the] law of man.” Id. at 122. The application of these elements has been premised on the idea that “reasoned discovery of human nature” would find the answers to challenging questions of the day. Id. Following King Henry VIII’s break with the Catholic Church, the belief that a legislature or a King could rule without limit caused many to overlook God in the parliamentary process. Id. However, Natural Law’s dedication to the rationality of human nature “refused to die” and passed to America’s Constitution. Id.

\textsuperscript{70} History has demonstrated that Natural Law is needed to resolve conflicting elements of the Constitution. For example, in \textit{Dred Scott v. Sanford}, the Supreme Court failed to resolve the morally conflicting slavery provisions of the Constitution with the Fifth Amendment right to due process. See generally 60 U.S. (19 How.) 393 (1856). Natural Law resolves this discord for the modern scholar because it unmistakably opposes the treatment of a slave as “sub-human” because of the inseparability of humanity and personhood. See Kmiec, supra note 51, at 194; Charles E. Rice, Some Reasons for a Restoration of Natural Law Jurisprudence, 24 WAKE FOREST L. REV. 539, 568–69 (1989). The standard is further explained by Aquinas who stated that “human law . . . may be unjust as ‘contrary to human good’ when ‘burdens are imposed unequally on the community.’” Id. at 568 (quoting T. Aquinas, Summa Theologica, I, II, Q. 96, art. 4).

\textsuperscript{71} See Rice, supra note 8, at 56.

\textsuperscript{72} Id. at 44.

\textsuperscript{73} Id. at 44–45.

\textsuperscript{74} Id. at 45.
good, preserving their own existence, preserving species, living in community with others, and using their intellect to know truth and to make decisions. These Natural Law principles have maintained a continuing validity by virtue of their derivation from human nature, a creation of God.

In property disputes, one must be careful not to automatically equate public sharing with the “common good.” As Aquinas pointed out, “human affairs are conducted in [a] more orderly fashion if each man is charged with taking care of some particular thing himself, whereas there would be confusion if everyone had to look after any one thing indiscriminately.” Therefore, Aquinas spoke of a reasonable method of resolution: “Wherefore laws should take account of many things, as to persons, as to matters, and as to times.” This philosophy neither excludes the rights of individual property owners, nor discounts the validity of the public’s right to access natural resources. Rather, it suggests that all factors be taken into consideration before deciding upon the issue at hand.

As both public and private interests are deemed important in constitutional matters, the most logical method to choosing one course of action over another would be the balancing of private prop-

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75 Id.
76 Id.
77 Rice, supra note 8, at 62. As Professor Rice explains, the “common good ‘cannot be defined except in reference to the human person. . . . In the name of the common good, the public authorities are bound to respect the fundamental and inalienable rights of the human person.’” Id. (quoting Aquinas, supra note 70, at II, II, Q. 66, art. 2). Others have described the “common good” as a social state which:

- guarantees to each person that place in the community which belongs to him and in which he can freely develop his God-given talents, so that he can attain his own bodily, spiritual and moral perfection and so that, through his service to the community, he himself can become richer in external and internal goods.


78 See Rice, supra note 8, at 235 (quoting Aquinas, supra note 70, at II, II, Q. 66, art. 2). It should be noted, however, that Aquinas did not intend for an exclusive focus on individual property rights. See id. (quoting Aquinas, supra note 70, at II, II, Q. 66, art. 2). In the words of Aquinas, “[A] rich man does not act unlawfully if he anticipates someone in taking possession of something which at first was common property, and gives others a share: but he sins if he excludes others indiscriminately from using it . . . .” Id. at 236 (alterations in original). Pope John Paul II has spoken to this issue as well. In Centesimus Annus, the Holy Father talks about “the necessity and therefore the legitimacy of private ownership as well as the limits which are imposed on it . . . . God gave the earth to the whole human race for the sustenance of all its members, without excluding or favoring anyone.” Id. (citing Pope John Paul II, Centesimus Annus (May 1, 1991)).

79 See id. at 57 (quoting Aquinas, supra note 70, at I, II, Q. 96, art. 1).
From the state’s interest in natural resource preservation. After balancing these factors, the means that produces the greatest amount of good for preserving human life would best fulfill Natural Law’s demand for the “common good.”

It is not hard to justify the limited reach of the public trust doctrine in this respect. A rational person can see how the balancing of constitutional values would implicitly require protection of the navigable waterways. As the *Illinois Central* Court observed, economic exclusion from the navigable waterways would be detrimental to the state’s overall commercial interests, and no private interest could conceivably outweigh such a significant economic need. Natural Law itself recognizes that economic freedom is an essential element to realizing personal freedom, and a vast number of citizens have relied upon the freedom to navigate since the country’s formative years.

Taking into account the economic lifelines provided by the country’s waterways, it is not surprising that the Court adopted the public trust doctrine as a matter of constitutional importance. The doctrine was not founded upon an abstract desire for increased public access, but rather a balanced common law protection of economic rights retained by the people. Since “the ribbons of waterways tied the early

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81 See Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 454 (1892) (“The harbor of Chicago is of immense value to the people of the State of Illinois in the facilities it affords to its vast and constantly increasing commerce; and the idea that its legislature can deprive the State of control over its bed and waters and place the same in the hands of a private corporation created for a different purpose . . . is a proposition that cannot be defended.”) (emphasis added).

82 See supra note 23 and accompanying text. However, it must be remembered that Natural Law does not view economic freedom as an absolute right. See Rice, supra note 8, at 237.

83 See *Illinois Central*, 146 U.S. at 452. The Court in *Illinois Central* pointed out:

[t]hat the state holds the title to the lands under the navigable waters of Lake Michigan . . . by the common law, we have already shown, and that title necessarily carries with it control over the waters above them whenever the lands are subjected to use. . . . It is a title held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties.

*Id.*
nation together—economically, politically, and symbolically,” the public trust doctrine flows naturally from the Constitution’s articulated values under the Commerce Clause and the Ninth Amendment, and complements Natural Law’s right to self-preservation.

III. The Expanding Trust

While Illinois Central Railroad Co. v. Illinois and its succeeding cases established that the Constitution of the United States has “minimum requirements” set for the public trust, much of the modern focus remains on the coverage of the public trust beyond traditional navigable waterways. In 1988, the Supreme Court of the United States took on the public trust concept directly. In Phillips Petroleum Co. v. Mississippi, the Supreme Court held that Mississippi received ownership of all its lands under waters that were subject to the “ebb and flow” rule, extending the reach of the public trust to the tidelands. Although the case did not directly determine whether the public had a right to access these waters under the public trust doc-

While some have suggested that the Court’s decision in Illinois Central supports greater public access, regardless of the common law’s economic reasoning, a careful reading uncovers a uniquely economic aspect of the public trust:

> The interest of the people in the navigation of the waters and in commerce over them may be improved in many instances by the erection of wharves, docks and piers therein, for which purpose the State may grant parcels of the submerged lands; and, so long as their disposition is made for such purpose, no valid objections can be made to the grants.

_Id._ (emphasis added).

This language suggests that a minor infringement on the trust may be allowed to promote the economic development of the submerged land. Hence, the underlying purpose of the trust would seem to be economics. See Phillips Petroleum Co. v. Mississippi, 484 U.S. 469, 488 (1988) (O’Connor, J., dissenting) (“Because the fundamental purpose of the public trust is to protect commerce, the scope of the public trust should parallel the scope of federal admiralty jurisdiction.”).

84 See Wilkinson, _supra_ note 1, at 438. The economic significance of the waterways should not be underestimated. See _id_. Public trust commentators have noted that the nation demanded cheap access to transportation and an end to sectional rivalries in order to preserve the Union and achieve economic welfare. _Id._ (quoting William J. Hull & Robert W. Hull, _The Origin and Development of the Waterways Policy of the United States_ 8 (1967)).

85 See Archer et al., _supra_ note 38, at 13 (“[I]t is apparent that a state may increase the universe of public trust uses beyond the traditional areas of navigation, commerce, and fishing, as well as narrow its involvement by granting private rights in these lands.”); see also Lum, _supra_ note 17.

trine, it held open the possibility that states had “unfettered discretion in administering the trust.”

This case clearly warrants attention because of the implication that protection under the public trust could expand beyond its traditional scope. In her dissenting opinion in *Phillips Petroleum*, Justice O’Connor put the matter in its proper perspective: “[T]his case presents an issue that we never have decided: whether a State holds in public trust all land underlying tidally influenced waters that are neither navigable themselves nor part of any navigable body of water.” As Justice O’Connor’s opinion highlighted, the *Phillips Petroleum* decision could be problematic for the rational thinker: “American cases have developed the public trust doctrine in a way that is consistent with its common-law heritage. Our precedents explain that the public trust extends to navigable waterways because its fundamental purpose is to preserve them for common use for transportation.”

In determining that the public trust should be expanded to reach those tidelands under an “ebb and flow” standard, most would hope that the *Phillips Petroleum* majority found suitable reasons for the expansion. Moreover, it would seem fitting for the Court to explain why its “tidal test” is superior to the traditional “navigability test” in supporting the underlying purpose of the public trust. The Court did mention that lands beneath the tidal waters may be used for fishing, but failed to show how the limited public interest in fishing outweighed the traditional interests associated with private ownership.

Instead of discussing the fundamental purpose of the public trust doctrine in protecting commercial and economic interests, the majority loosely stated that individual states have always enjoyed “the au-

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87 See Wilkinson, *supra* note 1, at 462.
88 See Archer et al., *supra* note 38, at 12 (“The *Phillips Petroleum* decision may have significant implications for future exercises of state authority over public trust lands.”).
89 *Phillips Petroleum*, 484 U.S. at 485 (O’Connor, J., dissenting). Justice O’Connor noted that the “Court has defined the public trust repeatedly in terms of navigability.” *Id.* at 485–86.
90 *Id.* at 487. The dissent cites prior decisions as well. “It is, indeed, the susceptibility to use as highways of commerce which gives sanction to the public right of control over navigation upon [navigable waterways], and consequently to the exclusion of private ownership, either of the waters or the soils under them.” *Id.* at 488 (quoting Packer v. Bird, 137 U.S. 661, 667 (1891)).
91 *Id.* at 476 (majority opinion).
92 *Id.* This failure of showing is quite serious, as there is no precedent for the majority to hang its hat on. As Justice O’Connor properly warns, “[t]he Court’s decision departs from our precedents, and I fear that it may permit grave injustice to be done to innocent property holders in coastal States.” *Id.* at 494 (O’Connor, J., dissenting).
Authority to define the limits of the lands held in public trust and to recognize private rights in such lands as they see fit.\textsuperscript{93} Counter to common law reasoning, the decision seems “purely artificial and arbitrary as well as unjust.”\textsuperscript{94}

The \textit{Phillips Petroleum} recognition of an expanded trust could have profound implications. Not only could it be argued that a property owner must be restricted in using tidelands according to the wishes of the state, but the owner could also be wholly evicted from the area without warning, reasonable expectation, or compensation under the theory that a state holds the tidelands in trust for the people.\textsuperscript{95} Constitutionally speaking, the notion that a state should control the scope of the trust is not too offensive so long as it accounts for competing constitutional values.\textsuperscript{96}

Undoubtedly, the \textit{Phillips Petroleum} case gave the public trust doctrine a troubling new role in expanding state police power. By recognizing that a state may define the extent of the lands that it holds in public trust, the Court ignored some important features of the original doctrine.

First, the Court empowered the states with the right to determine which submerged lands are reserved under the public trust, but failed to review the underlying principles of the doctrine’s constitutional

\textsuperscript{93} See \textit{id.} at 475 (majority opinion). The majority casually rejects the doctrine’s fundamental commercial purpose as being one of many interests that is established by the state in setting the limits for the public trust. \textit{See id.} at 475–76. Ironically, none of the interests the Court refers to are mentioned in the doctrine’s founding case, \textit{Illinois Central}. \textit{See generally} 146 U.S. 387 (1892). At a minimum, the Court should balance the perceived public interest against those of private property owners when changing the scope of the doctrine.

\textsuperscript{94} See \textit{The Propeller Genesee Chief v. Fitzhugh}, 53 U.S. (12 How.) 443, 457 (1851).

\textsuperscript{95} See \textit{Phillips Petroleum}, 484 U.S at 493 (O’Connor, J., dissenting). The issue is not one of mere speculation. As the dissent notes:

\begin{quote}
“Due to this attempted expansion of the [public trust] doctrine, hundreds of properties in New Jersey have been taken and used for state purposes without compensating the record owners or lien holders; prior homeowners of many years are being threatened with loss of title; prior grants and state deeds are being ignored; properties are being arbitrarily claimed and conveyed by the State to persons other than the record owners; and hundreds of cases remain pending and untried before the state courts awaiting processing with the National Resource Council.”
\end{quote}


\textsuperscript{96} See generally \textit{Archer et al.}, \textit{supra} note 38. “Before attempting to provide access to public trust areas or to protect public trust resources, however, a state must consider the prospective risk that its action will be challenged as a regulatory taking.” \textit{Id.} at 82.
mandate. Moreover, the Phillips Petroleum decision allows states to assign private interests more freely, which is a clear contradiction to the Court’s philosophy in Illinois Central and a potential abuse in takings cases. Finally, the decision opens the door to a vast expansion of state trust authority. As the Phillips Petroleum majority noted, “several of our prior decisions have recognized that the States have interests in lands beneath tidal waters which have nothing to do with navigation.”

If a state merely needs an interest to expand the limits of the trust, such as fishing or “creat[ing] land for urban expansion,” what is to prevent a state from expanding the trust to avoid a takings claim in any situation? Clearly, a state maintains a wide range of interests in all of its lands, and the potential for authoritative abuse is now greater. It must be remembered that the term “public trust” provides an enormous shield against private interference—a private owner has no takings claim when he owns a “revocable title.”

Regardless of future court battles, one thing is certain—the scope of the public trust doctrine will be determined by the states. Like other doctrines, the public trust was created with “a set of minimum [constitutional] standards that can be expanded, but not contracted, by the states.” The nature and breadth of that expansion, however, is another matter for consideration.

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97 Id. at 50 n.111 (“As a matter of both sound public policy and legal precedent, the fate of the public trust doctrine is in any event placed in the state courts.”).
98 Id. at 57 (“The Supreme Court’s ruling permits conveyance of ownership of public trust lands to private parties . . . .”).
99 Phillips Petroleum, 484 U.S. at 476.
100 Id.
101 See James L. Huffman, A Fish Out of Water: The Public Trust Doctrine in a Constitutional Democracy, 19 Env'l L. 527, 548 (1989). As one skeptic points out, the Supreme Court has never articulated constitutional environmental rights simply by linking the Constitution to such claims. See id. “The courts would [then be free to] argue that because these public rights are protected under the public trust doctrine, they predate any private claims of right.” Id.
102 See Roger W. Findley et al., Cases and Materials on Environmental Law 921 (6th ed. 2003). Perhaps a showdown is yet to come. The Court’s recent opinion in Lucas v. South Carolina Coastal Council offered strong support for takings claims, particularly when an owner is totally deprived of using his land. 505 U.S. 1003, 1027–31 (1992). However, it does not mention the public trust doctrine as a “categorical exception” to the deprivation rule. Id. at 1030–31 (listing relevant factors in applying the deprivation rule).
103 See Wilkinson, supra note 1, at 464 n.164.
IV. EVALUATING STATE PUBLIC TRUST TRENDS

Now that there is wide recognition of the public trust doctrine, much of the modern focus lies with the states who have attempted “to expand the doctrine as it applies to the resources in their jurisdiction[s].”¹⁰⁵ In this respect, several states have contributed significantly to the doctrine’s application and expansion in recent years.¹⁰⁶ Although the public trust doctrine is a creature of the common law, its growth can be attributed to both legislative and judicial efforts.¹⁰⁷

A. Legislative Perspective

Examining the public trust concept in the legislative arena is an important aspect of trust evaluation. As Justice Antonin Scalia notes, “the main business of government, and therefore of law, [is] legislative.”¹⁰⁸ The purpose of this section is to discuss the appropriate means for a legislature to approach the public trust concept.

Some states have incorporated public trust rights directly within the text of their state constitutions.¹⁰⁹ Article I, Section 27 of the Penn-

¹⁰⁶ Archer et al., supra note 38, at 15–17, 15 n.1. In recent years, more attention has been given to the landward extension of the public trust doctrine. See Tarlock, supra note 33, § 8.20. With respect to the traditional doctrine, ten states have statutes that specifically address the seaward limit of the doctrine: Alabama, Alaska, Florida, Illinois, Louisiana, Maine, Massachusetts, Michigan, Mississippi, and Pennsylvania. Archer et al., supra note 38, at 15 n.1. Nine states have statutes that define the seaward limit of the doctrine somewhat vaguely: California, Delaware, Hawaii, Indiana, North Carolina, Ohio, South Carolina, and Wisconsin. Id. One state, California, has even undertaken public trust land mapping. Id. at 17–18. Case law has been developing under the doctrine as well. See id. at 16 n.1. There are twenty-two states that have applied the doctrine consistently to the three nautical mile limit, while five states have developed “less certain” case law with respect to the seaward limit. Id. For a comprehensive listing of state judicial postures on the ever expanding accommodations of the public trust, see Tarlock, supra note 33, § 8.20.
¹⁰⁷ See Archer et al., supra note 38, at 16.
¹⁰⁸ Scalia, supra note 9, at 13 (alteration in original) (quoting Lawrence M. Friedman, A History of American Law 590 (1973)).
¹⁰⁹ Article XI, Section 1, of the Hawaii Constitution states: “[A]ll public natural resources are held in trust by the State for the benefit of the people.” See David L. Callies & J. David Breemer, Selected Legal and Policy Trends in Takings Law: Background Principles, Custom and Public Trust “Exceptions” and the (Mis)use of Investment-Backed Expectations, 36 Val. U. L. Rev. 339, 358 (2002) (quoting Haw. Const. art. XI, § 1). Water rights have been expressly granted in other state constitutions. See Alaska Const. art. VIII, § 3 (reserving the right of the people to use waters in their natural state); Colo. Const. art. XVI, § 5 (declaring the “waters of every natural stream . . . to be the property of the public”); Mont. Const. art. II, § 3 (providing for a “clean and healthful environment” as an “inalienable right”); N.D. Const. art. XI, § 3 (stating that the waters are retained by the state for “min-
sylvania Constitution states that “[t]he people [of the state] have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment.”\textsuperscript{110} Moreover, Pennsylvania has declared its “public natural resources are the common property of all the people, including generations yet to come,”\textsuperscript{111} an extraordinary emphasis on natural resource preservation and extension of public resource rights.\textsuperscript{112}

While this direct naming of broad public trust rights puts the Pennsylvania property owner on edge, the citizens of Pennsylvania can take some comfort knowing the state legislature passed this resource provision under its “traditional authority” to “set public policy on problematic uses of land.”\textsuperscript{113} After all, there is something reassuring about the right of a populace to determine its destiny through the “nation’s democratically-driven processes.”\textsuperscript{114}

However, it is equally important that legislatures utilizing the public trust doctrine do so within a set of principled limits.\textsuperscript{115} Those
limits are established within the laws of human nature.116 Such human nature is consistent with the constitutional values that respect both individual rights and public benefit, and thus show a definite grounding in the tenets of Natural Law.117

In setting appropriate legislative limits, Natural Law provides a sound philosophy for determining what is best for the “common good.”118 Recognizing that economic freedom is a key to personal freedom, but that all human beings have a right to “part of God’s gift,” Natural Law supports the balancing perspective between property rights and public rights.119 Moreover, Natural Law focuses on the welfare of the human person and how an integrated “society of [human] persons” can improve the efficiency and productivity of land use that preserves human life.120

When choosing resources that should be protected under the public trust doctrine, legislatures should proceed cautiously and consider all factors affecting both individual property owners and the public at large. If such a refined balance is achieved, public trust preservation is likely to prove “a more amenable result,” and the constitutionality of the action will not likely be challenged.121

But what is the deciding element at the end of the day? In the spirit of the original doctrine and the Constitution’s Natural Law principles, it means that public preservation of a natural resource can be made insofar as it retains an economic benefit for the greater common good.122 Indeed, a public trust preservation that increases profit can

they are constitutional or common law, procedural or substantive, in all public and private property strips clarity, certainty, and predictability from the very core of the public trust doctrine.

Id.

116 See id. The public trust doctrine should be seen as granting equitable relief in three cases: where inappropriate attempts are made by governmental agencies to sell or alienate public trust resources to private individuals; where governmental agencies attempt to shift or divert a trust resource from one specific public use to a new and inappropriate one; and where a course of agency action is being pursued in derogation of the trust use which has the effect of either destroying the resource or giving rise to its pollution. Zygmunt J. B. Plater et al., Environmental Law and Policy: Nature, Law & Society 26–27 (3d ed. 2004).

117 See Kmiec & Presser, supra note 69, at 121–71.

118 See Rice, supra note 8, at 46.

119 Id. at 236–37 (quoting Pope John Paul II, supra note 78, at Nos. 30, 31).

120 Id. at 242 (quoting Pope John Paul II, Laborem Exercens, No. 43 (1981)).

121 See Humbach, supra note 113, at 780.

122 See Rice, supra note 8, at 238 (quoting Pope John Paul II, supra note 120, at No.35).
better serve a society that endeavors to best “satisfy their basic needs” while simultaneously serving the whole of humanity.\footnote{123}{Id. (quoting Pope John Paul II, \textit{supra} note 120, at No. 35).}

However, the public trust debate cannot rest entirely upon finding natural resources to protect. If that were the case, environmental advocates could simply accumulate any number of arguments that would provide support for an economic benefit.\footnote{124}{It may be possible to support any environmental cause with an economic argument. See Cohen, \textit{supra} note 115, at 273.}

A proper balancing equation also requires an evaluation of the effects to be endured by the individual property owner. As St. Thomas Aquinas observed, it is perfectly “lawful for man to possess property.”\footnote{125}{Rice, \textit{supra} note 8, at 235 (quoting Aquinas, \textit{supra} note 70, at II, II, Q. 66, art.1).} These aspects of personal ownership are vital for several reasons. First, people are more careful and efficient when procuring for themselves than for the community at large.\footnote{126}{Id. (quoting Aquinas, \textit{supra} note 70, at II, II, Q. 66, art.1).} Second, “human affairs are conducted in [a] more orderly fashion” when people take charge of their own property.\footnote{127}{Id. (quoting Aquinas, \textit{supra} note 70, at II, II, Q. 66, art.1).} Finally, “a more peaceful state” of affairs is likely to endure when people are secure in their private property.\footnote{128}{Id. (quoting Aquinas, \textit{supra} note 70, at II, II, Q. 66, art.1).}

Aquinas wisely proffered that “human agreement” on these competing public and private issues must come from the positive law.\footnote{129}{Id. (quoting Aquinas, \textit{supra} note 70, at II, II, Q. 66, art.1).} Accordingly, the best application of the public trust in the legislative arena occurs when decisions are made to benefit the common good through longstanding principles of human reasoning.

Natural Law reasoning is not difficult in application. The Natural Law approach recognizes that the preservation of human life is good.\footnote{130}{See supra text accompanying note 77.} In support of human life, “God gave the earth to the whole human race for the sustenance of all its members, without excluding or favoring anyone . . . .”\footnote{131}{See Rice, \textit{supra} note 8, at 236 (quoting Pope John Paul II, \textit{supra} note 78, at Nos. 30, 31).} The conquering of the earth by human beings is the means by which they provide a “fitting home” and “makes
part of the earth his own.’”¹³² At the same time, human beings should not obstruct others from sharing in “part of God’s gift.”¹³³

As discussed before, Natural Law reasoning can be used to justify the limited application of the public trust doctrine to watercourses.¹³⁴ Just as God’s earth was provided for the sustenance of its members, not even the private property owner can justify controlling the navigable waterways to the economic detriment of so many people.¹³⁵ The public trust doctrine is based upon the principled reasoning that protecting the vital economic interests of the community outweighs any barrier to free commerce.¹³⁶ Similarly, any legislative enactment that sets aside a public trust resource should take a balancing approach.

It is hard to imagine another natural resource that supports as many people in such a significant way.¹³⁷ More importantly, what principle could justify the impairment of private landowners’ rights to efficiently develop their own portion of God’s earth?¹³⁸ In supporting life, Natural Law advocates find that “[t]he right to own and dispose of property” is a basic human right.¹³⁹ Any limitations will have to be

¹³² Id. (quoting Pope John Paul II, supra note 78, at Nos. 30, 31).
¹³³ Id. (quoting Pope John Paul II, supra note 78, at Nos. 30, 31). The public trust, embodying as it does, fundamental conservative principles, seeks to recognize that “[t]he ultimate measure of a society” is to be found outside “physical needs for survival” and should include “the full quality of its people’s lives, and the legacy of ideas, accomplishments, resources, and potentials it seeks to pass on to successor generations.” Plater et al., supra note 116, at 102.
¹³⁴ See supra Part II.
¹³⁵ See Yannacone, supra note 37, at 653.
¹³⁶ Even Pope John Paul II recognizes that “the free market is the most effective instrument for utilizing resources and responding to needs.” Rice, supra note 8, at 237 (quoting Pope John Paul II, supra note 78, at Nos. 30, 31).
¹³⁷ While environmental activists may argue that the demand for greater environmental protection over the years demonstrates a greater concern for resource preservation, it does not follow that these values should be preserved as communal property rights. See Cohen, supra note 115, at 255. When considering the opportunity costs associated with inhibiting commercial development, it is hard to imagine that the continued existence of the waterfowl or preservation of wetlands will outweigh the cost of economic development. See id. “In a well functioning market economy, property will usually be put to its most valuable use because that is what is most profitable to the property owner.” Id.
¹³⁸ Id. at 261. It is imperative to realize the cost of impairing the private landowner. As Professor Cohen notes, the uncertainties created by an uninhibited and unpredictable public trust expansion “fall[s] squarely on the shoulders of the property owner.” Id. The property owner’s ability to predict the market also creates an incentive for him to anticipate future events and use his property in a productive manner. See id. “[I]n that anticipation he is serving the community at large.” Id. Unlike watercourse application, applying the public trust to other natural resources is likely to “make property ownership more risky and thereby diminish the value of investing in property in ways that increase its value.” Id.
¹³⁹ See Rice, supra note 8, at 237.
established through sound principles that outweigh this right. Of course, this Article has argued that the most logical principle is economics.\footnote{It has been observed that, “‘[l]aw is forward looking’ and ‘pragmatic’ and should be as but a servant of human needs. One of the most basic human needs is to be secure economically; for from that security comes an ability to purchase goods in the market place (e.g., food, clothing, shelter) which are necessary to sustain life at a level of enjoyment and thus promote individual happiness.” See Smith, Nuisance Law, supra note 80, at 739.}

Legislative public trust application outside the watercourses, however, may be economically feasible or reasonable. While public trust legislation may prove controversial outside the traditional watercourse context, there are still creative ways to invoke a public trust concept that is congruous with its economic roots.

Land trusts are being utilized increasingly to provide federal tax breaks to developers of private property.\footnote{Joe Stephens & David B. Ottaway, Developers Find Payoff in Preservation; Donors Reap Tax Incentive by Giving to Land Trusts, but Critics Fear Abuse of System, Wash. Post, Dec. 21, 2003, at A1.} These are not the traditional public trust mandates, however, but rather are legislative incentives to increase resource preservation. Commonly referred to as “conservation easements,” landowners agree to restrict development on their land and “donate” the easement to a nonprofit land trust or a government agency.\footnote{Id. at A20. In turn, these organizations certify that the restrictions are “meaningful and provide some public benefit, such as preserving open space or protecting wildlife.” Id. at A1.} In exchange, the landowner is afforded a tax break to compensate “for the reduction in the land’s market value.”\footnote{Id.}

These “land trust” initiatives may not only prove to be economically sound, but also to fit squarely within the original public trust doctrine’s constitutional values of respecting both “\textit{jus publicum}” and “\textit{jus privatum}” rights.\footnote{See supra Part II.} The land trust sets aside an ecological interest for the benefit of the public at large.\footnote{See Stephens & Ottaway, supra note 141, at A20. Many conservationists are reporting positive results. This initiative has been credited with being the “fastest-growing arm of the environmental movement, fueling a boom in land conservation and helping to protect more than 6 million acres nationwide.” Id.} In most cases, the conservation easement results in preserving wildlife and natural landscape while preventing urban sprawl.\footnote{Id.} At the same time, the burden of the land trust is not forced upon the unwilling landowner.
While such trust applications may seem limited in nature, they could provide even greater benefits than a mandatory trust. Not only can land trusts increase the amount of resources preserved on behalf of the public, but they also can increase the profitability margin that serves the community. Some researchers believe that the easements could increase property values by making the “neighborhoods more exclusive and scenic, with less density.”

This creative approach is anchored firmly within the principled reasons of the public trust doctrine—preserving a natural resource to provide an economic benefit to the greatest number of people. At the same time, it respects the Natural Law balancing approach toward the common good. Land trusts increase the profitability of the whole by respecting the rights of the individual. In the end, it might just achieve Aquinas’s ideal of a harmonized community.

**B. Environmental Enhancement**

The public trust doctrine—far from being curtailed—should be seen as an “affirmative instrument,” linking environmental protection of the biotic community with resource utilization. This linkage will perhaps validate what Dworkin termed an “equality of resources.” Heretofore, the central focus of the American version of the doctrine has been broad public access to multiple natural resources. These resources have expanded greatly from protecting shorelines and waters to include boating, swimming, fishing, hunting, preserving wildlife habitat, undertaking scientific studies, aesthetic beauty, maintaining ecological integrity, and retaining open spaces, which are all seen today as part of “legitimate public expectations.” Depending upon viewpoints, the doctrine’s major advantage, or disadvantage, is its “immunity . . . from Fifth Amendment ‘takings’ claims.” This becomes an especially complex and volatile issue upon realizing that “fully one-third of public trust property is in private rather than public hands,

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147 Id.
150 Bader, supra note 148, at 751, 753; see also Richard J. Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 Iowa L. Rev. 631, 649 (1986) (detailing a number of other applications including “archaeological remains, and even a downtown area”).
151 Bader, supra note 148, at 754. See generally Callies & Breemer, supra note 109, at 355–61.
[and that] private property rights also exist in many such lands and wa-
ters.”152 The core issue then becomes the extent to which private prop-
erty rights are either compromised or eliminated altogether without
any Fifth Amendment compensation—all to satisfy the voracious appe-
tite of the contemporary public trust doctrine.153

Seen as a tool to maintain the health of natural systems rather
than as a general environmental tool, a “new,” revised public trust
doctrine would require an initial determination by a reviewing court
as to whether the health of a specific ecological system would be im-
paired by a particular activity. This inquiry would be met by surveying
the impact on the diversity and the stability of the threatened biotic
community. Accordingly, the planned use would be deemed judicially
acceptable, if found to present little, if any, threat to the biotic com-
munity. Additionally, the proposed project activity would have to meet
the statutory conditions imposed by the Clean Water Act,154 the Na-
tional Environmental Policy Act,155 and the Administrative Procedure
Act.156 These statutory considerations would be independent of the
public trust doctrine’s common law principles.

Conversely, if the activity were judicially determined to be a
threat to environmental health, it would be either modified or en-
joined. In making such a determination, no balancing of social poli-
cies or cost benefit analyses would be allowed. The “new” doctrine
would be recognized as “an inviolable shield protecting the environ-
ment.”157 However, making this an effective judicial inquiry would
require that the court evaluate the cumulative and “synergistic effects”
of any proposed activity in light of other long-term projects.158 The
uncertainty that would unavoidably be associated with such subjective
assessments of this nature perhaps dooms the notion of expanding
the public trust doctrine under this analysis.

152 Callies & Breemer, supra note 109, at 355.
157 Bader, supra note 148, at 757–58.
158 Id. at 758; see William D. Araiza, Democracy, Distrust, and the Public Trust: Process-Based Constitutional Theory, the Public Trust Doctrine, and the Search for a Substantive Environmental Value, 45 UCLA L. Rev. 385, 452 (1997) (suggesting the need for a process justification for
the judiciary in cases of this nature as well as a process-based methodology for implement-
ing such a review).
C. The Judicial Perspective

The most expansive development of the public trust doctrine will likely occur in state courts. Given the U.S. Supreme Court’s deference to the states for controlling the scope of the trust in *Phillips Petroleum v. Mississippi*, it is not surprising that a number of state courts have taken the initiative to expand constitutional guarantees. While state court opinions do not always indicate the source of expanding trust law, many have cited *Illinois Central Railroad Co. v. Illinois* and its tenet for creating public access to the watercourses as “a rule of general applicability.” This standard is understood as having broad parameters, allowing states an incredible leeway for fashioning their own individual bodies of trust law.

Several western states have pursued actively the idea, as water rights beyond the traditional watercourses have been declared public trust resources through judicial opinions and legislative declaration. The Arizona Supreme Court has declared that water rights are a protected resource under the state constitution and cannot be abdicated through legislative action. The Montana Supreme Court has relied on the public trust doctrine to guarantee access to all waters that may be used recreationally. Finally, the Washington Supreme Court has extended its protection of trust resources to include “tidelands, shorelands and beds of navigable waters.”

The expansion of the public trust has not been limited to mere water resources. In New Jersey, courts have cited the public trust doctrine as a means of extending the public protection of dry-sand areas. In *Matthews v. Bay Head Improvement Ass’n*, the Supreme Court of New Jersey recognized that swimmers had a right to passage and access to upland sands so that they could enjoy the traditional use of the ocean and foreshore.

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160 See Wilkinson, supra note 1, at 462, 463 n.163.

161 Id. at 463 n.163.

162 Id. at 461–62.

163 See Blumm, supra note 109, at 599–600.


165 See id. at 435.

166 Id. at 439–40.

167 Callies & Breemer, supra note 109, at 359–60.

The Supreme Court of California has become especially creative and expanded the public trust doctrine to include “food and habitat for fish and wildlife, open space, and use for scientific study.”\(^{169}\) This is a significant departure from the reasoning of traditional public trust application, as the California precedent recognizes protection for “environmental resources in their own right, not simply because humans use them.”\(^{170}\)

Much of the expansion regarding the public trust can be attributed to changing perceptions regarding property and the state police power.\(^{171}\) Assigning responsibility to the states for determining the scope of the public trust is not necessarily a bad idea, so long as state judges are influenced by sound reasoning and balanced decisionmaking.\(^{172}\) In its constructive role, Natural Law’s rational thinking can benefit court decisions by serving as “a reasonable guide to principles and general objectives” that promote the “common good” through a balanced approach, much like the operation of common law.\(^{173}\)

Even the Supreme Court’s most recent takings cases have emphasized that state common law is the best means for determining the proper balance between individual property rights and police power because “state courts are in the best position to monitor the evolution of these two concepts.”\(^{174}\) Be that as it may, judges have a specific responsibility to linking their extensions of the public trust doctrine to principled economic reasoning.\(^{175}\) Without it, they would not be abiding by a “precedent-bound common-law system.”\(^{176}\) As the Natural Law demonstrates, such systems provide the stability, predictability, and


\(^{170}\) *Id.*

\(^{171}\) See Kmiec, *supra* note 61, at 147.

\(^{172}\) See *supra* note 96 and accompanying text.

\(^{173}\) See Rice, *supra* note 8, at 55.

\(^{174}\) Kmiec, *supra* note 61, at 154. Two state courts—as early as 1957—presented a construct or, at least, a *vade mecum* for state judicial forays into public trust emanations, where diversions in use of public trust lands are validated when: they are supervised and controlled by public bodies; the areas in question are both devoted and open to the public; in comparing the area of original use, the diminished use is smaller than the entirety; the public uses within the original area are neither impaired significantly nor destroyed; and “the disappointment of those wanting to use the area of new use for former purposes was negligible when compared to the greater convenience to be afforded those members of the public using the new facility.” Paepke v. Pub. Bldg. Comm’n, 263 N.E.2d 11, 19 (Ill. 1970); see State v. Pub. Serv. Comm’n, 81 N.W.2d 71, 73–74 (Wis. 1957).

\(^{175}\) See *supra* Part II.

\(^{176}\) See Scalia, *supra* note 9, at 7.
efficiency that are essential to promoting the greatest amount of human happiness.

Certainly the common law may be an appropriate method for determining specific trust applications because of the “common sense of [its] ancient (yet dynamic) principle[s].” However, state courts and legislatures should be guided by exactly that—common sense principles that were known to the Framers. Just as the public trust doctrine was borne of a principled economic purpose to promote the common good, so too should it grow within the natural bounds of that purpose. If the public trust doctrine pushes the limits of this reason, it may find itself in the middle of a “ takings puzzle.”

D. New, Unbridled Expansion or Reasoned Application?

On April 23, 2004, the U.S. Court of Appeals for the Seventh Circuit held in United States v. Snook that violations of the public trust—recognized normally as applicable to violations of environmental law by public officials—could be broadened to justify increased sentences for industry officials. More specifically, Ronald Snook—at various times in his career classified as an “Environmental Manager” or “Environmental Specialist”—was found guilty of violating the Clean Water Act and of concealing material information.

As Environmental Manager at Clark Refining and Marketing, Inc., a petroleum refinery in Blue Island, Illinois, Snook was responsible for maintaining the refinery’s compliance with pertinent environmental regulations and managing its waste water treatment system. A local waste control ordinance prohibited the discharge of various pollutants with stated levels of concentration into a sewer system which, in turn, flowed into a municipal water treatment plant. It also required dischargers, such as Clark Refining, to submit reports of their self-monitoring compliance activities. Snook and an associate were found guilty by a jury of not only selectively reporting testing

177 Kmiec, supra note 61, at 158.
178 See generally id. at 147–159.
179 366 F.3d 439, 445–46 (7th Cir. 2004).
180 Id. at 441–42 (citing 18 U.S.C. § 371; 33 U.S.C. §§ 1317(d), 1319(c)(2)(A)).
181 Id. at 442 (citing 18 U.S.C. § 1001(a)(1)).
182 Id.
183 See id.
184 Id.
results of their discharges, but also—and perhaps more importantly—of the numerous violations that occurred on several occasions.\footnote{185}{\textit{Snook}, 366 F.3d at 442.}

In his appeal, Snook argued that any position of trust which he held was not to the local municipality where the wastewater facility was situated nor to the public it served; rather, it was to Clark Refining.\footnote{186}{\textit{Id.} at 445.} The court rejected this contention altogether and stated, “[t]he Clean Water Act is public-welfare legislation and the victims of violations are the public.”\footnote{187}{\textit{Id.} (citing United States v. Technic Servs., Inc., 314 F.3d 1031, 1049 (9th Cir. 2002)).} Further, the court stated that “the regulations here apply to matters that directly and significantly affect the public’s health and safety.”\footnote{188}{\textit{Id.} at 446.}

Similar current cases have strengthened and, indeed, enhanced the mandate of \textit{Snook},\footnote{189}{\textit{See, e.g.}, United States v. Perez, 366 F.3d 1178, 1185–86 (11th Cir. 2004); \textit{Technic Servs.}, 314 F.3d at 1049–52; United States v. Gonzalez-Alvarez, 277 F.3d 73, 81–82 (1st Cir. 2002).} leading to the conclusion that a trend which elevates every environmental violation as an abuse of the public trust doctrine is developing. This, in turn, may be taken to mean that other health and welfare statutes will be seen as affecting public health and safety.

In a strong dissent to the majority opinion in \textit{Snook}, Circuit Judge Coffey emphasized several points to curtail the forward thrust of the public trust doctrine. First, Snook was not a government employee, but rather a private one selected by his employer, Clark Refining. Second, because of this relationship, it was his employer, “not the public, who reposed its confidence in Snook such that a fiduciary relationship may have been created,”\footnote{190}{\textit{Snook}, 366 F.3d at 447–48 (emphasis omitted).} and while perhaps trusting Snook to conform to existing environmental regulations, “the public did not entrust Snook (in the sense of placing a fiduciary obligation on Snook) with the duty of protecting its health and welfare interests in the environment.”\footnote{191}{\textit{Id.} at 448 (emphasis omitted).} Third, if any fiduciary duty existed, it was to be found in municipal or district officers—and not with either Clark Refining or Snook—whose responsibility it was to ensure compliance with water regulations by inspections.\footnote{192}{\textit{Id.} at 450 (citing United States v. Kuhn, 345 F.3d 431, 437 (6th Cir. 2003); United States v. White, 270 F.3d 356, 372–73 (6th Cir. 2001)).} Even though an employee of
a private corporation may act in a manner that significantly harms the public, as in *Snook*, it is absurd to conclude that that an employee is acting as a fiduciary or agent of the public.\(^{193}\)

Judge Coffey’s dissent is, by far, the more reasoned approach to follow in public trust cases. If unfettered judicial discretion is not curbed, then—absent strict legislative direction—what was, at best, always seen as a penumbral emanation within the Natural Law will rise to an unjustified level of legal recognition and a usurpation of state action. If legislatures do not act decisively in setting limits for applications of the public trust doctrine, this lethargy will surely result in further unbridled expansions of the doctrine by the judiciary—bereft of its foundational framework in the Natural Law, a framework tied to the realization that individual property rights should only be compromised when the “common good” is truly advanced.

The reality and “application” of the *Snook* court for attaining an equilibrium between state legislative action and judicial interpretation is very dubious, because it is always the judiciary which not only determines the doctrine’s content, but also applies it to the facts of each case and ultimately enforces it against the legislature and state administrative agencies.\(^{194}\) “The legislature has no power to abolish or modify the doctrine, either across the board or in particular situations. Consequently, the judiciary has the final say on the validity of legislative and administrative grants of public trust resources into private ownership.”\(^{195}\)

The principle of majoritarian democracy is violated by this judicial posture, since the freedom of state legislatures to determine state policy “except when its choices run afoul of the state constitution, the federal constitution, or other federal law” is not only compromised, but actually destroyed.\(^{196}\) Unfortunately, there is no settled answer or formula to mapping the validity of the judicial source for action here which empowers the courts “to reject legislative decisions regarding private grants of public trust resources.”\(^{197}\) Thus, it is incumbent upon the courts to impose judicial self-restraint and follow the canons of strict construction which should, in turn, give rise to a framework for principled decisionmaking which is tied to a reasonable, common-sense balancing of the issues. The tenets of Natural Law can be of

\(^{193}\) *Id.* at 451.

\(^{194}\) See Grant, *supra* note 34, at 849–50.

\(^{195}\) *Id.* at 850.

\(^{196}\) *Id.*

\(^{197}\) *Id.*
great value in illuminating the judicial pathway to achieve the point of equilibrium in the balancing test.

E. Tempering the Future

While a level of skepticism may well persist regarding the contemporary value of Natural Law theory—especially with the recent push for expansive trust rights under the rubric of a flexible Constitution—198 it is submitted here that the theory has a level of useful application in future public trust cases. Even given the recent deferral by the Supreme Court to state jurisdictions in deciding disputations regarding property issues,199 it remains highly unlikely that the Supreme Court will allow the public trust doctrine to “emerge[] from the water and march across the land.”200

No matter what environmental activists claim regarding the growth of the doctrine, the road to a broader public trust will be tempered by competing property values that are mentioned specifically within the text of the Constitution.201 By referencing the logic of these competing values, the Natural Law originalist may successfully defend the public trust stance.

In Lucas v. South Carolina Coastal Council, the Supreme Court announced some constitutional limits that could inhibit the public trust application.202 Specifically, the Court stated that governmental restrictions that seek validation upon the “‘background principles’ exception ‘cannot be newly legislated or decreed.’”203 This means that newly developed policies of state public trust cannot find validity through mere judicial or legislative declaration.204 “Yet Lucas and Palazzolo [v. Rhode Island] make clear that the dispositive question is whether the land use restriction itself is part of shared and traditional limitations or, instead, a novel interpretation of state law.”205

Additionally, the Lucas Court enunciated a working principle which holds that any elimination of all beneficial use of land can be

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198 See Hunter, supra note 6, at 383.
200 See Cohen, supra note 115, at 256.
201 See Archer et al., supra note 38, at 73–84.
202 505 U.S. at 1029.
204 See Callies & Breemer, supra note 109, at 375.
205 Id.
defended only upon “an objectively reasonable application of relevant precedents” in the jurisdiction where the land is situated. The Natural Law originalist can accept this premise because the Natural Law philosophy is anchored in history, precedent, economic reasoning, and a balancing of interests.

The 2003 case of *Champlain’s Realty Associates v. Tillson* is illustrative of a modern and reasoned application of the public trust doctrine. An owner of a Rhode Island marina was subjected to a regulation that prevented the docking of commercial ferries. Passed by the Town of New Shoreham, the regulations directed that a cease and desist order be issued against the local owner of the marina.

Referencing the long history of the doctrine, a Rhode Island Superior Court declared the local restrictive ordinance invalid and announced that the state agency was responsible, primarily for ensuring that the waters of the state are utilized in the most appropriate and beneficial fashion for the general public.

In *Champlain*, the use of the public trust doctrine falls directly within its own reasonable application by supporting the state’s right to protect commercial interests in a valuable natural resource. In addition, by relying upon the historical underpinnings of the doctrine, the *Champlain* court stabilized further the very concept of the public trust and tied it to a firm foundation in principles of Natural Law. This, in turn, arguably supports the ultimate conclusion that when not

206 Id. (quoting Lucas, 505 U.S. at 1032 n.18) (emphasis omitted). But see Daniel A. Nussbaum, Note, McQueen v. South Carolina Coastal Council: Presenting the Question of the Relevance of the Public Trust Doctrine to the Total Regulatory Takings Analysis, 53 S.C. L. REV. 509 (2002) (arguing that the state can successfully defend a regulatory takings claim by utilizing the public trust doctrine).

207 The Court emphasizes that property law regulations, no matter what their origin, must be reasonable in their application and established precedents. See Callies & Breemer, supra note 109, at 375. In other words, a state’s declaration of public trust will not attain automatic immunity. See id.


209 Id. at *2–4.

210 Id. at *3–4.

211 See id. at *19–20. Earlier, the Rhode Island Supreme Court determined—consistent with past precedent—that “[t]he public-trust doctrine holds that the state holds title to all land below the high-water mark in a proprietary capacity for the benefit of the public.” Greater Providence Chamber of Commerce v. State, 657 A.2d 1038, 1041 (R.I. 1995). By benefiting the public, the doctrine, in turn, “preserves the public rights of fishery, commerce, and navigation in these waters.” Id. As well, each state must apply its own public trust doctrine without regard to positions taken by other sister states. Id. at 1042; see Hall v. Nascimento, 594 A.2d 874, 876–78 (R.I. 1991).

followed, any substitute legal analysis for the Natural Law framework will prove to be an “unstable . . . base on which to erect an edifice of useful positive law.”

Conclusion

The public trust is an ancient concept that has retained validity throughout the centuries. In American constitutional law, the public trust doctrine emerged from the idea that commercially protected interests enjoyed the right to free navigation on the watercourses. While the original doctrine was somewhat simplistic, it was rooted in ancient values and inherited from a line of principled economic reasoning. This critical reasoning can be credited in part to the Natural Law foundation of the American Constitution.

Regardless of whether the public trust is made law by the legislature, exists within the common law or is structured and enlightened in application by the tenets of Natural Law, the doctrine has an impact. The doctrine must be seen as representing and giving legal force to innumerable “unmarketized present and future social values” that are oftentimes ignored or overlooked in daily life—values that shape the total life experience.

Although the common law affecting “rivers, lakes, oceans, dunes, air, streams (surface and subterranean), [and] beaches,” for example, may not be seen as the same law affecting other “typical environmental object[s],” some of these resources come within the protection of the public trust doctrine. As such, they could be developed in such a manner to achieve a broad ranging environmental protective base. Liberalizing legal standing for offenses against environmental resources would have the added effect of supplementing conventional moralities by engrafting an environmental ethic onto the public trust doctrine. Accordingly, this reconstruction could well be

213 See Cohen, supra note 115, at 240.
214 See generally Smith, supra note 17; Sax, supra note 19.
215 See supra notes 50–81 and accompanying text; see also Brennan, supra note 43, at 971–72.
216 Plater et al., supra note 116, at 102.
219 Christopher D. Stone, An Environmental Ethic for the Twenty-First Century, in Should Trees Have Standing?, supra note 217, at 135, 141.
seen as yet another sound emanation within the penumbra of Natural Law—one that not only takes a renewed legitimacy from this relationship but consequently undergirds or validates the contemporary relevance of the very doctrine itself by showing its practical outreach to contemporary issues of environmental management and enhancing the legal status of the environment by giving it legal voice.\textsuperscript{220}

However, any expansion of an environmental ethic or engraftment of it onto the public trust doctrine should be tethered to a Natural Law template which seeks a reasoned balance in decisionmaking between the rights of individual property ownership with the need for expanded protection of public environmental resources. In this way, the doctrine is given both a directional focus and a level of needed restraint.

Judicial activism has the effect of preempting a full and balanced discourse both to test and to shape society’s relationship with the natural environment.\textsuperscript{221} Instead of continuing to broaden the base of judicial latitude for intervening, and thereby second-guessing the administrative decisionmaking process, technically incompetent courts should despise efforts to make themselves balancing artists that are intent on finding balancing points of environmental protection with competing social values.\textsuperscript{222} The role of the judiciary in resource decisionmaking then becomes one of interpreting, rather than designing, judicial enforcement powers being used to safeguard state legislative policies—adopted by state constitutional provisions—directed toward the protection of the vast resources within the public trust and thereby setting a standard for environmental conservation.\textsuperscript{223}

Expansion of the public trust doctrine for no other reason than to protect the environment simply ignores the economic precedent established by the original doctrine itself. Any furtherance of the doctrine must be based upon rational thinking and advancing the “com-

\textsuperscript{220} Christopher D. Stone, “Trees” at Twenty-Five, in Should Trees Have Standing?, supra note 217, at 159, 171.

\textsuperscript{221} See Araiza, supra note 158, at 387–88.

\textsuperscript{222} Id. at 402–03. See generally Lazarus, supra note 150, at 712–13 (expressing concern over the wide latitude of courts in second-guessing administrative decision makers in dealing with public trust issues).

\textsuperscript{223} See Araiza, supra note 158, at 452; see also Barton H. Thompson, Jr., Environmental Policy and State Constitutions: The Potential Role of Substantive Guidance, 27 Rutgers L.J. 863, 911–912 (1996) (expressing concern that the intrusiveness of judicial activism here is having the effect of overvaluing public trust uses to the detriment of preserving private property rights). See generally James L. Huffman, supra note 102.
As this Article has discussed, the most principled approach to advancing the common good is balancing the legitimate economic interests of individual property owners against public resource preservation. When this is executed, rarely can it be shown that the benefits of resource preservation outweigh the economic concerns of property owners. Thus, any expansion of the doctrine should be slow and scrutinized to the highest degree and with a spirit of judicial restraint.

Regardless of the Constitution’s limited mandate for the public trust, the U.S. Supreme Court’s decision in Phillips Petroleum Co. v. Mississippi has placed the burden of developing the public trust concept with the states. Nevertheless, Natural Law still plays a valuable constructive role to legislators and judges who must implement the doctrine. Once again, proper reasoning and principled economic decisionmaking can develop a contemporary public trust concept that is aligned with the Constitution’s Natural Law values. However, any application that exceeds these principled limits is improper and lacks a stable foundation. Thus, the Natural Law advocate should strive to keep public servants from wandering outside the confines of balanced reasoning.

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224 See Rice, supra note 8, at 56.

225 See 484 U.S. 469, 484 (1988); cases cited supra note 174 (providing a framework for developing a practical state public trust concept).
EXCUSES, EXCUSES: THE APPLICATION OF STATUTES OF REPOSE TO ENVIRONMENTALLY-RELATED INJURIES

Andrew A. Ferrer*

Abstract: Injuries resulting from environmental conditions created by improvements to real property have always been commonplace. Across jurisdictions, however, there is some evidence to suggest that defendants may be able to escape liability for certain environmentally-related injuries by invoking statutes of repose. Although statutes of repose may protect defendants from prejudice in court and relieve them of past obligations, they may also prevent injured plaintiffs from obtaining redress in court where their injuries were latent or undiscoverable. This Note explores the nature and purpose of statutes of repose, discusses whether they might be used by defendants during environmental litigation by addressing case law and public policy considerations, and offers suggestions for balancing the interests of plaintiffs and defendants to the extent that statutes of repose are applicable to environmental injuries.

Introduction

Landowners frequently hire contractors, architects, or related professionals to perform services on their property to make improvements, such as adding new construction or renovations. Often, the work is performed properly and to the satisfaction of the landowner. However, negligent or improper performance of such work may result in environmental damage and personal injuries to the landowner or other individuals. These plaintiffs would likely expect compensation from those who are responsible for their injuries, but that may not always be possible. State legislatures have enacted laws that regulate the time during which defendants may be held liable for the injuries of others. Such laws are known as statutes of repose. Like statutes of limitations, statutes of repose bar a cause of action from

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being filed in court after a specific period of time has elapsed.\textsuperscript{1} Statutes of repose grant defendants a substantive right to be free from liability for the purpose of protecting them from obligations long past,\textsuperscript{2} guarding against prejudice in court by ensuring good evidence is present,\textsuperscript{3} and enabling them to plan their future activities with greater certainty and confidence.\textsuperscript{4}

Although many courts have held statutes of repose to be constitutional,\textsuperscript{5} a plaintiff’s claim may be barred before the cause of action has accrued or before the injury has been discovered because statutes of repose begin to run earlier than statutes of limitations.\textsuperscript{6} As a result, many plaintiffs might find themselves with no redress in court; especially plaintiffs whose injuries were latent for long periods of time.\textsuperscript{7}

Many of these statutes of repose pertain to liability arising from making improvements to real property.\textsuperscript{8} Accordingly, an important question is whether a statute of repose could be used by defendants facing liability for environmental harms or injuries that have occurred in connection with such services. This question is particularly important in light of the latency of environmental harms and the legal and sociopolitical concerns of fairness to plaintiffs and defendants alike. Should defendants, who have caused plaintiffs to suffer injuries and environmental harms, be immune to liability by virtue of the passage of time? Should the recovery interests of injured plaintiffs be balanced against—or even superseded by—defendants’ interests in leaving the past behind? What environmental considerations would play into the effect of statutes of repose in such litigation? This Note will address some of the legal and social policy issues that statutes of repose may present in an environmental context by evaluating the stat-

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\textsuperscript{3} See 5 The Law of Hazardous Waste § 17.05[4], at 17-248 (Susan M. Cooke ed., 2004) (discussing rationales and principles underlying limitations periods).
\textsuperscript{4} Peacock, supra note 2, at 231–33.
\textsuperscript{5} 5 The Law of Hazardous Waste, supra note 3, § 17.05[4][d], at 17-259.
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utes purpose, effect, and construction. In addition, this Note outlines arguments that plaintiffs and defendants may make regarding the application of statutes of repose in environmental litigation.

Part I of this Note examines the nature of statutes of repose and describes their acceptance as constitutional. Part II offers insight into how statutes of repose have been justified and discusses their relevance to environmental claims. Finally, Part III takes an analytical look at statutes of repose in an environmental context, evaluates the degree to which they may or may not be used in environmental litigation in light of case law and public policy considerations, and offers suggestions as to how to balance interests when applying statutes of repose.

I. THE NATURE OF STATUTES OF REPOSE AND CONSTITUTIONALITY

A. The Difference Between Statutes of Repose and Statutes of Limitations

Generally, a cause of action must be filed in court before it is barred by an applicable statute of limitations or statute of repose.\(^9\) However, to plaintiffs and defendants, a statute of repose seems like a statute of limitations; both are legal instruments that limit a cause of action by imposing a time constraint.\(^10\) Part of the confusion is exacerbated by the fact that courts have often been “inconsistent with their use of these terms.”\(^11\) Nevertheless, because each statute relates to different aspects of the cause of action, the statutes differ in their significance in litigation.\(^12\)

A statute of limitations restricts the amount of time in which plaintiffs may file actions in court to enforce rights after their injuries have been, or should have been, discovered.\(^13\) If the plaintiff does not file within the limitations period, his right to a remedy is waived.\(^14\) Accordingly, a limitations statute can be seen as primarily an administrative tool used to facilitate court filings, since it is a rule that relates to procedure rather than substance.\(^15\)

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\(^9\) Toxic Waste Litigation, supra note 7, at 1604.


\(^12\) See id. at 225–27.

\(^13\) Id. at 225–27; see Sch. Bd., 360 S.E.2d at 327–28.

\(^14\) Peacock, supra note 2, at 226.

Because environmental lawsuits are often centered around “allegations of improper activities that can be years, even decades, old, the statute of limitations is an important and frequently relied upon defense in such cases.” However, a time-barring statute that begins to run before potential plaintiffs show signs of injuries may preclude opportunities to obtain compensation. Today, a majority of jurisdictions have adopted a “discovery exception” that requires the limitations period not to begin until the plaintiff knows of—or has reason to know of—the injury. Discovery rules limit the effectiveness of statutes of limitations as a defense in environmental litigation. However, even if discovery rules are generally accepted across states, they will not wholly eliminate the possibility that some claims would be time-barred. Some states have limited discovery rules to statutes of repose.

Statutes of repose limit the time during which a defendant may bear potential liability for injuries against plaintiffs. Unlike a statute of limitations, “[a] statute of repose begins to run from the occurrence of the incident raising liability,” rather than from the moment a cause of action accrues or an injury is discovered. Statutes of repose typically apply to negligence and strict liability claims as well. Where a statute contains language that restricts a party from filing an action after a specific date or time period, or provides that “no action may be filed for a claim that accrued before a particular date,” this is usually a “tell-tale sign that the statute is one of repose, not of limitation.”

What does a statute of repose mean for litigants? Simply stated, claimants must file their suits within the applicable statute of limitations period, “but in no event may suit be brought after expiration of

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17 5 The Law of Hazardous Waste, supra note 3, § 17.05[4], at 17-247 to 17-249.
18 Id.
19 Pacific, supra note 16.
20 Toxic Waste Litigation, supra note 7, at 1606.
the repose period.”

Therefore, if a plaintiff’s cause of action does not arise or is not discovered before the statute of repose has run, it will be “extinguished” even if the plaintiff satisfies the statute of limitations; the defendant will thus escape liability. Unlike statutes of limitations, statutes of repose create “a substantive right in those protected to be free from liability after a legislatively-determined period of time.” Statutes of repose gain their substantive quality by acting as an absolute bar to a cause of action.

However, since statutes of repose may relieve defendants of liability even before a cause of action has accrued or been discovered, their application to environmental claims is controversial. In a variety of environmental cases—most notably, toxic exposure and contamination cases—a plaintiff may be unaware of an injury until long after it has occurred. Many environmental cases “tend to involve injuries or damages that evolve over time.” For example, “[h]azardous substances may be released and migrate continuously for decades” before the toxins, or symptoms of illness, are detected by individuals or communities. Property damage from environmental contamination may similarly be latent; thus, many years will often pass before the discovery of harm to property and the commencement of an action. Therefore, it is these kinds of situations in which the running of a statute of repose before an injured party has discovered his cause of action has the potential to leave him without any relief. In essence, a statute of repose exemplifies the doctrine of “‘damnum absque injuria’ (‘a wrong for which the law affords no redress’).”

26 Peacock, supra note 2, at 227.
27 See id. at 227; see also Sch. Bd., 360 S.E.2d at 327–28 (holding that a statute of repose makes the defendant immune from liability when the repose period has run).
32 5 THE LAW OF HAZARDOUS WASTE, supra note 3, § 17.05[4], at 17-249.
33 Id.
34 Id.
35 Id.
36 Id. at 17-248 to 17-249.
B. The Constitutionality of Statutes of Repose

Despite the possibility that plaintiffs may be left without rempense for injuries, federal courts have held statutes of repose to be consistent with the U.S. Constitution; statutes of repose have survived scrutiny with respect to due process and equal protection challenges, since courts have held that the statutes do not involve fundamental rights or suspect classifications. Challenges to statutes of repose are more effective when based on state constitutions. However, state courts usually follow the standards of review set forth by the Supreme Court of the United States when evaluating statutes of repose, applying the lenient rational basis review in the absence of any fundamental right or suspect classification. Under a rational basis test, courts will uphold a statute as long as it is merely rationally related to a permissible legislative objective. Courts have consistently held that the prevention of stale claims and the protection of defendants from protracted liability are “well-established” objectives for legislatures to pursue with statutes of repose. Accordingly, legislatures may reasonably conclude that claims should no longer be viable after a certain number of years following substantial completion of improvements to real property.

Viewed differently, the success of equal protection challenges under state constitutions may largely depend upon “how closely a state’s equal protection analysis mirrors that of the United States Supreme Court’s consideration of equal protection violations of the United States Constitution.” The rational basis analysis is likely favorable to those protected by a statute of repose, since it is an approach to constitutional law that is “designed to provide substantial deference to the legislative body . . . which generally yields a conclu-

39 See id. at 736–37 (holding that statute of repose did not involve a fundamental right or suspect classification, and was rationally related to a legitimate state purpose).
41 Hicks, supra note 8, at 636–37.
42 Id. at 636.
43 Id. at 643.
44 Id. at 636–37.
45 Id.
46 Id. at 638.
47 Baughman, supra note 40, at 682–83.
sion validating the legislation under consideration.” In contrast, jurisdictions that employ a stricter standard or require a “tight match” between a law and its intended legislative purpose are less likely to find a repose statute constitutional. A similar trend has been noted with respect to due process analysis among the states.

Jurisdictions which have held statutes of repose to be unconstitutional have generally predicated this result upon “open court” provisions—requiring courts to remain open for any injury—of their respective state constitutions. Recently, at least thirty-nine states have retained “some form of open courts provision.” In many of these states, “the courts view such open court provisions as a requirement that the state provide some remedy for every legally recognized wrong,” although the specific language and construction of a state’s open courts provision will control the scope of its applicability. In some states, the mere possibility that a statute of repose could bar a cause of action before it arises is often sufficient to violate an open courts provision.

Some courts have held that an “absolute denial of access to courts before the claim even arises is antithetical to the purpose of open courts provisions.” In such states, the underlying theory is that “[d]eath cannot occur without there first being conception . . . . Neither can a cause of action expire before it accrues.” One state that follows this line of argument and is particularly averse to statutes of re-

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49 Baughman, supra note 40, at 682–83.
50 See Hicks, supra note 8, at 644–45.
51 Kenyon v. Hammer, 688 P.2d 961, 965–66 (Ariz. 1984); Hicks, supra note 8, at 644–45.
52 Werber, supra note 48, at 774 n.57.
53 Kenyon, 688 P.2d at 966 (citations omitted).
54 Hicks, supra note 8, at 644–45. For a good example of a state open courts provision, see ALA. CONST. art. I, § 13 (“all courts shall be open; and that every person, for any injury done him, in his lands, goods, person, or reputation, shall have a remedy by due process of law; and right and justice shall be administered without sale, denial, or delay”).
55 Baughman, supra note 40, at 681.
56 Hicks, supra note 8, at 647.
57 Id. at 647 (alteration in original) (quoting Daugaard v. Baltic Coop. Bldg. Supply Ass’n, 349 N.W.2d 419, 425 (S.D. 1984)). But see Cleveland v. BDL Enters., 663 N.W.2d 212, 220–25 (S.D. 2003) (holding that the state open court provision did not prevent the legislature from enforcing statutes of limitation or statutes of repose).
pose is Ohio.\textsuperscript{58} Ohio courts have held that statutes of repose which “closed the door” on remedies before causes of action could accrue are unconstitutional.\textsuperscript{59} Similarly, the Arizona state courts have held statutes of repose to be inconsistent with the state constitution.\textsuperscript{60} Arizona’s Supreme Court has held that its state constitution guarantees the right to file and litigate actions in court as a “fundamental right.”\textsuperscript{61} Accordingly, the court has held that statutes of repose would violate equal protection under the state constitution, since they would discriminate against plaintiffs whose injuries had not arisen or had not been discovered before the repose period had run.\textsuperscript{62} In effect, the “abolition of a cause of action before injury has occurred,” or before the plaintiff is aware of his injury, has been declared an “abrogation” of a fundamental right afforded under the Arizona Constitution.\textsuperscript{63}

Nevertheless, statutes of repose have been held to be constitutional by many jurisdictions,\textsuperscript{64} because “open courts” principles have not been interpreted the same way in all jurisdictions.\textsuperscript{65} For example, some state courts refrain from interfering with the legislature’s annulment of a cause of action “if the theory on which the cause of action is based did not exist when the state adopted the constitutional mandate for open courts.”\textsuperscript{66} Other jurisdictions view their open courts provisions as protecting only vested rights so that “a citizen’s constitutional right to a day in court is not violated by a repose time bar because a right to a cause of action cannot vest after the time period runs.”\textsuperscript{67} Accordingly, the legislature retains the power to “abrogate a nonvested right.”\textsuperscript{68}

In addition, some statutes of repose apply to only one particular theory of liability, such as strict liability, “so that open courts provisions are not violated because [other] remedies such as workers compensation still exist.”\textsuperscript{69} Moreover, some state courts “give more defer-


\textsuperscript{59} \textit{Id.} at 547.

\textsuperscript{60} Kenyon v. Hammer, 688 P.2d 961, 979 (Ariz. 1984).

\textsuperscript{61} \textit{Id.} at 975.

\textsuperscript{62} \textit{Id.} at 967–79.

\textsuperscript{63} Kenyon, 688 P.2d at 966; see ARIZ. CONST. art. 18, § 6 (1911) (”[t]he right of action to recover damages for injuries shall never be abrogated . . .

\textsuperscript{64} 5 \textit{The Law of Hazardous Waste}, supra note 3, § 17.05[4][d], at 17-259.

\textsuperscript{65} Baughman, supra note 40, at 682.

\textsuperscript{66} \textit{Id.}

\textsuperscript{67} \textit{Id.}

\textsuperscript{68} Hicks, supra note 8, at 645.

\textsuperscript{69} Baughman, supra note 40, at 682.
ence to the state legislature and uphold repose statutes as legitimate measures that address reasonable goals.”70 There are also states that do not guarantee a fundamental right to bring actions for damages, thus enabling legislatures to “define, abolish and abrogate such rights with impunity so long as it acts reasonably.”71 Challenges to statutes of repose under the U.S. Constitution using “open courts” theories may also be unsuccessful, since the federal Constitution does not explicitly have such a provision.72 Moreover, there is little evidence to suggest that the current membership on the U.S. Supreme Court would “take the ‘activist’ role needed to create such a right.”73

Illinois and Missouri have open courts provisions but have upheld statutes of repose, finding that they do not conflict because statutes of repose eliminate the cause of action itself rather than close off the courts to anyone.74 Even Alabama’s open courts provision may be overcome by a statute of repose, although defendants must show that the law is substantially related to the eradication of a particular social evil.75

In contrast, the Supreme Court of New Hampshire has examined whether statutes of repose are “substantially related to [a] legitimate legislative object” when determining if they violate important substantive rights.76 New Hampshire has been a leader in applying a more stringent standard of review than other courts when evaluating the constitutionality of statutes of repose.77 It has been with “rare exception” that federal and state courts have applied standards of review that are more stringent than the rational basis test when determining the validity of statutes of repose.78 However, despite the widespread acceptance of statutes of repose by state and federal courts, the “[c]ourts continue to grapple with constitutional issues when determining whether to uphold and apply a repose statute so as to preclude a cause of action before injury occurs . . . .”79 Courts also struggle in cases where knowledge or discovery of the relationship between

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70 Id.
72 Baughman, supra note 40, at 681.
73 Werber, supra note 48, at 774.
77 See Hicks, supra note 8, at 640.
78 Werber, supra note 48, at 768.
79 Id. at 765.
the injury and the defendant’s conduct did not exist or occur before the end of the repose period.80

II. COMMON JUSTIFICATIONS FOR THE ENACTMENT OF STATUTES OF REPOSE AND THEIR RELEVANCE TO ENVIRONMENTAL CLAIMS

A. Justifications for Statutes of Repose

Numerous rationales exist to justify statutes of repose,81 separately from statutes of limitations.82 While applying a statute of limitations to bar a plaintiff’s claim might be justifiable on grounds that he had no excuse for failing to file his suit on time, there is no comparable rationale for applying statutes of repose to time-bar suits.83 On a broad level, statutes of repose have derived justification from considerations relating to the best economic interests of the public as a whole, and represent “substantive grants of immunity based on a legislative balance of the respective rights of potential plaintiffs and defendants struck by determining a time limit beyond which liability no longer exists.”84 A few main arguments stand out in support of statutes of repose.85

The first argument in favor of statutes of repose is built around the evidentiary difficulties in meeting the burden of proof when evaluating a defendant’s liability in court.86 With the passage of many years, the difficulty in locating or preserving reliable evidence to prove or disprove liability—especially for defects, negligence, damages, and potential defenses—increases, since evidence is often lost, memories fade, and witnesses can no longer be found.87

The second argument justifying statutes of repose is premised upon a theme of fairness to defendants, suggesting that defendants should not suffer protracted liability or else their ability to “plan their affairs with a degree of certainty” would be impaired.88 In other words, legislatures have recognized a public interest in granting defendants immunity after a certain period of time has elapsed so that they may

80 Id.
81 See Peacock, supra note 2, at 231–33.
83 Id.
85 See Peacock, supra note 2, at 231–33.
86 See id.
87 Baughman, supra note 40, at 678–79; Peacock, supra note 2, at 231–33.
88 Id.
conduct their activities with the “reasonable expectation” that they will not be liable for “ancient obligations.”

Proponents of statutes of repose also believe that with the passage of time, jurors will unjustly and improperly evaluate defendant liability by holding defendants to safety standards and expectations that are based upon current technology and practices rather than those which existed at the time the defendants’ actions occurred. Similarly, defendants worry that misuse or modification of their products by plaintiffs that was unforeseeable at the time of manufacture “may be inappropriately judged foreseeable by a modern jury.”

Statutes of repose have also been intended to serve as a mechanism for combating insurance premiums in the construction industry, the manufacturing industry, and in the medical profession. Not surprisingly, insurance companies and “big business” have “typically comprised the main motivating force behind adoption . . . of statutes of repose.” Insurance companies have insisted that time limits on liability are necessary to provide defendants with affordable liability policies. The underlying theory is that “[p]redictable liability endpoints for businesses enable actuaries to more accurately calculate the risks that determine premium prices,” thereby increasing insurance policy options and stabilizing costs for defendants. Historically, bearing responsibility for “older products, latent medical problems, and ‘permanent’ or durable improvements” exposed defendants to “abnormally long periods of potential liability and unusually large numbers of potential plaintiffs.”


90 Baughman, supra note 40, at 679.

91 Id.

92 Id. at 679–80; Hicks, supra note 8, at 632.

93 Baughman, supra note 40, at 679–80.

94 Id. at 679. For example, in the area of products liability, insurers have argued that “inflated prices and policy cancellations are most directly caused by the potential for infinite manufacturer liability.” Id.

95 Id. at 679–80.

96 Hicks, supra note 8, at 632.
B. The Relevance of Statutes of Repose to Environmental Claims

An important question for defendants facing environmental litigation is whether they may take advantage of statutes of repose to avoid liability. Currently, few states have enacted general statutes of repose that defendants might invoke to broadly defend against claims for environmental damage.\footnote{Toxic Waste Litigation, supra note 7, at 1609.} Oregon has a general statute of repose, which eliminates a cause of action for negligent injuries ten years after the defendant acted or failed to act.\footnote{Or. Rev. Stat. § 12.115 (2003).} The broad language of the Oregon statute appears applicable to a variety of legal claims, creating the possibility for application to environmental litigation.\footnote{Id.} Oregon courts have supported this broad construction of the statute, finding it applicable in cases of negligence, strict liability, and products liability claims.\footnote{Johnson v. Star Mach. Co., 530 P.2d 53, 57–60 (Or. 1974); Toxic Waste Litigation, supra note 7, at 1609 n.38.}

Even though most states lack a generally applicable statute of repose, various forms of repose statutes apply to particular claims and “pockets of liability.”\footnote{5 The Law of Hazardous Waste, supra note 3, § 17.05[4][d], at 17-259; accord Toxic Waste Litigation, supra note 7, at 1609.} For example, statutes of repose are commonly crafted for products liability, medical malpractice suits, and contractor liability for improvements to real property.\footnote{5 The Law of Hazardous Waste, supra note 3, § 17.05[4][d], at 17-259; accord Toxic Waste Litigation, supra note 7, at 1609.} In products liability litigation, an applicable statute of repose would typically “begin to run at the date of manufacture or first sale to a consumer.”\footnote{Peacock, supra note 2, at 226.} For home construction or improvements to real property, the applicable statutes of repose usually begin to run at the moment of the improvements’ opening for use or upon substantial completion.\footnote{Mass. Gen. Laws ch. 260, § 2B (2004); Hicks, supra note 8, at 631.} Real property statutes of repose typically prescribe a repose period ranging from seven to twelve years.\footnote{Andrew D. Ness & Marcia G. Madsen, Trends in Contractor Liability for Hazardous Waste Cleanups: The Current Legal Environment, 22 PUB. CONT. L.J. 581, 591 (1993).}

Massachusetts has a statute of repose that applies directly to improvements to real property.\footnote{See Mass. Gen. Laws ch. 260, § 2B.} The law provides that tort actions for damages that arise out of the design, planning, construction, or gen-
eral administration of improvements to real property cannot be filed “six years after the earlier of the dates of: (1) the opening of the improvement to use; or (2) substantial completion of the improvement and the taking of possession for occupancy by the owner.”

Illinois has a similar real property statute of repose. However, the Illinois statute appears to extend beyond tortious conduct, reaching injuries arising out of acts or omissions in connection with improvements to real property. Virginia also has a statute of repose that applies to actions “for any injury to property, real or personal, or for bodily injury or wrongful death, arising out of the defective and unsafe condition of an improvement to real property.”

Real property statutes of repose vary widely in their construction. Some real property statutes of repose, such as those in Connecticut and Florida, are more exclusive than others in that they mainly protect professionals including architects, contractors, and land surveyors. Real property statutes of repose in other states “have a broader reach, protecting materialmen, laborers, and other workers participating in the construction.” Reacting to court decisions holding that statutes of repose violate equal protection rights, some legislatures have broadened the group of defendants that come within the scope of real property statutes of repose. The most broadly crafted statutes of repose—such as those in Minnesota and Hawaii—are designed to protect almost “everyone involved in the construction,” including the “owners or persons in possession of the improvement.” It remains unclear, however, whether real property statutes of repose protect contractors who remediate environmental damage—entities that remedy hazardous or toxic contamination problems created by other individuals—who inadvertently worsen or cause further environmental injuries to plaintiffs.

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107 Id.
109 Id. (“No action based upon tort, contract or otherwise may be brought against any person . . . after 10 years have elapsed from the time of such act or omission.”).
111 Ness & Madsen, supra note 105, at 591.
112 Hicks, supra note 8, at 631 (citing CONN. GEN. STAT. ANN. § 52-584a (West Supp. 1984); FLA. STAT. ANN. § 95.11(3)(c) (West 1982)).
113 Hicks, supra note 8, at 631 (citing N.C. GEN. STAT. § 1-50(5)(b)(9) (1983); WIS. STAT. ANN. § 893.155 (West 1983)).
114 Hicks, supra note 8, at 631.
115 Id. (citing HAW. REV. STAT. § 657-8 (Supp. 1982); MINN. STAT. ANN. § 541.051 (West Supp. 1984)).
116 Ness & Madsen, supra note 105, at 591.
C. Common Applications of Real Property Statutes of Repose

Across jurisdictions, real property statutes of repose have commonly been used in cases surrounding personal injuries, wrongful death actions, nuisance, and related property damage claims.\footnote{117 See generally Gaggero v. County of San Diego, 21 Cal. Rptr. 3d 388 (Ct. App. 2004); Stanske v. Wazee Elec. Co., 722 P.2d 402 (Colo. 1986); Olson v. Owens-Corning Fiberglas Corp., 556 N.E.2d 716 (Ill. App. Ct. 1990).} Sullivan v. Iantosca illustrates the application of a real property statute of repose in Massachusetts.\footnote{118 See 569 N.E.2d 822, 823–26 (Mass. 1991).} In Sullivan, the court considered whether a defendant building contractor was liable in negligence for building the plaintiff’s home on an improper landfill material that adversely affected the foundation of the structure.\footnote{119 See id.} However, the defects in the foundation did not appear for eight years.\footnote{120 See id. (stating that defects were discovered in 1986, but construction had ended in 1978).} Because the six-year statute of repose had already run, the court upheld a lower court decision granting summary judgment in favor of the defendant on negligence claims.\footnote{121 See id. at 823–26.} In broad support of the defendant’s position, the court noted that, despite the fact that the plaintiff did not discover the cause of action until after the repose period had run, the statute was to be applied as written.\footnote{122 See id.} As construed by the court, the statute of repose forbid inquiry into “the fact that a plaintiff did not discover or reasonably could not have discovered the harm before the six-year period of the statute of repose expired.”\footnote{123 Id. (citing Tindol v. Boston Hous. Auth., 487 N.E.2d 488, 490 (1986)).} Moreover, the court held that circumstances which would toll a relevant statute of limitations, such as fraudulent concealment, mental illness, minority, and common law estoppel would not modify the statute of repose or prevent its application.\footnote{124 Sullivan, 569 N.E.2d at 823–24.}

Similarly, in Stanske v. Wazee Electric Co., a Colorado court held that the plaintiff’s personal injury claims against the defendant—who negligently installed an electrical system that injured the plaintiff—was barred by the state real property statute of repose, since the statute encompassed “all actions” related to improvements to real property and the defendant’s installation of the electrical system qualified
as such an improvement. The application of the Colorado real property statute of repose to personal injury cases was later echoed in *Homestake Enterprises v. Oliver*, in which the court held that the plaintiff’s personal injury action against the defendant construction company for its negligent testing and observation of a sprinkler system was barred by the statute of repose. Like Colorado, personal injury and wrongful death actions are covered by the Georgia real property statute of repose, and may even protect defendant manufacturers of defective materials from such suits if those materials were an integral or essential part of the improvement to real property so as to be considered “improvements” themselves.

**D. State Environmental Statutes and Statutes of Repose**

In at least two jurisdictions, defendants facing claims under state environmental statutes have not successfully relied on statutes of repose for relief from environmental liability. For example, in *Town of Weymouth v. James J. Welch & Co.*, a Massachusetts court was unwilling to apply the real property statute of repose to property damage claims related to contamination from hazardous substances under the Massachusetts Oil and Hazardous Material Release Prevention Act. The defendant contractor was sued over the improper installation of an oil tank—which resulted in leakage contamination—under the law which comprehensively covered property contamination from hazardous substances. The plaintiff was unaware of the contamination for almost thirteen years following the installation of the tank. The defendant argued that the contamination claims were tort actions subject to the six-year statute of repose for improvements to real property and that he was relieved from liability, since the six-year repose period had

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126 See 817 P.2d 979, 984 (Colo. 1991) (holding defendant liable for causing road icing that lead to plaintiff’s injury).


131 Id. at 197–98; see Mass. Gen. Laws, ch. 21E, §§ 2, 5(a) (2004).

already run. However, the court ruled in favor of the plaintiff and asserted that it would be inappropriate to characterize claims under the contamination statute as tort actions for purposes of applying the real property statute of repose. The court explained that doing so “would be unjust to victims of environmental pollution and spoliation of property,” and would conflict with the purpose behind the contamination statute’s liberal discovery rule, to compensate the injured.

Similarly, New Jersey courts have held that the state real property statute of repose do not shield defendants from liability under the Spill Compensation and Control Act (Spill Act), which covers contamination claims related to the discharge of hazardous substances. In Pitney Bowes, Inc. v. Baker Industries, the defendant sought protection under a real property statute of repose since it faced liability under the Spill Act for improperly designing and installing heating oil tanks that leaked into the plaintiff’s groundwater and caused contamination. The court held that under the Spill Act there was “no provision of any defense available . . . based on the passage of time.” In essence, the court stated that the environmental statute created a new cause of action that was “unrelated to any time bar at all” and beyond the scope and applicability of the statute of repose. Finally, the court justified its holding—much like the James J. Welch & Co. court— by observing that the function and purpose of the Spill Act was to address the “grave public consequences of hazardous-substance discharges that threaten the health and safety of everyone,” and that limiting liability through a repose statute would impair the statutory scheme and run afoul of legislative intent.

In contrast, Michigan courts have held that a statute of repose may bar an untimely filing of claims brought under a state environmental statute. In Shields v. Shell Oil Co., the plaintiff landowners purchased land on which Shell Oil Company had maintained under-

\[\text{133 Id. at 198.}\]
\[\text{134 Id. at 198–200.}\]
\[\text{135 Id.}\]
\[\text{137 Id. at 1326 (citing N.J. STAT. ANN. § 58:10–23.11 (West 1988)).}\]
\[\text{138 Id.}\]
\[\text{139 Id. at 1327.}\]
\[\text{140 Id.}\]
\[\text{141 Id. at 1328.}\]
ground gasoline storage tanks.\textsuperscript{143} When Shell performed excavations to the land to remove the tanks, the surrounding soil became contaminated with gasoline, which was subsequently discovered by the plaintiff.\textsuperscript{144} Seeking recovery of response activity costs for the environmental pollution, the plaintiff filed an action under the Michigan Natural Resources and Environmental Protection Act (NREPA).\textsuperscript{145} However, the court held that the NREPA claims were subject to a statute of repose that was meant to remove the “threat of litigation [from] haunting” defendants.\textsuperscript{146} This decision is controversial and may be subject to further litigation; the state supreme court later reviewed the case and vacated the decision because there were too many unanswered questions as to whether the statute of repose should begin to run under the particular facts.\textsuperscript{147}

The next part of this Note will present an analysis of the arguments that defendants and plaintiffs may use to either justify or prevent the application of statutes of repose in an environmental context. These arguments may have important ramifications for both legal policy and public environmental policy, particularly with respect to identifying responsible parties with proper evidence, compensating the injured, and encouraging environmental responsibility and compliance with environmental laws.

III. Analysis of Statutes of Repose in Environmental Contexts

A. Past Applications of Statutes of Repose to Environmental Claims

Improving land and real property poses a risk of creating environmental harm, especially in light of the nature of the work involved and materials used.\textsuperscript{148} However, a defendant may face challenges in invoking a statute of repose to escape liability, as some courts have not allowed the use of statutes of repose for claims brought under environmental statutes.\textsuperscript{149} Defendants may be able to justify the applica-

\textsuperscript{143} Id. at 722.
\textsuperscript{144} Id.
\textsuperscript{145} Id. at 722–23.
\textsuperscript{146} Id. at 727.
tion of statutes of repose for environmental injuries by analogizing to other types of claims and injuries that may involve environmental components, such as wrongful death and personal injury actions. In tort litigation, for example, a plaintiff may assert that the defendant was negligent in rendering improvements to real property, and that this negligence caused another person’s death, or physical or mental injuries.

Since courts have applied real property statutes of repose to free defendants of liability in these circumstances, defendants sued under environmental statutes may be able to successfully argue for the application of statutes of repose in similar cases where the defendant’s environmental harm led to the plaintiff’s injuries. In convincing a court to apply statutes of repose where environmental injuries are involved, defendants may argue that the causal relationship between their own conduct and the plaintiff’s injuries does not change when environmental effects play a role in the plaintiff’s injuries. In both scenarios, the defendant performs improvements to real property in such a way as to create a hazard that has a delayed harmful impact on the plaintiff. Therefore, regardless of whether the plaintiff was hurt by a defective structure, or was injured by contamination or pollution, the injuries arose in connection with the improvements to real property performed by the defendant. However, it has been noted that some environmental claims, such as those based upon toxic waste exposure, are “fundamentally different” from other causes of action because the latent manifestation of the injuries may cause “serious doctrinal and practical problems” for the victims to seek recovery.

Despite these issues, defendants may be able to rely on some precedent that applies real property statutes of repose to cases involv-

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150 See, e.g., McDonough v. Marr Scaffolding Co., 591 N.E.2d 1079, 1083–84 (Mass. 1992) (holding that the Massachusetts real property statute of repose applies to wrongful death claims involving improvements to real property); Parent v. Stone & Webster Eng’g Corp., 556 N.E.2d 1009, 1011 (Mass. 1990) (holding that the state real property statute of repose applies to personal injuries caused by defendant’s negligence).
151 See McDonough, 591 N.E.2d at 1080–81; Parent, 556 N.E.2d at 1010–11.
153 Contra Toxic Waste Litigation, supra note 7, at 1603 (noting that toxic tort claims are “fundamentally different” from other causes of action).
154 See McDonough, 591 N.E.2d at 1080–81.
155 See Biniek, 818 A.2d at 332–33 (demonstrating how defendant’s negligent performance of services exposed plaintiffs to toxic contamination).
156 Toxic Waste Litigation, supra note 7, at 1603.
ing environmental harms. Recent cases in Mississippi and Washington have allowed a statute of repose affirmative defenses in cases involving environmental harms resulting from improvements to real property. The Massachusetts Supreme Judicial Court has also applied real property statutes of repose to tort claims for both property damage and personal injuries involving environmental contamination. Similarly, a New Jersey court has held that the state real property statute of repose may relieve defendants of liability for having caused injuries related to contamination and pollution resulting from fuel leakage, since the statute of repose was intended to cover such scenarios. Defendants in other jurisdictions may be able to apply similar logic to argue that the scope of real property statutes of repose includes environmental harms, hazards, and injuries resulting from making improvements to real property.

A recent California case illustrates the application of a real property statute of repose involving environmental complications. In Gaggero v. County of San Diego, the California Court of Appeals affirmed a lower court decision, which held that the plaintiff’s actions against the defendants for nuisance, negligence, trespass, and recovery of toxic waste response costs were time-barred by a ten-year statute of repose. The statute covers actions arising out of latent defects in the design, construction, or operation of improvements to real property that result in property damage. The plaintiff purchased a former landfill from the defendant and operated a nursery there for sev-

157 See Biniek, 818 A.2d at 334–36 (discussing that New Jersey’s real property statute of repose would have applied to defendant’s negligent contamination of property had he qualified for protection under the statute); Pitney Bowes, Inc. v. Baker Indus., 649 A.2d 1325, 1325 (N.J. Super. Ct. App. Div. 1994) (explaining that parties would be “otherwise entitled to the benefit of the ten-year repose” statute in cases involving construction that resulted in pollution and contamination, except for contribution claims under the “Spill Act”).


159 See Conley v. Scott Prods., Inc., 518 N.E.2d 849, 850–51 (Mass. 1988) (affirming a lower court decision which granted summary judgment under the state real property statute of repose, even though defendant negligently installed urea formaldehyde foam insulation into plaintiff’s home, resulting in property damage and personal injuries).

160 Biniek, 818 A.2d at 334.

161 See id.

162 See Gaggero v. County of San Diego, 21 Cal. Rptr. 3d 388 (Ct. App. 2004).

163 Id. at 389–90.

eral years. Over time, the plaintiff noticed environmental damage to his nursery structures caused by the former landfill, such as severe subsidence. Specifically, the plaintiff explained that the decomposition of materials deposited at the former landfill were producing methane gas and creating “void pockets in areas beneath the landfill covering.” However, the court held that because the defendant had made “improvement[s]” to the land while he was the owner and operator of the property, the statute of repose applied to the property damage claims that arose out of the defendant’s conduct.

Statutes of repose are particularly important in asbestos litigation which has historically involved personal injury causes of action for property damage and for negative health effects associated with toxic exposure. Although asbestos litigation has been termed “the mother of all mass torts,” there is significant controversy regarding when these lawsuits may be time-barred. Asbestos is a highly toxic material, the harmful environmental and health effects of which may not be discovered until years after exposure. In particular, diseases associated with toxic asbestos exposure, such as asbestosis, mesothelioma, and other forms of cancer, have long latency periods that range from ten to forty years, and are not reasonably discoverable by examination while dormant.

For many years, actions for latent asbestos injuries were time-barred before individuals “reasonably could have known they were injured.” To remedy this problem, state legislatures, state courts, and the U.S. Supreme Court began adopting the discovery rule to postpone the accrual of the cause of action until the plaintiff discovered, or reasonably could have discovered, his latent injury. However, this remedy chiefly concerns determining the date that a cause of action has accrued to a plaintiff for purposes of applying statutes of

165 Gaggero, 21 Cal. Rptr. 3d at 389–90.
166 Id. at 390.
167 Id.
168 Id. at 389–90.
170 Id. at 696–98.
171 See id. at 704–08.
172 Id. at 707.
173 Mehs, supra note 7, at 965–66.
174 Grant, supra note 169, at 697.
175 Id. at 697, 708; see Urie v. Thompson, 337 U.S. 163, 169–70 (1949).
limitations and is silent as to statutes of repose. Thus, despite the concerns regarding the latent health and environmental effects of asbestos, statutes of repose have been applied in suits for toxic contamination from asbestos exposure. In Olson v. Owens-Corning Fiberglas Corp., the Appellate Court of Illinois affirmed a lower court decision that held that the plaintiff’s wrongful death action against defendants for having exposed her husband to asbestos for decades was barred by a state statute of repose. The plaintiff argued that the statute of repose should not be applied, since injuries from toxic exposure to asbestos are latent and may not be discoverable until after the repose period. Although the court recognized that relieving defendants of liability before the cause of action has accrued would unfairly burden some plaintiffs, it was unwilling to create an exception to the statute of repose for latent asbestos-related injuries.

B. Arguments Favoring the Application of Statutes of Repose to Environmental Claims

Defendants should take advantage of many of the policy justifications behind statutes of repose. Because improving real property often involves numerous problems in “maintaining quality control over . . . designs before construction and safety standards after construction,” defendants could argue that statutes of repose are necessary to shield them from environmental claims arising from variables beyond their control, or for which the passage of time would make liability unfair due to the degradation of evidence “in long-delayed litigation.”

Establishing causation and “defining the date of injury” for purposes of determining culpability is also especially difficult with envi-

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176 See Grant, supra note 169, at 696–97; see also Thompson, 337 U.S. at 169–71 (holding that “invasion of legal rights” occurs and statute of limitations begins to run when plaintiff is reasonably capable of discovering his injuries if they are latent); Mehs, supra note 7, at 976.
178 Id. at 719–21.
179 Id. at 718.
180 Id. at 719–21; Mehs, supra note 7, at 981.
181 Hicks, supra note 8, at 633.
182 See id. at 638 n.83.
183 5 The Law of Hazardous Waste, supra note 3, § 17.05[4], at 17-248 (discussing rationales for time-barring claims). For example, degradation of evidence may occur due to long-term exposure to the elements.
Environmental claims. Evidence that shows who is responsible for environmental injuries may be confounded if there have been multiple owners or users of a property. This is particularly problematic for architects and similar professionals, since they have no control over the condition of the property or the construction work they have performed once their work is complete. Over time, injuries may arise from “improper maintenance or failure to [make proper] repair[s]” by the property owners, “rather than inherent design defects in the original construction” as allegedly created by defendants. These defendants may have difficulty disproving evidence that ostensibly implicates their culpability for environmental hazards, but which may have actually been created by the actions of third-parties or by changes in the surrounding environment.

Related to evidentiary problems at trial is the problem of changing technologies and standards with respect to environmental harms. Practices that may have previously been considered safe in an industry may later be found to carry grave environmental consequences. Legal standards also change over time. Courts have recognized this reality, noting that “the standards for architectural performance as well as building codes in effect could have changed significantly in the intervening years, and it would be difficult to establish the standard of care of a reasonably prudent architect at the time the design services were rendered . . . .” Therefore, at trial, defendant architects and contractors face the possibility that their land improvements—and the ensuing environmental consequences—will be evaluated according to current

184 Grant, supra note 169, at 705; see Toxic Waste Litigation, supra note 7, at 1617–18 (describing the difficulties in establishing causation in environmental claims, and particularly toxic waste injuries, since the land involved may have changed ownership or control many times before injuries occurred).
185 Toxic Waste Litigation, supra note 7, at 1617–18.
186 Hicks, supra note 8, at 638 n.83; see Yarbro v. Hilton Hotels Corp., 655 P.2d 822, 825–26 (Colo. 1983).
188 See Arthur A. Schulz, Comment, Recovering Asbestos Abatement Costs, 10 Geo. Mason U. L. Rev. 451, 452–54 (1988) (discussing the wide use of asbestos in industry and the increased awareness of its risks as time passed and medical studies were conducted).
189 See Connaughton, supra note 24, at 514–15 (1989) (discussing the standard practice of using asbestos in buildings such as schools); Mehs, supra note 7, at 965 (“Only recently has society become aware of the dangers to human health and life associated with using one of the most dangerous materials of nature.”).
191 Yarbro, 655 P.2d at 826 n.5.
legal, technological, and environmental considerations rather than those which existed at the time of the conduct in question.\footnote{192}{See Kulbaski, \textit{supra} note 190, at 1032–33.}

In this regard, the “attitudes of juries towards appropriate levels of safety” in design, construction, and performance of services at the time of trial may reflect safety and environmental considerations that were once thought unnecessary or even unforeseeable.\footnote{193}{Id. at 1031.} This implies that defendants may not be able to trust that taking appropriate environmental safety measures by today’s standards would adequately defend them against future liability. As a result, defendants might have “great difficulty in predicting and planning for future liabilities.”\footnote{194}{Id.} Moreover, even if one argues that the threat of unpredictably-imposed liability by future juries may encourage meticulous environmental safety practices among architects and contractors, they would still have no reasonable way to conform their present conduct to future, unknown environmental standards to which they will ultimately be held at trial.\footnote{195}{See id. at 1031–33 (discussing how statutes of repose increase the likelihood that defendants will be held to safety standards which existed at the time they acted rather than those which they could not foresee).} Thus, statutes of repose help ensure the use of environmental standards that were foreseeable to defendants at the time they acted.\footnote{196}{See id. at 1031–33 (discussing how statutes of repose increase the likelihood that defendants will be held to safety standards which existed at the time they acted rather than those which they could not foresee).}

Additionally, it may be “wise public policy to minimize unreliable fact-finding” in environmental litigation by applying statutes of repose.\footnote{197}{Richardson, \textit{supra} note 82, at 1021.} By functioning to ensure good evidence is presented at trials, statutes of repose—like statutes of limitations—are consistent with society’s interests in preserving a reliable fact-finding justice system.\footnote{198}{Order of R.R. Telegraphers v. Ry. Express Agency, Inc., 321 U.S. 342, 348–49 (1944) (“by preventing . . . claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared”); Richardson, \textit{supra} note 82, at 1021.} As one commentator has noted, “[s]ociety and the judiciary are primarily concerned with the difficulty of proof in older cases as well as the identification of fraudulent claims in such cases.”\footnote{199}{Mehs, \textit{supra} note 7, at 983.} Society has an interest in bringing the proper perpetrators of environmental harms
to justice, which may make individuals environmentally conscious, responsible, and compliant with the law.

C. Statutory Language and Composition

Statutory language is an important element in determining whether the defendant’s conduct comes within a statute of repose, and what types of claims are covered. Most commonly, defendants will have to show that the alleged conduct giving rise to the environmental harm is within the scope of the statutes. For example, where a statute uses such wording, defendants will have to prove that their conduct qualifies as an “improvement to real property” within the meaning of the relevant statute of repose. A majority of courts have adopted the view that, in determining whether the defendant’s conduct constitutes an “improvement,” factors such as whether the construction “enhances the use of the property, involves the expenditure of labor or money, is more than mere repair or replacement, adds to the value of the property, and is permanent in nature” shall be considered.

1. “Improvements” to Real Property

Using the definition of “improvements” above, defendants can likely present their work as constituting improvements under statutes of repose, especially where their services involved a “complex system of components.” Courts have focused on each component of the defendant’s work as part of a “system” of improvements. If defendants can show that a particular “component” of a qualified improvement should be characterized as an “integral part” of that improvement, then

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201 See Toxic Waste Litigation, supra note 7, at 1603 (noting that where environmental injuries go uncompensated, dangerous environmental activities may be undeterred).
203 See Ness & Madsen, supra note 105, at 591.
204 Rosenberg, 293 A.2d at 666.
206 Van Den Hul v. Baltic Farmers Elevator Co., 716 F.2d 504, 508 (8th Cir. 1983); see Collins v. Trinity Indus., Inc., 861 F.2d 1364, 1365 (5th Cir. 1988); Travelers Ins. Co., 586 N.W.2d at 762.
208 Adair, 741 F.2d at 115.
the component itself will be considered an “improvement to real property” under the relevant statute of repose.\textsuperscript{209} This suggests that a particular component or aspect of the defendant’s work—which caused the plaintiff’s environmental injuries—may qualify as an improvement even if it would not have otherwise been an improvement when viewed in isolation.

Because some courts have adopted this system-based view, plaintiffs in those jurisdictions may have to negate the view that their injuries arose from components of work that were part of a system in order to invalidate application of the statute of repose.\textsuperscript{210} However, this system-based view is logical when considering the statute’s application to environmental injuries, since improvements made upon real property frequently do consist of a set or system of improvements “to artificially extract each component from an improvement to real property and view it in isolation would be an unrealistic and impractical method of determining what is an improvement to real property.”\textsuperscript{211} Therefore, as long as defendants render each component of their work as part of a scheme or system of improvements to real property, they increase their chances that courts will view their liability for environmental injuries as within the purview of statutes of repose.\textsuperscript{212}

In contrast, merely replacing building structures, such as underground gasoline tanks, may not qualify for protection as an improvement, where the items have a “finite useful period for use.”\textsuperscript{213} Merely removing structures from land is also unlikely to qualify as an improvement, since the term generally denotes a “product, object, or some other tangible item that remains on the real property” after the work has been finished.\textsuperscript{214} To circumvent this, however, defendants may argue that, to the extent making replacements or removing structures is part of a set or system of improvements to real property, this conduct should be considered an improvement, since some courts have held that “the work must be considered in light of the system” and not just on an individual basis.\textsuperscript{215}

\textsuperscript{210} See Adair, 741 F.2d at 115; Mullis, 296 S.E.2d at 584.
\textsuperscript{211} Mullis, 296 S.E.2d at 584; see Adair, 741 F.2d at 115; Pendzsu, 557 N.W.2d at 132.
\textsuperscript{212} See Adair, 741 F.2d at 115; Mullis, 296 S.E.2d at 584; Pendzsu, 557 N.W.2d at 132.
\textsuperscript{215} Pendzsu, 557 N.W.2d at 132.
Once it is established that the defendant made improvements to real property within the meaning of the particular state statute of repose, a variety of jurisdictions require a showing that the defendant’s injurious conduct relate to the design, planning, construction, supervision, or general administration of that improvement to real property.\textsuperscript{216} It is therefore in a potential defendant’s interests to carefully examine his activities, so as to take appropriate steps to ensure that the improvements he performs upon a property can be properly characterized as fitting one of the above criteria. For example, liability arising out of an improvement to real property is unlikely to be considered related to the improvement’s design where the defendant did not exercise “‘substantial control over [its] design.’”\textsuperscript{217} Such a scenario may resemble a situation in which the defendant has installed a widely manufactured product or device onto the plaintiff’s property but neither had substantial control of the product’s design, nor the design of its arrangement, placement, or function on the property.\textsuperscript{218}

2. Type of claim

In light of the variation in the statutory language among jurisdictions,\textsuperscript{219} it is important to examine whether a particular environmental claim is covered by the real property statute of repose. Consider, for example, harmful toxic contamination resulting from the defendant’s negligent performance of improvements to real property.\textsuperscript{220} If defendants in Massachusetts were to invoke the state real property statute of repose during litigation, they may only be able to escape environmental liability that is grounded in tort law, since the statute of repose only addresses “[a]ction[s] of tort . . . arising out of any deficiency or neglect” in rendering improvements to real property.\textsuperscript{221} In contrast, under the broader statutory language of the Illinois statute of repose, a wider range of environmental claims may be covered, since the statute encompasses actions “based upon tort, con-
tract or otherwise.”

Defendants in jurisdictions similar to Illinois may be able to exploit the broader statutory language, which could be construed to encompass a variety of legal claims that extend beyond the claims listed in the statute.

D. Arguments Against Application and Public Policy Concerns

As a matter of environmental policy, however, courts and legislatures should give more attention to the effects of statutes of repose in environmental contexts, and should consider amending state laws to limit their application in such circumstances.

1. Latency and Environmental Injuries

Even if statutes of repose protect some important evidentiary, judicial, and economic interests on behalf of defendants, broadly applying statutes of repose to environmental claims may undermine the concept of fairness in our justice system, since some plaintiffs with latent injuries—such as toxic waste victims—would have their claims “systematically barred . . . on the merits.”

The plight of victims of latent diseases from environmental harms “highlight[] the shortcomings” of rules that extinguish claims before the plaintiffs had a reasonable opportunity to discover their injuries. Thus, courts and legislatures should recognize that defendants who would “otherwise be liable for generating and tortiously creating environmental hazards should not escape liability simply for being fortunate that the hazards and injuries were latent in nature.

For example, statutes of repose would frequently bar environmental claims involving serious illnesses, since they “characteristically set time limitations that . . . are shorter than the average latency period for cancer and other diseases.” Thus, a person who has been exposed to hazardous contaminants because of the defendant’s negligent performance of services “may learn that she has developed leu-

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222 735 ILL. COMP. STAT. 5/13-214(b) (West 2002).
223 See id.
224 See Toxic Waste Litigation, supra note 7, at 1605 (arguing that legislatures should avoid enacting statutes of repose for particular environmental claims such as toxic waste injuries).
225 See Peacock, supra note 2, at 230–32.
226 Toxic Waste Litigation, supra note 7, at 1607.
227 Grant, supra note 169, at 697.
228 Toxic Waste Litigation, supra note 7, at 1607.
229 Id. at 1609.
kemia . . . but may not connect her disease with exposure” in time to file a sustainable claim.\(^{230}\) Even more concerning, however, is the fact that the latency of the victims’ illness may result in the victim remaining unaware of the environmental harms; moreover, the scientific community might be ignorant of the connection between the environmental harms and health consequences until it is too late.\(^{231}\)

2. Public Policy Concerns

The problems of applying statutes of repose to environmental claims extends beyond a determination of whether injuries are latent. Granting defendants a substantive right to escape liability for their mistreatment of the environment would be to give them a free pass for creating harms that retain a public character because of the interconnection between the environment and the people which inhabit it.\(^{232}\) The protective functions of environmental law and regulation may be undermined when defendants are aware that their potential liability for producing foreseeable environmental hazards and consequential injuries would be absolutely extinguished on a particular date.\(^{233}\)

In effect, the limits that statutes of repose provide may empower contractors to plan and execute their construction activities with less caution toward the safety of clients and greater disrespect for potential environmental consequences, in the “hope that few claims will arise . . . before the statutory period ends.”\(^{234}\) If environmental injuries remain uncompensated, dangerous environmental activities will remain undeterred.\(^{235}\) Accordingly, despite arguments that highlight the benefits of statutes of repose, the “fairness and efficiency costs of systematically barring actions and insulating [defendants] from environmental liability” are too high for society to bear.\(^{236}\)


\(^{231}\) Id.


\(^{233}\) Peacock, *supra* note 2, at 249; *Toxic Waste Litigation*, *supra* note 7, at 1602–04 (discussing the subversive effect that statutes of repose can have in tort law and products liability settings).

\(^{234}\) Peacock, *supra* note 2, at 249.

\(^{235}\) *Toxic Waste Litigation*, *supra* note 7, at 1603.

\(^{236}\) Id. at 1610.
E. Applying Statutes of Repose to State Environmental Statutes: A Look at Arguments For and Against Application

The fact that some courts have refused to apply statutes of repose to certain environmental claims indicates that they have recognized that statutes of repose in an environmental context may be “contrary to principles of fairness.” In particular, these courts believe that applying statutes of repose could “impair the statutory scheme” of state environmental remediation laws, which are designed to prevent “the grave public consequences” of environmental harms by ensuring that no responsible party is excused. Moreover, these environmental remediation statutes are designed to illuminate environmental policy and improve the government’s ability to respond to environmental hazards. Thus, the public good may be served by avoiding the application of statutes of repose to particular environmental claims—such as those brought under state environmental remediation statutes similar to the Massachusetts Oil and Hazardous Material Release Prevention Act, the New Jersey’s Spill Compensation and Control Act, or the Michigan environmental remediation statutes. States could more effectively enforce environmental protection laws by threatening defendants with having to pay for environmental response costs for their misconduct.

At least one court has refused to apply a statute of repose to a state environmental remediation statute by arguing that the limitations period prescribed in the remediation statute was intended by the legislature to exclusively govern whether claims shall be heard in court. The court held that application of a statute of repose would

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244 Town of Weymouth v. James J. Welch & Co., 6 Mass. L. Rep. 197, 198–200 (Super. Ct. 1996) (holding that the purpose of the § 11A limitations period in the state environmental statute would be undermined if the state statute of repose were applied).
undermine the state’s liberal discovery rule, since the statute of repose would have “a substantially greater impact on barring litigation than would a statute of limitations.” Moreover, the court held that the absence of language supporting a repose period in the environmental statute suggested legislative intent that the limitations period—with its liberal discovery rule—was to be the exclusive time-barring mechanism.

However, the logic behind this holding is vulnerable to attacks. First, defendants may argue that statutes of repose should apply to claims based upon state environmental statutes where the statute of repose’s language is broad. For example, if the statute of repose were to specify that it shall apply to actions “based upon tort, contract or otherwise,” defendants may argue that claims brought under environmental statutes could be said to fall within the broad “or otherwise” category of claims listed in the statute, especially where neither the statute of repose nor the particular environmental statute in question state to the contrary. Conversely, in jurisdictions where the statute of repose is primarily applicable to actions based upon tort—such as Massachusetts—defendants may have to categorize the environmental statutory claims in question as claims grounded in tort in order for the statute of repose to be relevant.

Defendants may also argue that, despite the desirability of maintaining and enforcing a liberal discovery rule in environmental statutes to protect plaintiffs, displacing a statute of repose with such a limitations period is inappropriate given the disparate natures of statutes of repose and statutes of limitations. “Statutes of limitation . . . are primarily instruments of public policy and of court management” by both “managing the progress of cases” and “granting or denying access to [the state’s] courts.”

245 Id. at 199.
246 Id. at 198–200.
247 See 735 ILL. COMP. STAT. 5/13-214(b) (West 2002) (containing the phrase “or otherwise” to broaden the statute beyond the enumerated causes of action).
248 Id.
249 Mass. Gen. Laws ch. 260, § 2B (2004) (referencing only “actions of tort” as subject to the statute of repose); see James J. Welch & Co., 6 Mass. L. Rep. at 198 (holding that the state environmental statute in question did not “sound in tort,” and thus the statute of repose was inapplicable).
251 Goad v. Celotex Corp., 831 F.2d 508, 511 (4th Cir. 1987).
In contrast, statutes of repose are intended to “relieve potential defendants from anxiety over liability for acts committed long ago.”\textsuperscript{252} They are substantive definitions of the defendant’s rights to escape liability, and are substantive laws which “reflect a State’s determination of the proper relationship between the people and property within its boundaries.”\textsuperscript{253} Therefore, if courts displace statutes of repose with statutes of limitations and discovery rules, they would be displacing defendants’ substantive rights concerning liability with mere procedural rules for judicial efficiency. The inherent differences between statutes of limitations and statutes of repose suggest that the procedure by which plaintiffs file lawsuits under statutes of limitations exists separately from defendants’ substantive right to avoid liability under statutes of repose.\textsuperscript{254} Indeed, statutes of limitations and statutes of repose coexist and may even be created in the same legislation.\textsuperscript{255}

In addition, the fact that an environmental statute contains its own limitations period with a liberal discovery rule, but does not reference a repose period, need not suggest a legislative intent to dispense with statutes of repose.\textsuperscript{256} Statutes of repose, like discovery rules, also protect important legal and social policy interests, and represent “a conscious policy decision that . . . defendants deserve the peace of mind that comes with a close-ended limitations period.”\textsuperscript{257} These interests are consistent with the Supreme Court’s holding that the right of defendants “to be free of stale claims in time comes to prevail over the right to prosecute them.”\textsuperscript{258} Moreover, no true legal conflict exists between statutes of repose and statutes of limitations—even those with liberal discovery rules—since statutes of repose merely function as a “cap” on statutes of limitations.\textsuperscript{259} Thus, defendants could argue that, if a particular environmental statute is to be

\textsuperscript{252} Id. at 511.
\textsuperscript{253} Id.; Stevenson, supra note 15, at 334 n.38.
\textsuperscript{254} See First United Methodist Church v. U.S. Gypsum Co., 882 F.2d 862, 866 (4th Cir. 1989).
\textsuperscript{256} Contra Town of Weymouth v. James J. Welch & Co., 6 Mass. L. Rep. 197, 198–200 (Super. Ct. 1996) (rejecting the applicability of the statute of repose to an environmental statute since a limitations period was provided for and no repose period was mentioned in the statute).
\textsuperscript{257} Grant, supra note 169, at 728.
\textsuperscript{259} Leslie Calkins O’Toole, Note, Wilder v. Amatex Corp.: A First Step Toward Ameliorating the Effect of Statutes of Repose on Plaintiffs with Delayed Manifestation Diseases, 64 N.C. L. Rev. 416, 417 (1986) (internal quotations omitted).
exempt from statutes of repose, then this exclusion should be based on reasons other than the mere presence of its own specific statute of limitations and discovery rule or lack of specific repose language.\textsuperscript{260}

In response to these arguments, plaintiffs may assert that “[t]he primary goal of statutory interpretation is to ascertain and give effect to the Legislature’s intent when it enacted a provision.”\textsuperscript{261} Accordingly, it is appropriate for courts to “look to the object of the statute, the harm which it is designed to remedy, and apply a reasonable construction which best accomplishes the statute’s purpose.”\textsuperscript{262} Using this analysis, refusing to apply statutes of repose to environmental statutes is justifiable, particularly in instances where the legislature specifically mandates a liberal discovery rule within the statute itself.\textsuperscript{263} Thus, subjecting those statutory environmental claims to a statute of repose could be contrary to the apparent intent of the legislature to create a specific cause of action that accrues when the plaintiff “knew or, in the exercise of reasonable diligence, should have known, of the injury.”\textsuperscript{264} Since statutes of repose eliminate a cause of action, they conflict with the goals of the discovery rule in ensuring that “a plaintiff’s claim does not expire before the plaintiff is aware of its existence.”\textsuperscript{265}

Additionally, plaintiffs may argue that statutes of repose must not apply to environmental remediation statutes, because doing so would frustrate the purposes of promoting environmental wellness and relief for the injured.\textsuperscript{266} Plaintiffs may also argue that, consistent with rules of statutory interpretation, environmental remediation statutes create private environmental causes of action so specific that they were likely intended to be exempt from, or should not be invalidated by, statutes of


\textsuperscript{262} In re Forfeiture of $5,264, 439 N.W.2d 246, 249 (Mich. 1989) (citations omitted); Shields, 604 N.W.2d at 724.

\textsuperscript{263} See Mass. Gen. Laws ch. 21E, § 11A(4) (2004) (enabling plaintiffs to file actions to recover reimbursement, contribution, or equitable shares of response costs within three years of when the plaintiff “discovers or reasonably should have discovered” that the defendant is responsible for the environmental hazards covered by the statute); James J. Welch \& Co., 6 Mass. L. Rep. at 197–200.

\textsuperscript{264} Grant, supra note 169, at 708 (quoting Columbus Bd. of Educ. v. Armstrong World Indus., Inc., 627 N.E.2d 1033, 1037 (Ohio Ct. App. 1993)).

\textsuperscript{265} Id. at 707–08 (citing Mehs, supra note 7, at 974).

repose, which speak in more general terms. Indeed, it is “well-settled” that where two statutes cover a given subject matter, the more specific statute will prevail over the more general statute, which otherwise might apply. Therefore, plaintiffs might successfully assert that environmental statutes more specifically cover the injuries in question than do statutes of repose, and should therefore operate independently and without interference from statutes of repose.

F. Balancing the Burden and a Potential for Compromise

In the American justice system, “[t]he law imposes on a plaintiff, armed with knowledge of an injury and its cause, a duty to diligently pursue the resulting legal claim.” Because statutes of repose may bar claims before injuries are even discovered, the application of statutes of repose to environmental injuries effectively requires that plaintiffs also perform their own due diligence and discover injuries before the repose period has ended. However, as some commentators have noted, “defendants, rather than innocent victims, should suffer the inconveniences” resulting from environmental harms they have caused. Accordingly, the burden to evaluate the environmental safety of improvements to real property ex ante should not be shifted from defendants to plaintiffs. For example, had the plaintiff in Shields v. Shell Oil Co. tested his soil sooner—thereby discovering the contamination caused by the defendant—he may have been able to file a claim before the end of the repose period. In that case, the statute of repose effectively penalized the plaintiff for merely having continued in the course of his own activities on the assumption that the defendant had not acted adversely to his interests. However, expecting

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267 Pitney Bowes, Inc., 649 A.2d at 1327 (holding that it is “self-evident” that the purpose of the Spill Act as an environmental remediation statute “would be defeated” if a statute of repose, which is more general than the Spill Act, were applicable to Spill Act claims).


269 See Tolchin, 2004 Conn. Super. LEXIS 2203, at *7–10 (stating that a state environmental statute was more directly applicable to the plaintiff’s claims pertaining to hazardous pollution than was the statute of repose invoked by defendants).


271 Toxic Waste Litigation, supra note 7, at 1607–08.


273 See id. at 722–23. For a period of years after the purchase of the property from the defendant, the plaintiff made use of his property by installing new tanks underground. Id.
plaintiffs will take affirmative steps to avoid environmental injuries may be unreasonable or unrealistic, because this presupposes that plaintiffs are capable of discovering these injuries through reasonable means and in time for filing.\textsuperscript{274}

What, then, can be done? In balancing the interests of plaintiffs and defendants in terms of environmental injuries and liability, state legislatures should consider modifying their statutes of repose in a way that both enables defendants to be sheltered from obligations long passed and gives plaintiffs a more reasonable opportunity to obtain relief for their injuries, whether overt or latent. Some states already have provisions built into their statutes of repose which provide plaintiffs with some protection from the harsh effects of repose time-bars.\textsuperscript{275} For example, the Connecticut real property statute of repose states that, although actions arising out of deficient performance of improvements to real property must be brought within seven years of substantial completion of the improvements, plaintiffs shall have one additional year to bring their claims if their injuries—personal, property, or wrongful death—are discovered in the final year before the claims would be time-barred.\textsuperscript{276} Similarly, the Illinois real property statute of repose provides that if before the ten year repose period has run, the plaintiff discovers his or her injuries, he or she will have no less than four years to bring the suit.\textsuperscript{277} Florida’s real property statute of repose takes a more complex approach and explicitly accounts for latent defects or injuries.\textsuperscript{278} In Florida, the four year repose period for actions arising out of the performance of improvements to real property begins to run when the owner takes possession of the property or the work is completed.\textsuperscript{279} However, if the injuries are latent, the repose period will instead begin to run when the plaintiff discovers, or should have discovered, the injury.\textsuperscript{280} Nevertheless, the statute says

\begin{itemize}
  \item It was only when the plaintiff moved to sell the property did he discover that the defendant’s prior conduct contaminated his land. \textit{See id.} \textsuperscript{274}
  \item \textit{See} \textit{Mehs, supra} note 7, at 965. For example, certain latent injuries associated with toxic exposure in the local environment may not be detectable by a routine examination. \textit{Id.}
  \item These states include Connecticut, Florida, and Illinois. \textit{See infra} notes 276–78.
  \item Conn. Gen. Stat. Ann. § 52-584a(a) to (b) (West 2005).
  \item 735 Ill. Comp. Stat. 5/13-214(b) (West 2003).
  \item \textit{Id.}
  \item \textit{Id.}
\end{itemize}
that the suit will be time-barred fifteen years after the owner takes possession or the work is completed.\textsuperscript{281}

Providing plaintiffs with additional time to file their suits beyond the repose period may abate the danger of suits being time-barred before injuries have accrued. However, in order for such modifications to statutes of repose to apply this benefit to plaintiffs, the additional time afforded would have to be significant, based upon a timetable during which environmental injuries are likely to become apparent. Thus, legislatures should not only adopt modifications to statutes of repose that provide extra time for plaintiffs to file suits once they have discovered their injuries, but should also consider lengthening or enacting larger repose periods from the start, so as to reflect the latent expression of many environmentally-caused injuries. This policy would be consistent with the current goals of statutes of repose, such as preventing the use of degraded evidence, and avoid the imposition of unforeseeable standards.\textsuperscript{282} If the goals of statutes of repose are important concerns in environmental litigation, shielding defendants following a longer repose period might be given greater legitimacy.

**Conclusion**

Statutes of repose are capable of enabling defendants to escape some of the particular “perils” of environmental litigation.\textsuperscript{283} There is precedent that supports the notion that where the defendant’s injurious conduct arises out of making improvements to real property, a state’s real property statute of repose is relevant and applicable to the litigation, depending on the type of environmental claims involved and the particulars of the statutory language. In protecting their respective interests, plaintiffs and defendants should be aware that case law supports the application of statutes of repose to tort claims with environmental components, such as those involving property damage and personal injuries.\textsuperscript{284} In contrast, there is some precedent for precluding

\textsuperscript{281} Id.
\textsuperscript{282} 5 The Law of Hazardous Waste, supra note 3, § 17.05\{4\}, at 17-248; Kulbaski, supra note 190, at 1031.
the application of statutes of repose to claims falling under state environmental remediation statutes. However, although these courts have refused to apply statutes of repose to statutory environmental claims, defendants are not without legal and policy justifications to convince courts otherwise. These arguments include the presentation of good evidence at trial,287 the appropriateness of particular legal standards enforced upon defendants,288 and the discrete functions of statutes of repose as compared to statutes of limitations. Moreover, plaintiffs must also be mindful that in most jurisdictions, it will be difficult for them to bring a constitutional challenge to defeat statutes of repose, since they are widely held to be constitutional and not contrary to fundamental rights. This will likely remain the subject of controversy in latent injury cases in which the plaintiff’s recovery may be time-barred before their injuries have been discovered.

The debate most fundamental to the applicability of statutes of repose in environmental litigation is that which embodies “the conflict that arises between the policy goals of statutes of repose and the policy goals of recovery.” While some argue that fairness requires imposition of liability upon defendants for the environmental harms that they have caused to innocent plaintiffs, others will argue that defendants deserve the peace of mind that they will not have to answer to liability arising long ago when environmental, technological, or legal circumstances were different. A viable option to simul-

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287 See 5 The Law of Hazardous Waste, supra note 3, § 17.05[4], at 17-248.

288 See Kulbaski, supra note 190, at 1031–33.


290 See 5 The Law of Hazardous Waste, supra note 3, § 17.05[4][d], at 17-259; Baughman, supra note 40, at 682–83.

291 See Mehs, supra note 7, at 965–66; Toxic Waste Litigation, supra note 7, at 1609–10.

292 Mehs, supra note 7, at 966.

293 Toxic Waste Litigation, supra note 7, at 1607–08.

taneously serve both the interests of plaintiffs and defendants may be the drafting of legislation to modify statutes of repose in ways that strike a compromise between the ability of plaintiffs to accrue a cause of action and the right of defendants to claim immunity after a period of time. In this regard, state legislatures should take the examples of Connecticut, Illinois, and Florida\textsuperscript{295} and consider amending statutes of repose to better account for latent characteristics common to many environmental injuries. Appropriate amendments include allowing for extensions to file lawsuits—where injuries were discovered at the last minute—or lengthening the repose periods. Ultimately, however, each jurisdiction must determine when, how, or whether to apply statutes of repose, thus excusing defendants for their environmental harms, or whether to set aside statutes of repose and adopt the old maxim that “no man may take advantage of his own wrong.”\textsuperscript{296}

\textsuperscript{295} See supra notes 276–81 and accompanying text.
MANDATORY INCLUSIONARY ZONING—
THE ANSWER TO THE AFFORDABLE 
HOUSING PROBLEM

BRIAN R. LERMAN

Abstract: Affordable housing has always been a problem in the United States. Cities and towns originally engaged in forms of discrimination through exclusionary zoning to exclude low-income residents. While many of the social attitudes persist today, the question is how to encourage new affordable housing development. This Note introduces the concept of inclusionary zoning as a successful method for creating affordable housing. The Note examines the constitutional analyses used for land use ordinances. Then, the Note evaluates existing affordable housing programs, distinguishing between the eastern approach and the western approach. The eastern approach—represented by New Jersey, Massachusetts, and Montgomery County, Maryland—is based upon a “fair share” of affordable housing but lacks any planning requirement. The western approach, as illustrated by Oregon and California, is based upon community planning of all necessary elements including affordable housing, and have successfully required affordable housing development. Ultimately, the Note adopts a perspective that mandatory inclusionary zoning in all communities is the best option and should be valid under an impact fee-like analysis.

Introduction

Mr. and Mrs. Smith live with their three children on two incomes—totaling less than thirty thousand dollars—in the Seattle area. The Smiths spend nearly two-thirds of their income on rent in a community where they fear for their family’s safety. After much effort, the Smiths have qualified for the purchase of affordable housing in a new...
development. The home has a yard and offers ample light and ventilation. It is near the children’s schools and the parents’ workplaces. The new home will allow the Smiths to recuperate some of the money previously lost to rent and will make family life more enjoyable.

Families throughout this country are in need of an opportunity such as this. The California Supreme Court in Home Builders Ass’n of Northern California v. City of Napa may have paved the way for courts nationwide to hold as constitutional inclusionary programs like the one described above—thus providing these types of opportunities to more Americans.

This Note addresses why, from a policy perspective, mandatory inclusionary zoning is the optimal approach to affordable housing. This Note will also examine how, from a legal perspective, inclusionary zoning, because of its similarity to an impact fee, is constitutional. Part I examines the basics of inclusionary zoning—what inclusionary programs are, why they are necessary, and how they differ. Part II focuses on the various constitutional arguments surrounding inclusionary zoning and illustrates how a constitutional determination depends upon how the ordinance is classified. It then examines the constitutionality of an impact fee. Part III describes the approaches of several states in addressing affordable housing. Finally, Part IV evaluates the most effective program for providing affordable housing. After finding that a mandatory inclusionary zoning approach is most beneficial, this Note compares the constitutional analysis of inclusionary zoning with that of impact fees and concludes that both should be viewed as valid legislative actions.

I. What Is Inclusionary Zoning?

Zoning has been a fundamental concept in American society since Village of Euclid v. Ambler Realty Co., which allowed cities and towns to plan for development. A zoning regulation is constitutional,

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3 See Good Neighbors, Affordable Family Housing, supra note 1.
4 Id.
5 See id.
6 See id.
7 See California Budge Project, supra note 2, at 4, 8, 10; Barbara E. Kautz, Comment, In Defense of Inclusionary Zoning: Successfully Creating Affordable Housing, 36 U.S.F. L. Rev. 971, 972–73 (2002).
8 See 108 Cal. Rptr. 2d 60 (Ct. App. 2001).
9 See 272 U.S. 365, 394–96 (1926) (establishing the police power to zone uses of property).
provided that it has a substantial relation to public health, safety, or welfare. The substantial relation standard provides local government broad deference so long as the "validity of the legislative classification for zoning purposes [is] fairly debatable."  

Zoning generally regulates uses and provides spatial requirements; however, land use planning should also consider the community’s need for affordable housing. Through “inclusionary” zoning, governments require or encourage developers—both residential and commercial—to create affordable residential units as a part of any new development. Typically, inclusionary zoning ordinances mandate a percentage of affordable units, designate an income level defined by median income, and provide for an affordable period—a required length of time for the units to remain affordably priced. In return, inclusionary ordinances often provide developers with incentives, the most common of which is a density bonus.

The advantage of an inclusionary system to a community is that it helps provide affordable housing without a major public financial

11 Euclid, 272 U.S. at 388; see Kautz, supra note 7, at 989.
12 See Paul Davidoff, Zoning as a Class Act, in INCLUSIONARY ZONING MOVES DOWNTOWN 1, 2–3 (Dwight Merriam et al. eds., 1985). Zoning has the “goal of creating a balanced integrated urban community and the duty to address the pressing need of the poor, homeless, and underprivileged members of our society.” Id. at 3.
13 See, e.g., Edith M. Netter, Legal Foundations for Municipal Affordable Housing Programs: Inclusionary Zoning, Linkage, and Housing Preservation, 10 ZONING & PLAN. L. REP. 161, 162 (1987). There are a variety of inclusionary zoning statutes, but the most effective are those that require set asides, preferably onsite. See Karen D. Brown, Brookings Inst., Ctr. on Urban & Metro. Policy, Expanding Affordable Housing Through Inclusionary Zoning: Lessons from the Washington Metropolitan Area, 2 (2001), available at http://www.brook.edu/dybdocroot/es/urban/publications/inclusionary.pdf. Most programs provide the developer with the option of providing the affordable units off-site or to pay an in-lieu-of fee. See id. Commercial developers will more likely construct the units offsite or pay a fee in lieu of providing units. See Mary E. Brooks, Housing Trust Funds: Lessons Learned from Inclusionary Zoning, in INCLUSIONARY ZONING MOVES DOWNTOWN, supra note 12, at 7, 9; see also infra notes 52–74 and accompanying text.
14 See, e.g., Brown, supra note 13, at 2; Robert W. Burchell & Catherine C. Galley, Inclusionary Zoning: Pros and Cons, in READER, supra note 2, at 27, 27; Kautz, supra note 7, at 980.
15 See Burchell & Galley, supra note 14, at 27. Incentives can be in the form of waivers of zoning requirements, tax abatements, waivers of fees, expedited permitting, or subsidies for required infrastructure. Id. A density bonus is defined broadly to include when a municipality provides a developer additional square footage, permits more units per acre, or provides other benefits. See Susan M. Denbo, Development Exactions: A New Way to Fund State and Local Government Infrastructure Improvements and Affordable Housing?, 23 REAL EST. L.J. 7, 30 n.115 (1994).
commitment. The developer, rather than the community, bears the cost of the affordable units. Moreover, the program can successfully integrate populations, while reducing sprawl and encouraging mixed-use development.

The original movement for inclusionary zoning began in the 1960s and 1970s. Three forces—housing advocates fighting exclusionary zoning, a decrease in federal subsidies for affordable housing, and an increase in local governments’ use of exactions—encouraged the creation of the first inclusionary zoning programs. Therefore, inclusionary zoning has only existed as a viable land use control for the past thirty years. More recently, this movement has been aided by rapidly rising real estate prices that have closed the housing market to many.

A. The Problem of Exclusionary Zoning

Many communities, especially affluent suburbs, have kept lower income families from moving into the community through “exclusionary” zoning by requiring large minimum lot sizes and large minimum floor areas, prohibiting mobile homes, and limiting multifamily residential areas. These types of zoning practices, which were especially common in the 1960s and 1970s, continue to be major obstacles

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16 See Burchell & Galley, supra note 14, at 28. When compared with public housing, inclusionary zoning offers affordable housing at a much lower cost to the community. See id.
17 See id.
20 Exactions are bargained-for exchanges between developers and local governments to provide for public needs. See Daniel J. Curtin, Jr. & Cecily T. Talbert, CURTIN’S CALIFORNIA LAND USE AND PLANNING LAW 291 (24th ed. 2004).
21 See Porter, supra note 19, at 213.
22 See Kautz, supra note 7, at 1025.
to affordable housing today.27 Many communities disguise exclusionary zoning practices as measures to preserve the community character.28 However, the motivation behind exclusionary zoning is typically multifaceted—prejudice against those of lower income,29 financial concern for the impact on property values, and fear of infrastructural costs caused by population increase.30

The concern over providing affordable housing for residents has led some courts to strike down exclusionary zoning and require offending cities or towns to provide inclusionary zoning.31 Typically, to invalidate an exclusionary ordinance, a developer must show a denial of substantive due process or equal protection.32 Courts have found a denial of substantive due process based upon the existence of a “regional general welfare.”33 Since regional general welfare extends beyond a municipality’s boundaries, municipalities may not use the police power—the authorization for local zoning—to exclude.34

In addition to judicial action, many state legislatures have also tried to combat exclusionary practices.35 For example, some states have flatly banned exclusionary and discriminatory zoning techniques; others have required cities and towns to affirmatively plan affordable housing pursuant to the police power.36 The latter type of statewide legisla-

29 See Morgan, supra note 27, at 361–63 (describing how exclusionary zoning techniques are used to increase the cost of housing and therefore suggesting these techniques discriminate based upon income level).
30 See Callies, supra note 26, at 536–37 (illustrating the financial motivations for exclusionary zoning because “[g]rowth cuts two ways: it brings in revenues but it increases municipal costs.”); Morgan, supra note 27, at 363 (explaining that exclusionary zoning protects cities and towns from the financial burden of development). Multifamily housing has a higher density, which means more children, and increased school costs. See Callies, supra note 26, at 537 (citing George Sternlieb, Ctr. for Urban Policy Research, Housing Development and Municipal Costs (1973)).
32 See Cornish, supra note 25, at 197–98.
33 See Mt. Laurel II, 456 A.2d at 415.
34 Porter, supra note 19, at 217; see also Payne, supra note 26, at 368–69 (discussing New Hampshire’s use of a regional definition to strike down exclusionary ordinances).
35 See generally infra Part III.
36 See Inst. for Local Self-Gov’t, Legal Issues Associated with Inclusionary Housing Ordinances, in READER, supra note 2, at 101, 102.
tion—a form of inclusionary zoning—can effectively eliminate exclusionary ordinances by requiring cities and towns to integrate affordable housing.\textsuperscript{37}

B. Affordable Housing

Although it is possible to remove exclusionary techniques without requiring inclusionary zoning, this will not necessarily result in affordable housing, because developers will still not be required to create affordable units.\textsuperscript{38} Providing affordable housing is essential because it preserves housing for long-time residents,\textsuperscript{39} encourages integration,\textsuperscript{40} and protects the environment by decreasing suburban sprawl.\textsuperscript{41} Affordable housing is lacking where communities have created exclusionary zoning or where real estate prices are escalating.\textsuperscript{42} Climbing real estate prices have often occurred in areas with extreme job growth—causing longer commutes, more sprawl, and social and economic problems for lower income residents.\textsuperscript{43} Therefore, inclusionary zoning is needed to address the severe housing shortage for these residents.\textsuperscript{44}

Some advocates of inclusionary zoning argue that the creation of affordable housing alone is insufficient; rather, the housing must be strategically placed within the community to prevent segregation based on income level.\textsuperscript{45} Segregated affordable housing can have a harmful effect on a neighborhood and thus has proven to be less effective than integrated units.\textsuperscript{46}

\textsuperscript{37} See Talbert & Costa, \textit{supra} note 18, at 557; see also infra Part I.C.

\textsuperscript{38} See Talbert & Costa, \textit{supra} note 18, at 557. Developers can fall on both sides of the affordable housing debate. Incentive programs can allow a developer to build more units, while mandatory programs create a cost to the developer. See infra Part I.C.

\textsuperscript{39} See California Budget Project, \textit{supra} note 2, at 10.

\textsuperscript{40} See Kautz, \textit{supra} note 7, at 973. By creating the affordable units in close proximity to jobs, schools, and transportation, the affordable units are more likely to be successful. See John A. Powell, \textit{Opportunity-Based Housing}, 12 J. Affordable Housing & Cmty. Dev. L. 188, 189 (2003). In recent years, more Americans are unable to afford a home or pay their own rent. See Salsich, \textit{supra} note 23, at 476. Residents unable to afford a home are at a severe disadvantage because “homeownership is the primary source of wealth for most Americans . . . .” Powell, \textit{supra}, at 195 (emphasis added).

\textsuperscript{41} See infra notes 47–49 and accompanying text.

\textsuperscript{42} See California Budget Project, \textit{supra} note 2, at 4.

\textsuperscript{43} See id. at 8, 10. While job growth is a goal of many communities, it has harmed lower income residents by squeezing them out of their communities to make way for higher paid workers. See id. at 10.

\textsuperscript{44} See Kautz, \textit{supra} note 7, at 973.

\textsuperscript{45} See Brown, \textit{supra} note 13, at 1.

\textsuperscript{46} See id.
Moreover, growth management—planning for all land use concerns, including affordable housing—offers the opportunity to both protect the environment and provide affordable housing.\textsuperscript{47} By providing a developer with a density bonus, inclusionary zoning offers the potential of reducing suburban sprawl.\textsuperscript{48} More residents reside in close proximity in affordable units, thus preserving open space and benefiting the environment.\textsuperscript{49}

Ultimately, inclusionary zoning prohibits exclusionary zoning and effectively provides for affordable housing, even in areas suffering from escalating real estate prices.\textsuperscript{50} To fill the void left in the absence of a constitutional right to housing, inclusionary zoning works toward providing affordable living spaces in otherwise unaffordable areas.\textsuperscript{51}

C. Inclusionary Zoning Programs: Mandatory Versus Voluntary

There are two basic forms of inclusionary zoning statutes: mandatory and voluntary.\textsuperscript{52} Mandatory inclusionary programs require that any developer constructing a project over a certain size reserve a portion of the units as affordable, commonly referred to as a “set-aside.”\textsuperscript{53} In effect, the mandatory approach creates affordable housing with any new development.\textsuperscript{54} In return for the affordable units, these manda-

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\item \textsuperscript{47} See Porter, \textit{supra} note 19, at 246. \textit{But see} Talbert & Costa, \textit{supra} note 18, at 560, 561 (noting arguments that Massachusetts inclusionary zoning statute does not protect the environment).
\item \textsuperscript{48} See Porter, \textit{supra} note 19, at 246 (examining inclusionary zoning’s impact on smart growth); Talbert & Costa, \textit{supra} note 18, at 562.
\item \textsuperscript{49} See Talbert & Costa, \textit{supra} note 18, at 562.
\item \textsuperscript{50} See Victor B. Flatt, \textit{A Brazen Proposal: Increasing Affordable Housing Through Zoning and the Eminent Domain Powers}, \textsc{Stan. L. & Pol’y Rev.}, Spring 1994, at 115, 116, 118. Seattle has been able to extract affordable units in an extremely competitive housing market. \textit{Id}. There is criticism that these inclusionary programs have failed to produce a sufficient number of affordable units; however, with the housing market remaining strong and the opportunity for federal and state subsidies, the success of recent inclusionary programs should continue. Porter, \textit{supra} note 19, at 242.
\item \textsuperscript{51} See D.C. Office of Planning, Inclusionary Zoning: A Primer 15 (2002), http://planning.dc.gov/planning/ (follow “Publications” hyperlink; then follow “Inclusionary Zoning: A Primer” hyperlink) [hereinafter Primer]. The District of Columbia comprehensive plan reads, “all neighborhoods should share in the overall social responsibilities of the community, including, but not limited to, housing the homeless, feeding the hungry, accommodating the disabled, and welcoming residents of diverse backgrounds and needs.” \textit{Id}. (emphasis omitted).
\item \textsuperscript{52} See Porter, \textit{supra} note 19, at 221.
\item \textsuperscript{53} See id.
\item \textsuperscript{54} See Powell, \textit{supra} note 40, at 205.
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tory provisions often provide the developer with density bonuses, which some commentators argue are necessary to avoid a takings challenge.55

Although incentives like density bonuses are not required for mandatory inclusionary zoning programs, the legislature must provide developers an “alternative” for the program to be upheld.57 The alternative can be in the form of off-site housing or imposed fees in lieu of on-site affordable units.58 Alternatives address developments where affordable units cannot be provided cost effectively.59 These alternatives require the developer to build or pay for a greater number of affordable units than if the developer builds them on-site.60 A mandatory program that provides developers with basic alternatives can survive both takings and due process challenges so long as there is a legitimate state interest.61

Mandatory inclusionary zoning has at least three important benefits. First, mandatory programs have been more successful than voluntary programs based upon the number of affordable units created.62 Second, mandatory programs can alleviate social problems such as crime and unemployment by mandating integration of the community.63 Third, an inclusionary program has the economic benefit of creating mixed income neighborhoods and decentralizing poverty—thereby reducing city expenditures—by providing affordable housing in otherwise gentrified areas.64

55 See Porter, supra note 19, at 217 (citing Jerold S. Kayden, Inclusionary Zoning and the Constitution, NHC AFFORDABLE HOUSING POL’Y REV., Jan. 2002, at 10, 12). The programs that have created the most affordable units have provided developers with incentives such as density bonuses as a form of compensation. See Primer, supra note 51, at 11.

56 See Daniel J. Curtin, Jr. & Elizabeth M. Naughton, Inclusionary Housing Ordinance Is Not Facially Invalid and Does Not Result in a Taking, 34 URB. LAW. 913, 913–14 (2002); Porter, supra note 19, at 229. However, in Home Builders Ass’n of Northern California v. City of Napa, a California appellate court validated an inclusionary zoning ordinance requiring ten percent affordable units without any incentives. See 108 Cal. Rptr. 2d 60, 67 (Ct. App. 2001).

57 See Curtin & Naughton, supra note 56, at 914 (discussing Home Builders, 108 Cal. Rptr. 2d 60).

58 See id.

59 See Porter, supra note 19, at 229. Projects on a small site, for a high-rise building, or isolated from transportation or employment do not permit cost-effective on-site affordable housing; therefore, developers would provide off-site units or pay a fee in-lieu of development. Id.

60 Id. at 229–30.

61 See Curtin & Naughton, supra note 56, at 915 (discussing the Home Builders court’s finding of a legitimate state interest).

62 See Brooks, supra note 13, at 9; Kautz, supra note 7, at 974–75.

63 See Primer, supra note 51, at 9.

64 See id. at 9 (discussing social and economic benefits of an inclusionary program).
One major drawback of mandatory inclusionary programs is that states must have enforcement mechanisms, such as financial sanctions, to address any failure to comply with a statewide inclusionary program. Another drawback is the strong resistance of the development community. Because the burden of the program will fall on developers, they are likely to oppose any such mandatory program.

Unlike mandatory programs, voluntary programs are dependent upon incentives provided to the developer, and therefore are devoid of much of the development community’s opposition. Moreover, voluntary programs provide developers with the element of choice, thereby avoiding a major obstacle of mandatory programs. Additionally, voluntary programs do create affordable units if the program provides sufficient incentives to the developer.

The major disadvantage of voluntary programs is that the incentives that have to be granted to entice a developer can be detrimental to the municipality by burdening the environment and local infrastructure. Incentives that merely offset the cost of the affordable units may not be a sufficient inducement for developers. Another disadvantage to voluntary programs is that developers are provided an element of choice: if the ultimate market-rate buyer is willing to pay a premium that exceeds the public incentives for affordable housing, the developer will forego the optional program. On the other hand, mandatory programs require all developers to comply with the mandatory set-aside of affordable units regardless of incentives, and thus provide more benefits to the community than voluntary programs.

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65 See Porter, supra note 19, at 248 (explaining that states could impose financial sanctions on communities failing to create sufficient shares of affordable housing or offer incentives to those communities that meet the requirement).

66 Kautz, supra note 7, at 979 n.53.

67 See id.

68 See id. at 982.

69 See id. at 989 (discussing challenges to an inclusionary ordinance).

70 See id. at 1019.

71 See Burchell & Galley, supra note 14, at 30.

72 See Kautz, supra note 7, at 982 (explaining that the development community may have insufficient knowledge of the economics of inclusionary programs).


74 See Kautz, supra note 7, at 982.
D. Removing Local Politics from the Debate

Another important benefit of mandatory inclusionary programs is that they provide affordable housing for the community without a large public financial investment.\textsuperscript{75} By not placing an enormous burden on the community, affordable housing can be created quickly and efficiently.\textsuperscript{76} Public officials and the community are more likely to support this type of program because the private developer pays for the affordable units.\textsuperscript{77}

Local politics can be removed from the inclusionary zoning debate through the use of regional affordable housing planning. Zoning has substantial social and economic impacts in the area of affordable housing, which arouse public opinion.\textsuperscript{78} Specifically, the public is likely to oppose inclusionary programs because the practice is counter to exclusionary zoning which preserves the status quo.\textsuperscript{79} Although the public argument is often framed as a concern about financial or environmental costs, in reality much of the opposition to inclusionary programs is rooted in discriminatory intent.\textsuperscript{80} One way to address this public concern is to apply inclusionary programs on a more regional level.\textsuperscript{81} Regional affordable housing planning allows for collaboration between the inner city and suburban communities in establishing a plan for affordable housing.\textsuperscript{82} In addition, it allows for a “fair share” approach; each municipality is obligated to provide its pro rata share of affordable units.\textsuperscript{83} To be effective, regional planning requires the par-

\textsuperscript{75} See Burchell & Galley, supra note 14, at 28 (explaining that “[g]enerally, the provision of affordable housing units as part of an inclusionary program does not require significant expenditure of public funds.”); Kautz, supra note 7, at 983 (claiming that “inclusionary zoning provides affordable housing at no public cost”).

\textsuperscript{76} See Powell, supra note 40, at 205.

\textsuperscript{77} See id. at 206.


\textsuperscript{79} See Solinski, supra note 24, at 37–38.

\textsuperscript{80} See Porter, supra note 19, at 214–15 (explaining the implications of inclusionary zoning on smart growth); Kautz, supra note 7, at 983 (discussing how inclusionary zoning provides affordable housing at no cost); Morgan, supra note 27, at 361–63; see also supra notes 28–31 and accompanying text.

\textsuperscript{81} See Powell, supra note 40, at 202.

\textsuperscript{82} Id. at 203.

\textsuperscript{83} Id. at 205.
ticipation of all segments of the community. When effective, regional planning results in the creation of successful affordable housing.

E. Challenges for Inclusionary Zoning Statutes

The largest problem with both mandatory and voluntary programs is a seeming dependence upon a strong housing market. Both programs presuppose that a developer will permit the community to extract affordable units in return for his right to develop. To function properly, developers must be able to sell market-rate units before any affordable units will be developed. Where market-rate housing is selling well, however, inclusionary ordinances have not brought an end to development in the area.

II. The Constitutionality of Inclusionary Zoning

When a municipality is considering inclusionary zoning, it must carefully craft a program that passes a constitutionality review. A strong constitutional precedent will not only permit local government to adopt progressive inclusionary measures, but will also entice communities to adopt strict mandatory inclusionary programs.

Inclusionary zoning statutes raise important constitutional issues: denial of due process and taking of private property without just compensation. The determination of the constitutionality of these ordinances has been a product of whether the ordinance is characterized as

84 See id. at 203 (illustrating that effective regional planning requires a broad political coalition).
85 See id.
86 See Primer, supra note 51, at 10–11.
87 Porter, supra note 19, at 214.
88 Burchell & Galley, supra note 14, at 30.
89 See Porter, supra note 19, at 220. “The proof that inclusionary programs can make economic sense for developers is that existing programs have not shut down housing development and that developers continue to plan and construct projects that include affordable housing within affordable and mixed-income projects.” Id.
90 See Home Builders Ass’n of N. Cal. v. City of Napa, 108 Cal. Rptr. 2d 60, 62–63 (Ct. App. 2001) (discussing the program adopted by the City of Napa to address its need for affordable housing); Brown, supra note 13, at 30 (discussing concerns surrounding Montgomery County’s inclusionary zoning ordinance); Curtin & Naughton, supra note 56, at 917–18.
a traditional land use ordinance, an exaction, or an impact fee.\textsuperscript{92} A land use ordinance is given substantial deference by the courts, and will most likely be upheld.\textsuperscript{93} However, an exaction does not receive the same judicial deference because exactions are based on adjudicative discretion.\textsuperscript{94} Courts require exactions to have a sufficient nexus or proportionality between the impact of the development and what is taken from the developer.\textsuperscript{95} Courts provide impact fees with more deference than exactions because they are legislative rather than adjudicative, and therefore apply to all developments.\textsuperscript{96}

A.\hspace{1em}Traditional Land Use Ordinance Analysis

Developers will often challenge inclusionary zoning ordinances characterized as a traditional land use ordinance as a denial of due process,\textsuperscript{97} or a taking of private property.\textsuperscript{98} The legislature is provided broad deference in relation to due process concerns; the law is upheld so long as it is to “achieve a legitimate public purpose . . . and . . . the ordinance [is] a reasonable means to accomplish this purpose.”\textsuperscript{99} In practice, any due process concern is likely satisfied because the creation of affordable housing has been approved by the courts as a legitimate state interest.\textsuperscript{100} More important, developers argue that the ordinance is a transfer of property from the developer to lower in-

\textsuperscript{92} See Netter, supra note 13, at 163; Kautz, supra note 7, at 989 (“The judicial scrutiny applied to inclusionary ordinances—and hence their ability to survive a legal challenge—depends significantly on how they are characterized. . . . [T]he courts have applied a deferential standard to requirements that can be characterized as generally applicable land use regulations . . . ”).

\textsuperscript{93} See Kautz, supra note 7, at 989. Many zoning ordinances are upheld based upon a finding of implied powers even where the legislature has not given municipalities the specific power. See Netter, supra note 13, at 164.

\textsuperscript{94} See Kautz, supra note 7, at 989; see also infra Part II.B.

\textsuperscript{95} See Ehrlich v. City of Culver City, 911 P.2d 429, 444 (Cal. 1996) (discussing why impact fees should not be subject to the same analysis as an exaction); Curtin & Talbert, supra note 20, at 301–02 (discussing Ehrlich v. City of Culver City).

\textsuperscript{96} Developers have attempted to raise equal protection claims. However, these claims are usually unsuccessful in the land use context. See Curtin & Talbert, supra note 20, at 288. The analysis requires a rational relationship between the ordinance and its objective, similar to a due process analysis. See id.; Netter, supra note 13, at 165.

\textsuperscript{97} See Primer, supra note 51, at 9.

\textsuperscript{98} Netter, supra note 13, at 165 (citing Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926); Bd. of Appeals v. Hous. Appeals Comm., 363 Mass. 339 (1973)). “Courts will presume the ordinance is valid and the burden of proving otherwise will fall on the challenger.” Id.

\textsuperscript{99} See Curtin & Naughton, supra note 56, at 915 (discussing how the City of Napa’s inclusionary ordinance substantially advanced a legitimate state interest).
come individuals and, therefore, is a taking.\textsuperscript{101} To avoid this challenge, the legislation must advance a legitimate state interest and the developer must not be denied substantially all economically viable use of the property.\textsuperscript{102}

As mentioned above, the basic adoption of inclusionary zoning statutes causes the creation of affordable housing to be viewed as a legitimate state interest.\textsuperscript{103} Once the local ordinance is proven to be a legitimate state interest, the question becomes whether the developer can be forced to provide the required affordable units.\textsuperscript{104} Although a developer may argue that the affordable units deny value to his property, the required inclusion of these units does not create a total diminution in value of the developer’s property.\textsuperscript{105} Under an inclusionary zoning regime, the developer still profits completely from the market-rate units and partially on the affordable units.\textsuperscript{106} Therefore, the developer is not entitled to compensation.\textsuperscript{107}

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\item See, e.g., \textit{Curtin \& Talbert}, \textit{supra} note 20, at 63 (explaining that an inclusionary ordinance is, in effect, a transfer of “property from developers to less materially advantaged households”); \textit{Porter}, \textit{supra} note 19, at 217 (recognizing that the takings claim is the strongest argument against an inclusionary zoning ordinance).
\item \textit{See Curtin \& Naughton}, \textit{supra} note 56, at 915. A legitimate state interest can be determined based upon both judicial precedent and legislative action. \textit{See Home Builders Ass’n of N. Cal. v. City of Napa}, 108 Cal. Rptr. 2d 60, 64–65 (Ct. App. 2001). The court in \textit{Home Builders} stated:

\begin{quote}
Our Supreme Court has said that the “assistance of moderate-income households with their housing needs is recognized in this state as a legitimate governmental purpose.” This conclusion is consistent with repeated pronouncements from the state Legislature which has declared that “the development of a sufficient supply of housing to meet the needs of \textit{all Californians} is a matter of statewide concern,” and that local governments have a “responsibility to use powers vested in them to facilitate the improvement and development of housing to make adequate provision for the housing needs of \textit{all economic segments} of the community.”
\end{quote}

\textit{Id.} (citations omitted).
\item \textit{See Parker}, \textit{supra} note 91, at 185.
\item \textit{See Mandelker}, \textit{supra} note 78, at 35.
\item \textit{See id.} Some developers argue that a “fair return on investment” is required for the affordable units; however, the Supreme Court has not required a fair return for municipalities to avoid a taking. \textit{Parker}, \textit{supra} note 91, at 185–86; \textit{see also} Mandelker, \textit{supra} note 78, at 35.
\item \textit{See Mandelker}, \textit{supra} note 78, at 35. Some scholars argue that to avoid these concerns, a community should provide a developer with compensation in the form of an in-
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B. Exaction Analysis—The Nollan/Dolan Test

If an inclusionary zoning ordinance is characterized as an exaction, the analysis differs. The takings analysis under exactions is less deferential to the legislature than for a traditional land use ordinance because it applies an intermediate level of scrutiny. Under such an analysis, a court will examine whether the municipality has asked for something “bear[ing] the required relationship to the projected impact of . . . [the] development.” The exaction doctrine exists to protect a developer from either paying for a public benefit that should be paid for by the public, or providing a benefit in excess of his impact on the community.

The analysis used for an exaction should not be applied to inclusionary zoning. First, the exaction analysis applies only in the special permit setting, not to a generally applicable statute or ordinance. Second, the analysis is aimed at protecting a developer from bearing a cost that should be paid for publicly. Therefore, because an inclusionary statute is both generally applicable and does not provide some-
thing for which the public would ordinarily bear the cost, the exaction analysis should not apply.\textsuperscript{116}

\section*{C. Impact Fee Analysis}

Some states impose an impact fee on developers.\textsuperscript{117} Impact fees are assessed at the time of building to pay for the infrastructure needed because of the new development.\textsuperscript{118} Similar developments in a community—both in size and impact—are required to pay the same impact fee.\textsuperscript{119} To validly enact impact fee ordinances, municipalities must create a comprehensive plan representing the needs of the community in terms of capital improvements with regard to future development.\textsuperscript{120} Fees are then assessed in accordance with that plan; any new project is charged a fee that represents a proportionate share of the capital costs.\textsuperscript{121}

The state has the power to authorize municipalities to impose impact fees.\textsuperscript{122} The development community, however, frequently challenges municipal impact fees, arguing that they are an unauthorized tax.\textsuperscript{123} An impact fee, however, is distinguishable from a tax for

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\item[116] See Curtin & Talbert, supra note 20, at 64; Mandelker, supra note 78, at 35.
\item[120] See Leitner & Schoettle, supra note 117, at 505–07 (listing several general factors used by states within their impact fee legislation, including “use of a citizens’ advisory committee, accounting requirements, and time limits for expenditures” and other state-specific requirements).
\item[121] See Michael B. Dowling & A. Joseph Fadrowsky III, Casenote, Dolan v. City of Tigard: Individual Property Rights v. Land Management Systems, 17 U. Haw. L. Rev. 193, 259–60 (1995) (discussing Hawaii impact fee legislation that requires a needs assessment of what public facilities will be impacted by new development, a substantial relation between the needs and the new development, a calculation of the pro rata share of the improvements, and the return of the fees to the developer if the improvements are not completed within six years).
\item[123] See Henderson Homes, Inc. v. City of Bothell, 877 P.2d 176, 180 (Wash. 1994) (holding that mandatory fees are illegal in Washington).
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several reasons. In determining whether a municipality has assessed a fee or a tax, courts examine several factors, such as the purpose of the fee, and the connection between the need for the development and public facility. Perhaps the most important characteristic of an impact fee is that, unlike a tax, it is allocated to a fund separate from the general fund. Additionally, an impact fee must be used for a specific service required by the development and not, as a tax would be, for a general public benefit. Finally, the fee must still be tailored to the impact of the development on the community to avoid being considered a tax.

Moreover, an impact fee authorized by the state is legislative rather than adjudicative, and therefore is given greater deference by courts. A municipality can defend its particular fee through a plan that demonstrates the cost to the community of new development. An inclusionary zoning ordinance deserves similar judicial deference to an impact fee, provided that the program addresses a lack of af-

125 See id. at 307 (explaining California’s requirement for impact fees); Leitner & Schoettle, supra note 117, at 495 (discussing six factors a court will consider). In California, a municipality must identify the purpose of the fee and how it will be used, demonstrate a reasonable relationship between the fee and the type of development and between the need for the public facility and the type of the development, and deposit the fees in a separate account for the purpose of constructing the facilities. See Curtin & Talbert, supra note 20, at 307.
126 See Leitner & Schoettle, supra note 117, at 495.
127 See, e.g., Collier County v. State, 733 So. 2d 1012, 1017 (Fla. 1999) (holding that the county’s impact fee ordinance fails to provide a direct benefit to the properties burdened by it); Daniels v. Borough of Point Pleasant, 129 A.2d 265, 267 (N.J. 1957) (holding that the municipality’s impact fee ordinance has no relation between the impact of the development and the burden on public facilities).
128 See Leitner & Schoettle, supra note 117, at 494; Powell, supra note 40, at 207.
129 Inst. for Local Self Gov’t, supra note 36, at 105; see San Remo Hotel L.P. v. City of San Francisco, 41 P.3d 87, 105 (Cal. 2002) (discussing that impact fees are restricted by the political process). Impact fees that are user fees can be adopted by municipalities without state legislation; however, the fee can be challenged on constitutional grounds as ultra vires. See Leitner & Schoettle, supra note 117, at 493. Impact fees in Florida have been upheld without specific legislation based upon case law. Id. at 508. Impact fees have generally been analyzed under three different tests: “specifically and uniquely attributable,” “rational nexus,” and “reasonable relationship.” Id. at 494 (internal quotation marks omitted).
130 See Leitner & Schoettle, supra note 117, at 495 (explaining techniques used by municipalities to show the program is reasonable, such as: (1) geographic areas to show the benefits of the additional facilities, or (2) a method whereby the cost of the additional facilities is determined and then the development is apportioned pro rata). Each state that authorizes an impact fee has different requirements for substantiating the impact fee. Id. at 496, 504–07.
fordable housing at a level proportionate to each development and it can be defended through sufficient planning by each municipality.\footnote{See Kayden, supra note 55, at 13 (explaining the arguments in favor of upholding an inclusionary ordinance, including that market-rate development directly or indirectly creates a need for affordable units). In addition, many inclusionary ordinances provide an in-lieu-of fee option when it is impossible or impractical to build the affordable units on site that are similar to an impact fee. See, e.g., Holmdel Builders Ass’n v. Twp. of Holmdel, 583 A.2d 277, 282 (N.J. 1990) (discussing the town’s passing of an impact-fee ordinance because it had no room for inclusionary development); CURTIN & TALBERT, supra note 20, at 320; Leitner & Schoettle, supra note 117, at 491; Nelson, supra note 118, at 541; see also supra notes 57–60 and accompanying text.}

III. INCLUSIONARY ZONING IN PRACTICE

Although, the discussion above provides a broad overview of inclusionary zoning, it is important to examine specific programs states have implemented across the country. “Eastern” states are generally non-plan states that have attempted to use non-plan inclusionary remedies to address the affordable housing problem, but have been unable to create concrete planning requirements.\footnote{Examples of the eastern state approach are New Jersey, Massachusetts, and Montgomery County, Maryland. See infra Part III.A.} “Western” states are plan states, and thus are more progressive with respect to land use; they have taken advantage of planning in creating affordable housing programs.\footnote{Examples of western states are Oregon and California. See infra Part III.B.} In addition to looking at specific inclusionary zoning programs, this Part examines several states which have not adopted inclusionary measures.\footnote{See infra Part III.C.} These states are instructive because they suggest the possibility of adopting statewide inclusionary zoning.\footnote{See infra notes 157–78 and accompanying text.}

A. Eastern Approach

Most of the eastern states have not, as of yet, implemented statewide inclusionary zoning programs.\footnote{See Massachusetts Comprehensive Permit Act, Mass. Gen. Laws ch. 40B, §§ 1–29 (2004); MONTGOMERY COUNTY, MD., CODE § 25A (2004); Mt. Laurel II, 456 A.2d 390 (N.J. 1983).} Instead, each state’s program is tailored to a specific problem; either, exclusionary zoning\footnote{See infra note 144 and accompanying text.} or a lack of affordable housing.\footnote{See infra notes 157–78 and accompanying text.} New Jersey and Massachusetts—leaders in eastern state affordable housing—have permitted developers to chal-
lengende local zoning as a bar to development.\textsuperscript{139} New Jersey, for example, created a “fair share” obligation—requiring each municipality to provide its fair share of affordable housing—through the courts.\textsuperscript{140} In contrast, Massachusetts has legislatively provided developers with a process for developing affordable housing that reduces the obstacles of local regulation through simple permitting and an easy appellate process for any local denial.\textsuperscript{141} The system used by Montgomery County, Maryland resembles a plan state because it legislatively requires planning of affordable housing through a mandatory inclusionary zoning measure, but the program only applies to a limited number of developments through size constraints.\textsuperscript{142}

1. New Jersey—Judicial Intervention

New Jersey originally had prohibited exclusionary zoning in \textit{Southern Burlington County NAACP v. Township of Mount Laurel (Mt. Laurel I)}.\textsuperscript{143} However, when striking the exclusionary ordinances failed to create affordable housing, eight years later in \textit{Mt. Laurel II}, the New Jersey Supreme Court imposed a “fair share” obligation on each community, and permitted municipalities to adopt inclusionary measures to meet that fair share.\textsuperscript{144} In response to \textit{Mt. Laurel II}, the state legislature adopted the Fair Housing Act.\textsuperscript{145} The act instituted fair share housing and created an administrative agency, the Council on Affordable Housing (COAH), to oversee the program.\textsuperscript{146}

COAH operates by establishing a fair share for each community.\textsuperscript{147} Each community must conduct a study to determine present and fu-

\textsuperscript{139} See Mass. Gen. Laws ch. 40B, § 22; Mt. Laurel II, 456 A.2d at 483.

\textsuperscript{140} See Mt. Laurel II, 456 A.2d at 449–50.


\textsuperscript{142} See infra Part III.A.3.

\textsuperscript{143} 336 A.2d 713 (N.J. 1975).

\textsuperscript{144} 456 A.2d at 449–50. “[W]here the Mount Laurel obligation cannot be satisfied by removal of restrictive barriers, inclusionary devices such as density bonuses and mandatory set-asides keyed to the construction of lower income housing, are constitutional and within the zoning power of a municipality.” Id. at 448. “The very basis for the constitutional obligation underlying Mount Laurel is a belief, fundamental, that excluding a class of citizens from housing on an economic basis . . . distinctly diserves the general welfare.” Id. at 449.


\textsuperscript{146} Solinski, \textit{supra} note 24, at 53.

ture affordable housing needs based upon factors such as employment opportunities and area income.148 Each municipality is then required to submit a housing plan to COAH to ensure compliance with the community’s fair share.149 Although the New Jersey program attempts to plan on a regional level, COAH has no authority to enforce the fair share requirements should a community propose a housing plan that does not meet minimum standards.150 Therefore, the program is solely voluntary, and the primary benefit to a community is that it protects the municipality from an exclusionary zoning suit.151

Moreover, New Jersey’s fair share program is insufficient at providing affordable housing.152 The courts provide the only remedy for a citizen who believes a community is engaging in exclusionary zoning.153 The administrative mechanism of COAH does little to protect the individual’s right to housing because it is voluntary.154 In summary, New Jersey requires an individual developer to pursue costly litigation to achieve a victory on affordable housing without the help of COAH.155

2. Massachusetts—”Anti-Snob” Zoning Act

Unlike the New Jersey approach, which requires municipal action, Massachusetts has adopted a program that permits a developer to initiate the affordable housing process.156 The Massachusetts Comprehensive Permit Law (40B) was adopted in 1969 to address a divide between the urban poor and the suburban wealthy.157 The law permits a developer to submit a proposal to a local zoning board of appeals

148 Solinski, supra note 24, at 53; see N.J. ADMIN. CODE § 5:92.
149 Solinski, supra note 24, at 53; see N.J. STAT. ANN. § 52:27D-309.
151 Id.
152 See Mt. Laurel II, 456 A.2d at 449; Solinski, supra note 24, at 54.
154 See Solinski, supra note 24, at 54 (explaining that the Fair Housing Act does not “empower the agency to enforce the fair-share requirements proactively” (quoting Note, supra note 150, at 1136)).
155 See id. Ultimately, “enforcement of the Act still depends upon individually initiated litigation. In the end the Mt. Laurel doctrine serves as the enforcement.” Id. (citing Note, supra note 150, at 1136).
for an affordable development. A developer need not comply with local regulations, including density, setback, and wetland protection requirements, if the municipality has not provided sufficient affordable housing, thus penalizing the municipality.

If a development is denied or is approved with conditions that the developer considers impractical, 40B permits the developer to appeal the local zoning board of appeals decision to the Housing Appeals Committee (HAC), an administrative court. The decision of the HAC is dependent upon whether the town has adequately provided for affordable housing, generally defined as ten percent of its housing stock; if the town has not so provided, the developer will almost certainly prevail. The remedy in Massachusetts belongs exclusively to developers, and therefore does not necessarily result in the construction of affordable units.

The number of affordable units created by 40B—in a process that penalizes municipalities for lacking affordable developments—has been rather small. Moreover, those units have been swayed toward two segments of the population, the elderly and current residents of the community, thus failing to provide affordable housing for the lar-

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158 See Mass. Gen. Laws ch. 40B, § 21. The developer must qualify as a public agency, or a limited dividend or nonprofit organization. Id. However, the definition of limited dividend organization is any developer who agrees to limit his profit margin to twenty percent. Melcher, supra note 141, at 236.

159 Witten, supra note 157, at 529–30.

In exchange for selling or renting twenty-five percent of the dwelling units in a development project at eighty percent of the median income for the community, 40B permits a developer of raw, under-developed, or previously-developed, land to force the approval of a development density unconstrained by any local rule, regulation, ordinance, or policy.

Id.


161 Mass. Gen. Laws ch. 40B, § 23 (establishing that the standard of proof for the HAC is whether the decision of the local zoning board of appeals is reasonable and consistent with local needs). Consistent with local needs is defined as either exceeding 10% of housing within the city, or construction of affordable housing within one year, on, more than the greater of 1/3 or 1% of land in the municipality or ten acres. Id. § 20. Therefore, at the HAC, the developer is almost assured of victory over the municipality. See id. §§ 20, 23.

162 See Porter, supra note 19, at 233.

163 See id. Many Massachusetts communities have adopted goals or policies, but very few have adopted a mandatory program to create affordable units. Id. Those that have done so have seen very limited results, as only one thousand units of affordable housing between 1990 and 1997 have been created by communities adopting inclusionary ordinances to achieve 40B goals. Id.
ger population. Therefore, the Massachusetts program fails to encourage diverse and integrated affordable housing.

3. Montgomery County, Maryland—Moderately Priced Dwelling Unit Program

Montgomery County has one of the more successful affordable housing programs in the country. The program, referred to as the “Moderately Priced Dwelling Unit Program,” was passed in 1974 in an effort to meet the public policy goal of providing housing for every person who worked within the community. The program addressed potential takings arguments by providing the developer with incentives to comply. The program applies to all residential developments between thirty-five and fifty units. Developers are required to reserve between 12.5% and 15% of the units as affordable, and in return receive up to a 22% density bonus. The units are then restricted—to keep them affordable—for ten years for owner-occupied units, and for twenty years for rental units.

The success of the Maryland approach has been in the integration of affordable units into the community. The county has only in very limited cases allowed developers to build off-site units in place of the on-site affordable units, thus placing affordable units in the same areas as market-rate housing. By placing the affordable units in areas of market-rate housing, the projects place a minimal burden on the local government and therefore generate the support of local officials.

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164 See id. at 244.
165 See id.
166 See Brown, supra note 13, at 2. Montgomery County has created over eleven thousand units during the course of the last twenty-five years. Id.
167 Primer, supra note 51, at 7, 11.
168 Id. at 7.
169 See Montgomery County, Md., Code § 25A-5 (2004). The exemption for large developments is based on the county requiring a development of that size to provide its own infrastructure; thus it is deemed inequitable to also require such a developer to provide affordable units. See Brown, supra note 13, at 5.
171 Brown, supra note 13, at 5.
172 See Powell, supra note 40, at 206.
173 Brown, supra note 13, at 6. “Between 1989 and 1999, only 10 requests to provide affordable units in other locations were approved, and only in cases where homeowner association or condominium fees were unusually high.” Id.
174 See Powell, supra note 40, at 206. Powell explains that “[i]t is also significant that elected officials view the program favorably. This is in part because every jurisdiction
However, one difficulty with the Montgomery County approach is that there remain only 3805 units designated as “affordable” within the inclusionary zoning system. The limited duration of affordability—ten to twenty years—creates a constant need for new affordable units. Another difficulty is that the program applies to fewer new projects because it only pertains to developments between thirty-five and fifty units. Thus, because the program only applies to a select group of developments, the program cannot provide as much affordable housing as a mandatory inclusionary zoning program that applies to all developments.

B. Western Approach—Planned Inclusionary Zoning

In general, western states have taken a planning approach to affordable housing by zoning through a comprehensive plan. These western states require more from municipalities in their planning and zoning and therefore can easily implement affordable housing requirements. In these states, mandatory planning for affordable housing benefits from preexisting enforcement mechanisms that are used for other statewide planning and zoning requirements. Oregon’s program demonstrates the benefit of a strong planning approach, but also illustrates how the development community, even in a plan state, can create major obstacles to mandatory inclusionary programs. California has a similar planning approach—without being derailed by the development community—that has effectively permitted mandatory inclusionary programs and thus created affordable housing.

1. Oregon

Oregon’s program requires municipalities to ensure housing opportunities exist for those who work in the community when creating a

within Montgomery County is impacted by the policy and because creating the affordable housing is not financially burdensome to local governments.” Id.

175 See Brown, supra note 13, at 5.
176 See id.
177 See id.
179 See Porter, supra note 19, at 233, 237.
180 See id. at 237 (explaining how states require municipalities to “prepare, as part of required comprehensive plans, a housing element consistent with the state housing goal”).
181 See Curtin & Talbert, supra note 20, at 20–21.
182 See Porter, supra note 19, at 237; infra notes 187–89 and accompanying text.
183 See infra Part III.B.2.
local comprehensive plan.\textsuperscript{184} The program provides that when an income level appears to have insufficient housing within a community, the local government must create adequate housing opportunities.\textsuperscript{185} For example, a municipality may be required to alter zoning from single family to multifamily to permit lower income residents to find affordable housing.\textsuperscript{186}

One major difficulty in the creation of affordable housing in Oregon is a statute passed in response to lobbying by the development community that prohibits mandatory set-asides.\textsuperscript{187} The statute provides that developers cannot be required to allocate a percentage of their units as market-rate housing.\textsuperscript{188} Therefore, the Oregon program does not have the tools necessary to require developers to incorporate affordable housing within their market-rate developments.\textsuperscript{189}

2. California

California state law requires housing to be included as part of each municipality’s comprehensive zoning plan—referred to as the “housing element.”\textsuperscript{190} The housing element must analyze a municipality’s current housing situation, set forth goals, policies, and objectives, and provide a method of implementation through zoning and land use controls.\textsuperscript{191} The adoption or amendment of a municipality’s housing element must first be approved by the state’s Department of Housing and Community Development.\textsuperscript{192} The local government, in implementing the housing element, is further required to work with the state and other local governments to meet its goals.\textsuperscript{193} The system becomes one of “fair share,” requiring each community to provide housing for its share of low- and moderate-income individuals.\textsuperscript{194} It also permits the

\textsuperscript{185} Id.
\textsuperscript{186} Id.
\textsuperscript{187} Id. § 197.309. See Porter, supra note 19, at 237. “[T]he Oregon Building Industry Association successfully lobbied the state legislature to adopt a law forbidding local jurisdictions and metro from requiring mandatory set-asides of for-sale affordable housing in market-rate developments.” Id.
\textsuperscript{188} Or. Rev. Stat. § 197.309.
\textsuperscript{189} See Porter, supra note 19, at 237. Ultimately, the state prohibition of mandatory set-asides will likely limit the creation of affordable housing throughout Oregon. See id.
\textsuperscript{190} Cal. Gov’t Code § 65,583 (West 1997); see Gary Binger, Inclusionary Housing Policy Background Paper, in Reader, supra note 2, at 15, 16.
\textsuperscript{191} Cal. Gov’t Code § 65,583.
\textsuperscript{192} Id. § 65,584(a), (b); see Curtin & Talbert, supra note 20, at 12.
\textsuperscript{193} Cal. Gov’t Code § 65,580; see Curtin & Talbert, supra note 20, at 12.
\textsuperscript{194} See Cal. Gov’t Code § 65,583.
temporary transfer of the share of one municipality to another which can reduce community resistance to the program overall.\textsuperscript{195}

In addition to the housing element, California has successfully created affordable housing through the California Coastal Commission and the California Redevelopment Law.\textsuperscript{196} The California Coastal Commission successfully encouraged municipalities within its jurisdiction to adopt ordinances requiring twenty-five percent of the municipality’s housing stock to be affordable housing.\textsuperscript{197} The California Redevelopment Law created affordable units by requiring that tax benefits of any redeveloped area be spent on affordable housing.\textsuperscript{198}

Although each municipality in California makes a determination about what type of affordable housing program is necessary, the state has encouraged a form of inclusionary zoning.\textsuperscript{199} In crafting an affordable program, the municipality decides to whom the affordable ordinance will apply, what income level will be included, and whether the developer will be offered density bonuses.\textsuperscript{200} The state law also prohibits the denial of permitting to an affordable developer without satisfactory findings for the denial.\textsuperscript{201}

One mandatory inclusionary program in California—the City of Napa’s—has been upheld as a constitutional land use ordinance.\textsuperscript{202} The progressive program requires a mandatory set-aside of ten percent affordable units for all new developments without any incentives provided to the developer.\textsuperscript{203} The success of Napa’s ordinance may have

\textsuperscript{195} Id. § 65,584.5. The transfer can only occur once every five years. Id. § 65,584.5(a)(3).
\textsuperscript{196} See Porter, supra note 19, at 234.
\textsuperscript{197} Id.
\textsuperscript{198} Id.; Talbert & Costa, supra note 18, at 564.
\textsuperscript{199} See Kautz, supra note 7, at 978. “The California legislature required that each municipality adopt a housing element that calculated each city’s share of the regional housing need and required each city to ‘make adequate provision’ for that need.” Id. (quoting Cal. Gov’t Code § 65,583(c) (West Supp. 2001)). Therefore, many communities adopted inclusionary ordinances to meet that requirement. See id.
\textsuperscript{200} See id. at 980–81. California does have a mandatory density bonus law of up to 25% if the developer provides 20% of the units to lower income families, 10% to very low income families, or 50% to seniors. Id. at 981 n.62.
\textsuperscript{201} Curtin & Talbert, supra note 20, at 13 (discussing part of state law that “prevent[s] a city from rejecting or making infeasible residential development for the use of very low, low-, or moderate-income households, unless the city makes a series of written findings based on substantial evidence”).
\textsuperscript{202} Home Builders Ass’n of N. Cal. v. City of Napa, 108 Cal. Rptr. 2d 60, 67 (Ct. App. 2001); Curtin & Naughton, supra note 56, at 913, 916 (explaining that “inclusionary land-use ordinances, such as in the Napa situation, as legislative acts are entitled to deference from the courts and to be judged under a deferential standard”).
\textsuperscript{203} Home Builders, 108 Cal. Rptr. 2d at 62–63. The ordinance did provide for two alternatives for the developer: off-site dedication of land or payment of fees in lieu of building,
opened the door for this type of mandatory program to be used more frequently because of its proven constitutionality.\textsuperscript{204}

Western states, given their planning approach to zoning, have had more success in implementing inclusionary programs. The western states’ approaches, especially that of the City of Napa, illustrate the potential for inclusionary programs.\textsuperscript{205}

C. Judicial Trends Toward Inclusionary Zoning

While imposing a “fair share” requirement on municipalities successfully creates affordable housing, some courts have also suggested that it may be possible to implement inclusionary zoning without this imposition.\textsuperscript{206} New Hampshire courts have provided such a remedy to developers.\textsuperscript{207} The New York judiciary has gone further in requiring zoning to consider regional needs.\textsuperscript{208} These types of programs suggest the opportunity for more widespread inclusionary zoning, but only at the request of the development community.\textsuperscript{209} Thus, it appears that developers may have an opportunity to challenge zoning as an obstacle to affordable housing.\textsuperscript{210}

1. New Hampshire

New Hampshire has addressed one of the more difficult problems for developers challenging exclusionary zoning ordinances.\textsuperscript{211} The court has permitted a constitutional attack without finding a due process or equal protection violation.\textsuperscript{212} These challenges have been allowed based upon a definition of the general welfare that extends beyond the community—similar to the definition in New Jersey—but without requiring municipalities to provide a fair share of affordable housing.\textsuperscript{213} For example, the court in Britton v. Town of Chester held that once the zoning ordinance is found suspect, the developer is entitled to

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  \item both at the sole discretion of the city council. \textit{Id.} at 62. The ordinance also gave the city council the ability to exempt the project from the inclusionary program if the requirement lacked a rational relationship for the particular project. \textit{Id.}
  \item See \textit{id.} at 66; Curtin & Naughton, \textit{supra} note 56, at 918.
  \item \textit{Home Builders}, 108 Cal. Rptr. 2d at 66; Curtin & Naughton, \textit{supra} note 56, at 918.
  \item See \textit{supra} notes 144–55 & 190–204 and accompanying text.
  \item Britton v. Town of Chester, 595 A.2d 492, 497 (N.H. 1991).
  \item See Britton, 595 A.2d at 497–98; Berenson, 341 N.E.2d at 242–43.
  \item See Britton, 595 A.2d at 497–98; Berenson, 341 N.E.2d at 242–43.
  \item See Cornish, \textit{supra} note 25, at 202–03.
  \item Id. at 202 (citing Town of Chesterfield v. Brooks, 489 A.2d 600, 604–05 (N.H. 1985)).
  \item See Britton, 595 A.2d at 497.
\end{itemize}
construct his development provided it is reasonable and creates low- or moderate-income housing.\textsuperscript{214}

The New Hampshire court held that it will not accept exclusionary zoning measures.\textsuperscript{215} Drawing conclusions from \textit{Britton}, it appears that the state has adopted a general welfare concept that extends beyond the individual municipality to the community at large without mandating a fair share approach.\textsuperscript{216}

2. New York

Although New York has not created a “fair share” approach, the test for reasonableness for zoning ordinances has contributed to creation of affordable housing.\textsuperscript{217} In \textit{Berenson v. Town of New Castle}, the Court of Appeals of New York required that municipal zoning “provide for the development of a balanced, cohesive community which will make efficient use of the town’s available land” and that each municipality consider regional affordable housing needs.\textsuperscript{218}

The benefit of the position that the New York court has taken is that it allows a developer to challenge a zoning ordinance as unreasonable for not providing for the municipality’s fair share of community housing.\textsuperscript{219} However, the flaw of the approach is that each municipality is not affirmatively required to provide its fair share of affordable housing without a reasonableness challenge—unlike in New Jersey.\textsuperscript{220} The developer’s challenge becomes an essential element in proving that the

\begin{footnotesize}
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\item \textit{Id.} at 497–98. Reasonableness is defined as “consistent with sound zoning concepts and environmental concerns.” \textit{Id.}
\item \textit{Payne, supra} note 26, at 366 (discussing \textit{Britton} where the Town of Chester had created exclusionary zoning through large lot sizes and limited multifamily development).
\item \textit{See id.} at 369.
\item Chester, combined with the constitutional theory espoused by the \textit{Mount Laurel} cases . . . confirms what amounts to a consensus among courts that have faced exclusionary zoning/affordable housing claims. The concept of a “regional general welfare” that must be served by the assemblage of land use controls has become so well established as to make it an easy doctrinal call for courts in other states who must make similar decisions.
\item \textit{See Solinski, supra} note 24, at 42.
\item \textit{See Solinski, supra} note 24, at 42–43 (explaining that the New York courts have chosen to assess the reasonableness of what the municipality has done in consideration of present and future housing needs).
\item \textit{See id.} The New York requirements of a municipality are much more passive than the New Jersey courts, which “require municipalities to act affirmatively and aggressively to ensure the construction of lower income units.” \textit{See id.} at 42.
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municipality has not provided its share of regional affordable housing.\textsuperscript{221}

\section*{IV. Statewide Mandatory Inclusionary Zoning Is Constitutional Under an Impact Fee Analysis}

Mandatory inclusionary zoning approaches offer developers, municipalities, and low- and moderate-income residents advantages over other inclusionary zoning techniques. The optimal approach is state legislation requiring mandatory inclusionary zoning by every municipality—permitting the municipality to determine the proper set-asides through general statewide guidelines—based upon a municipal comprehensive plan.\textsuperscript{222} Because all municipalities will have an affordable requirement, developers will have little incentive to take development elsewhere, thus preventing a race to the bottom.\textsuperscript{223}

The fundamental element of such an approach is state adoption of an affordable housing planning requirement for each municipality.\textsuperscript{224} This approach recognizes that some land use concerns extend beyond the municipality and therefore should be planned for accordingly.\textsuperscript{225} All states, including non-plan states, should require comprehensive planning of affordable housing.\textsuperscript{226} A plan for affordable housing

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\item \textsuperscript{221} See id. at 43.

\item \textsuperscript{222} See Powell, supra note 40, at 202. This approach can create difficulties in the context of a weaker real estate market; however, by requiring this program everywhere, affordable housing becomes integrated into the community and thereby protected. See Primer, supra note 51, at 10–11; Powell, supra note 40, at 202. Traditional zoning is no longer sufficient to provide the affordable housing needed today. See Brian W. Ohm & Robert J. Sitkowski, Integrating New Urbanism and Affordable Housing Tools, 36 Urb. Law. 857, 865 (2004).

\item \textsuperscript{223} See Morgan, supra note 27, at 383–84. Critics may argue that development within the state will cease, but this argument seems unlikely to prevail. See Porter, supra note 19, at 220; supra Part I.E.

\item \textsuperscript{224} See Witten, supra note 157, at 552 (arguing that Massachusetts must adopt a planning approach similar to California to provide affordable housing). A planning requirement helps to insulate the program from judicial intervention because the plan will support the ordinance as rational. See Netter, supra note 13, at 167, 168. The program will require revision on a continual basis, similar to California’s requirement that each municipality update its housing element once every five years. See Curtin & Talbert, supra note 20, at 23; Netter, supra note 13, at 167.

\item \textsuperscript{225} See Morgan, supra note 27, at 372–73 (explaining that environmental concerns and the need for affordable housing was the motivation behind states adopting comprehensive planning).

\item \textsuperscript{226} See Witten, supra note 157, at 552. Witten sets forth five steps to solve the affordable housing crisis in Massachusetts. See id. at 552–53. First, the state must adopt mandatory planning that resembles California. Id. at 552. Second, there must be a statewide housing plan. Id. Third, cities and towns must be given time to comply with the statewide and municipal housing plans. Id. Fourth, the state must authorize impact fees and mandatory
\end{enumerate}
\end{footnotesize}
should consider present and future needs based upon factors outlined in the statute, including population, housing supply, and buildable land.\textsuperscript{227}

In addition to creating a plan, municipalities should be required to legislatively enact an inclusionary program, specifying the “percent of units required, affordability level, resale provisions, deed restrictions, physical standards for the affordable units, price and rent levels, [and] selection of tenants and buyers.”\textsuperscript{228} This municipal legislation should include goals and policies for the creation of affordable housing.\textsuperscript{229}

Ultimately, this type of program has the benefit of providing affordable housing at a low cost to the general public.\textsuperscript{230} In addition, the program ensures the creation of a “fair share” of affordable units by all municipalities,\textsuperscript{231} provides adequate enforcement techniques,\textsuperscript{232} and is constitutional based upon an impact fee-like analysis.\textsuperscript{233}

A. A “Fair Share”—The Creation of Real Affordable Housing

All inclusionary programs have some relationship to a community providing its “fair share” of affordable housing.\textsuperscript{234} The benefit of a mandatory approach is that the fair share must be part of the planning of each community—not something judicially imposed without sufficient enforcement mechanisms.\textsuperscript{235} This planning, which has proven successful in California, requires municipalities to submit affordable housing plans to state and regional government for approval.\textsuperscript{236} A coordinated effort ensures that affordable needs are con-
sidered together with other land use needs. Therefore, the planning process for affordable housing becomes part of the municipality’s land use plan, not superior to other land use concerns.

Unlike the eastern state approaches, which have enacted programs whereby a developer can reduce the obstacles to affordable housing, a widespread solution should create affordable housing with any new development. The inclusionary program of each municipality should require contributions from both residential and commercial development. For commercial development, the program should require creation of affordable housing off-site sufficient to house employees from the jobs created by the development.

For residential units, the program should model Napa, California’s program, whereby the units are built on-site absent special approval. In the event that the developer is able to obtain this special approval, the city must require additional off-site units or a fee in excess of the cost of on-site units. This type of program will encourage on-site development that has the benefit of integrating the community, and therefore provides significant economic and sociological benefits.

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237 See id. at 13.
238 Cf. Witten, supra note 157, at 530 (explaining that the Massachusetts program permits developers that provide twenty-five percent affordable units to exempt their project from any local regulation).
239 See PRIMER, supra note 51, at 11; Kautz, supra note 7, at 974–75.
242 See Home Builders Ass’n of N. Cal. v. City of Napa, 108 Cal. Rptr. 2d 60, 62–63 (Ct. App. 2001); Curtin & Naughton, supra note 56, at 914. Napa’s program requires special approval from the city council to not build the affordable units on-site, but the planning board may be capable of making a sufficient finding. See id. San Mateo, California has a similar approach to Napa, but without any alternatives—on-site affordable units must be constructed with any new development. See Kautz, supra note 7, at 1019–20. The approach is similar to traditional zoning regulation because just as developers must comply with zoning, they must comply with the inclusionary requirement. See id. at 1020.
243 See Porter, supra note 19, at 229 (explaining that although off-site units or a fee in-lieu-of development may increase the number of affordable units, “it tends to defeat the goal of distributing affordable housing throughout the community and increasing neighborhood housing diversity”).
244 See Burchell & Galley, supra note 14, at 28 (explaining that the integration “avoids the problems of over-concentration, ghettoization and stigmatization generally associated with solely provided and isolated affordable housing efforts”); Talbert & Costa, supra note 18, at 557–58; Morgan, supra note 27, at 379 (illustrating sociological benefits, including “better educational and employment opportunities”). In addition, on-site units generally have higher quality construction because they are constructed together with market-rate units. See id. (claiming that integrated affordable units encourage better construction be-
Unlike the Maryland approach—which limits its affordable housing program to specific lot and project sizes—a mandatory inclusionary zoning program should not have exclusions that permit a developer to construct outside of the inclusionary requirements. The program should require that the construction of even single family residential units require a fee to be paid toward the creation of affordable housing. By requiring municipalities to adopt mandatory inclusionary zoning based on a comprehensive plan, the program can effectively create affordable housing with any new development.

B. Enforcement Mechanisms

While the creation of an inclusionary program may be possible in every state, there must be a way to enforce such a program for it to be effective. The difficulty with eastern programs is that they are based upon regional planning of affordable housing—originating from a “regional general welfare.” This regional planning is especially difficult when these states have no existing regional planning structure. Without adequate planning, the only remedy to provide affordable housing in these eastern states is through lawsuits by would-be developers.

A mandatory, statewide, inclusionary zoning program, however, would resolve these enforcement difficulties. Inherent in state government is a preexisting structure to enforce statutes on municipalities: administrative agencies and the courts. Currently, many inclusionary statutes require municipalities to submit their affordable housing plans

cause the “marketability of conventional units is likely to be affected by the appearance of nearby low income units”).

245. See Brown, supra note 13, at 24; supra notes 177–78 and accompanying text.
246. See Cecily T. Talbert & Nadia L. Costa, Inclusionary Housing Programs: Local Governments Respond to California’s Housing Crisis, 30 B.C. ENVTL. AFF. L. REV. 567, 575 (2003) (discussing the City of Napa ordinance that requires contributions from single family developments).
247. See Powell, supra note 40, at 202–03.
248. See id. at 202.
249. See Witten, supra note 157, at 523 n.59 (naming the limited number of regional planning agencies).
250. See Porter, supra note 19, at 232 (explaining that the remedy in Massachusetts belongs solely to the developer); Solinski, supra note 24, at 54 (discussing the expense of challenging a municipality in New Jersey for violating the “fair share” requirement).
251. This is the Massachusetts approach to inclusionary zoning. See Witten, supra note 157, at 532; see also supra Part III.A.2.
to a regional or state administrative agency for review. California, as illustrated earlier, uses such an arrangement, whereby the Department of Housing and Community Development must approve any new or modified municipal housing plan. This type of built-in enforcement allows the state to retain a check on local government housing policy. However, in the absence of local inclusionary zoning, alternate enforcement can be achieved through an override of local land use regulation, financial sanctions, or judicial action. The most effective solution seems to be empowering municipalities with the ability to plan for affordable housing in conjunction with state oversight.

C. The Impact Fee Analysis Answer to Inclusionary Zoning Challenges

The difficulty with these programs, as discussed above, is courts’ unwillingness to see these mandatory inclusionary zoning ordinances as traditional land use ordinances that deserve broad deference. However, the problem can be solved through state authorization of mandatory set-asides of affordable units which should be given deference by the courts. Although the development community will likely continue to argue that such a program violates due process and affects a taking, both analyses are dependent upon whether the ordinance implicates a legitimate state interest. As we have seen, affordable housing can be justified as a legitimate state interest. When a court

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252 See Morgan, supra note 27, at 374–77 (discussing approaches of Oregon, Florida, California, and Washington that require municipalities to have their affordable housing plans reviewed).

253 See Curtin & Talbert, supra note 20, at 12–13.

254 See id.

255 See Witten, supra note 157, at 553 (arguing that the use of enforcement techniques should be a last resort).

256 See Porter, supra note 19, at 248.

257 See Mt. Laurel II, 456 A.2d 390, 467 (N.J. 1983); see also supra Part III.A.1.

258 See Kautz, supra note 7, at 989; see also Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926). Some courts have seen inclusionary zoning as outside the scope of a traditional land use ordinance—outside of “home rule” which is the grant of the police power in many states—and, therefore requires an authorizing statute. See Netter, supra note 13, at 166 (discussing Massachusetts Supreme Judicial Court finding of inclusionary zoning to be outside the scope of home rule).

259 See Kautz, supra note 7, at 1006 (explaining that an inclusionary ordinance will not be subject to the same judicial scrutiny as an exaction).

260 See Agins v. City of Tiburon, 447 U.S. 255, 260 (1980); Primer, supra note 51, at 9–10 (illustrating that once a finding of a legitimate state interest is reached, there is no taking). The first prong of Agins requires that to have a taking, there must be no legitimate state interest. See Agins, 447 U.S. at 260.

261 See supra notes 99–102 and accompanying text.
applies an impact fee analysis to a mandatory inclusionary ordinance, it will likely find that the ordinance passes constitutional muster.262 Both impact fees and mandatory inclusionary ordinances attempt to compensate a community for the impact of development.263 From a constitutional analysis, both are legislative actions and therefore are entitled to deference by the courts.264

Having found the ordinance constitutional, the only remaining analysis for a court would be whether the municipality complies with the statutory requirements.265 The rationale for providing substantial deference to impact fees is that they are legislative and based upon a plan created with regard to the impact of development.266 Inclusionary zoning ordinances that are authorized by the state legislature deserve the same general deference because they are also legislatively enacted.267 The municipality must be able to demonstrate that the inclusionary ordinance is based upon the need for affordable housing in the community.268 To determine whether an inclusionary zoning ordinance is constitutional, the court need only consider whether the municipality has acted within the scope of its authority.269 If the law is outside the scope of the authority it will be found to be arbitrary or capricious and therefore void.270

In addition, the similarities between an impact fee and mandatory inclusionary zoning illustrate why an exaction analysis is mis-
placed in this context. Exactions require closer scrutiny because of the potential for abuse when a decision applies exclusively to a single landowner. Unlike an exaction, both mandatory inclusionary ordinances and impact fees are not adjudicative but rather are legislative. Therefore, unlike exactions, both impact fees and inclusionary zoning ordinances deserve broad deference by the courts.

Finally, neither impact fees nor mandatory inclusionary zoning ordinances are takings because they do not deny developers substantially all economic use of their property. Both programs require developers to pay for the public costs of their development—in money or affordable housing. Rather than being denied their right to develop, developers are forced to pay a fee for that right. Similar to rent control, developers are not being denied their investment by mandatory inclusionary ordinances.

**Conclusion**

To effectively create affordable housing, a community should adopt a mandatory inclusionary zoning regime. Each community should create a comprehensive plan for the provision of this affordable housing based upon a “fair share” of the regional need for such housing. The program would create affordable housing with any new development.

Many states have already authorized some type of inclusionary zoning. However, even in states that have yet to enact such legislation, the judiciary seems to provide room for inclusionary approaches. In addition, the *Home Builders Ass’n of Northern California v. City of Napa* decision further illustrates that the constitutional rights of developers will not bar inclusionary programs.

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271 See Kleven, *supra* note 108, at 112; see also, Kautz, *supra* note 7, at 1006 (discussing how courts are finding that generally applicable fees are not considered under an exaction analysis).


273 See *Curtin & Naughton, supra* note 56, at 914.

274 See *Talbert & Costa, supra* note 246, at 578.

275 See *San Remo Hotel L.P. v. City of San Francisco*, 41 P.3d 87, 111 (Cal. 2002) (providing impact fee ordinance broad deference); see also *supra* notes 122–31 and accompanying text.

276 See *Leitner & Schoettle, supra* note 117, at 492; *Parker, supra* note 91, at 186 (explaining that a developer can be required to provide affordable housing because the property still has value).

277 See *Mandelker, supra* note 78, at 35.

278 See *Kautz, supra* note 7, at 1012–13. The difference with an inclusionary ordinance is that a developer, unlike a landlord, is not entitled to a fair return on affordable units. See *id.*
Any legislative affordable housing program deserves broad judicial deference. Like an impact fee, once the program is authorized it should be considered constitutional. Therefore, in looking to the future, the *Home Builders* argument should be advanced in favor of inclusionary programs; inclusionary programs are legislative, like an impact fee, and therefore deserve deference by the courts. This constitutional analysis will permit these programs to address a serious social concern—providing affordable housing to Americans nationwide.
CIVIL LIABILITY FOR WARTIME ENVIRONMENTAL DAMAGE: ADAPTING THE UNITED NATIONS COMPENSATION COMMISSION FOR THE IRAQ WAR

KEITH P. McMANUS*

Abstract: There is little doubt that war has a deleterious effect on the natural environment of battlegrounds. Customary principles of international law, as well as more formal instruments such as treaties, address wartime environmental protection. An analysis of these mechanisms reveals that they are inadequate to ensure protection and restoration of environmental resources damaged during war. Thus, a mechanism is needed for assessing civil liability against nations for any wartime environmental damage. The United Nations Compensation Commission (UNCC), created to compensate victims of the Persian Gulf War, is a mechanism that if modified could fill this void. This Note focuses on the modifications that could make the UNCC a successful mechanism for assessing civil liability for wartime environmental damage. Further, this Note applies the adapted UNCC to the Iraq War, and examines whether U.S.-led coalition forces should be held civilly liable for damage to Iraq’s natural environment.

Introduction

The effects of war extend well beyond the destruction of strategic targets; civilian casualties are a devastating byproduct of inaccurate weaponry and military intelligence. Beyond human casualties, however, war also has a significant detrimental effect upon a nation’s natural environment. What international law provisions exist to protect the environment from wartime degradation? Can a nation be held civilly responsible when potentially irreplaceable environmental resources are damaged or destroyed during combat? This Note will address these questions, viewing the latter through the lens of the Iraq War, also known as Operation Iraqi Freedom, that commenced in March 2003.

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Part I of this Note will examine historical impacts of warfare on the natural environment, including the current Iraq War. Part II will focus on the customary principles of international law governing war. Part III will address the current international environmental law provisions concerning war and environmental degradation. Part IV will examine the possible civil liability schemes for environmental damage incurred during war. Part V will focus on adapting the United Nations Compensation Commission (UNCC) to create a framework for civil compensation for environmental damage caused by war that can be applied to modern conflicts, particularly the Iraq War. Finally, Part VI will apply the adapted UNCC framework to the Iraq War as a method of holding U.S.-led coalition (Coalition) forces civilly liable for environmental degradation caused during the war.

This Note is not intended to offer a critique of the motives or necessity of the Iraq War, but rather addresses state responsibility for actions during war that damage a nation’s valuable natural environment.

I. THE IMPACT OF WAR ON THE ENVIRONMENT

A. Historical Overview of the Impact of War on the Environment

The effects of war on the environment—whether as an unintentional byproduct of conventional warfare or a deliberate act to gain strategic advantage—are both catastrophic and well-catalogued. 1 In 146 B.C., the Romans salted the fields of Carthage to make the land useless for agricultural production. 2 The United States’ use of atomic bombs on the Japanese cities of Hiroshima and Nagasaki at the end of World War II produced widespread environmental devastation, 3 and exposed the environment to high levels of radiation. 4 In the Vietnam War, the United States employed substances such as Agent Orange, which resulted in deforestation and destruction of vegetation. 5

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3 See Hourcle, supra note 1, at 657.
5 See id.
The growth of the environmental movement in the late 1960s and early 1970s expanded public consciousness of the environmental effects of certain warfare techniques. Despite this new awareness, however, war has continued to have disastrous effects on the natural environment.

B. The Current Situation: The Persian Gulf War and Beyond

In 1991, Iraq, under the control of Saddam Hussein, invaded neighboring Kuwait, beginning the Persian Gulf War and a series of environmental catastrophes. Iraq pumped up to 4 million barrels of oil into the Persian Gulf, endangering marine wildlife, migratory birds, and the fishing industry. In addition, Iraq set hundreds of Kuwaiti oil wells ablaze, spewing carcinogenic smoke that lowered temperatures and resulted in “black rain.” The total impact of Iraq’s military action on the natural environment is difficult to estimate. So far, twelve nations have submitted claims to the United Nations (U.N.), estimating the cost of environmental damage from the Persian Gulf War at $79 billion.

More recently, U.S.-led air strikes in the former Yugoslavia resulted in environmental damage. Operation Allied Force, under the aegis of the North Atlantic Treaty Organization (NATO), caused environmental degradation through the bombing of industrial fuel and chemical plants. In one instance, air strikes resulted in the release of “2,100 metric tons of ethylene dichloride . . . and 200 kilograms of

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6 See id. at 488.
9 Kass & Gerrard, supra note 8, at 3; see Hourcle, supra note 1, at 657; Gupta, supra note 7, at 253.
13 Id.
metallic mercury” which polluted soil, a canal, and the Danube River.\textsuperscript{14}

More current and relevant to this analysis is the Iraq War, commenced by forces in March 2003.\textsuperscript{15} There is concern that the Iraq War will have a significant effect on Iraq’s environment and water and could result in destruction of endangered species.\textsuperscript{16} Furthermore, the use of weapons that contain uranium by U.S. forces could result in widespread environmental contamination.\textsuperscript{17} At the beginning of the Iraq War, a group of two hundred lawyers and scholars from fifty-one nations sent a letter to U.N. Secretary-General Kofi Annan, warning of the possibility of “massive . . . environmental destruction.”\textsuperscript{18} Former U.N. Chief Weapons Inspector Hans Blix said of the impending Iraq War: “To me the question of the environment is more ominous than that of peace and war.”\textsuperscript{19}

Another concern with the Iraq War from an environmental destruction standpoint is the protection of archaeological and culturally significant artifacts, which are often included in a broad definition of “the environment.”\textsuperscript{20} Reports have indicated that the Iraq War has caused damage to some of Iraq’s most ancient artifacts, including the Ishtar Gate, which sustained damage when U.S.-led troops were based in the historic city of Babylon.\textsuperscript{21}

In March 2003, the U.N. Environment Programme (UNEP) issued the \textit{Desk Study on the Environment in Iraq}.\textsuperscript{22} The stated purpose of the \textit{Desk Study} was to aid in “tackling the immediate post-conflict hu-

\begin{itemize}
\item \textsuperscript{14} Id. at 472.
\item \textsuperscript{15} David E. Sanger & John F. Burns, \textit{Threats and Responses: The White House; Bush Orders Start of War on Iraq; Missiles Apparently Miss Hussein}, N.Y. Times, Mar. 20, 2003, at A1. In addition to the Iraq War, U.S. forces also bombed Afghanistan in 2001 as part of Operation Enduring Freedom. \textit{See} Cohan, \textit{supra} note 4, at 490. The campaign in Afghanistan has resulted in deforestation as well as significant harm to wildlife. \textit{Id}.
\item \textsuperscript{16} Pianin, \textit{supra} note 11.
\item \textsuperscript{17} \textit{See} Charles Seabrook, \textit{War in the Gulf: On the Front Lines: The Iraqi Environment; Another Casualty of War}, Atlanta J.-Const., Apr. 9, 2003, at 16A.
\item \textsuperscript{19} Pianin, \textit{supra} note 11.
\item \textsuperscript{20} See Cohan, \textit{supra} note 4, at 485.
\item \textsuperscript{21} Sue Leeman, \textit{U.S.-Led Troops Inflicting Widespread Damage on Babylon, Museum Warns}, Associated Press, Jan. 15, 2005, \textit{available at} 1/16/05 APWORLD 00:18:46 (Westlaw). In addition, this account reported that armored vehicles destroyed “2,600-year-old brick pave[ment] . . . . [The damage] includ[ed] broken bricks stamped by King Nebuchadnezzar II . . . .” \textit{Id}.
\end{itemize}
manitarian situation in Iraq.”

Among the “environmental impacts and risks” of the Iraq War discussed in the Desk Study were, inter alia, disruption of power and water supplies, waste management and disease, burning oil wells, bomb damage, damage to industrial sites, and physical degradation of ecosystems. In addition, the Desk Study indicates that as of April 15, 2003, the U.S.-led “coalition air forces had used 18,275 precision-guided munitions . . . and around 8,975 unguided munitions.” The eight hundred Tomahawk cruise missiles used in the Iraq War as of April 12, 2003 were more than twice the amount used throughout the duration of the Persian Gulf War.

II. THE CUSTOMARY LAW OF WAR AND ITS RELATIONSHIP TO WARTIME ENVIRONMENTAL DEGRADATION

As shown by the examples listed above, the environment is at risk during wartime. But what international law mechanisms exist to govern the conduct of nations during wartime? How can these mechanisms be applied to determine whether or not the military actions of a nation that result in environmental destruction are lawful?

A. Customary Principles of the Law of War

The law of war provides four customary principles that can be applied to an environmental analysis: necessity, proportionality, discrimination, and humanity. These general principles are drawn from the Hague Convention, signed in 1907.

Under the customary principle of necessity, a nation may use any amount of force necessary to defeat the enemy, so long as those techniques are legal under the laws of war. One commentator summarizes this principle as “each destructive act must be connected to the submission of the enemy.” This principle would seem to afford na-
tions a wide degree of discretion for choice of military action, as one could argue that destruction of the natural environment is necessary for the defeat of the enemy. This principle, however, must be balanced against the remaining three customary principles.

The customary principle of proportionality serves to mitigate the principle of necessity by requiring that military actions or weaponry not cause excessive destruction or loss of life when compared to the military advantage sought by the action. The principle of proportionality is perhaps the most effective principle to apply to an environmental analysis. For example, it is obvious that the Roman’s salting of fields and the Iraqi’s intentionally causing an oil spill would be illegal because the destruction caused by the acts is excessive when compared to the pursued military advantage.

The customary principle of discrimination holds that militaries must distinguish between military and civilian targets, and use appropriate weapons that are capable of this type of discrimination. Under this principle, it is illegal to attack nonmilitary targets, such as environmental resources like forests and bodies of water.

The humanity principle is embodied in the notion that “[m]ilitary forces at war must . . . take all possible measures to avoid unnecessary suffering.” Much of the environmental degradation that results from warfare, such as the use of biological weapons or contamination of the natural environment creates unnecessary human suffering. Historically, the humanity principle only applied to human suffering, and therefore, those environmental harms that affected human suffering. Following Iraq’s actions in the Persian Gulf War, some have suggested

Wilcox also points out that this “principle was articulated in writing as early as 1868 in the Declaration of St. Petersburg.” Id. at 303.

32 See id.

33 See id.

34 See Hourcle, supra note 1, at 667–68. Hourcle points out that Article 51 of Additional Protocol I to the Geneva Convention codifies the principle of proportionality: “[A]n attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.” Id. (quoting Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 51, June 8, 1977, 1125 U.N.T.S. 3, 16 I.L.M. 1391 [hereinafter Protocol I]).

35 See Wilcox, supra note 10, at 303.

36 Hourcle, supra note 1, at 665–66.

37 See id. at 666.

38 Wilcox, supra note 10, at 303.

39 See Cohan, supra note 4, at 495–96.

40 See id. at 496.
that the international community has shifted to a wider view of unnecessary suffering in applying the humanity principle.41

These general customary principles of the law of war were not developed to protect the environment during wartime; however, the breadth of the principles can be applied to evaluate the actions of a nation to determine whether or not a military action that results in environmental degradation is lawful under the international law of war.42

B. The 1907 Hague Convention

In addition to the customary principles of the law of war, official treaties that codify general laws of war can be applied to the area of wartime environmental protection.43 First among these treaties is the Hague Convention of 1907, which is an early example of a binding law of war.44 The provision of the Hague Convention that seems most applicable to environmental protection is Article 23(g), which states that it is unlawful “[t]o destroy or seize the enemy’s property, unless such destruction or seizure be imperatively demanded by the necessities of war.”45 There are many legal traditions, including the public trust doctrine,46 and old English cases like Keeble v. Hickeringill, that consider natural resources to be property.47 Under this viewpoint, Article 23(g) would stand as a strong, binding international law prohibiting the destruction of the environment during war unless imperatively necessary.48

However, it is this very clause that makes Article 23(g) somewhat problematic in affording protection against environmental destruction.49 The clause requires that military conduct be balanced against the principle of necessity, which could trump environmental concerns in many instances.50

41 Id.
42 See Wilcox, supra note 10, at 304.
43 See id.; Alexander, supra note 12, at 475–76.
44 Alexander, supra note 12, at 476.
45 Hague Convention, supra note 29, art. 23(g); see Wilcox, supra note 10, at 304–05.
48 Sharp, supra note 31, at 11; see Wilcox, supra note 10, at 304.
50 See id.
The Geneva Convention of 1949\footnote{Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287, 6 U.S.T. 3516 [hereinafter Geneva Convention].} is very similar to the 1907 Hague Convention in scope and application to environmental protection.\footnote{See Simonds, supra note 49, at 171–72.} Like the Hague Convention, Article 53 of the Geneva Convention forbids an occupying force from destroying any type of property, except when “absolutely necessary.”\footnote{Geneva Convention, supra note 51, art. 53; Simonds, supra note 49, at 171–72.} In terms of environmental protection, the Geneva Convention has the same limitation as the Hague Convention, in that there is a built-in recognition of military necessity.\footnote{See Geneva Convention, supra note 51, art. 53.} The Geneva Convention is even less useful for environmental protection because its stated purpose is “to protect a strictly defined category of civilians from arbitrary action on the part of the enemy,” which tends to limit the expansion of Article 53.\footnote{Simonds, supra note 49, at 172 (quoting Commentary on the IV Geneva Convention 301–02 (Jean S. Pictet ed., 1958)).}

III. INTERNATIONAL ENVIRONMENTAL LAW AND WAR

A. International Instruments Respecting War and the Environment

The customary principles of the law of war and the two binding conventions discussed above are important because they represent the basic underpinnings of the law of war.\footnote{Hourcle, supra note 1, at 660–61.} However, these principles are limited in application to environmental protection during wartime because they were not drafted with the intention of being applied to the environment.\footnote{See Alexander, supra note 12, at 478.} In 1977, this all changed with the introduction of the word “environment” into the international law of war.\footnote{Hourcle, supra note 1, at 670.}

1. Protocol I to the Geneva Convention

Protocol I to the Geneva Convention\footnote{Protocol I, supra note 34.} was the first formal international law of war document to use the word “environment.”\footnote{Hourcle, supra note 1, at 670.} Although Protocol I has not been ratified by the United States, its provisions concerning the environment “have been officially cited by the
United States.”\textsuperscript{61} The relevant portions of the document specifically address wartime environmental degradation and the associated weaponry.\textsuperscript{62} The three relevant sections of Protocol I are Articles 35(3), 55, and 56.\textsuperscript{63}

Article 35(3) states that “[i]t is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment.”\textsuperscript{64}

Article 55, entitled “Protection of the Natural Environment,” states that “[c]are shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage” and “includes a prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment . . . .”\textsuperscript{65}

Article 56, though not aimed specifically at environmental protection, could help to avoid significant environmental damage.\textsuperscript{66} Article 56 seeks to protect public works and installations that could have disastrous environmental results if destroyed, “namely dams, dykes and nuclear electrical generating stations.”\textsuperscript{67} Article 56, however, is limited because it does not include industrial facilities, and therefore, does not prohibit the kind of environmental destruction that occurred during Operation Allied Force in the former Yugoslavia.\textsuperscript{68}

Although the use of the term “natural environment” is a promising and noteworthy development in the body of the law of war,\textsuperscript{69} other phrases in these articles of Protocol I have proven troublesome.\textsuperscript{70} Both Articles 35(3) and 55 only prohibit damage to the natural environment that is “widespread, long-term and severe.”\textsuperscript{71} The Department of Defense has stated that “[d]uring . . . negotiation [of Protocol I], there was general agreement that one of its criteria for determining whether a violation had taken place (“long term”) was

\textsuperscript{61} Id. at 672.
\textsuperscript{63} See Protocol I, supra note 34, arts. 35, 55, 56; Hourcle, supra note 1, at 672–73.
\textsuperscript{64} Protocol I, supra note 34, art. 35.
\textsuperscript{65} Id. at art. 55.
\textsuperscript{66} See Rich, supra note 62, at 452.
\textsuperscript{67} Protocol I, supra note 34, art. 56.
\textsuperscript{68} Hourcle, supra note 1, at 658, 674.
\textsuperscript{69} See Simonds, supra note 49, at 173.
\textsuperscript{70} See Hourcle, supra note 1, at 673.
\textsuperscript{71} Protocol I, supra note 34, at 28; see Hourcle, supra note 1, at 673.
measured in decades.” Based on this definition of “long-term” the Department concluded that it was unclear whether the environmental damages caused by Iraq in the Persian Gulf War “would meet the technical-legal use of that term in Protocol I.” The Defense Department’s interpretation is in spite of the fact that the damage was “severe in a layman’s sense of the term.”

Another phrase of concern is “intended or may be expected” in Article 55. The inclusion of these terms means that there is no prohibition on collateral environmental damage when it is not intended or expected—the most likely kind of damage to occur during war. This narrow reading on the prohibition of environmental damage in Protocol I is supported by a Department of Defense report which states that “[t]he prohibitions on damage to the environment contained in Protocol I were not intended to prohibit battlefield damage caused by conventional operations . . . .”

Protocol I to the Geneva Convention represents an important development for the recognition of the need for environmental protection during war, but it is greatly limited in its application and “lack[s] strength due to vague and uncertain wording.”

2. The Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques

Another international law mechanism that makes explicit reference to environmental protection during war is the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (ENMOD). The purpose of ENMOD—which was drafted in response to the use of deforestation chemicals by the United States in Vietnam—is to prohibit environmental

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73 Id. at 637.
74 Id.
75 Protocol I, supra note 34, art. 55; see Hourcle, supra note 1, at 673.
76 See Hourcle, supra note 1, at 673.
77 DOD Report, supra note 72, at 637.
78 Hourcle, supra note 1, at 674.
80 Cohan, supra note 4, at 511.
modification for hostile purposes. The significance of ENMOD is apparent when compared to the wording of Protocol I. Article I of ENMOD prohibits any party to the treaty from “hostile use of environmental modification techniques having widespread, long-lasting or severe effects as the means of destruction, damage or injury . . . .”

While ENMOD contains the same adjectives—“widespread,” “long-lasting,” (“long-term” in Protocol I) and “severe”—as Protocol I, ENMOD uses “or” instead of “and” in connecting these terms. This creates a more stringent prohibition, since any environmental modification that results in widespread, long-lasting, or severe effects would be prohibited, as opposed to Protocol I, which requires that all three criteria be met. Also of importance is the fact that ENMOD does not provide an exception for military necessity.

Despite these important differences between ENMOD and Protocol I, critics suggest that ENMOD is not likely to curtail environmental degradation caused by war. One major criticism is that ENMOD is limited by the fact that it prohibits environmental modification techniques only, and does not forbid conventional warfare tactics that damage the environment as a byproduct. Critics have suggested that ENMOD, therefore, prohibits “the kinds of methods used by villains in science fiction rather than conventional warfare,” since the environmental modification must be a “deliberate manipulation of natural processes—the dynamics, composition or structure of the earth . . . .”

Therefore, ENMOD’s significance is rooted in the fact that it is the first international treaty to come into existence for the sole purpose of environmental protection during war, rather than for its practical effect on the wartime conduct of nations.

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81 ENMOD, supra note 79, art. 1.
82 Hourcle, supra note 1, at 675–76; Rich, supra note 62, at 453.
83 ENMOD, supra note 79, art. 1.
84 Protocol I, supra note 34, arts. 35, 55; ENMOD, supra note 79, art. 1; see Hourcle, supra note 1, at 675–76; Rich, supra note 62, at 453.
85 Hourcle, supra note 1, at 675–76.
86 Rich, supra note 62, at 452–53.
87 Hourcle, supra note 1, at 675–76; Rich, supra note 62, at 453.
88 See Hourcle, supra note 1, at 675.
89 Id.
90 ENMOD, supra note 79, art. 2.
91 See Hourcle, supra note 1, at 675; Rich, supra note 62, at 453.
3. Rio Declaration

Another international document that addresses environmental degradation that results from war is the Rio Declaration on Environment and Development of 1992.\(^\text{92}\) The Rio Declaration was a followup to the Stockholm Conference on the Human Environment of 1972,\(^\text{93}\) which was the first U.N. Conference that dealt solely with the environment.\(^\text{94}\) Unlike Protocol I and ENMOD, the Rio Declaration is a nonbinding document.\(^\text{95}\) Nevertheless, it was negotiated and agreed to by 176 nations, and represents an “important example of the use of soft law instruments in the process of codification and development of international law.”\(^\text{96}\)

Most applicable to the issue of war and the environment are Principles 23 and 24 of the Rio Declaration.\(^\text{97}\) Principle 23 states, “[t]he environment and natural resources of people under oppression, domination and occupation shall be protected.”\(^\text{98}\) Principle 24 states, “[w]arfare is inherently destructive of sustainable development. States shall therefore respect international law providing protection for the environment in times of armed conflict and cooperate in its further development, as necessary.”\(^\text{99}\)

Although these principles are nonbinding, some commentators consider them to be valuable instruments.\(^\text{100}\) Most noteworthy about Principle 23 is that it establishes “an absolute right to environmental protection and not one balanced by the needs of the belligerent parties.”\(^\text{101}\) In this way, it sidesteps the pitfall of military necessity that so dominates customary principles of the law of war and the early treaties.\(^\text{102}\) Furthermore, Principle 23 recognizes oppression and domina-

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\(^{95}\) See id. at 9.

\(^{96}\) Id.

\(^{97}\) Hourcle, supra note 1, at 677–78; Rich, supra note 62, at 454.

\(^{98}\) Rio Declaration, supra note 92, princ. 23.

\(^{99}\) Id. princ. 24.

\(^{100}\) See Birnie & Boyle, supra note 94, at 9; Hourcle, supra note 1, at 678.

\(^{101}\) Hourcle, supra note 1, at 678.

\(^{102}\) See discussion supra Part II.
tion—likely the predominant nature of hostilities in the modern age. Principle 24 is significant because it recognizes the need to further develop international wartime environmental protection law, although it does not give any specific guidance.

4. Red Cross Guidelines

Another nonbinding international wartime environmental protection document that could be useful in determining breaches of international law is published by the International Committee of the Red Cross. Entitled Guidelines for Military Manuals and Instructions on the Protection of the Environment in Times of Armed Conflict, the publication states that wartime environmental degradation which is not necessary is a breach of international humanitarian law and is punishable as such. The Guidelines list a series of prohibited acts within environmental degradation, including deforestation, and destruction of civilian objects or historic monuments. The Guidelines are a compilation of existing international environmental laws. This is noteworthy because the Guidelines “translate often vague international norms into daily practice.” As a result, the bulk of international environmental protection law should be incorporated into the military operations manuals of all nations, raising the possibility that environmental war crimes could be successfully enforced at law.

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103 Rich, supra note 62, at 454.
104 See Hourcle, supra note 1, at 678.
106 Drummbl, supra note 105, at 132 (quoting San Remo Manual on International Law Applicable to Armed Conflicts at Sea (Louise Doswald-Beck ed., 1995)).
107 ICRC Guidelines, supra note 105, art. III.
108 Id. art. I(1).
109 Drummbl, supra note 105, at 132.
110 See id. Drummbl argues that the ICRC Guidelines “could constitute the level of objective knowledge imputed to all military and civilian leaders and agents for purposes of culpability under international criminal legislation.” Id.
5. Draft Articles on State Responsibility

In 1996, the International Law Commission adopted Draft Articles on State Responsibility. The purpose of the Draft Articles is to codify rules on state responsibility for wrongful acts, beginning with the principle that “every internationally wrongful act of a State entails the international responsibility of that State.” Most applicable to an environmental analysis is Article 19(3)(d) of the Draft Articles that states “an international crime may result . . . from . . . a serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment.” The importance of this provision is rooted in the fact that it “is one of the few international agreements . . . that demonstrated a willingness to criminalize environmental degradation.”

B. Possible Criminal Enforcement Mechanisms for War-Related Environmental Damage

As evidenced from the discussion of international law, enforcement is a difficult proposition, especially given the limited number of courts that would hear “environmental war crimes” cases. For example, despite the well-documented environmental harm committed by Iraq in the Persian Gulf War, no international tribunal took any steps to prosecute the acts as environmental war crimes.

1. International Court of Justice

One possible enforcement mechanism is the International Court of Justice (ICJ), established as the judicial body of the U.N. through its charter. Under Article 93 of the U.N. Charter, all members of the U.N. are automatically parties to the Court. Although the ICJ is equipped to hear environmental war crimes cases, it is unlikely that it

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112 ILC Draft Articles, supra note 112, art. 1.

113 Id. art. 19(3).

114 Druml, supra note 105, at 139–40.

115 See Hourcle, supra note 1, at 687.

116 Id.


118 Id. art. 93, para. 1.
ever will. Therefore, the ICJ is not an effective mechanism for enforcing environmental war crimes because it is unlikely that any nation would consent to jurisdiction.

2. International Criminal Court

Another possible enforcement mechanism for liability for wartime environmental degradation is the newly formed International Criminal Court (ICC). Organized pursuant to the Rome Statute, the ICC is the first international criminal tribunal. Though not organized with the intention of prosecuting environmental crimes, the Rome Statute includes a reference to environmental degradation in its list of justiciable offenses. Specifically, Article 8 of the Rome Statute includes “[i]ntentionally launching an attack in the knowledge that such attack will cause incidental . . . widespread, long-term and severe damage to the natural environment” among its catalog of “war crimes.”

Similar to the ICJ, it is unlikely that the ICC will be an effective tribunal for prosecuting environmental crimes. Despite the inclusion of environmental damage in the list of war crimes, the Rome Statute has “either a high threshold for the crime or incorporates a military necessity balancing test.” Therefore, it is unlikely that environmental damage caused by conventional warfare would be punishable, although some of Iraq’s actions in the Persian Gulf War may fall within the ambit of the Rome Statute. The unlikelihood of the ICC

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119 See Hourcle, supra note 1, at 687–89; Alexander, supra note 12, at 485.
121 See Hourcle, supra note 1, at 687–88. Yugoslavia attempted to enjoin the conflict in Kosovo by bringing a claim before the International Court of Justice, but it was dismissed for lack of jurisdiction. Id.
124 Rome Statute, supra note 123, art. 8(2)(b)(iv); Drumbl, supra note 105, at 124.
125 Rome Statute, supra note 123, art. 8(2)(b)(iv).
126 See Hourcle, supra note 1, at 688.
127 Id.
128 Sharp, supra note 122, at 241–42.
as an enforcement mechanism for wartime environmental damage “runs counter to the thinking that international humanitarian law may offer the possibility of an effective response to wartime environmental destruction.”  

The ICC is also hampered by the fact that not all nations are, or will likely ever be, parties to the Court—including the United States—for failing to ratify the Rome Statute.

IV. Civil Liability for Wartime Environmental Degradation: Possible Enforcement Mechanisms

The current customary law and treaty system is inadequate for protection of the environment from damage caused by conventional warfare. Civil liability, which has been utilized in past conflicts, may be a more appropriate remedy and could serve as a possible deterrent to methods of warfare that cause environmental damage. This Part will look at various civil liability systems by comparing possibilities and limitations for recouping environmental damage caused by war.

A. United Nations Security Council Enforcement

In response to Iraq’s actions in the invasion of Kuwait during the Persian Gulf War, the U.N. passed Resolution 687, cataloguing Iraq’s actions and detailing reparations. Paragraph 16 of Resolution 687 states “Iraq . . . is liable under international law for any direct loss, damage, including environmental damage and the depletion of natural resources, or injury to foreign Governments, nationals and corporations, as a result of Iraq’s unlawful invasion and occupation of Kuwait.” As a member of the U.N., Security Council resolutions are binding upon Iraq. Thus, it would seem that Security Council enforcement is an effective way to enforce civil liability for environmental damage inflicted during war, since such damage was explicitly

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129 Drumbl, supra note 105, at 124.
130 A full list of nations that have ratified the Rome Statute can be found at the ICC website at http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty11.asp (last visited Feb. 2, 2006).
131 See discussion supra Parts II–III.
134 Id. para. 16.
135 Gupta, supra note 7, at 269.
included in Resolution 687. The Security Council, however, has had problems with enforcing resolutions; therefore, the U.N. created the UNCC through Resolution 687.

B. United Nations Compensation Commission

Paragraph 18 of Resolution 687 “create[s] a fund to pay compensation for claims that fall within paragraph 16 . . . and . . . establish[es] a Commission that will administer the fund.” The UNCC is not a court, but rather is an administrative body that processes claims and determines proper amounts of payment from the fund. Setting up and funding the UNCC turned out to be two very different projects, as a lack of cooperation by Iraq turned a projected $6 billion compensation fund into a mere $21 million by 1993. However, this was sufficient to compensate all those who filed valid personal injury claims. The UNCC set up a series of categories based on the different types of losses that were suffered by individuals. Those who suffered injury due to Iraq’s actions could then submit claims within the categories and receive compensation from the UNCC.

The UNCC represents a novel and potentially powerful tool for civil liability, because unlike the ICJ or ICC, the UNCC can operate without consent from the sanctioned party. As such, the UNCC as it exists could be adapted to future conflicts to recoup the cost of environmental damage, and also to create a deterrent to any environmentally destructive action because of potential civil liability.

There has been extensive critical commentary in this area, discussing the strengths and weaknesses of the UNCC as a mechanism.

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136 See Resolution 687, supra note 133, para. 16.
137 Resolution 687, supra note 133, at para. 18; Libera, supra note 132, at 295; see Gupta, supra note 7, at 267–69.
138 Resolution 687, supra note 133, para. 18.
140 See Libera, supra note 132, at 297–98. Iraq refused to cooperate by scaling back oil production, as the UNCC was to receive thirty percent of all oil production profits. Id.
141 Id. at 298.
143 Libera, supra note 132, at 299–300.
144 See id. at 308–09.
145 See id. at 309.
for civil compensation for wartime environmental damage.146 The limitations of the UNCC involve the cooperation of the sanctioned nation, as well as the presence of public wealth that could be seized by the UNCC.147 Although the UNCC has jurisdiction without the consent of the sanctioned party, that nation—like Iraq after the Persian Gulf War—could impede funding of the UNCC by failing to cooperate with sanctions.148 In addition, critics have cited the low priority status of environmental claims in the UNCC claims category hierarchy as another weakness.149 UNCC claims are divided into six categories, running A through F; claims for environmental damage are included in category F4, the “second from the bottom of all ‘F’ claims.”150

C. The Alien Tort Claims Act

The Alien Tort Claims Act151 (ATCA) is a U.S. federal law that grants the federal courts jurisdiction over tort claims filed by aliens.152 The full text of ATCA reads “[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”153 Use of ATCA for filing suit for environmental damage was shown in Beanal v. Freeport-McMoRan, Inc.154 In Beanal, an Indonesian citizen filed suit against a U.S. corporation for environmental damage.155 Although the plaintiff’s claims were dismissed, the existence of the case establishes the potential of ATCA and the federal courts as a means and venue to find civil liability for environmental damage to other nations.156

147 See Libera, supra note 132, at 297–98, 301–07. “Public wealth” is defined as “wealth that is not privately owned”—governmental assets or income like Iraq’s oil reserves. Id. at 306.
148 See id. at 297–98.
149 Lee, supra note 146, at 215–16.
150 Id. at 215.
152 Alexander, supra note 12, at 492.
155 Beanal, 969 F. Supp. at 366.
156 See id. at 382–83.
However, the potential adaptability of ATCA is limited when applied to environmental damage caused by war. Commentators have recognized that the “Foreign Sovereign Immunities Act . . . supersedes the ATCA when the defendant state was acting in its official capacity,” which is likely to be the case in any act of war. In addition, the United States cannot be a defendant under ATCA, limiting any possible recovery for environmental damage in the Iraq War. If a creative plaintiff sought to sidestep the government’s immunity by filing suit against officers of the United States, the case would likely fail as a non-justiciable political question.

V. ADAPTING THE UNITED NATIONS COMPENSATION COMMISSION: A PROPOSAL FOR A CIVIL COMPENSATION SCHEME FOR WARTIME ENVIRONMENTAL DAMAGE

Despite the numerous international law provisions that serve to protect the environment from degradation during war, there exists a gap between the growing international concern for the environment and the mechanisms that can actually curtail environmental damage caused by war. The gap exists for practical reasons, such as the lack of clearly defined violations and methods of enforcement. In addition, there are political reasons, such as the reluctance of some nations to consent to jurisdiction of international courts. Some commentators also believe that there is a lack of adequate scientific information concerning the effects of war on the environment.

Closing this gap requires the development of a mechanism that clearly defines wartime environmental damage and has the ability to enforce its judgments—both to compensate those affected by war and to serve as a deterrent from future unnecessary environmental degra-

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157 See Alexander, supra note 12, at 492.
159 See Alexander, supra note 12, at 493 (citing Canadian Transp. Co. v. United States, 663 F.2d 1081 (D.C. Cir. 1980)).
160 Id. (citing Baker v. Carr, 369 U.S. 186, 217 (1962)).
161 See discussion supra Parts I–IV.
162 See Druml, supra note 105, at 123–24; George Black, Is Environmental Destruction a War Crime?, ONEARTH, Winter 2005, at 6, 7 available at http://www.nrdc.org/onearth/05win/briefings.asp (“The Iraq occupation has shown again that international law remains a dead letter as far as the environment is concerned.”).
163 Druml, supra note 105, at 123; see Alexander, supra note 12, at 485–86.
164 See Alexander, supra note 12, at 485–86.
165 Hourcle, supra note 1, at 689.
In developing such a mechanism, it is instructive to look at some of the successes of domestic environmental law. For example, the Clean Air Act, and Clean Water Act have had “teeth,” and thus a degree of success, due to the statutes’ provisions for citizen participation. The current international law and warfare mechanism that has the most citizen participation is the UNCC, since individuals and corporations were given the ability to make claims and be awarded damages. This is noteworthy as UNCC awards are distributed to individual claimants through their governments, rather than directly to governments to use as it chooses.

The major issue for any environmental protection that is only magnified when dealing on an international level is enforcement. If citizens of an affected nation are going to successfully recover damages for environmental degradation from a foreign nation, they will need a body that has the authority to collect those damages. While the ICJ and the ICC are hamstrung by limited jurisdiction based on consent and membership, the U.N. has a wide membership, and the support of the majority of the world’s nations. As discussed above, the U.N. has already established the UNCC for dealing with claims arising against Iraq from the Persian Gulf War. Given its widespread international support, “[t]he Commission is a concrete manifestation of the international community’s commitment to the principles of state responsibility.”

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166 See Drumbl, supra note 105, at 123–24.
170 See Libera, supra note 132, at 295.
171 Andrea Gattini, The UN Compensation Commission: Old Rules, New Procedures on War Reparations, 13 EUR. J. INT’L L. 161, 170 (2002). The UNCC supervises the distribution of awards by governments and can sanction them if they fail to turn over the awards to the individual claimants. See id.
172 See Juni, supra note 146, at 72.
173 See ICJ Rules, supra note 120, art. 38(5); discussion supra Part III.B.2.
175 See discussion supra Part IV.B.
The citizen participation aspect of the UNCC and its position as part of the U.N. make it particularly suited for adaptation to create a permanent body for imposing civil liability for environmental damage caused by war.\textsuperscript{177} In fact, in December 2004, the UNCC approved $2.9 billion in awards based on claims of environmental damage resulting from the Persian Gulf War.\textsuperscript{178} Kuwait received $2.27 billion, Saudi Arabia received $625 million, and Iran received a small amount.\textsuperscript{179} Interestingly, Saudi Arabia’s award was compensation for environmental damage caused by the international coalition forces that liberated Kuwait, who used the Saudi desert for military installations.\textsuperscript{180} Furthermore, the explicit reference to “environmental damage and the depletion of natural resources” as a cognizable claim in Resolution 687, which created the UNCC, is additional evidence of how the UNCC is suited for adaptation to ensure civil compensation for wartime environmental harm.\textsuperscript{181}

A. Structure of the United Nations Compensation Commission

In terms of structure, the “UNCC is a subsidiary branch of the [U.N.] Security Council . . . composed of the Governing Council, the Commissioners, and the Secretariat.”\textsuperscript{182} The report of the U.N. Secretary-General, which detailed the structure of the Commission stated:

The Commission is not a court or an arbitral tribunal before which the parties appear; it is a political organ that performs an essentially fact-finding function of examining claims, verifying their validity, evaluating losses, assessing payments and resolving disputed claims. It is only in this last respect that a quasi-judicial function may be involved.\textsuperscript{183}

Thus, the Commission is an administrative, not judicial, body that serves to review and fill claims.\textsuperscript{184} The Commissioners’ duty is to re-

\begin{itemize}
  \item \textsuperscript{177} Libera, \textit{supra} note 132, at 295.
  \item \textsuperscript{178} \textit{Iraq Digest}, \textit{Seattle Times}, Dec. 10, 2004, at A22.
  \item \textsuperscript{179} \textit{Id.} The Kuwaiti award was for “damage caused by Iraqi troops, who used trenches and lakes filled with crude oil to defend their positions.” \textit{Id.}
  \item \textsuperscript{180} \textit{Id.}
  \item \textsuperscript{181} See discussion \textit{supra} Part IV.A; Resolution 687, \textit{supra} note 133, para. 16.
  \item \textsuperscript{182} Libera, \textit{supra} note 132, at 296.
  \item \textsuperscript{184} \textit{Id.}
\end{itemize}
view submitted claims.\textsuperscript{185} The Secretariat administers the fund, while providing administrative support to the Governing Council.\textsuperscript{186}

**B. Weaknesses of the United Nations Compensation Commission**

The UNCC’s ability to serve as a civil compensation scheme for wartime environmental damage is hampered by several issues.\textsuperscript{187} From a practical standpoint, the UNCC is limited by the fact that the sanctioned nation must have public wealth that can be seized to add monies to the fund and any uncooperative nation can make the collecting of such money difficult.\textsuperscript{188} Another problem arising from a lack of money is the fact that the UNCC does not support itself and requires money from the sanctioned nation to cover its high administrative costs.\textsuperscript{189} These costs are the result of the need for support staff as well as the high cost of specialists to serve as commissioners.\textsuperscript{190} These costs may well continue to be considerable, as commentators have estimated that it may take sixteen to thirty years to settle all claims.\textsuperscript{191} Despite this estimate the UNCC reports that claims processing was concluded in June 2005, with only “payment of awards to claimants and a number of residual tasks” remaining.\textsuperscript{192}

Another weakness of the UNCC results from the timing of the filing of claims, especially when concerning claims for environmental damage.\textsuperscript{193} All environmental damage claims had to be for harms that occurred between August 2, 1990 and March 2, 1991.\textsuperscript{194} In addition, environmental damage claims submitted to the UNCC had to be filed by February 1, 1997.\textsuperscript{195} Given that the extent of environmental damages are often not known until long after the initial harm occurs, it is likely that many environmental damages will be under-compensated if compensated at all.\textsuperscript{196}

\textsuperscript{185} Id.
\textsuperscript{186} Id. at para. 6.
\textsuperscript{187} See discussion supra Part IV.B.
\textsuperscript{188} See Libera, supra note 132, at 297–98.
\textsuperscript{189} Lee, supra note 146, at 216.
\textsuperscript{190} Id.
\textsuperscript{191} Id. at 217.
\textsuperscript{193} See Lee, supra note 146, at 221.
\textsuperscript{194} Gattini, supra note 171, at 177.
\textsuperscript{195} Id.
\textsuperscript{196} See id.; Lee, supra note 146, at 221.
C. Strengths of the United Nations Compensation Commission as a Civil Compensation Mechanism for Wartime Environmental Damage

In addition to the benefits discussed above, another strength of the UNCC as a model for a civil compensation mechanism for wartime environmental damage is its broad definition of “environmental damage.”197 Decision 7 of the Governing Council of the UNCC details the type of environmental losses that can be submitted as claims.198 Paragraph 35 of the document lists as compensable claims any “[a]batement and prevention of environmental damage . . . measures already taken to clean and restore the environment or future measures . . . monitoring and assessment of the environmental damage . . . monitoring of public health . . . and [d]epletion of or damage to natural resources.”199

The broad definition of environmental damage utilized by the UNCC was informed by a report furnished by the U.N. Environment Programme (UNEP).200 The purpose of the UNEP report was to “provide[...] definitions and guidance for evaluating environmental claims.”201 Most useful to wartime environmental compensation is the fact that the UNEP report interpreted “‘environmental damage’” in a broad sense to mean “‘impairment of the environment.’”202 According to the UNEP report, the damage need not be permanent to be a compensable environmental harm.203 Also of note is the UNEP report’s broad definition of “natural resources,” which the report interpreted as naturally occurring assets that “‘have a primarily commercial use or . . . value.’”204

Another strength of the UNCC is its efficiency as a clearinghouse for civil compensation for wartime environmental damage. Although twelve years may seem like a long time to process claims, it is efficient

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197 See Juni, supra note 146, at 62–63.
199 Id. para. 35.
200 Juni, supra note 146, at 61. The report was entitled Report of the Working Group of Experts on Liability and Compensation for Environmental Damage Arising from Military Activities. Id. at 61 n.28.
201 Id. at 61.
203 Id. at 63 (quoting Working Group, supra note 202, at 10).
204 Id. (quoting Working Group, supra note 202, at 10).
when viewed in light of the fact that: (1) there were 2.68 million claims filed; (2) the UNCC was operating with a unique mandate consisting of new procedures; and (3) court proceedings on a single case can sometimes take nearly as long.205 This level of efficiency could never be achieved using a standard judicial process to adjudicate wartime environmental damage claims.

D. Adapting the United Nations Compensation Commission to Serve as a Civil Compensation Mechanism for Wartime Environmental Damage

Given the strengths and weaknesses detailed above, it is apparent that the UNCC is a unique international body that has the capacity for filling the gap between existing wartime environmental law and the need for an enforceable civil compensation scheme.206 However, before it can be utilized to redress environmental wrongs in future conflicts, it must be adapted to increase its effectiveness.207

As a threshold issue, the U.N. Security Council must make the UNCC a permanent body with jurisdiction over future conflicts, as the UNCC has reached “completion of 12 years of claims processing . . . and brings to an end the work of the panels of Commissioners, as a whole.”208 Doing so will ensure, for the sake of efficiency, that this unique mechanism need not be reorganized and reconvened to handle claims arising out of any future military conflicts.

1. Increasing the Priority of Environmental Claims

If the UNCC is to be an effective civil compensation mechanism for wartime environmental damage, it is also going to have to increase the priority level of environmental damage claims.209 During the claims process, the UNCC expedited category A, B, and C claims, while the focus on category D, E, and F claims only occurred “in recent years.”210 In an adapted version of the UNCC, environmental damage claims

205 UNCC at a Glance, supra note 192. The UNCC claims that “the resolution of such a significant number of claims with such a large asserted value over such a short period has no precedent in the history of international claims resolution.” Id.
207 See Lee, supra note 146, at 215–21.
208 See UNCC at a Glance, supra note 192.
209 Lee, supra note 146, at 215–16.
must be given a higher priority to ensure timely and successful processing of claims.\textsuperscript{211}

2. Permanent Funding

Another important change that must be made in adapting the UNCC is to fund the Commission from outside sources, as opposed to the seized assets of the sanctioned nation.\textsuperscript{212} The UNCC, as it currently operates, relies upon Iraq’s oil sanctions for its existence.\textsuperscript{213} If the UNCC is to remain as a permanent, viable entity, it will have to be properly funded and not be at the mercy of potentially uncooperative sanctioned nations.\textsuperscript{214} Commentators have suggested voluntary contributions, taxes, and permits as possible revenue streams to support the UNCC.\textsuperscript{215}

3. Developing a Clear and Precise Definition of Environmental Damage

a. \textit{Learning from Existing International Environmental Law of War}

Most important to an adaptation of the UNCC that successfully compensates for wartime environmental damage is a clear and precise definition of what constitutes a compensable environmental harm.\textsuperscript{216} The framework of Decision 7 and the technical assistance of the UNEP report offer a good starting point because they interpret environmental damage very broadly, enhancing environmental protection.\textsuperscript{217} However, these existing UNCC definitions can be bolstered by incorporating the strengths and weaknesses of the existing environmental law of war instruments and customs previously examined.\textsuperscript{218}

Early environmental law of war provisions, such as the Hague Convention (1907) and the Geneva Convention (1949), are inadequate to protect the environment because they contain a military necessity exception derived from customary principles of war.\textsuperscript{219} In addition, Protocol I contains environmental provisions that are hampered by imprecise wording—for example, “long-term” harm—which can be interpreted to

\textsuperscript{211} See id.
\textsuperscript{212} See Lee, \textit{supra} note 146, at 216–18.
\textsuperscript{213} Gattini, \textit{supra} note 171, at 181.
\textsuperscript{214} See Lee, \textit{supra} note 146, at 216.
\textsuperscript{216} See Juni, \textit{supra} note 146, at 63.
\textsuperscript{217} See id. at 61–64.
\textsuperscript{218} See discussion \textit{supra} Parts II–IV.
\textsuperscript{219} See \textit{supra} Part II.
make certain environmental damage noncompensable.\textsuperscript{220} Furthermore, Protocol I is hindered by not taking collateral damage into account and only prohibiting wartime environmental damage that is intended or expected to occur.\textsuperscript{221}

The shortcomings in the language of preexisting international environmental law of war provisions can be avoided by drafting clear and precise definitions of environmental harms.\textsuperscript{222} The definition must not contain any military necessity exceptions, in order to cut down on the ability of nations to use the customary law of war to avoid liability.\textsuperscript{223} The definitions should also follow the UNEP report in its broad interpretation of environmental damage, and not get trapped by the “widespread, long-term, and severe” language contained in Protocol I and ENMOD.\textsuperscript{224} Rather, the definition of environmental harm should allow for a wide variety of claimants and latitude for those who evaluate the claims.

b. Geographic Limitations

There should be some limitation in the definition of compensable environmental harm, however, especially in the area of geographic limitation.\textsuperscript{225} The UNCC definitions, as applied to the Persian Gulf War, did not “set[] any limit on the geographical location of losses, a circumstance which could have given rise to difficult issues of proof of causation and of evidence.”\textsuperscript{226} Any future definitions of compensable environmental damage should include reasonable geographical limitations to ensure that sanctioned nations are not held responsible for unrelated environmental problems in remote regions, where there is a tenuous chain of causation.\textsuperscript{227}

\begin{flushright}
\textsuperscript{220} See DOD Report, supra note 72.
\textsuperscript{221} See Protocol I, supra note 34, arts. 55, 56.
\textsuperscript{222} See Simonds, supra note 49, at 171.
\textsuperscript{223} See id. Despite the military necessity exception in Article 53 of the Geneva Convention, “contemporary international law does permit, if not demand, the post bellum liability of the aggressor, as the ‘unjust’ belligerent, by denying him the exculpatory ground of military necessity.” Gattini, supra note 171, at 177.
\textsuperscript{224} See discussion supra Part III.
\textsuperscript{225} See Gattini, supra note 171, at 177.
\textsuperscript{226} Id.
\textsuperscript{227} See id.
\end{flushright}
4. The Timing of Claims

Another important change to make is the implementation of more liberal filing deadlines for environmental claims. There should be a deadline so that the sanctioned nation need not fear the filing of claims indefinitely. However, this deadline should extend longer than the six years allowed under the current UNCC system. Although the February 1, 1997 deadline for environmental claims is extended over a year beyond the deadlines for other categories of claims, this seems insufficient. Wartime “environmental damage of such magnitude will most probably have long-term, widespread and at present not yet fully apparent negative effects.”

5. Studying the Effectiveness of the Size of Environmental Awards

Another important factor that should be considered is whether the size of the environmental damage awards of the UNCC were adequate to rehabilitate or compensate for environmental damage. A study comparing prewar and post-UNCC award Persian Gulf environmental quality would be helpful in determining whether the environmental damage awards from the UNCC were too small. If such a study were to find that the environmental awards were insufficient to rehabilitate the wartime environmental damage, then the size of the awards should be increased when the UNCC is made a permanent body. Appropriate award sizes will also lead to greater efficiency, as those satisfied with awards will be less likely to pursue compensation through national courts.

Recovery through the UNCC does not preclude the use of traditional legal methods to pursue remedies, and “[t]he risk of flooding national courts with lawsuits or other proceed-

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228 All category A, B, C, and D claims had a filing deadline of January 1, 1995; category E and F claims had a deadline of January 1, 1996, with the exception of category F environmental claims, which had a deadline of February 1, 1997. The Claims, supra note 142.
229 See Gattini, supra note 171, at 177.
230 See The Claims, supra note 142.
231 See id.
232 Gattini, supra note 171, at 177.
233 See Huston, supra note 206, at 918.
235 See Gattini, supra note 171, at 181.
ings against Iraq is inversely proportional to the degree of ‘customer satisfaction’ provided by the UNCC.”

VI. SHOULD U.S.-LED COALITION FORCES BE HELD CIVILLY LIABLE FOR ENVIRONMENTAL DAMAGE IN THE IRAQ WAR UNDER A MODIFIED UNITED NATIONS COMPENSATION COMMISSION COMPENSATION SCHEME?

A. Legality of the 2003 Iraq War

There has been heated debate on both sides of the political spectrum about whether or not the U.S.-led coalition (Coalition) should have gone to war in Iraq, and this debate is still raging today. The purpose of this Note is not to comment on the moral, ethical, or political justifications for the Iraq War. As such, the following section will focus on the legality of the war and whether or not the Coalition should be open to claims for environmental damage caused during the War.

U.N. Resolution 687 predicated Iraq’s liability on the fact that its invasion and occupation of Kuwait, which started the Persian Gulf War, was “unlawful.” Therefore, the legality of the military conduct is a determining factor as to whether or not liability should be assessed.

The Iraq War was not predicated on self-defense, but rather on a doctrine of preemptive military action, unauthorized by the U.N. Security Council and, thus, “without the cloak of legality and legitimacy that clear Security Council authority would have provided.” Critics have argued that preemptive military action is a “dangerous doctrine... so patently lacking in any basis in international law that... it needs the most searching scrutiny.”

236 Id.
237 The depth of public sentiment on both sides of this debate was especially apparent during the 2004 presidential campaign when the Iraq War became a central issue. Jodi Wilgoren & Elisabeth Bumiller, In Harshest Critique Yet, Kerry Attacks Bush Over War in Iraq, N.Y. Times, Sept. 21, 2004, at A1.
238 This Note defines “Coalition” as those nations that contributed militarily to the Iraq War. For a list of these nations, as of the March 2003 invasion of Iraq, see http://www.whitehouse.gov/news/releases/2003/03/20030327-10.html (last visited Feb. 14, 2006).
239 Resolution 687, supra note 133, para. 16.
240 See id.
242 Lowe, supra note 241, at 865.
A less policy-based and more international law-based justification for the Iraq War was U.N. Resolution 1441, which stated that Iraq was in breach of Resolution 687. Critics have argued that basing justification on a “revival” of the authorization of a coalition to use force against Iraq that existed from the Persian Gulf War is flawed in many ways. Most significantly, there is no doctrine of revival in Security Council proceedings, any “revival” would have to be in coalition with Kuwait, and “Resolution 1441, on its face, quite patently does not authorise the use of force against Iraq and does not indicate that the authorization to the 1991 States acting in coalition with Kuwait could possibly be revived.” Despite political, humanitarian, and national security arguments supporting the Iraq War, it is clear that a justification for war grounded in international law is tenuous.

B. Scope of Coalition Responsibility Under a Modified United Nations Compensation Commission Scheme

If the Security Council were to determine that the Iraq War was an illegal use of force, then Coalition nations could be held liable for broad categories of damages under the UNCC precedent. As discussed above, U.N. Resolution 687 established Iraq’s liability for damage—specifically environmental damage—incurred during the Persian Gulf War. However, Iraq is liable for damage beyond the actions of its own military. Iraq is also liable for damages resulting from the actions of both sides of the conflict; though this provision has drawn criticism, it is grounded in a norm of international law that holds aggressors responsible for “damage arising from the legitimate exercise of a self-defence by the state that is the victim of the aggression.” In addition, Iraq is liable to the UNCC for damage resulting “from the breakdown of civil order in Kuwait and Iraq.”

Given that Iraqi forces fought to repel Coalition troops, and that civil unrest has resulted in two years of violence by insurgents, the

243 See id.
244 See id. at 865–66.
245 Id. at 865.
246 See Gattini, supra note 171, at 173.
247 Resolution 687, supra note 133, para. 16.
248 Gattini, supra note 171, at 173.
249 Id.
250 Id. “[T]he UNCC’s decision to attribute such losses to Iraq is [not] unprecedented in international law.” Id. Rather, this type of liability was attached in the Somoan Claims case (1902) and the Naulilaa case (1928). Id.
Coalition could be held civilly liable for environmental damages beyond those caused directly by its own military.251

C. Should the U.S.-Led Coalition Be Held Civilly Liable?

The documented and potential damage to Iraq’s environment as a result of the Iraq War is widespread and hard to dispute.252 The Iraq War has been very expensive for the United States, and it is unclear how much of the reconstruction costs the United States will pay.253 Senator Joseph Biden has stated that the United States “typically covers about 25% of the post-conflict reconstructions costs,” but that strained relations with foreign nations as a result of the conflict will probably lead to reduced international contributions.254 In addition, Iraq, at the end of 2004, had amassed $200 billion in debt and reparations.255

Given the grim financial situation in Iraq and the low priority often given to environmental damage—as evidenced by the category system of the UNCC—it is likely that there will not be adequate funding for environmental rehabilitation in postwar Iraq.256 Holding Coalition nations civilly liable through an adapted UNCC will force the wealthier nations who engaged in military activity—without the imprimatur of the Security Council or international law—that resulted in environmental degradation throughout Iraq to repay Iraqi citizens for that damage.

In addition to fairness, imposing civil liability on Coalition nations for environmental damage caused during the Iraq War will also perform the important normative function of assessing state responsibility for causing environmental damage, as was the case with Iraq in Resolution 687.257 Following the invasion of Iraq in March 2003, U.S. forces established an informal system of compensation for aggrieved Iraqis.258 The program, dubbed “condolence payments,” allows Iraqis to file claims for death, injury, and property damage and to receive compen-

252 See discussion supra Part I.
254 Id. at 127.
255 Id. at 123 (quoting *Iraq Policy and Issues, Hearing Before the S. Comm. on Foreign Relations, 108th Cong. (2003)* (statement of Ambassador Paul Bremer)).
256 See *The Claims*, supra note 142.
257 See Resolution 687, supra note 133, at para. 16.
sation from the U.S. military. The compensation system, however, "does not admit guilt or acknowledge liability or negligence. . . [But, is rather] a gesture that expresses sympathy in concrete terms." This type of system is indicative of nations' reluctance to voluntarily take responsibility for wartime damages. However, assessing UNCC civil liability to Coalition forces, as was done to Iraq in the Persian Gulf War, would express state responsibility in concrete terms. This application of UNCC liability to Coalition forces would act as a deterrent to future conflicts, since the cost of engaging in armed conflict would greatly increase. This precedent would be invaluable in ensuring that aggressive nations include harm to the environment in their calculations when contemplating possible military action.

Over the first year of the program, the United States has paid out about $2.2 million in the form of condolence payments. This paltry sum makes it apparent that UNCC involvement is required to ensure that Iraqis are sufficiently compensated for their environmental losses. The closest that condolence payments come to recognizing environmental damage is a maximum five hundred dollar payment for property damage. Attaining condolence payments is difficult for Iraqis as they shoulder the burden of proof and U.S. military commanders make the decisions without any appeals process. Major John Moore, an Army legal officer, described the condolence payments "as a public relations tool—sort of a no-hard-feelings type of payment. . . . 'It's not designed to make them whole again, only to alleviate their hardships.'" As the full extent of the damage to Iraq's environment becomes apparent, there are certain to be justified "hard feelings" on the part of Iraqi citizens. Regardless of the sympathetic nature of the condolence payment program, Iraqi citizens—like the citizens of Kuwait following the Persian Gulf War—deserve a pro-

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259 Id.
260 Id.
261 See id.
262 See Resolution 687, supra note, 133, para. 16 ("Iraq . . . is liable under international law for any direct loss, damage, including environmental damage and the depletion of natural resources, or injury to foreign Governments, nationals and corporations, as a result of Iraq's unlawful invasion and occupation of Kuwait.").
263 See Libera, supra note 132, at 310.
264 See id.
265 Zucchino, supra note 258, at C5.
266 See id.
267 See id. The maximum payment for death is $2500 and for injury $1500. Id.
268 Id.
269 Id. (quoting Major John Moore, U.S. Army Legal Officer).
gram that will aim to make their degraded environment whole again through adequate payments and an accessible, fair claims process. The UNCC is such a mechanism, and the U.N. should build upon the Persian Gulf War precedent by imposing civil liability for environmental damage on Coalition forces through this mechanism.

Conclusion

Military history, as well as more current events such as the Persian Gulf War and the Iraq War, makes clear that war causes significant environmental damage. This is a fact that is often overlooked when considering the toll of war. Current international environmental law provisions are inadequate to protect the natural environment from wartime degradation. If effective wartime environmental protection does not yet exist, a civil liability system can act as a substitute, serving as both a deterrent to aggressive nations and as an opportunity for environmental remediation.

Following the Persian Gulf War, the U.N. made a significant step toward such a civil liability system by establishing the UNCC, with jurisdiction to approve claims for environmental damage. However, as it stands now, the UNCC is not fully equipped to effectively assess civil liability for wartime environmental degradation. The UNCC must be adapted to better compensate for environmental harms.

With an adapted UNCC in place, the U.N. should continue its forward progress in the area of compensation for wartime environmental damage by imposing UNCC civil liability against Coalition forces for environmental degradation during the Iraq War. The liability will ensure that Iraq’s environment is restored to prewar conditions, but also will extend the valuable UNCC precedent, which will act as a deterrent to future conflicts.

Despite the strong fairness, deterrence, and environmental remediation arguments for imposing UNCC liability on Coalition forces, it is unlikely to occur for political reasons. Given the power that the United States and Great Britain wield in the international community, it is unlikely that the U.N. will risk further fraying an already tense relationship by passing a resolution placing formal blame on Coalition nations.
DEVELOPMENT AID IN AN ENVIRONMENTAL CONTEXT: USING MICROFINANCE TO PROMOTE EQUITABLE AND SUSTAINABLE WATER USE IN THE NILE BASIN

SHREEVANI SUVARNA*

Abstract: Water resource management plays a critical role in everything from the viability of individual communities to regional political stability. Nowhere is this more apparent than in the Nile Basin. The Nile Basin Initiative (NBI) is a recent effort to overcome historical clashes over use of the Nile’s waters in order to achieve a basin-wide framework for transboundary cooperation. One element of NBI focuses on community-level action in furtherance of transboundary cooperation, and includes a microgrant program to help achieve its goals. Significantly, however, NBI does not include a microcredit program. This Note argues that, in light of the deep connections between inadequate water resources and the marginalization of women and the poor, NBI should supplement its microgrant program with microcredit programs to further its goals. More broadly, this Note advocates for the use of microcredit programs—which are generally implemented only in the development aid arena—in an environmental context.

Introduction†

Thirty years ago, Egypt, a lower riparian of the Nile, yet a dominant regional power, issued military threats against its upstream neigh-

* Managing Editor, Boston College Environmental Affairs Law Review, 2005–06. The author dedicates this article in loving memory of her father, who first opened her eyes to water resource management. The author extends appreciation to family, friends, and teachers for their unending encouragement.

† The above logo is for the United Nations International Year of Microcredit (2005). It signifies projects that further the goals of the program—increasing awareness of and innovative uses for microcredit.
bors to prevent them from interfering with the Nile’s flow.\footnote{Eyal Benvenisti, Sharing Transboundary Resources: International Law and Optimal Resource Use 17 (2002).} Egyptian President Anwar Sadat stated in 1970 that “‘[t]ampering with the rights of a nation to water is tampering with its life; and a decision to go to war on this score is indisputable in the international community.’”\footnote{Jutta Brunnée & Stephen J. Toope, The Changing Nile Basin Regime: Does Law Matter?, 43 Harv. Int’l L.J. 105, 106 (2002) (alteration in original) (quoting Raj Krishna, The Legal Regime of the Nile River Basin, in The Politics of Scarcity: Water in the Middle East 23, 34 (Joyce R. Starr & Daniel C. Stoll eds., 1998)); see Arun P. Elhance, Hydropolitics in the Third World: Conflict and Cooperation in International River Basins 53 (1999) (noting that after signing the Camp David peace accord, Sadat stated that the only reason the country would go to war with a neighboring country would be a water-related dispute).} In 1988, Boutros Boutros-Ghali, Egypt’s Minister of State Foreign Affairs, stated that the Nile would cause the next war in the Middle East.\footnote{Brunnée & Toope, supra note 2, at 106.} Tension over water rights continued into the Gulf War in 1991, when media reports suggested that Sudan was aiming missiles at the Aswan High Dam in Egypt.\footnote{Id.} Although a “water war” has not yet occurred, it is essential for future social and political stability in this region that the Nile’s ten riparian states—Uganda, Rwanda, Burundi, Tanzania, Zaire, Kenya, Eritrea, Ethiopia, Sudan, and Egypt—achieve a cooperative scheme for use of the Nile’s water.\footnote{See Elhance, supra note 2, at 53.} Leaders of these states have indicated a greater willingness to cooperate with regard to water rights to the Nile.\footnote{See Brunnée & Toope, supra note 2, at 106–07.}

ple, the community-level projects in NBI include a small-grant program.10 These grants, known as microgrants, are intended to be awarded to local communities to “support community-driven interventions to address transboundary environmental threats on a local scale.”11 Distinct from microgrants are microloans—small, unsecured loans often given on an individual basis and a tool generally seen as part of development aid12—which are not an element of NBI. This Note argues that microcredit, when used in conjunction with existing strategies in international environmental law and policy, can make significant contributions to water resource management in the developing world.

Part I explores the geographical, historical, and hydropolitical settings for conflict in the Nile Basin. The historical failure of large-scale cooperation over water resource management in the Nile Basin, combined with local and regional power struggles, have contributed to problems of water scarcity and water-related inequities. Part II examines the cooperative framework created by NBI and details its funding structure. Part III describes problems arising from state control over water management practices. Part III emphasizes the value of a human rights approach to environmental resource management, and considers the implications of addressing a human right to water. By accepting the viability of a human rights approach to water resource management, one can begin to import development aid tools, such as microgrants, into environmental resource management. Part IV provides a closer look at funding structures available through the World Bank and other international organizations. Part V presents ways in which microcredit may be used in the context of water resource management. Although microcredit is typically viewed as development aid for purposes of stimulating a local economy or reducing poverty, microcredit programs can be implemented for broader policy objectives. This Note concludes that, in light of the strong correlation between poverty and environmental resources, microcredit can further the goals of international environmental projects in the developing world in general, and in the Nile Basin in particular.

10 Id. at 19–20.
11 Id. at 19.
12 Isobel Coleman, Defending Microcredit, 29 FLETCHER F. WORLD AFF. 181, 182 (2005) (“[D]onors should accept microfinance for what it is: not a silver bullet, but an important tool in the development toolkit.”); see infra note 122 and accompanying text (explaining the difference between microgrants and microloans).
I. THE NILE RIVER AND HYDROPOLITICS IN THE DEVELOPING WORLD

A. The Nile River

The Nile River is the world’s longest river and the lifeblood of Eastern Africa, providing sustenance and power for hundreds of thousands of people in this politically volatile region.\textsuperscript{13} The Nile has the largest number of riparian states in the developing world, and flows through some of the youngest sovereign states in the developing world.\textsuperscript{14}

Africa’s colonial legacy left the continent with national borders that follow neither natural nor social divides.\textsuperscript{15} The flow of the Nile’s water through areas of political instability and power asymmetry further compounds the challenges to transboundary cooperation.\textsuperscript{16} Despite the vastness of the Nile Basin—stretching from Lake Victoria in south-central Africa to the Mediterranean Sea\textsuperscript{17}—and the ever increasing need for irrigation in this region, use of the Nile’s resources is far from evenly distributed among the riparian states.\textsuperscript{18} For example, Ethiopia generates at least eighty percent of the Nile’s water, while Egypt, the greatest consumer of the river’s resources, contributes no water to the Nile.\textsuperscript{19}

\textsuperscript{13} See Elhance, supra note 2, at 60–61.
\textsuperscript{14} Id. at 80–81.
\textsuperscript{16} See Elhance, supra note 2, at 62–66.
\textsuperscript{17} Id. at 54. The basin area comprises a total area of 3 million square kilometers. Peter Rogers, International River Basins: Pervasive Unidirectional Externalities, in The Economics of Transnational Commons 35, 59 (Partha Dasgupta et al. eds., 1997). The main body of the Nile is primarily composed of two parts: the Blue Nile, which drains Lake Tana; and the White Nile, which originates in Lake Victoria and feeds the Sudanese swamps known as the Sudd. Brunnée & Toope, supra note 2, at 117. The two tributaries meet in Khartoum. Id.
\textsuperscript{18} See Elhance, supra note 2, at 56; Brunnée & Toope, supra note 2, at 117; Rogers, supra note 17, at 59 (“[T]he existing treaties and effectively all of the water consumption occur in the two downstream riparians which essentially make no contribution to the river flow.”).
The Nile Basin has a history of recorded agricultural settlement reaching back at least six thousand years. The centrality of the Nile Basin to Africa’s agriculture and development is evident in long-standing efforts to harness and control the Nile’s waters to serve the needs of over 250 million people. However, frequent droughts, and uneven or unpredictable rainfall, makes the flow of the Nile’s water inconsistent: twenty percent of the Nile’s total discharge is spread out over nine months, while the remaining eighty percent occurs during August, September, and October.

These geographic features contribute to the incentive for each riparian state to increase its access to and control of the Nile’s water. This desire for dominance over the Nile’s water is evident, for example, in Egypt’s construction of the Aswan High Dam. While the Aswan High Dam has provided some benefits to Egypt, its impact on the Basin as a whole has not been universally positive, as it “has kept the river from flooding and depositing renewing sediment . . . . The delta has instead been inundated with catastrophic superlatives: It is among the world’s most densely cultivated lands, with one of the world’s highest uses of fertilizers and highest levels of soil salinity.” As agriculture, development, and population in Africa grow, demand for the Nile’s water far exceeds available resources for all of the riparian states, rendering historical forms of noncooperative, unstable, and inequitable water uses unsustainable.
B. History of the Use of and Conflict over the Nile’s Water

Despite the importance of the Nile Basin to its riparian states, cooperation among these states has been a historical challenge.\textsuperscript{28} Not only did Africa’s colonial legacy impose unnatural state borders along the Nile’s anfractuous path, it also set the stage for the Nile to be a flashpoint for conflict in the post-colonial period.\textsuperscript{29}

In the colonial period, Great Britain effectively controlled the entire Nile through its military dominance in Africa and its political control of Egypt, Sudan, and the three upper riparian states on the White Nile.\textsuperscript{30} Colonial-era treaties ensured that no projects could be built in the Nile Basin, and that no upstream Nile water could be withdrawn without Egyptian and British consent.\textsuperscript{31} Control over the Nile was an essential part of British colonial strategy.\textsuperscript{32} This control was also the key to Egypt’s own viability, because Egypt, despite its military power, is vulnerable due to its heavy reliance on the Nile for water and position as a lower riparian.\textsuperscript{33}

Colonial-era tensions carried over into the post-colonial period, creating a regime in the Nile Basin that was, until recently, properly characterized as one of open conflict.\textsuperscript{34} Remnants of colonial-era agreements compound the problems presented by already existing asymmetries in information, gaps in science and uncertainty about technical matters, ineffective means of enforcement, claims of sovereignty and superior rights, domestic and international conflicts in interest, and the upstream-downstream dynamic.\textsuperscript{35} The process of de-

\textit{Id.} solely on the anticipated increases in the respective populations and on the current rates of water extraction.

\textit{Id.}\textsuperscript{28} at 66–67.
\textit{Id.}\textsuperscript{29} See \textit{Brunnée & Toope, supra} note 2, at 122.
\textit{Id.}\textsuperscript{30} \textit{Elhance, supra} note 2, at 68.
\textit{Id.}\textsuperscript{31} \textit{Id.}; \textit{Elhance, supra} note 2, at 276. For a list of all treaty arrangements regarding the Nile, see Rogers, \textit{supra} note 17, at 62–63 tbl.3.5.
\textit{Id.}\textsuperscript{32} See \textit{Elhance, supra} note 2, at 68–70.
\textit{Id.}\textsuperscript{33} at 54. “No other country in the world is so dependent on the water of a single river that it shares with not two or three but eight other states, all located upstream from Egypt.” \textit{Id.} (citations omitted).
\textit{Id.}\textsuperscript{34} See \textit{Brunnée & Toope, supra} note 2, at 105.
terminating the rights of the riparian states to use the Nile’s water has therefore been quite contentious.36

II. THE NILE BASIN INITIATIVE AS A FRAMEWORK FOR COOPERATION AMONG BASIN STATES

A. Origins of the Nile Basin Initiative

In 1999, all of the Nile Basin riparians, except for Eritrea, signed NBI, the first basin-wide agreement regarding the Nile River.37 NBI’s goal is “to achieve sustainable socio-economic development through the equitable utilization of, and benefit from, the common Nile Basin resources.”38 NBI resulted from efforts, ongoing since the early 1990s, to promote greater regional cooperation and information sharing.39 Earlier efforts to develop a basin-wide agreement for the use of the Nile’s water include the Hydromet Project in the late 1960s40 and the Technical Committee for the Promotion of the Development and Environmental Protection of the Nile Basin (TECCONILE) in the early 1990s.41

For many years, the Nile riparian states have been caught in a vicious cycle in which “much-needed regional cooperation and economic development will not materialize without political stability in the basin, and political stability will remain elusive without regional cooperation and equitable economic development.”42 Contemporary attitudes toward equitable water allocation and transboundary cooperation in the Nile Basin, as reflected by the beginning of NBI, give hope that the Nile riparian states can instead enter a different cycle, in which a “broader integration of regional development in turn strengthens the relationships between the countries sharing international rivers, which further

36 See Swain, supra note 19, 296–99; The Nile: Moving Beyond Cooperation, supra note 21, at 15–16.
37 Wiebe, supra note 19, at 732. Eritrea is participating in NBI as an observer. The Nile: Moving Beyond Cooperation, supra note 21, at 3.
38 TEAP, supra note 9, at 1 (emphasis omitted).
39 See Carroll, supra note 22, at 297–98.
40 Ashok Swain, Managing the Nile River: The Role of Sub-Basin Co-operation, in CONFLICT MANAGEMENT OF WATER RESOURCES 145, 154–55 (Manas Chatterji et al. eds., 2002). The Hydromet Project, launched in 1967, was ultimately unsuccessful in securing basin-based arrangements beyond the existing unstable agreement that existed between Egypt and Sudan. Id.
41 Id. at 155. The TECCONILE program created the momentum that ultimately led to the creation of NBI. Id.
42 Elhance, supra note 2, at 62.
reinforces cooperation.” Designed to be a transitional arrangement moving from planning to action, NBI focuses on fostering dialogue, information exchange, and technology assistance as well as creating joint development initiatives in furtherance of transboundary goals. The benefits of regional cooperation under NBI involve not only enhanced environmental sustainability and increased economic productivity in areas such as food and energy production, but also extend to coordinated development and integration.

NBI is not a panacea; it can easily be criticized for not going far enough to achieve its goals in the Nile Basin. Moreover, some have criticized NBI as embodying a strategy in which consensus of all of the riparian states is obtained early on by dealing only with less difficult issues and delaying controversial issues. Much remains to be seen with respect to NBI’s impact and long-term success. At the very least, efforts to achieve consensus through NBI mark a historic moment of willingness to cooperate on a basin-wide scale.

B. Organization of the Nile Basin Initiative

One of NBI’s primary functions is implementation of the Strategic Action Program, which consists of two subprograms: the Shared Vision Program and the Subsidiary Action Program. The Shared Vision Program has approximately $130 million in funding for seven main projects focused on grant-based activities for engendering trust and cooperation while encouraging an environment for investment.

One Shared Vision Program project, the Nile Transboundary Environmental Action Project (Nile TEAP), supports development of a “basin-wide framework for actions to address high-priority transboundary environmental issues within the context of the Nile Basin Initiative’s . . . Strategic Action Program.” Although Nile TEAP is a part of NBI’s Shared Vision Program, it has more specifically defined

44 Brunnée & Toope, supra note 2, at 108.
46 See The Nile: Moving Beyond Cooperation, supra note 21, at 28.
47 Swain, supra note 19, at 306.
49 See The World Bank Group, supra note 7.
51 See TEAP, supra note 9, at 108.
52 Id. at 1.
objectives, such as enhancing basin-wide cooperation and environmental awareness and providing a forum for stakeholder participation.\textsuperscript{53} In order to achieve its objectives, Nile TEAP focuses on component activities ranging from institutional to grassroots efforts.\textsuperscript{54} This Note focuses on the Nile Transboundary Microgrants Program, one of the community-level projects under Nile TEAP.\textsuperscript{55}

III. LINKING DEVELOPMENT AID STRATEGIES AND ENVIRONMENTAL PROTECTION: A HUMAN RIGHTS PERSPECTIVE

Although the participation of the Nile riparian states is a significant achievement, it does not guarantee that the Nile’s water will be used sustainably and equitably both across and within each riparian state.\textsuperscript{56} To achieve truly equitable and sustainable uses of the Nile’s water—an essential component to achieving transboundary cooperation—the international community must recognize that dramatic disparities and inequities exist regarding access to water rights within each riparian state, and that “water is critical for sustainable development, including environmental integrity and the eradication of poverty and hunger, and is indispensable for human health and well being.”\textsuperscript{57}

A. Domestic and Basin-Wide Heterogeneity and Achieving Collective Action

The fact that the Nile riparian states are heterogeneous in ideology, economy, ethnicity, religion, and geography is in part responsible for the challenges encountered in achieving a cooperative framework.\textsuperscript{58} Differing priorities in water management procedures and differing levels of commitment and concern toward a basin-wide initiative add further challenges to the prospect of basin-wide cooperation.\textsuperscript{59} The heterogeneity of the Nile riparian states thus es-

\textsuperscript{53} Id.

\textsuperscript{54} Id. at 10–12, tbl.1. These component activities are “1. Institutional Strengthening to Facilitate Regional Cooperation. 2. Community-level Land, Forest and Water Conservation. 3. Environmental Education and Awareness. 4. Wetlands and Biodiversity Conservation. [And] 5. Water Quality Monitoring Basin-wide.”

\textsuperscript{55} Id. at 11, tbl.1; see also discussion infra Part IV.B.


\textsuperscript{57} Id. See generally TEAP, supra note 9, 18–22 (discussing the rationale for both community-level and basin-wide projects).

\textsuperscript{58} Elhance, supra note 2, at 63.

\textsuperscript{59} Swain, supra note 40, at 155–56.
sentially precludes the possibility that the riparian states will easily agree on a principle or set of principles of water allocation. The Nile River Basin Transboundary Environmental Analysis, initiated in 1999 as part of NBI, was created to “help translate existing national environmental commitments and interests into regional and basin-wide analytical frameworks, priorities and, eventually, basin-wide actions.” NBI has essentially created a basin-wide basis for dialogue involving the participation of the Nile’s riparian states. Participation of each riparian state in a basin-wide dialogue, however, does not ensure the protection of all important domestic interests or peoples within each state. Domestic interest groups often present an obstacle to regional cooperation due to small-group domination. Protectionist policies and the “willful burdening of domestic groups by other groups who abuse the inherent flaws that exist in the domestic political processes of states” make even domestic consensus a challenge. Thus, a major challenge in the institutional framework established by NBI is addressing the fact that the Nile riparian states are tremendously heterogeneous on a domestic level, yielding a significant potential for distorted governmental choices that may, and often do, neglect the interests of certain beneficiaries of ecosystem preservation.

Protecting human interests on a domestic level is deeply connected with transboundary management of water resources because environmental degradation unquestionably poses a threat to human health and human life. By 2025, between five and six Nile Basin

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60 David Goldberg, World Bank Policy on Projects on International Waterways in the Context of Emerging International Law and the Work of the International Law Commission, in The Peaceful Management of Transboundary Resources 153, 163 (Gerald H. Blake et al. eds., 1995) (noting that Egypt has an interest in following the “no appreciable harm” rule with regard to use of the Nile’s water, whereas Ethiopia, because of its upper riparian status, has an interest in following the principle of equitable use, and thereby asserting a claim to increased use of the Nile’s water).
61 TEAP, supra note 9, at 1 (emphasis added).
62 See id. at 2.
63 See Benvenisti, supra note 1, at 12–13 (“Most governments have tended to play down the interests of minorities, especially indigenous groups. . . . Disrespect for human rights and minority cultures has also been strongly associated with national management of water and other natural resources.”).
64 Id. at 101.
65 Id. at 11; see id. at 127–28.
66 See id. at 19–20.
countries will be considered water scarce.68 How well the Nile riparian states stave off the potentially catastrophic consequences of water shortage will dramatically impact not only the political stability but also the quality of life in this part of the developing world.69 NBI’s goals recognize this relationship and include a directive “to promote economic development and fight poverty throughout the basin.”70

Collective action should focus on the positive human relationship with the Nile, but it must consider the temptation to use the Nile’s water as a “water weapon” in a politically unstable climate.71 The potential for inadequate protection of minorities and future generations demands that collective action in the Nile Basin adequately address the needs of underrepresented domestic populations; adopting a human rights perspective in the transboundary management of the Nile’s water is an essential part of doing so.72

B. Water as a Human Right

Adopting a human rights perspective in environmental protection in general, and in the allocation of water rights in the Nile Basin in particular, involves recognizing “that environmental rights also means rights for humans.”73 Specifically, a human rights perspective in environmental issues supports the belief that humans have a right to a healthy environment, and that, as a matter of basic human rights, “individuals have certain entitlements in relation to the environment.”74 Application of this view requires identification of groups most com-

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68 The Nile: Moving Beyond Cooperation, supra note 21, at 2.
69 Sadoff et al., supra note 15, at 55 (“To a greater extent in Africa than anywhere else in the world, international rivers have the potential to join countries economically and politically—or, conversely, to cause economic and political tensions between them.”).
70 TEAP, supra note 9, at 1.
71 See Benvenisti, supra note 1, at 12; McCaffrey, supra note 67, at 6. For example, historically controversial Jonglei Canal Project was planned to divert the Nile’s waters before reaching the Sudd marshes region in Sudan as a way to draw more water from Sudan into Egypt as part of a water sharing agreement between the two states. Benvenisti, supra note 1, at 14. The plan, however, would divert water away from people in the Jonglei region, who oppose the project because they rely on agriculture and aquaculture for their livelihood. Id.
72 See infra Part III.B.
monly disadvantaged in society: minorities and future generations.\textsuperscript{75} Because attention to future generations is an accepted principle of sustainable development, national and international law as well as international development institutions have validated the principle of intergenerational equality as a normative concept in environmental protection.\textsuperscript{76} Indeed, the 1972 Stockholm Declaration of the United Nations Conference on the Human Environment states that: “[t]o defend and improve the human environment for present and future generations has become an imperative goal for mankind—a goal to be pursued together with, and in harmony with, the established and fundamental goals of peace and of worldwide economic and social development.”\textsuperscript{77}

Less explicitly addressed in the international dialogue on environmental protection is recognition that protection of minority interests is necessarily linked to ecosystem management.\textsuperscript{78} A growing number of scholars and nongovernmental organizations\textsuperscript{79} recognize the undeniable link between ecosystem preservation and the enjoyment of fundamental human rights.\textsuperscript{80} Others, however, criticize the inclusion of human needs in an environmental framework as unnecessarily anthropocentric.\textsuperscript{81} In practice, most human rights instruments as well as global and regional tribunals fail to make explicit the connection between human rights and environmental rights.\textsuperscript{82}

Human rights law may be one method to encourage governments to manage water resources in a way that ensures sustainability.\textsuperscript{83}

\textsuperscript{75} Benvenisti, \textit{supra} note 1, at 116.
\textsuperscript{76} See id. at 116–20.
\textsuperscript{78} See Benvenisti, \textit{supra} note 1, at 120–21 (“[O]nly a few references in existing national constitutions and international human rights conventions link[] human rights and ecosystem management. . . . [T]he 1997 United Nations Convention on the Law of the Non-Navigational Uses of International Watercourses . . . missed a golden opportunity to make a strong commitment to the human rights aspect.”).
\textsuperscript{79} See, e.g., Benvenisti, \textit{supra} note 1; \textit{Linking Human Rights and the Environment} (Romina Picolotti & Jorge Daniel Taillant eds., 2003); McCaffrey, \textit{supra} note 67.
\textsuperscript{80} See generally Catherine Redgwell, \textit{Life, the Universe and Everything: A Critique of Anthropocentric Rights}, in \textit{Human Rights Approaches to Environmental Protection}, \textit{supra} note 74, at 71, 71–87.
\textsuperscript{81} See generally id.
\textsuperscript{82} Dinah Shelton, \textit{The Environmental Jurisprudence of International Human Rights Tribunals}, in \textit{Linking Human Rights and the Environment}, \textit{supra} note 79, at 1, 11–12; see \textit{supra} note 78.
\textsuperscript{83} McCaffrey, \textit{supra} note 67, at 24.
Although the international legal framework does not address individual rights to a sustainable environment in explicit terms, a human right to water may be inferred from well-recognized provisions of international law. The view that humans have a right to water is particularly relevant in the case of the Nile Basin, where issues of water scarcity relate to both an absolute shortage of water, and the use of water allocation as a method of subordinating certain populations to others in politically unstable states. Quite often, governments marginalize the interests of minorities—usually indigenous groups—in national resource management strategies. Effective management of the Nile and other rivers as a transboundary resource therefore requires a system in which attention is given not only to the obstacles of international cooperation, but also to the resolution of domestic inequities. Ultimately, in the Nile Basin as elsewhere, human rights cannot be protected without preservation of the environment, and environmental goals cannot be furthered without attention to the impact of environmental resource scarcity on human rights.

IV. Funding Community Level Action: Microgrants and Microloans

Economic programs for environmental purposes frequently focus either on costly large-scale projects or on small-grant funded localized actions. One part of the Nile Basin Initiative (NBI)—the Nile Transboundary Microgrants Program (Nile TMP)—focuses on using community-based economic infusions through small grants to promote...
broader, regional cooperation. Omitted from this picture, however, is the use of “trickle-up” microfinance programs to create local change in a way that enhances large-scale transboundary cooperation and promotes ecosystem preservation.

A. Large Grants and Small Grants: An Overview of Economic Development in Environmental Projects

Large-scale public-works style water projects, along with their “massive infusions of money,” are often considered “boons to economic progress.” Social scientists, however, are aware that these large-scale markers of economic “progress” have tremendous social, cultural, political, and behavioral repercussions that can be either positive indicators of progress or negative indicators of social dominance.

The Aswan High Dam in the Nile Basin is an example of the complexities—economic, geopolitical, and environmental—that can accompany such large-scale projects. Critics of the Aswan High Dam—built in large part to create water security and exercise sovereignty in Egypt—claim that the dam is responsible for both socio-economic and environmental problems in the Nile Basin. Large-scale projects such as the Aswan High Dam represent economic and environmental priorities quite different from those seen in community-based small-grant programs.

There is a close relationship between economic development and environmental initiatives. Although many factors influence environmental resource management, economic stability in particular is more likely to promote efficient and equitable uses of environmental re-

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90 For example, although NBI addresses poverty issues in its policy goals, and although the Nile TEAP focuses in part on community-level actions, neither explicitly incorporates microlending programs in the Nile Basin. See TEAP, supra note 9, at 2, 19–23.
91 Rogers, supra note 88, at 124.
92 Id.
93 See Elhance, supra note 2, at 74–79.
94 See id. at 76.
95 Id. at 78. The Aswan Dam significantly contributed to political tensions in the Nile Basin, largely because it was an affront to other riparian states as a means of establishing Egypt’s total sovereignty and dominance in the use of the Nile’s water. See id. at 74–79. To make matters worse, the Aswan Dam did not improve—and perhaps worsened—the issue of water scarcity throughout the Nile Basin due to the diversion of the Nile’s water and other ecological problems. See id. at 79; Brunnée & Toope, supra note 2, at 119.
96 Elhance, supra note 2, at 74–79.
sources. Cooperative arrangements among the World Bank, the United Nations Development Programme (UNDP), and the United Nations Environmental Programme are manifestations of this recognition. For example, the Global Environmental Facility (GEF) has explicitly recognized that the integration of environmental and development initiatives is necessary to secure the cooperation of developing countries in an environmental initiative; as a result, small grants are frequently the most appropriate tools for funding environmental initiatives.

The GEF’s Small Grant Programme (SGP), launched in 1992, is perhaps the best example of institutional recognition of the correlation between the environment and localized development initiatives. The program operates by first identifying areas where global benefits are at stake—such as biodiversity, climate change, or international waters—and then funding programs that directly seek to preserve the global benefit or redress the global harm where traditional development aid would not otherwise be available. In the Nile TMP, as is generally the case, communities and nongovernmental organizations (NGOs), but not individuals, will be eligible recipients of small grants.

Although SGP implements widespread small-grant programs with the ultimate purpose of achieving sustainable environmental development, microloan programs do not appear to be part of the strategic implementation of environmental initiatives. This may be due to the doctrinal division of human rights approaches and environmental

97 See Sadoff et al., supra note 15, at 15–16.
99 See id.
102 The size of the grants and organizational requirements to receive grants indicate that this is the case. See TEAP, supra note 9, at 20.
103 See Global Environment Facility, supra note 100.
104 See infra Part IV.C (discussing microfinance).
105 See generally TEAP, supra note 9 (defining the scope of the Nile TMP); Grameen Foundation USA, Client Profiles, http://www.grameenfoundation.org/programs/client_profiles/ (last visited Jan. 19, 2006) (providing example profiles of microloan borrowers, who tend to focus on hunger, poverty, education, and rights).
harm approaches to resource management. Additionally, micro-

grants and microloans differ both in functionality and implementation.

B. Funding the Nile Basin Initiative and the Nile Transboundary Microgrants Program

The Nile Basin Trust Fund (NBTF) is a multidonor trust fund that was created for the purpose of financing NBI activities. NBI, through the NBI Secretariat, manages the overall fund flow and disbursements of GEF and NBTF monies. However, NBTF is currently managed by the World Bank. The Nile Transboundary Environmental Action Project (Nile TEAP) will be jointly supported by the UNDP and the World Bank and will use the NBI Secretariat for decentralized implementation of the funding process.

The Nile TEAP provides a total of at least $11.1 million to go toward community-level land, forest, and water conservation projects. In the initial stages, these projects will focus on pilot activities at selected transboundary sites for the purposes of demonstrating the feasibility of local-level approaches to land and water conservation. In addition to the anticipated positive local impact, these programs have the potential to strengthen national NGO networks as well as improve NGO-government collaboration.

A major component of the community-level land, forests, and water conservation aspect of the Nile TEAP is the Nile TMP, which is designed to “support community-driven interventions to address transboundary environmental threats on a local scale.” Each participating NBI country will have a national Nile TMP. Using the institutional best practice model of SGP, “[t]he main emphasis of the Nile Transboundary Microgrants will be on piloting new and promising transboundary initiatives, on the development and dissemination of best practice and on exchanges of lessons learned in environmental and

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106 See supra Part III.B. See generally Redgwell, supra note 80.
107 TEAP, supra note 9, at 6.
108 Id.
109 Id.
110 Id. at 7.
111 Id. at 18. GEF will supply $3.72 million, and NBTF/World Bank will supply $7.38 million. Id.
112 Id.
113 TEAP, supra note 9, at 18.
114 Id. at 19.
115 Id.
natural resource management.” Significantly, the Nile TMP is also aimed at discouraging overexploitation of natural resources by providing alternative sustainable livelihood opportunities to affected communities.

The maximum size of Nile TMP grants will be $25,000 each. It is anticipated, however, that many smaller grants will be given, with an average grant size of $10,000. Projects that fulfill the following six specific criteria will be given funding priority:

1. focus on transboundary environmental problems and sites,
2. provide for community participation in their design, implementation and evaluation,
3. pay attention to the needs of women and/or indigenous peoples and practices,
4. draw on local or Nile Basin scientific and technical resources,
5. support capacity development, and
6. communicate best practices to wider audiences.

Notably, women and women’s groups are to be given particular attention in Nile TMP decisions and activities.

C. Microloans as a Tool for Alleviating Poverty

In the context of development aid, microloans differ from microgrants in three central ways: (1) microloans exist in smaller denominations than microgrants, and are therefore more accessible to individuals than microgrants; (2) microloans may be more cost-effective than other forms of development aid because they are loan based instead of grant based; and (3) individuals are more likely to use their money responsibly and for income-producing purposes when they are under an obligation to repay, and where group-lending enforcement mechanisms exist. The origins of large-scale, international microfinance lay in the original Grameen Bank of Bangladesh. The founder of the original Grameen Bank recognized that people could break out of pov-

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116 Id.
117 Id. at 20.
118 Id. at 20.
119 TEAP, supra note 9, at 20.
120 Id. at 19.
121 Id. at 20. For a discussion of the importance of placing particular emphasis on including women in such programs, see infra Part V.B.1.
122 See Coleman, supra note 12, at 181–82, 185.
erty by taking small, unsecured loans with reasonable and appropriate conditions for repayment, for the purposes of starting small businesses.\textsuperscript{124} The United Nations declared the year 2005 to be the International Year of Microcredit in recognition of the fact that microloans—small loans given to individuals in society who otherwise have no access to credit—and other forms of microfinance are valuable mechanisms to fight poverty.\textsuperscript{125} Microcredit operates on the principle that those who have access to financial institutional structures, and to credit in particular, are more able to account for daily needs.\textsuperscript{126} In its most frequently cited examples, microcredit allows poor people—those who would otherwise not be “bankable”—to gain sufficient capital in order to start an entrepreneurial business.\textsuperscript{127}

Microcredit programs emerged from widespread criticism of traditional “trickle-down” style funding programs that were State-dominated efforts.\textsuperscript{128} The increasing popularity of microcredit as a tool for alleviating poverty is aptly summarized in a UN resolution passed in 1997:

[M]icrocredit programmes have proved to be an effective tool in freeing people from the bondage of poverty and have led to their increasing participation in the mainstream economic and political process of society . . . . [The programs] have especially benefited women and have resulted in the achievement of their empowerment in a world where more women than men live in absolute poverty and [where] the imbalance continues to grow.\textsuperscript{129}

Microcredit uses a “[t]rickle-up” paradigm to energize development from the poorest segment of society while breaking dependency on

\textsuperscript{124} See id.


\textsuperscript{127} See id.


\textsuperscript{129} G.A. Res. 97, supra note 125, at 1; Taylor, supra note 128, at 317 (quoting G.A. Res. 97, supra note 125, at 1).
government handouts. Though it originated with small, unsecured loans, microfinance has grown to include a variety of financial services for the poor, “including savings, money transfers, payment services, and insurance.”

Microcredit programs often place special emphasis on the needs of women for several reasons: women “often face social barriers to entry into the formal economy and turn to the informal sector to provide for themselves and their families”; women often engage in activities suitable for microloan funded enterprises; and the inclusion of women in income-producing activity serves to empower them. Additionally, “[i]n a world where most poor people are women, studies have shown that access to financial services has improved the status of women within the family and the community.” Evidence also shows that women should be targeted for microloans because they are more careful with family finances and are less likely than the family patriarch to spend the money for unintended purposes. Ultimately, microfinance can play a role in female empowerment: it improves a woman’s ability to make decisions that affect her life by increasing a woman’s market access, role in family decision making, and participation in public action.

Neither microgrants nor microloans are a “silver bullet,” but each form of aid can play a valuable role in conjunction with other forms of development aid in the developing world. Microloans can be particularly beneficial because they are provided in much smaller amounts than microgrants and they focus most particularly on the “poorest of the poor.” Although both microgrant and microloan programs are ultimately concerned with socioeconomic development, microloan programs differ in that they stem from the recognition that credit, and

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130 Taylor, supra note 128, at 316; see Coleman, supra note 12, at 183–84.
131 Coleman, supra note 12, at 182.
132 Taylor, supra note 128, at 319; see Coleman, supra note 12, at 185–86. Microcredit allows women to bring their activities in the informal market—such as small scale agriculture—into the formal economy. Taylor, supra note 128, at 319.
133 See International Year of Microcredit 2005, supra note 126.
134 See Coleman, supra note 12, at 185–86; Taylor, supra note 128, at 319.
135 International Year of Microcredit 2005, supra note 126.
136 Coleman, supra note 12, at 185.
137 Id. at 185–86.
138 Id. at 182.
not just money, is necessary to combat poverty.\textsuperscript{140} Additionally, microloans can be made available to individuals, whereas microgrants on the scale of those given in the Nile TMP would typically require full community participation.\textsuperscript{141} Moreover, conditions for repayment may generate increased responsibility in use of given funds; thus, microgrants, as well as microloans in a credit-saturated environment, may not always be completely effective.\textsuperscript{142} As global environmental policy incorporates increasingly economic approaches, microloan programs are a logical complement, but not a substitute, to existing strategies for improving sustainable environmental development; this is particularly so because in targeting poverty, microloans help further a variety of development goals.\textsuperscript{143}

However, it should be noted that some commentators criticize microcredit and question its effectiveness.\textsuperscript{144} In particular, critics cite the unavailability of certain forms of quantitative data for assessment of microcredit, and also question the long-term effectiveness of microcredit on reducing poverty.\textsuperscript{145} Despite these criticisms, it remains true that “the poor, like the rich—perhaps even more so because of their vulnerability—benefit substantially from the ability to smooth their income.”\textsuperscript{146} In turn, microcredit helps achieve development objectives beyond poverty reduction, such as improved health and nutrition and increased school enrollment.\textsuperscript{147}

V. Analysis

Microgrants are an integral part of generating community level action in furtherance of transboundary cooperation over the Nile’s wa-

\textsuperscript{140} Grameen, Grameen Bank, http://www.grameen-info.org/bank/index.html (last visited Jan. 19, 2006). Microloan programs can also provide other support mechanisms for individuals unavailable in larger scale microgrants; for example, Grameen borrowers are required to abide by the program’s social contract, and attend weekly loan collection meetings. \textit{See} Coleman, \textit{supra} note 12, at 184–85.

\textsuperscript{141} \textit{See} TEAP, \textit{supra} note 9, at 19–20 (discussing the organizational structure for funding the Nile TMP).

\textsuperscript{142} \textit{See} Coleman, \textit{supra} note 12, at 183–84.

\textsuperscript{143} \textit{See} id. at 184–85.

\textsuperscript{144} \textit{See} Taylor, \textit{supra} note 128, at 324–30 (providing an assessment of the effectiveness of microcredit).

\textsuperscript{145} \textit{See} id. at 324–27.

\textsuperscript{146} Coleman, \textit{supra} note 12, at 181.

\textsuperscript{147} \textit{Id.} at 181–82, 184. Indeed, Secretary-General Kofi Annan openly recognized the important role microcredit can play in achieving the Millennium Development Goals. \textit{See} Press Release, U.N. Secretary-General, \textit{supra} note 125.
ter.\textsuperscript{148} Supplementing NBI’s microgrant program with a microloan program is an important step in mitigating the effects of water scarcity in the Nile Basin and in other parts of the developing world.\textsuperscript{149} To achieve true community-level participation in water conservation and transboundary cooperation, NBI must address both the connections between poverty and marginalization of minorities and women, on the one hand, and ecosystem preservation on the other.\textsuperscript{150} This section addresses how and why a microloan program integrated with a water-resource oriented initiative such as NBI could play this role.\textsuperscript{151} By reducing poverty and the marginalization of women and minority groups, a microloan program can intervene in both the causes and the consequences of water scarcity.\textsuperscript{152} Microcredit is therefore central to addressing the three key principles of water management for the future: “1) equity in the form of poverty alleviation . . . , 2) preservation of natural resources and, . . . 3) governance.”\textsuperscript{153} Ultimately, microloans can improve the human and natural environment with respect to water resources, and can provide an effective local intervention where failures of governance exacerbate inequity and scarcity of water resources.\textsuperscript{154}

A. Microcredit: A Tool to Compensate for Failures of Governance in Water Management

Africa’s water crisis, like the water crises in much of the developing world, “is one of water governance, essentially caused by the ways

\textsuperscript{148} See TEAP, supra note 9, at 19.


\textsuperscript{150} See SADOFF ET AL., supra note 15, at 3.

\textsuperscript{151} See generally Blank et al., supra note 149.

\textsuperscript{152} See WORLD WATER ASSESSMENT PROGRAMME, U.N. EDUC. SCIENTIFIC & CULTURAL ORG., EXECUTIVE SUMMARY: WATER FOR PEOPLE WATER FOR LIFE 4 (Mar. 2003), http://unesdoc.unesco.org/images/0012/001295/129556e.pdf [hereinafter WWAP] (“For humanity, the poverty of a large percentage of the world’s population is both a symptom and a cause of the water crisis.”).


\textsuperscript{154} See infra Part V.A–C.
in which we mismanage water.”

“[I]ntertia at leadership level, . . . a world population not fully aware of the scale of the problem,” and a lack of empowerment continue to present dramatic obstacles to water resource management.

When examining the nature of conflict and cooperation over a widely shared resource such as the Nile, the tendency is to examine issues of state-to-state, basin-, or subbasin-level cooperation. NBI can help generate shared normative principles that lend legitimacy to project activities while also creating a foundation of shared principles at these levels. In Africa, however, issues of water resource management and scarcity are deeply rooted in domestic conflicts, and must also be addressed on a local level.

To a large extent, domestic tensions over water management derive either from conflict between indigenous systems of water management and national interests, or from conflict among various interest groups within a local system. While indigenous systems of water management in Africa vary widely, examples of indigenous water systems in Kenya and Tanzania are instructive in understanding these tensions. In Kenya and Tanzania, indigenous systems of water management were based on water ownership in the local community or a particular clan. In these cases, water is considered a free, open-access resource for certain limited uses, with access for other uses—

155 WWAP, supra note 152, at 4; see id. at 30.
156 Id. at 4.
157 See, e.g., Elhance, supra note 2, at 53–83; Brunnée & Toope, supra note 2, at 156.
158 Brunnée & Toope, supra note 2, at 156.

A further key development [in increasing cooperation in the Nile Basin] was the recognition, through the NBI process, that only a shared basin-wide set of normative principles would legitimize particular project activities by ensuring a perspective that was inclusive of the identities and interests of all basin states. At the same time, the states recognized that regional or sub-basin projects were more likely than basin-wide projects to generate concrete results that would, in turn, lend greater legitimacy to the governing principles by showing them to be effective. In sum, it was not possible to promote “action on the ground” before a shared framework of principles had been elaborated and inclusive processes of discussion had been created.

Id.

160 See generally id. (discussing characteristics of indigenous water management in East Africa and local as well as global trends for water resource management).
161 See id. at 5–6.
162 Id. at 5.
particularly for the grazing of cattle—regulated by community or family leaders.\textsuperscript{163} Communities and clans, in some instances, allowed others to access their water and some developed reciprocal arrangements for resources when necessary.\textsuperscript{164}

Modern government interventions may threaten water resources secured under this form of community control by forcing reallocation of resources.\textsuperscript{165} The response of one villager in Tanzania to a request by the government that the village share its water aptly captures the domestic tensions concerning water: “The people from the government came and said, “The water belongs to the nation, and you must share it.” But the villagers said “No, the water is ours” and armed themselves in order to fight.”\textsuperscript{166} The tension between communities and the state reflects a problem of governance over water resources because, while local water practices may be stable, they are not necessarily equitable.\textsuperscript{167} In some situations, external interventions are properly warranted.\textsuperscript{168} For example, in individual communities, women and poor people are generally the least able to exercise influence over community planning,\textsuperscript{169} yet they are often the most affected by water scarcity.\textsuperscript{170} In such cases, an external intervention can create a water management strategy that adequately accounts for the needs of those people most burdened by water scarcity within a given community.\textsuperscript{171} On the other hand, totally decentralized water resource management inevitably allows any riparian community to easily draw more water than its share from a river, jeopardizing the access of downstream communities.\textsuperscript{172}

\begin{itemize}
\item \textsuperscript{163} Id. at 7.
\item \textsuperscript{164} Id. at 5.
\item \textsuperscript{165} See Huggins, \textit{supra} note 159, at 4, 6 Box 1.
\item \textsuperscript{166} Id. at 4 (quoting Anna Sembeo of Oldonyosambu village, Arusha Region, Tanzania).
\item \textsuperscript{167} See id.
\item \textsuperscript{168} See id.
\item \textsuperscript{169} Id.
\item \textsuperscript{170} Kofi A. Annan, U.N. Secretary-General, Message of the Secretary-General to Launch the “Water for Life” Decade (Mar. 22, 2005) (transcript and video clip available at http://www.un.org/waterforlifedecade/).
\item \textsuperscript{171} See \textit{infra} Part V.B for examples of specific interventions for this purpose.
\item \textsuperscript{172} See Huggins, \textit{supra} note 159, at 12 Box 3. Huggins provides an example of an Oxfam project that went awry due to insufficient hydrological data. See id. Oxfam helped build a gravity-fed water scheme in a particular village, not realizing that the water source also fed an underground stream used by a downstream village. Id. The gravity-fed water scheme cut-off the downstream riparians from their water source; as a result, the downstream villagers destroyed the gravity-fed scheme, leaving the village that Oxfam intended to assist without a protected water source. Id.
\end{itemize}
While in some cases state intervention can be valuable where community cooperation is present, state interventions into local water management practices can also further inequities and undermine sustainable use.\textsuperscript{173} In Kenya, for example, the government encouraged the growth of settlements in an arid region by identifying settlement areas and appointing a chief who is responsible for settling the area.\textsuperscript{174} This responsibility gives the chief perverse incentives to engage in competitive behavior with other nearby settlements and communities in order to attract more settlers.\textsuperscript{175} These incentives include fencing in waterpans for grazing animals such that only settled people and their animals have access, disregarding the customary norm that prevented people from allowing cattle to graze too close to wells in the dry season.\textsuperscript{176} Although settlers experience many benefits of settlement,\textsuperscript{177} the changing grazing patterns have resulted in overgrazing.\textsuperscript{178} The result has been “reduced availability of key fodder species, a situation that may be reversible, but is currently reducing nutrients available to herds. Consequently, . . . [animal] milk and meat yield is poorer, with associated human health impacts.”\textsuperscript{179}

Thus, it is not clear how external intervention in local water management should be fashioned, and whether the state should direct that intervention.\textsuperscript{180} At least two problems arise with advocating for state-driven intervention. First, state interventions are likely to be fraught with corruption and the influences of domestic interest groups, resulting in increased marginalization of minority groups due to small-group capture problems.\textsuperscript{181} Second, because “[t]he decentralization of water resources management to the ‘lowest appropriate level,’ as advocated in the Dublin Principles, is one component of an ‘enabling environment’ for customary practices” there exists the risk that centralized water resource management would jeopardize efficiency and equity by disabling the implementation of even sustainable indigenous practices.\textsuperscript{182} Where state intervention is not present, however, customary

\textsuperscript{173} See id. at 6 Box 1.
\textsuperscript{174} Id.
\textsuperscript{175} Id.
\textsuperscript{176} Id.
\textsuperscript{177} These benefits include “improved healthcare and education.” Id.
\textsuperscript{178} Huggins, supra note 159, at 6 Box 1.
\textsuperscript{179} Id.
\textsuperscript{180} See Benvenisti, supra note 1, at 53–57, 98–99, 198–200.
\textsuperscript{181} Id. at 53–57.
norms of indigenous practices might not consider gender equity and other broader interests.\textsuperscript{183} Thus, neither indigenous practices nor state interventions universally solve the crisis of governance in water resource management; this is why “a truly community-based approach must be followed to create an atmosphere of negotiation and mutual understanding between interest groups.”\textsuperscript{184}

A community-based approach has the benefits of increased stakeholder participation in all aspects of water resource management, including sanitation education, conservation, and infrastructure development,\textsuperscript{185} while also enhancing the legitimacy of existing government initiatives.\textsuperscript{186} For example, NBI’s Nile TMP promotes “community-driven interventions to address transboundary environmental threats on a local scale.”\textsuperscript{187} The funding available to NGOs and communities through the Nile TMP may be effective at promoting community-level projects that either directly support transboundary activities or directly relate to a transboundary cooperation issue.\textsuperscript{188} For instance, a microgrant might fund a community project to build water sanitation or irrigation facilities shared across a border or directly affecting a neighboring state.\textsuperscript{189}

While the microgrant program aims to generate participation from all aspects of a community and from women in particular,\textsuperscript{190} it
may not adequately reach the water-related needs or concerns of the most disenfranchised populations within a community. The amount of grant money, the application process, and the need for a community-wide action or support factor into this inadequacy. The level of sophistication of the microgrant program may itself be an obstacle for poor and illiterate individuals seeking out funding, whereas this may not be a major obstacle for unified communities. Additionally, by the terms of the program, microgrants will not be given for purely domestic activities that do not involve environmental issues shared by at least one other Nile Basin country. Therefore, the Nile TMP may not fully realize the potential to intervene in the vicious cycle that connects social marginalization via status or poverty and environmental degradation.

Microloans can introduce improved stakeholder participation beyond that of microgrants in a way that will ultimately benefit the Nile Basin as a whole. This is because microloans are specifically designed to target the poorest and most marginalized portions of society, and because microloans are available to individuals, whereas microgrants are available to communities. The following sections discuss ways in which microcredit can supplement microgrants in water management strategy by circumventing problems of both governance and marginalization of those groups most impacted by water scarcity.

V.B (discussing why the inclusion of women in water planning and management is essential to cultivating sustainable use practices).

191 See TEAP, supra note 9, at 19–23 (discussing the institutional organization for Nile TMP). In general, the Nile TMP will “draw on the best practice model of the UNDP GEF Small Grants Programme . . . although the specific arrangements will vary by country.” Id. at 19. The organization of the microgrant program requires a grant application and institutional oversight or participation through a Microgrant Lead Specialist in each country. Id. at 19–20. While some countries will be able to coordinate the Nile TMP with existing small grants programs, others may not have existing institutional infrastructure. Id. at 20–21.

192 See id. at 20.

193 See id.

194 See infra Parts V.B–C. Increased fiscal responsibility, increased program sustainability, and increased individual access are important features leading to the success of microloan programs; therefore, administering microgrants on an individual basis would be unlikely to have the same effect as a microloan.
B. Microcredit: Targeting the Connection Between Poverty, Health, and Environmental Stability

1. The Links Between Poverty, Women, and Water

Poor countries are particularly dependent on their natural resources, such as water, soil, forests, and animals, yet they are least equipped to protect these resources.\footnote{See Partha Dasgupta et al., Preface to The Economics of Transnational Commons, supra note 17, at v, v.} Indeed, “[i]t is becoming increasingly clear that water will soon become the most crucial resource constraint for economic development and social welfare in the arid and semi-arid regions of the Third World where it has not already done so.”\footnote{Arun P. Elhance, Geography and Hydropolitics, Swords & Ploughshares, Winter 1992–93, at 3, 3, available at http://www.acdis.uiuc.edu/Research/S&Ps/1992-93-Wi/S&P_Wi-92-93.pdf.} Because water management is so crucial to economic development, the international community must adopt the tools of economic development in promoting more equitable and sustainable uses of water in the world.\footnote{See Sadoff et al., supra note 15, at 33.} Unfortunately, only very recently have environmental resources been a significant part of governmental planning models.\footnote{See Dasgupta et al., supra note 195, at v.}

Microcredit is currently used throughout the world—including in Nile basin states—”‘to address the constraints that exclude people from full participation in the financial sector.’”\footnote{Press Release, U.N. Capital Dev. Fund, General Assembly Greenlights Programme for the International Year of Microcredit 2005: Observance Will Promote Access to Financial Service and Empowerment of the Poor, Especially Women, (Dec. 29, 2003) (quoting Kofi Annan, U.N. Secretary-General), available at http://www.uncdf.org/english/news_and_events/archive/news_year2005.php.} Microcredit programs are generally implemented with specific economic development goals in mind; this is because microcredit is first and foremost a development aid tool.\footnote{See Coleman, supra note 12, at 184–85.} This section argues, however, that widespread implementation of water resource-oriented microcredit programs throughout the Nile Basin can alleviate both the sources and symptoms of water scarcity,\footnote{See WWAP, supra note 152, at 4.} while also mitigating the impact of domestic tensions and inequities that can be a barrier to fully realized international cooperation.\footnote{See Benvenisti, supra note 1, at 12–13.}
In order to understand why the use of microcredit should be expanded to environmental initiatives and not only be used for economic development programs, one must understand the connections between water scarcity, poverty, and the marginalization of women.203 The water problem in Africa is not only one of allocation; it is also one of outright scarcity, as there simply is not enough water to meet demand.204 Water scarcity has the least impact on wealthy and powerful individuals in an otherwise poor country because they are able to control and allocate water in a favorable manner.205 For example, a coffee estate in Tanzania held exclusive water rights for a local water source; locals had to accept allocation of water set out in the water rights document belonging to the estate.206 The farmer of the coffee estate was obligated to provide nearby villagers with this water as stipulated in the 1958 document.207 Demand from nearby villagers, however, now exceeds the supply provided by the estate, and has led to arguments and in some cases vandalism.208 While the estate did not itself suffer from water scarcity, the growing population of villagers and livestock means that nearby villagers, who had little means of changing water allocation, would instead experience the effects of water stress.209

The previous example illustrates the ordinary power dynamic that inheres in water resource allocation in the Nile Basin. This power dynamic is worsened by the fact that water scarcity most severely affects poor people because they are unable to secure a water supply.210 In other cases, poor people do not have adequate access to water because they cannot live within a reasonable distance of a water source.211 In yet other circumstances, water policy is used as a “punishing tool in domestic politics.”212 Water scarcity generates a downward spiral of poverty and ill health; as a result of water scarcity, poor people “are blighted by the burden of water-related disease, living in degraded and often dangerous environments, struggling to get an education for their children and to earn a living, and to get enough to eat.”213

203 See generally WWAP, supra note 152.
204 See Sadoff et al., supra note 15, at 33; UN-Water, supra note 185, at 5.
205 See Huggins, supra note 159, at 18 Box 5.
206 Id.
207 Id.
208 Id.
209 See id.
210 See supra notes 204–09 and accompanying text.
211 See UN-Water, supra note 185, at 5.
212 Benvenisti, supra note 1, at 12.
213 WWAP, supra note 152, at 4; see id. at 11.
Ultimately, “the poverty of a large percentage of the world’s population is both a symptom and a cause of the water crisis.”214 The developing world is currently engaged in a vicious cycle where poor people are most affected by water scarcity; due to their lack of resources, poor communities engage in unsustainable or unsanitary water practices.215 These practices decrease the availability of clean water as “short-term survival supersedes long-term resource protection.”216 Water degradation makes it harder for people to generate water-related livelihoods, thus ultimately generating more poverty, because “[w]ithout improved access to freshwater and sanitation, the overarching goal of poverty reduction cannot be achieved. The economic consequences resulting from a lack of clean water and improved sanitation are often underestimated.”217

Women are disproportionately impacted by issues of water scarcity and cleanliness in comparison to men.218 This is due in large part to the fact that women typically bear the primary responsibility for household water and hygiene.219 On average, women and girls walk 3.7 miles every day to carry 5.3 gallons of water.220 Men, on the other hand, are rarely expected to walk several hours to fetch water.221 In addition to being responsible for water supply, women are responsible for household matters of sanitation and the use of water “for food preparation, care of domestic animals, crop irrigation, personal hygiene, care of the sick, cleaning, washing and waste disposal.”222 “Women and girls [also] have the greatest need for private and safe sanitation facilities” in order to improve health and hygiene, reduce embarrassment, and improve personal safety.223

Although women play a central role in household and community management, their voices are often overlooked in water management and sanitary resource planning.224 As a result, the “impressive store of

214 Id. at 4.
215 See UN-WATER, supra note 185, at 5, 8–9.
216 Id. at 15.
217 Id. at 5.
219 Id. at 4.
220 UN-WATER, supra note 185, at 5.
221 A Gender Perspective, supra note 218, at 4.
222 UN-WATER, supra note 185, at 7.
223 Id.; see A Gender Perspective, supra note 218, at 4.
224 UN-WATER, supra note 185, at 7.
“environmental wisdom” developed by women on the location and nature of water resources is untapped.225 The failure to use this “extensive traditional knowledge” not only jeopardizes the efficiency of community water resource management and sanitary planning, it also prevents women from engaging in more efficient practices with respect to domestic water management, and thereby locks women out of opportunities to make money or receive an education.226

In India, for example, the estimated national cost of women fetching water for home use is 150 million work days per year, which equals a national loss of $208 million in income.227 In addition to the amount of time invested in fetching water, a lack of sanitation facilities often prevents girls from attending school.228 By consulting with women when engaging in water resource and sanitation planning, by building nearby water access points, and by providing private sanitation facilities in schools, women will have the opportunity to make significant financial contributions to their families and communities, thereby reducing poverty.229 Reduced poverty ultimately yields more sustainable uses of water resources.230 Improved access to water generates intangible benefits for women as well—“[w]ith closer water comes greater self-esteem, less harassment of women and better school attendance by girls.” 231

2. Opportunities to Use Microcredit to Break Vicious Cycles

Small grants, such as those planned to be given in the Nile TMP, can be highly beneficial for communities that have a collective interest in promoting a particular project in furtherance of transboundary cooperation.232 Despite the fact that the Nile TMP places special emphasis on incorporating the needs of women in microgrant-funded projects, domestic power relationships, problems of governance, and cultural phenomena may prevent women and poor people from having their needs adequately represented.233 Additionally, the number

225 A Gender Perspective, supra note 218, at 4.
226 UN-Water, supra note 185, at 7; see id. at 5.
227 Id. at 5.
228 Id. (“If schools lack adequate sanitation facilities, girls often will not attend.”).
229 See id. at 5, 7.
230 See supra notes 214–17 and accompanying text.
231 A Gender Perspective, supra note 218, at 4.
232 See TEAP, supra note 9, at 19.
233 See UN-Water, supra note 185, at 7. The “central role of women is often overlooked in efforts to improve management of water resources and extend access to adequate sanitation. Women often have no voice in decisions about the kind of services they receive.” Id.
of individual women and impoverished people that need help far exceeds the number of communities that will receive small grants.234

Microloans can circumvent these problems, because in the case of microloans, community enablement is less vital; this is precisely why microloans are effective at reaching the poorest of the poor without distorting funds from more powerful individuals or entities.235 Additionally, microloans are well suited for stimulating income-generating activity by funding microenterprises.236

Many activities funded by microloans may not have a direct relationship to water resources but will nevertheless reduce poverty, thereby intervening in the vicious cycle connecting poverty and inadequate water resources. For example, an individual can take a loan for as little as fifty dollars for a small thirty-five millimeter camera and a few rolls of film, and create a business taking wedding or other special occasion photographs.237 In a more common example, an individual could borrow money via a microloan to purchase a cellular phone, and then use the phone to run a small pay phone business.238

234 See TEAP, supra note 9, at 19–20 (addressing the scope of the Nile TMP).
236 See Coleman, supra note 12, at 184; Press Release, U.N. Secretary-General, supra note 125, at 184 (“[M]icrofinance is not charity. . . . It is recognition that poor people are the solution, not the problem. It is a way to build on their ideas, energy, and vision. It is a way to grow productive enterprises, and so allow communities to prosper.”). It is not appropriate, however, to provide microcredit under conditions that “pose severe challenges to loan repayment.” International Year of Microcredit 2005, supra note 126. “In these cases, grants, infrastructure improvements or education and training programmes are more effective.” Id.
237 My uncle, a farmer in rural India, did precisely this when he received a small camera as a present from my mother. As a result, he was able to generate a profit regularly.
238 Taylor, supra note 128, at 318. This practice was originally launched by Grameen Telecom. Id. The United Nations International Year of Microcredit recounts a similar story:

Fatima Serwoni lives in the village of Namunsi in Uganda and runs a small store, selling food and household items. She has built her business with the help of a series of loans from FOCCAS, a local microfinance institution. Since becoming a client, she has increased her weekly income by 80 per cent and has consistently paid the school fees for her four children. With her most recent loan, Fatima purchased a mobile phone kit to start a payphone business, becoming one of the first “village phone operators” of MTN villagePhone, an initiative of Grameen Foundation USA and MTN Uganda. Undeterred by the lack of electricity in her village, Fatima uses a car battery to charge her phone. With the nearest public payphone more than four kilometres away, people in Fatima’s community are happy to have convenient and affordable telephone access for the first time. Fatima is pleased with her new business,
Other examples of microloan-funded enterprises include the creation of a noodle business with a twenty-five dollar loan, and a floral landscaping and resale businesses with a similar loan.\textsuperscript{239} Even where the funded activity does not directly impact water resources, as in the examples above, it ultimately improves water management because it reduces the need to place short-term survival above long-term preservation of water resources.\textsuperscript{240}

Some microloan-funded projects, however, do have a direct impact on water resource use and management.\textsuperscript{241} For example, a woman could borrow enough money to build a cart capable of transporting water for several families. She could then create a business out of providing water to other women who would ordinarily have to fetch the water themselves. Those women, in turn, would have more time to engage in other income-generating activities or to pursue education. Microloans could also be used to fund “micro-irrigation”—irrigation of small plots.\textsuperscript{242} For instance, a small-scale bucket irrigation kit can be purchased with a microloan of ten dollars.\textsuperscript{243} The kit consists of a bucket and two lengths of drip tape.\textsuperscript{244} The irrigation provided is suitable for kitchen gardens, allowing individuals—most likely women—to sell small amounts of crop.\textsuperscript{245} This irrigation system is also scalable, allowing for irrigation of larger plots of land.\textsuperscript{246} While the concept might appear simplistic, the bucket kit is currently distributed in over one hundred countries, and makes significant contributions to individual livelihoods.\textsuperscript{247} In light of the direct and indirect beneficial impacts microloans can have on environmental resource use, the international environmental community should look to microloans to supplement existing environmental projects.

\textsuperscript{240} \textit{See} \textit{International Year of Microcredit 2005, supra} note 238.
\textsuperscript{241} \textit{See generally UN-Water, supra} note 185, at 15.
\textsuperscript{242} \textit{Id.} at 3.
\textsuperscript{243} \textit{Id.} at 9.
\textsuperscript{244} \textit{Id.}
\textsuperscript{245} \textit{See id.}
\textsuperscript{246} \textit{See id.}
\textsuperscript{247} \textit{See Blank et al., supra} note 149, at 9.
C. Microcredit: A Tool to Improve Water Resource Management

Environmental degradation in the developing world results in part from short-term survival needs preventing efforts to engage in long-term resource protection. As discussed above, microloans may be used as a tool to alleviate poverty, thereby reducing the need to place short-term survival over long-term resource protection. In addition, microloans can be used to directly discourage environmentally harmful activities and promote sustainable uses of water resources.

One way in which microloans can benefit the environment generally, and water resources particularly, is by promoting more equitable and sustainable uses of land. By using microloans to fund the small-scale irrigation methods proposed by Blank and his colleagues—such as using bucket kits—one can obtain high productivity from small plots while reducing reliance on large scale irrigation schemes that benefit only a small minority. Reduced reliance also has the potential to discourage unsustainable land-conversion practices, which create an incentive for “[o]ver-exploitation of water for irrigation and the intensification of agriculture.” Land conversion is harmful to ecosystems and threatens the availability and quality of water resources because it fills water bodies with silt, inhibits natural recharge, and eliminates natural flood control and key components of the aquatic environment, such as habitats for fisheries and waterfowl.

In addition to discouraging harmful land conversion, microloans can play an integral role in reducing water consumption for irrigation. Small-scale irrigation projects, funded with microloans, or a

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248 See UN-WATER, supra note 185, at 15.
249 See supra Part V.A–B.
250 See UN-WATER, supra note 185, at 11 (“a greater effort is needed to help farmers around the world produce more food of better quality with less water and less stress on the environment.”).
251 Blank et al., supra note 149, at 9.
252 See id. at 3.
253 UN-WATER, supra note 185, at 11 (“Though more productive than rain-fed agriculture, irrigation is coming under close scrutiny for its relatively poor yield considering the resources used.”).
255 The dual goal of poverty eradication and environmental sustainability can only be met if “more food of better quality with less water and less stress on the environment” can be produced. UN-WATER, supra note 185, at 11.
A combination of microloans and microgrants, can reduce water consumption by promoting high productivity from small plots and discouraging potentially wasteful large-scale damming and irrigation. Small-scale irrigation projects can also be combined with microloan-funded seed-buying programs to promote the planting of crops that use relatively little water.

Microlending can also have a direct beneficial impact on the environment by discouraging deforestation activities. Deforestation is especially pronounced where wood or wood-derived coal is used for energy consumption; one significant use of wood in this context is for cooking fuel. This deforestation, in turn, directly and adversely affects water resources because “the continued availability of water depends on the conservation of forests and the use of soil and water conservation technologies in people’s farms. As woodland areas are cleared for cultivation . . . less water permeates the ground, and more is diverted away from the groundwater store as run-off.”

Significantly, wood-derived coal use for cooking is inefficient in its use of time, energy, and finances.

One can hypothesize that a microloan program, in conjunction with other forms of funding, could be used to intervene in this cycle.

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256 Blank et al., supra note 149, at 3.
257 See supra notes 91–96 and accompanying text.
258 Brunnée & Toope, supra note 2, at 121 (discussing the problems of “seemingly more efficient high-yielding crop varietals that demand much more water than traditional crops”). This could also be combined with programs to discourage overfarming. For example, increased education and awareness about the harms of overfarming—perhaps funded by microgrant—combined with alternative livelihood opportunities—funded by microloan—can encourage crop rotation and other sustainable farming activities.
260 Huggins, supra note 159, at 10.
261 Sims, supra note 259, at 85.

Because they cannot afford the kind of stoves needed to burn more efficient fuels, the poor continue to rely on woodfuels even though their cost is as high or higher than kerosene, gas or electricity [even for the urban poor]. Official subsidies often favour modern fuels, overlooking the inability of the poor to either switch to a modern fuel or support the costs of traditional [sic] fuels. Measures are therefore urgently needed to enable poor urban households to meet their minimum basic energy needs.

Id. Women also expend significant amounts of time collecting woodfuels, which are less energy efficient than modern fuels. See id. at 83–84. Additionally, women are more likely to suffer from upper-respiratory distress when cooking with woodfuels due to kitchen smoke. See id. at 98–100.
of environmental degradation. First, microgrants could be used to create facilities producing alternative biomass fuels, train individuals to produce fuel briquettes from sawdust and wastepaper, and help individuals overcome the costs associated with converting to a different type of fuel. Second, microloans could be used to discourage deforestation by providing alternative livelihood opportunities for those who would otherwise cut down trees and resell the lumber or wood-derived coal. Microloans can also help stimulate economic activity, such as the creation of a food-vending business, that is enabled by the availability of lower-cost, reliable fuel in the form of biomass briquettes. Third, a microloan program could fund enterprises involved in the distribution of various alternative cooking fuels, such as solar cooking and fuels derived from agricultural waste. Although it is currently unaffordable to fund highly localized alternative biomass briquette production plants, microloans could be used to fund a transportation enterprise for individuals to transport alternative biomass briquettes from a point of distribution to a village or town. In these ways, microloans can play an important role in creating the new ethic of environmental stewardship necessary for long-term ecosystem preservation.

Conclusion

Effective management of transboundary water resources is crucial for the Nile riparian states, both for economic development and for national security. Failures of governance and problems of unequal representation, however, preclude the possibility that all vital domestic interests will be adequately addressed in the basin-wide dialogue on

263 See id. (discussing how making biomass briquettes was an income-generating activity for women in Malawi).
264 See id. at 21.
266 See U.N. Dev. Programme, supra note 262.
267 WWDR, supra note 254, at 130.
transboundary cooperation. Although state-level action is a necessary component of international water management, community-level action is equally vital for achieving sustainable and equitable water use. This is due in large part to the fact that water is deeply connected to domestic social, economic, and cultural structures.

Where the relationship between poverty eradication and environmental protection has been recognized, it has rarely been translated into concrete implementation. The creation of NBI is a historic step in achieving cooperation over the Nile’s water and ameliorating the causes and effects of water scarcity in the Nile Basin. NBI currently recognizes the need for community-level action, in particular through Nile TEAP and Nile TMP.

Microcredit programs are successfully implemented for purposes of poverty eradication throughout the developing world, including the Nile riparian states. However, microcredit programs do not play a central role in achieving environmental goals. The Nile Basin is one of the most complex and strained shared river basins in the world. Given the combination of developmental and environmental needs in the region, a full cooperative scheme requires inclusion of microloans together with existing approaches to cooperation. Microloans can provide dramatic benefits in conjunction with international environmental efforts, especially in the Nile Basin.

By implementing a microcredit program in conjunction with other community-level NBI initiatives, the international community can end the vicious cycle of poverty and marginalization. As part of an international program for the management of the Nile’s water, a microloan program with an environmental focus has the potential to pull people out of poverty and alleviate stress on the environment due to an inability to achieve efficient and environmentally friendly practices. The Nile riparian states stand to gain a great deal by willingly including microfinance among the tools used at the community level.