Environmental Law’s Path Through the 4th Estate: Environmental Law and the Media

SYMPOSIUM ARTICLES

BEHIND THE CURVE: THE NATIONAL MEDIA’S REPORTING ON GLOBAL WARMING

Matthew F. Pawa & Benjamin A. Krass

[pages 485-510]

Abstract: In July 2004, eight States, the City of New York and three land trusts filed suit against five electric power corporations for contributing to global warming. The complaints allege that the defendants are the largest global warming polluters in the United States. The plaintiffs seek an injunction under the federal common law of public nuisance, or in the alternative, under state nuisance law, to require the power companies to reduce their emissions of carbon dioxide. Press coverage of the plaintiffs’ global warming case so far has been mixed. The press has generally failed to understand several of the important legal principles involved, including the legal doctrine of public nuisance. The legal case takes place against a backdrop of a long campaign of distortion by industry relating to the science of global warming that has affected the reporting on global warming generally. Historically, the press has unwittingly distorted coverage of global warming science by uncritically accepting the industry view that the science is in dispute.

LAW, MEDIA, & ENVIRONMENTAL POLICY: A FUNDAMENTAL LINKAGE IN SUSTAINABLE DEMOCRATIC GOVERNANCE

Zygmunt J.B. Plater

[pages 511-550]

Abstract: The functional linkages between law and media have long been significant in shaping American democratic governance. Over the
past thirty-five years, environmental analysis has similarly become essential to shaping international and domestic governmental policy. Environmentalism—focusing as it does on realistic interconnected accounting of the full potential negative consequences as well as benefits of proposed actions, policies, and programs, over the long term as well as the short term, with careful consideration of all realistic alternatives—provides a legal perspective important for societal sustainability. Because environmental values and norms are often in tension with established industrial interests that resist public interest accountability, they are inevitably forced to play on political battlefields dominated by lobbyists’ spin and corporate stratagems for manipulating public perceptions. The press, to which Thomas Jefferson entrusted the critical task of “informing the discretion” of the populace, is a crucially important and often disappointing resource of democratic governance, not least in the area of environmental law. This Essay surveys these problems and explores the potential for environmental lawyers to improve the relationships among environmental analysis, media, and societal governance at both the “micro” level of daily practice and “macro” level of national policy and law-making.

MODERN MEDIA’S ENVIRONMENTAL COVERAGE:
WHAT WE DON’T KNOW CAN HURT US

Jane Akre & Steve Wilson

[pages 551–562]

Abstract: Jane Akre and Steve Wilson had more than fifty years experience as broadcast journalists before becoming Whistleblowers against Rupert Murdoch’s News Corporation, Fox. Steve has worked as an investigative reporter on the network and local level, a program syndicator and currently is at WXYZ in Detroit as Chief Investigative Reporter. Jane has been an anchor at CNN and at various local stations from California to Atlanta as well as consumer, crime, health and investigative reporter. Together they were the first journalists to blow the whistle on the internal workings of a newsroom.

“REFRAMING” THE PRESENTATION OF ENVIRONMENTAL LAW AND POLICY

Charlotte Ryan & Samuel Alexander

[pages 563–592]

Abstract: In 1995, Congress, with the support of the Clinton administration, passed the Personal Responsibility and Work Opportunity Reconciliation Act, a sweeping welfare reform designed to appease conser-
ervative critics of 1960s War on Poverty programs. In the last decade, conservatives have intensified a comparable campaign to dismantle environmental programs and regulatory agencies established during the 1970s through the efforts of the environmental movement. Conservatives’ calls for market forces to replace governmental environmental protection programs echo the arguments of conservative opponents of welfare. Similarly, contemporary battles over environmental policy are being waged in the mass media arena. Therefore, it behooves environmental advocates to review the public discourse that surrounded the welfare debates of the 1990s. Using frame analysis, this Essay describes the evolution of media discourse in Massachusetts from 1990 through 1994 regarding the role of government and its responsibility in providing public welfare programs. The Essay then draws lessons from welfare reform that are relevant to current environmental debate.

ENVIRONMENTAL ATTORNEYS AND THE MEDIA:
GUIDELINES FOR EFFECTIVENESS

John M. Stanton

[pages 593–600]

Abstract: It is often difficult for a public interest advocate to compete with wealthy interests that have vastly greater resources at their disposal and opposing policy preferences. In order to level this playing field, advocates can effectively employ media strategies that allow the public to participate in the public policy debate. This public awareness can often be very effective in influencing the course of the debate and sensitizing policy makers to the competing interests at stake. Accordingly, media tools and goals should be considered at the outset of strategy development, and should inform everything from a project’s title to its budget. Public involvement, made possible through media coverage, can play a pivotal role in influencing policymaking proceedings in the judicial, executive, and legislative branches of government.

ESSAY

NEPA AND ENVIRONMENTAL JUSTICE: INTEGRATION, IMPLEMENTATION, AND JUDICIAL REVIEW

Uma Outka

[pages 601–626]

Abstract: The purpose of the National Environmental Policy Act (NEPA) is to assure “for all Americans safe, healthful, productive, and esthetically
and culturally pleasing surroundings,” a goal that is essential to environmental justice. Although NEPA provides the structure for federal environmental decisionmaking, is it effective as a tool for addressing environmental justice concerns? This Essay addresses NEPA’s limitations and potential for this purpose, and assesses the role of case law and judicial review in shaping this integrative process. To do so, it considers the environmental justice implications of NEPA’s structural gaps—including exemptions, categorical exclusions, and so-called “functional equivalents”—and evaluates judicial review of agencies’ environmental justice analyses to date.

NOTES

ATTORNEYS’ FEES AND THE CONFLICT BETWEEN RULE 68 AND THE CLEAN WATER ACT’S CITIZEN SUIT PROVISION

Daniel E. Burgoyne

Abstract: Environmental “citizen suit” statutes provide incentives for citizens to bring enforcement actions by awarding successful plaintiffs reasonable attorneys’ fees. Defendants have attempted to use Federal Rule of Civil Procedure 68 to block a successful plaintiff’s recovery of attorneys’ fees. Under Rule 68, defendants may offer to allow a judgment to be issued against them for a fixed dollar amount. Plaintiffs may either accept this judgment offer or proceed to trial. If plaintiffs proceed to trial, however, they must receive a judgment more favorable than the offer or pay the defendants’ litigation costs. Defendants argue that the word “costs” as used in Rule 68 applies to attorneys’ fees in addition to other litigation costs. If so, the use of Rule 68 can have a great influence on the economics of citizen suit litigation. This Note explores whether or not Rule 68 should be read to apply to attorneys’ fees in citizen suits under the Clean Water Act and other environmental statutes.

SHIFTING THE BURDEN: POTENTIAL APPLICABILITY OF BUSH V. GORE TO HAZARDOUS WASTE FACILITY SITING

Alison E. Hickey

Abstract: Since its inception in the 1980s, advocates of the environmental justice movement have attempted to remedy the disproportionate siting of hazardous waste facilities in minority neighborhoods by employing the Equal Protection Clause. These lawsuits have thus far been largely unsuc-
cessful because of litigants’ inability to prove intentional discrimination by government actors in such siting decisions. However, in the 2000 decision issued by the U.S. Supreme Court in *Bush v. Gore*, the mere potential for discriminate impact of a decision made by government actors was sufficient to trigger a strict scrutiny analysis under the Equal Protection Clause. While the decision was declared to have little precedential value outside the voting rights context, this Note examines the potential for application of this novel approach to the Equal Protection Clause in future environmental justice claims arising under the Fourteenth Amendment.

THE PROJECT BIOSHIELD PRISONER’S DILEMMA: AN IMPETUS FOR THE MODERNIZATION OF PROGRAMMATIC ENVIRONMENTAL IMPACT STATEMENTS

*David M. Shea*

[pages 695–737]

**Abstract:** Passage of the Project BioShield Act of 2004 evinced an executive and legislative desire to increase government-controlled laboratory space dedicated to studying dangerous pathogens. Pursuant to this Act, the National Institutes of Health (NIH) awarded generous construction grants to research universities nationwide. Unsurprisingly, siting disputes have subsequently arisen over the placement of several of these proposed laboratories in densely populated areas. Because NIH chose not to complete a programmatic environmental impact statement (PEIS), the potential litigation endgames are suboptimal. This fuels a larger debate over the relevance of PEISs in general in light of their recognized value but sporadic invocation. This Note uses a game theory model to argue that initial completion of a thorough PEIS would have led NIH to propose laboratories in areas with comparatively lower population densities. This preferable but currently unattainable outcome demonstrates the need for reform. To that end, this Note concludes with recommendations for legislative, executive, and judicial modernization of PEISs.
BEHIND THE CURVE: THE NATIONAL MEDIA’S REPORTING ON GLOBAL WARMING

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Abstract: In July 2004, eight States, the City of New York and three land trusts filed suit against five electric power corporations for contributing to global warming. The complaints allege that the defendants are the largest global warming polluters in the United States. The plaintiffs seek an injunction under the federal common law of public nuisance, or in the alternative, under state nuisance law, to require the power companies to reduce their emissions of carbon dioxide. Press coverage of the plaintiffs’ global warming case so far has been mixed. The press has generally failed to understand several of the important legal principles involved, including the legal doctrine of public nuisance. The legal case takes place against a backdrop of a long campaign of distortion by industry relating to the science of global warming that has affected the reporting on global warming generally. Historically, the press has unwittingly distorted coverage of global warming science by uncritically accepting the industry view that the science is in dispute.

Introduction

In July 2004, eight States, a city, and three nonprofit land trusts filed suit against six electric power corporations for contributing to global warming...
global warming.\(^1\) Together, the defendants operate approximately 174 fossil fuel-fired power plants in twenty states.\(^2\) The lawsuit alleges that the defendants’ annual emissions of approximately 650 million tons of carbon dioxide are contributing to global warming and that global warming constitutes a public nuisance.\(^3\) The lawsuit also alleges that the defendants are the largest global warming polluters in the United States, and among the largest in the world; according to the allegations of the complaint, their annual emissions alone constitute ten percent of all U.S. carbon dioxide emissions.\(^4\) The plaintiffs seek an injunction under the federal common law of public nuisance, or in the alternative, under state nuisance law, to require the power companies to reduce their emissions.\(^5\)

The plaintiffs in *Connecticut v. American Electric Power Co.* allege that global warming poses threats of severe harm to people, property, and the natural environment.\(^6\) They also contend that global warming will: (1) increase heat deaths; (2) increase ground-level smog, and hence, suffering from asthma and other respiratory diseases; (3) disrupt water supplies in the Western United States and other places dependent upon snowpack for water supply; (4) intensify the hydrologic cycle, creating more and greater floods and an increased likelihood of drought; (5) reduce water levels in the Great Lakes; (6) disrupt and permanently damage forests and ecosystems; and (7) accelerate sea level rise, thereby causing increased beach erosion, permanent inundation of low-lying coastal property, damage to property and hazard to human safety from larger coastal storm surges, and flooding of salt marshes and tidal wetlands that are vital breeding grounds for fish and shellfish.\(^7\)

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4. Id. at *7.
5. See id. at *6.
6. Id.
The federal district court recently dismissed *American Electric Power* on the basis of the nonjusticiable political question doctrine; however, that decision is now on appeal to the Second Circuit Court of Appeals.\(^8\)

I. LEGAL BACKDROP TO THE GLOBAL WARMING PUBLIC NUISANCE CASE

This Part sets forth the legal theories underpinning the public nuisance claim in *Connecticut v. American Electric Power Co.* through a discussion of public nuisances and joint and several liability in the global warming context.

A. Public Nuisance Case Law

A public nuisance is “‘an unreasonable interference with a right common to the general public.’”\(^9\) An action to abate a public nuisance is a quasi-criminal exercise of the police power—\(^10\)—an important feature relevant to standing and other aspects of the doctrine. Public nuisance “is very comprehensive—it includes everything that endangers life or health, gives offense to the senses, violates the laws of decency, or obstructs the reasonable and comfortable use of property.”\(^11\) Public nuisance is widely recognized to have significant “flexibility as a tort concept” and the Restatement definition adopted in 1972 “provides the tort considerable space in which to develop and adapt to the needs of the time.”\(^12\) Because of its flexibility, common law nuisance continues to play a vital role in complementing statutory environ-

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\(^12\) Bryson & Macbeth, *supra* note 10, at 247, 249. This article is an excellent overview of the *Restatement (Second) of Torts* definition of public nuisance and the use of public nuisance in environmental law; it was written just as the new definition was being finalized. *Id.* at 241. The authors demonstrate the potency of public nuisance claims in protecting the environment, and argue eloquently for continued vitality of the doctrine in environmental cases. *See generally id.* Ironically, one of the authors—Macbeth—is now defense counsel in *American Electric Power*. See No. 04 Civ. 5669, U.S. Dist. LEXIS 19964, at *6* (S.D.N.Y. Sept. 19, 2005), *appeal docketed*, No. 05-5119-cv (2d Cir.).
mental enforcement tools, particularly to address newly discovered threats.\textsuperscript{13}

Environmental harm is the quintessential public nuisance. In fact, modern environmental and energy statutes are codifications of the common law of public nuisance:

The theory of nuisance lends itself naturally to combating the harms created by environmental problems. . . . “The deepest doctrinal roots of modern environmental law are found in principles of nuisance. . . . Nuisance actions have involved pollution of all physical media—air, water, land—by a wide variety of means. . . . Nuisance actions have challenged virtually every major industrial and municipal activity which is today the subject of comprehensive environmental regulation. . . . Nuisance theory and case law is the common law backbone of modern environmental and energy law.”\textsuperscript{14}

On the same day that it established the modern framework for the federal common law of public nuisance in \textit{Illinois v. City of Milwaukee (Milwaukee I)},\textsuperscript{15} the Supreme Court of the United States found that “[a]ir pollution is, of course, one of the most notorious types of public nuisance in modern experience.”\textsuperscript{16}

The complaints in \textit{American Electric Power} invoke federal common law as their primary claim because the dispute involves ambient, interstate air pollution.\textsuperscript{17} The Supreme Court held, in its unanimous opinion in \textit{Milwaukee I}, that “[w]hen we deal with air and water in their ambient or interstate aspects, there is a federal common law.”\textsuperscript{18} The emissions at issue in the global warming case, in fact, are inher-

\textsuperscript{13} See, e.g., New York v. Shore Realty Corp., 759 F.2d 1032, 1049–53 (2d Cir. 1985) (finding the state not entitled to injunctive relief under federal Superfund statute, but affirming injunction under public nuisance claim); see also Robert Abrams & Val Washington, \textit{The Misunderstood Law of Public Nuisance: A Comparison with Private Nuisance Twenty Years After Boomer}, 54 Alb. L. Rev. 359, 391–92 (1990) (“Even after the passage of major environmental laws, but before the enactment of statutes in the late 1970s and early 1980s directly addressing the disposal of hazardous waste, public nuisance frequently offered the only remedy to secure the cleanup of toxic dumps.”) (citations omitted).

\textsuperscript{14} Cox v. City of Dallas, 256 F.3d 281, 291 (5th Cir. 2001) (quoting William H. Rodgers, Jr., \textit{Handbook on Environmental Law} § 2.1, at 100 (1977)) (second and subsequent alterations in original) (citation omitted).

\textsuperscript{15} Illinois v. City of Milwaukee (Milwaukee I), 406 U.S. 91, 103–08 (1972).


\textsuperscript{17} See 2005 U.S. Dist. LEXIS 19964, at *6–7.

\textsuperscript{18} 406 U.S. at 103.
ently ambient and interstate because carbon dioxide emitted in any one state affects the concentration of carbon dioxide in other states.

*Milwaukee I* held that federal common law cases addressing interstate pollution give rise to subject matter jurisdiction as a federal question, under 28 U.S.C. § 1331(a), and thus may be filed in federal district court.\(^{19}\) Previously, such cases were addressed under the Supreme Court’s original jurisdiction, which is exclusive with respect to cases between states and nonexclusive with respect to cases by a state against a citizen of another state.\(^{20}\) While the jurisdictional aspect of *Milwaukee I* was new, the recognition of a federal common law cause of action for interstate environmental harm in *Milwaukee I* was not new.

*Milwaukee I* remains good law notwithstanding the Court’s later decision that the federal common law claim at issue in *Milwaukee II* was preempted,\(^{21}\) because *Milwaukee II* was based entirely upon legislation enacted after *Milwaukee I*.\(^{22}\) The Supreme Court has continued to cite *Milwaukee I* as good law after *Milwaukee II*.\(^{23}\) Moreover, in *International Paper Co. v. Ouellette*, the Court stated that “the control of interstate pollution is primarily a matter of federal law.”\(^{24}\) For unregulated interstate or ambient pollution, *Milwaukee I* remains good law.

The doctrinal roots of *Milwaukee I* are deep, reaching back at least to *Missouri v. Illinois*, in which the Court permitted a downstream state to seek injunctive relief against an upstream state for sewage pollution of a river.\(^{25}\) The Court held that the right of a state to seek relief in federal court against an interstate nuisance was inherent in a constitutional scheme in which the states gave up their rights to resolve such disputes with military force, stating:

> [I]t must surely be conceded that, if the health and comfort of the inhabitants of a State are threatened, the State is the proper party to represent and defend them. If Missouri were an independent and sovereign State all must admit that she could seek a remedy by negotiation, and, that failing, by

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\(^{19}\) See *id.* at 98–108.


\(^{22}\) See *id.* at 307–08.

\(^{23}\) For example, in *Texas Indus., Inc. v. Radcliff Materials, Inc.*, decided one month after *Milwaukee II*, the Supreme Court held that “federal common law exists” in “interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations” and cited *Milwaukee I* as its primary example of such proper federal common law. 451 U.S. 630, 641 & n.13 (1981).


force. Diplomatic powers and the right to make war having been surrendered to the general government, it was to be expected that upon the latter would be devolved the duty of providing a remedy and that remedy, we think, is found in the constitutional provisions we are considering.26

Since Missouri, the Supreme Court repeatedly has recognized the federal common law cause of action for interstate environmental harm.27 The Court deems these cases “nuisance actions,”28 which encompass a broad class of interstate harms including economic and other injuries.29

Justice Holmes’ opinion for the Court in Georgia v. Tennessee Copper Co. remains the Court’s most eloquent exposition of the federal common law of public nuisance.30 In that case, Georgia sought an injunction against copper smelting facilities in Tennessee whose sulfur dioxide emissions—the same emissions that today are known to cause acid rain—crossed into Georgia.31 The Court again based its decision upon the inherent right of a state to defend itself even in a constitutional scheme in which states renounced their rights to the use military force:

When the States by their union made the forcible abatement of outside nuisances impossible to each, they did not thereby agree to submit to whatever might be done. They did not renounce the possibility of making reasonable demands on the ground of their still remaining quasi-sovereign interests; and the alternative to force is a suit in this court.

26 Id.
27 See, e.g., New Jersey v. City of New York, 283 U.S. 473, 476–77 (1931) (suing to restrain ocean dumping of trash); North Dakota v. Minnesota, 263 U.S. 365, 366 (1923) (seeking to restrain drainage changes increasing the flow of water in an interstate stream); New York v. New Jersey, 256 U.S. 296, 298 (1921) (suing to enjoin the discharge of sewage into New York harbor); Georgia v. Tenn. Copper Co., 206 U.S. 230, 236–38 (1907) (suing to restrain sulfurous air emissions crossing state lines). Interestingly, in Ohio v. Wyandotte Chemicals Corp., the Court found that interstate pollution is a matter of state law, 401 U.S. 493, 495–99 (1971), but this holding was reversed the following year in Milwaukee I. See Milwaukee II, 451 U.S. at 327 n.19 (stating that Milwaukee I overruled the indication in Wyandotte that state law would control); Milwaukee I, 406 U.S. 91, 102 n.3 (1972).
30 See 206 U.S. at 236–39.
31 Id. at 236.
It is a fair and reasonable demand on the part of a sovereign that the air over its territory should not be polluted on a great scale by sulphurous acid gas, that the forests on its mountains, be they better or worse, and whatever domestic destruction they have suffered, should not be further destroyed or threatened by the act of persons beyond its control, that the crops and orchards on its hills should not be endangered from the same source. If any such demand is to be enforced this must be, notwithstanding the hesitation that we might feel if the suit were between private parties, and the doubt whether for the injuries which they might be suffering to their property they should not be left to an action at law.32

Significantly, the traditional balancing of interests of the parties that a court undertakes in an equitable case, and in cases between states, is not appropriate in a case between a sovereign state and a private party, especially where public health is at stake.33 This is made clear from *Tennessee Copper*, where the Court stated, “[t]his court has not quite the same freedom to balance the harm that will be done by an injunction against that of which the plaintiff complains, that it would have in deciding between two subjects of a single political power,”34 and “[t]he possible disaster to those outside the State must be accepted as a consequence of [Georgia’s] standing upon her extreme rights.”35 Based upon *Tennessee Copper*, the Seventh Circuit has held:

[W]hen the polluting activity is shown to endanger the public health, injunctive relief is generally appropriate.

Similarly, while determining whether to issue an injunction generally involves a balancing of the interests of the parties, the balance is of less importance when the plaintiff is a sovereign state. And if the pollution endangers the public health, injunctive relief is proper, without resort to any balancing.36

In short, the current global warming case invokes a well-established body of public nuisance case law. The harms identified in the

32 *Id.* at 237–38 (citation omitted). These passages were later relied upon by the Court in *Milwaukee I*. See 406 U.S. at 104–05.
33 See *Tenn. Copper*, 206 U.S. at 237–38.
34 *Id.* at 238.
35 *Id.* at 239.
case clearly involve harms to public rights and benefits including: public safety, due to threats from heat deaths and flooding; public health, due to threats from heat stress and increase in ground-level ozone smog; the integrity of natural resources, such as water supplies and forests; and public property, due to damage from inundation of coastal land and interference with navigation. These are typical public harms for traditional public nuisance claims. Moreover, the harms from global warming are as long-lasting and permanent as possible because the effects of global warming will be felt for thousands of years. Unquestionably, the harms from global warming present a quintessential public nuisance.

B. Joint and Several Liability

The principle of joint and several liability for contributing to an indivisible injury applies to the global warming case. Public nuisance liability attaches where a defendant causes or contributes to a public nuisance.\(^{37}\) Where the actions of numerous parties aggregate to produce a single injury, each party is jointly and severally liable.\(^{38}\) The law has long been clear that a polluter may be enjoined from contributing to a public nuisance regardless of the number of co-contributors, even if the defendant’s contributions alone would be insufficient to create the nuisance.

Three seminal state law cases that have been relied upon in federal common law are illustrative. In People v. Gold Run Ditch & Mining Co., California brought a public nuisance abatement action against one of several mining companies that was dumping mine tailings in a river, causing downstream flooding.\(^{39}\) The Supreme Court of Californ-
nia affirmed an injunction even though the trial court found that the defendant’s contribution alone might not have been harmful.\textsuperscript{40} The court quoted the following passage from the trial court’s ruling:

“On the American river and its tributaries a vast amount of mining was done in early times, and up to this time a great deal is being done, besides that by the defendant. No other mine contributes annually more \textit{detritus} to the river than the defendant; still I am unable to say that defendant’s mine alone, without reference to the \textit{debris} from other mines, materially contributes to the evils mentioned; or, in other words, if there were no mining operations save those of the defendant, I am not prepared to say that it would materially injure the valley lands or the navigation of the river. It is the aggregate of \textit{debris} from all the mines which produces the injuries mentioned in these findings.”\textsuperscript{41}

Although the defendant’s pollution alone would not have created the nuisance, the court held that “in an action to abate a public or private nuisance all persons engaged in the commission of the wrongful acts which constitute the nuisance may be enjoined jointly or severally.”\textsuperscript{42}

Likewise, in \textit{Woodyear v. Schaefer},\textsuperscript{43} the Court of Appeals of Maryland rejected the defendant’s argument that its pollution alone was insignificant in light of the large number of co-contributors in a nuisance action by a downstream landowner:

It is no answer to a complaint of nuisance that a great many others are committing similar acts of nuisance upon the stream. Each and every one is liable to a separate action, and to be restrained.

The extent to which the appellee has contributed to the nuisance, may be slight and scarcely appreciable. Standing alone, it might well be that it would only, very slightly, if at all, prove a source of annoyance. And so it might be, as to each of the other numerous persons contributing to the nuisance. Each standing alone, might amount to little or nothing. But it is when all are united together, and contribute to a common result, that they become important as factors, in

\textsuperscript{40} \textit{Id.} at 1157, 1160.
\textsuperscript{41} \textit{Id.} at 1156.
\textsuperscript{42} \textit{Id.} at 1157.
\textsuperscript{43} 57 Md. 1, 13 (1881).
producing the mischief complained of. And it may only be after from year to year, the number of contributors to the injury has greatly increased, that sufficient disturbance of the appellant’s rights has been caused to justify a complaint.

One drop of poison in a person’s cup, may have no injurious effect. But when a dozen, or twenty, or fifty, each put in a drop, fatal results may follow. It would not do to say that neither was to be held responsible.\textsuperscript{44}

In \textit{Lockwood Co. v. Lawrence}, a downstream owner sought an injunction against several sawmill operators that were dumping wood shavings and refuse wood into the stream above the plaintiffs’ property.\textsuperscript{45} The plaintiffs acknowledged that “it is impossible to distinguish what particular share of damage each has inflicted or will inflict,” but contended that each was contributing something to the nuisance.\textsuperscript{46} The Supreme Judicial Court of Maine held that injunctive relief was proper notwithstanding the fact that each defendant’s contribution alone might have been harmless, stating:

In the case at bar, it may be that the act of any one respondent alone might not be sufficient cause for any well grounded action on the part of the complainants; but when the individual acts of the several respondents, through the combined results of these individual acts, produce appreciable and serious injury, it is a single result, not traceable perhaps to any particular one of these respondents, but a result for which they may be liable in equity as contributing to the common nuisance, as we have before stated.\textsuperscript{47}

All three of these cases were relied upon as part of the federal common law of public nuisance in \textit{United States v. Luce}, in which a fish processing plant—one of two contributors to air pollution that constituted a nuisance at a nearby federal facility—was held jointly and severally liable.\textsuperscript{48} More recently, the district court in \textit{Illinois v. Milwaukee} imposed joint and several liability in a multiple polluter case as a matter of federal common law. “It is impossible to demonstrate that any Illinois resident has been infected by pathogens originating in Mil-

\begin{itemize}
\item \textsuperscript{44} Id. at 9–10 (citations omitted).
\item \textsuperscript{45} 77 Me. 297, 302–03 (1885).
\item \textsuperscript{46} Id. at 303.
\item \textsuperscript{47} Id. at 309–10.
\item \textsuperscript{48} 141 F. 385, 390, 411–12 (D. Del. 1905).
\end{itemize}
waukegan sewage. Viruses and bacteria do not bear labels . . . .”\textsuperscript{49} Nonetheless, the court imposed liability.\textsuperscript{50} The plaintiffs in that case not only alleged harm from pathogens, but also from the nutrients phosphorus and nitrogen contained in the sewage, which contributed to the eutrophication of an entire Great Lake.\textsuperscript{51} The court held:

Anyone who contributes to the injury is liable, even though his conduct, standing alone, might not have been sufficient to cause the injury. Here, it may be that Milwaukee’s one million pounds of phosphorous a year would not cause a problem in the lake if there were no other phosphorous being added. But there is other phosphorous being added, and it is clear that the total amount of phosphorous being put into the lake is causing a problem.

There may be a discharge so small that, as a practical matter, it can be regarded as de minimis, even though as a logical matter it is still part of the whole. But clearly that is not this case. We are dealing here with the most significant point source on the lake.\textsuperscript{52}

Every homeowner in the Lake Michigan watershed who used traditional laundry detergent was also contributing phosphorous to the lake. Every farm in the watershed was a non-point source contributing nutrients to the lake.\textsuperscript{53} Yet, this did not bar a case against the watershed’s biggest point source polluters under federal common law. Indeed, it did not even bar liability following a full trial on the merits.\textsuperscript{54} Only the fact that Congress passed a statute that eventually preempted the claim came to the defendants’ rescue.\textsuperscript{55} Thus, under federal and state common law of public nuisance, it is simply not a defense that a defendant’s pollution alone would not have created the nuisance.\textsuperscript{56} A contributor is liable when his pollution combines with that of others to produce the nuisance.\textsuperscript{57}

\textsuperscript{50} See \textit{id.} at *17.
\textsuperscript{51} See \textit{id.} at *20.
\textsuperscript{52} \textit{Id.} at *22–23.
\textsuperscript{53} See \textit{id.} at *16.
\textsuperscript{54} See \textit{id.} at * 25.
\textsuperscript{56} \textit{Luce}, 141 F. at 412.
\textsuperscript{57} \textit{Id.}
Federal courts frequently apply this principle of joint and several liability as a matter of federal common law in multiple-polluter cases under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).[^58] Such cases typically involve numerous responsible parties who have contributed hazardous waste to a dump site. Congress did not legislatively establish joint and several liability in CERCLA; rather, federal courts have developed joint and several liability in such cases as a matter of federal common law ever since the decision in *United States v. Chem-Dyne Corp.*[^59] Joint and several liability under federal common law has now become a basic tenet of CERCLA law.[^60] The principle of joint and several liability for multiple polluters is thus well-established under federal common law and familiar to the courts.

The principle of joint and several liability for multiple polluters is highly significant. The principle affects the standing inquiry insofar as courts may not “raise the standing hurdle higher than the necessary showing for success on the merits in an action.”[^61] Thus, standing rules of cause-in-fact and redressability cannot rewrite the controlling liability rules; rather, a court must look to the entire corpus of pollution from all contributors when assessing these elements of standing. The principle of joint and several liability also means that other polluters are not indispensable parties because it is blackletter law that joint tortfeasors are not indispensable parties.^[62]

[^59]: 572 F. Supp. 802, 808–10 (S.D. Ohio 1983) (holding that federal common law controls and applying *Restatement (Second) of Torts* principles of joint and several liability for indivisible injuries).
[^60]: See, e.g., *United States v. Alcan Aluminum Corp.*, 990 F.2d 711, 722 (2d Cir. 1993) (“[W]here each tortfeasor causes a single indivisible harm, then damages are not apportioned and each is liable in damages for the entire harm.”); *O’Neil v. Picillo*, 883 F.2d 176, 178 (1st Cir. 1989) (“The rule adopted by the majority of courts, and the one we adopt, is based on the Restatement (Second) of Torts: damages should be apportioned only if the defendant can demonstrate that the harm is divisible.”).
[^62]: See, e.g., *Temple v. Synthes Corp.*, 498 U.S. 5, 7 (1990) (per curiam) (“It has long been the rule that it is not necessary for all joint tortfeasors to be named as defendants in a single lawsuit.”); *Samaha v. Presbyterian Hosp. of New York*, 757 F.2d 529, 531 (2d Cir. 1985) (“it is settled federal law that joint tortfeasors are not indispensable parties”); *New York v. Shore Realty Corp.*, No. CV-84-0864, 1984 U.S. Dist. LEXIS 16183, at *4 (E.D.N.Y. June 4, 1984) (“It is well settled law that one tortfeasor [sic] may not compel the joinder of other alleged joint tortfeasors under Rule 19.”).
II. REPORTING ON GLOBAL WARMING IN GENERAL

A. Deception and Denial

A central problem that has plagued reporting on global warming for over a decade has been the tendency of reporters to accept uncritically the industry view that the science of global warming is in dispute. Because reporters are trained to report both sides of a story, they repeatedly have fallen prey to the industry tactic of trying to create a scientific dispute when in fact there is none. However, as journalist Ross Gelbspan has observed, the journalistic rule to report both sides of a story is appropriate for opinions, but not for facts:

The ethic of journalistic balance comes into play when there is a story involving opinion: Should abortion be legal? Should we invade Iraq? Should we have bilingual education or English immersion? At that point, an ethical journalist is obligated to give each competing view its most articulate presentation—and equivalent space.

But when it’s a question of fact, it’s up to a reporter to dig into a story and find out what the facts are. The issue of balance is not relevant when the focus of a story is factual. In this case, what is known about the climate comes from the largest and most rigorously peer-reviewed scientific collaboration in history.

As James Baker, head of the U.S. National Atmospheric and Oceanic Administration, said, “There’s no better scientific consensus on any other issue I know—except perhaps Newton’s second law of dynamics.”

A recent study of this problem attempted to determine whether there indeed was a disconnect between the scientific consensus on global warming and the reporting on the problem in America’s leading newspapers. The investigators started by examining two scientific issues with respect to global warming: the existence of anthropogenic global warming and the actions to be taken in response to global warming. They found a clear scientific consensus that human

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63 Ross Gelbspan, Boiling Point 73 (2004).
64 Maxwell T. Boykoff & Jules M. Boykoff, Balance as Bias: Global Warming and the US Prestige Press, 14 Global Envtl. Change 125, 131 (2004). The authors are professors of Environmental Studies and Government, respectively. Id. at 125.
65 Id.
emissions of greenhouse gases are the dominant force behind global warming and that immediate and mandatory actions are necessary to combat the problem.\textsuperscript{66} They next examined over 3500 articles in the \textit{New York Times}, \textit{Los Angeles Times}, \textit{Washington Post}, and \textit{Wall Street Journal} from 1988 to 2002 and found that the majority of articles provided “balanced” coverage that gave the incorrect impression of the significant scientific dispute on these topics.\textsuperscript{67}

This study probably understates the extent of the misreporting problem with respect to the existence of anthropogenic global warming by defining the scientific consensus as admitting some debate with respect to the dominant cause of recent global warming.\textsuperscript{68} A more recent, deeper survey of nearly 1000 scientific articles, published in peer-reviewed scientific journals, found that no papers addressing global climate change disagreed with the consensus position of the Intergovernmental Panel on Climate Change (IPCC), which is that “[M]ost of the observed warming over the last 50 years is likely to have been due to the increase in greenhouse gas concentrations.”\textsuperscript{69} As pointed out in this survey, the American Meteorological Society, the American Geophysical Union, and the American Association for the Advancement of Science “all have issued statements in recent years concluding that the evidence for human modification of climate is compelling.”\textsuperscript{70}

Earlier this year, the national science academies of Brazil, Canada, China, France, Germany, India, Italy, Japan, Russia, the United Kingdom, and the United States issued a joint statement claiming that:

\begin{quote}
[T]here is now strong evidence that significant global warming is occurring. . . . It is likely that most of the warming in recent decades can be attributed to human activities. . . .
\end{quote}

\begin{quote}
. . . .
\end{quote}

It is vital that all nations identify cost-effective steps that they can take now, to contribute to substantial and long-term reduction in net global greenhouse gas emissions.

\textsuperscript{66} \textit{Id.} at 131.

\textsuperscript{67} \textit{Id.} at 128, 129.

\textsuperscript{68} See \textit{id.} at 129.

\textsuperscript{69} Naomi Oreskes, \textit{The Scientific Consensus on Climate Change}, 306 Sci. 1686, 1686 (2004) (alteration in original) (quoting \textit{INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2001: IMPACTS, ADAPTATION, AND VULNERABILITY} 21 (J.J. McCarthy et al. eds., 2001)).

\textsuperscript{70} \textit{Id.}
Action taken now to reduce significantly the build-up of greenhouse gases in the atmosphere will lessen the magnitude and rate of climate change.\footnote{Joint Science Academies’ Statement: Global Response to Climate Change, http://nationalacademies.org/onpi/06072005.pdf (last visited Apr. 2, 2006) (citations omitted).}

Yet, despite this extraordinary consensus among scientists that grows stronger every year, news stories continue to report a supposed dispute among scientists. One recent example from the \textit{Washington Post} states:

Scientists have documented a gradual increase in Earth’s temperature in recent decades. Most authorities on climate change believe that the burning of fossil fuels, such as coal and gasoline, is at least partially responsible for the rise. \textit{Some scientists disagree, however, saying the increase may be the result of normal weather cycles.}\footnote{Richard Morin, \textit{Beliefs About Climate Change Hold Steady}, \textit{Wash. Post}, Oct. 2, 2005, at A16 (emphasis added).}

Ironically, this misleading statement appears in an article reporting on the results of a \textit{Washington Post}-ABC News poll regarding public attitudes on global warming.\footnote{\textit{Id.}} The article reports that while fifty-six percent of respondents believed that global warming was occurring, only forty-one percent said it requires immediate governmental action and forty-seven percent adhere to the position that the problem must be studied further before the government acts.\footnote{\textit{Id.}} The position that more study is required prior to government action is, of course, the fossil fuel industry’s standard position and is a means of delaying action to address global warming. The article’s statement about an alleged scientific dispute will, of course, only further the public misperception that there is such a legitimate dispute, and will thus affect one of the central questions being polled by the \textit{Washington Post}—whether further scientific study is required before taking action.\footnote{See \textit{id.}}

Why is the press missing the boat so badly on global warming? The perception of a divided scientific community is largely the product of a long and sophisticated public relations campaign by the electric power, coal, oil, and automobile industries to mislead the public. This campaign has, as its central feature, promotion of the idea that there is a dispute about global warming through the use of industry-
funded “skeptics.” For the most part, these skeptics have some scientific training but are not climatologists. They are not “skeptics” in the positive sense in which scientists should be skeptical with an open and critical mind subject to persuasion by the best evidence. Rather, their skepticism is one-sided, taking issue only with scientific evidence that would tend to harm the interests of their corporate paymasters. Tellingly, their criticisms are almost never published in peer-reviewed journals but on the pages of the Wall Street Journal’s editorial page, the Washington Times, or in industry-funded “journals” that are not peer-reviewed. The use of industry-funded “skeptics” to cast doubt on the science seems to have succeeded in fooling many journalists who report on global warming—even as a subset of those journalists have unmasked this effort.

In addition, industry has produced a bewildering array of organizations with names such as the Advancement of Sound Science Coalition, Global Climate Coalition (GCC), and the Science & Environmental Policy Project, which sprang up in the 1990s as global warming science matured and policymakers became serious about tackling the problem with mandatory emissions reductions. GCC—formed by automobile, oil, coal, and electric power corporations—was one of the most forceful of these industry groups. GCC “maintain[ed] that global warming is speculation,” and its tactics have been compared to those of the Tobacco Institute. The campaign continues today:


77 See sources cited supra note 76.

78 See, e.g., Cushman, supra note 76; David Rubenstein, A Counter-SLAPP in the Offing?, Corp. Legal Times, July 2000, at 70.

79 See Rubenstein, supra note 78.

80 Id.
American Electric Power Service, a defendant in the current public nuisance case, is a former board member of the now-disbanded GCC.81

One of GCC’s more notorious deceptions was the widespread distribution in 1998 of a petition—supposedly signed by 17,000 scientists opposing the Kyoto Protocol—accompanied by a “scientific study” concluding that carbon dioxide emissions pose no climatic threat and instead amount to “a wonderful and unexpected gift from the industrial revolution.”82 The petition mimicked the format of the National Academy of Sciences, and was so misleading that the Academy took the unusual step of distancing itself from the petition in order to mitigate the confusion.83 It later became clear that the organization that assembled the petition—the Oregon Institute of Science and Medicine—was a self-described “very small” endeavor run by a biochemist who also advocates nuclear shelters and home schooling.84 Even more disconcerting is the fact that among the list of 17,000 “scientists” who signed the petition via the Internet, were the names of fictional television characters from M*A*S*H, the singer James Brown, and a singer from the Spice Girls.85

A somewhat similar petition had been organized two years earlier by Dr. S. Fred Singer, one of the most notorious industry-funded skeptics. Titled “The Leipzig Declaration on Global Climate Change,” the petition stated that “there does not exist today a general scientific consensus about the importance of greenhouse warming from rising levels of carbon dioxide” and was allegedly signed by over one hundred “independent scientists concerned with atmospheric and climate problems.”86 The vast majority of the signatories were not climatologists; rather, they included medical doctors, nuclear scientists, one

81 Press Release, Global Climate Coalition, Global Climate Coalition Membership (on file with author).
83 Stevens, supra note 76.
expert on flying insects, and some people who could not be located.\footnote{Christian Jensen, How Many Climate Researchers Support the “Leipzig Declaration”?}, \footnote{Id.} Approximately one-third of the European signatories, when contacted by the Danish Broadcasting Company, claimed they had never signed it.\footnote{Id.} One signatory was Roy Leep, a weatherman for a local news station in Tampa, Florida, who does not have a college degree.\footnote{David Olinger, Cool to the Warnings of Global Warming's Dangers, St. Petersburg Times, July 29, 1996, at 1A.} Another signatory was Richard F. Groeber, who runs Dick’s Weather Service in Springfield, Ohio.\footnote{Id.} When asked if he was a scientist, he replied “I sorta consider myself so . . . I had two or three years of college training in the scientific area, and 30 or 40 years of self-study.”\footnote{Id.}

Although these episodes may seem comical at some level for their Keystone Cops qualities, these were serious efforts by highly sophisticated industries to discredit the science of global warming. Moreover, repeatedly trotting out skeptics to counter the mainstream scientific consensus has been successful in convincing many people that there is a serious scientific debate over whether global warming is even happening:

[D]espite being rather easy targets for their critics, the skeptics do seem to have been successful at changing the parameters of the global warming debate.

Because of their visibility in newspaper articles, radio talk shows and television news programs, they have managed to create the impression of widespread debate in the scientific community on the global warming issue, perhaps far more than their actual numbers would suggest.\footnote{Ivanovich, supra note 76.}

While the small handful of reporters who have revealed industry’s role in manufacturing a false scientific debate are to be commended, the vast majority of their colleagues have fallen prey to industry’s manipulation. In being duped, the national media has unwittingly helped create a dominant impression among the American public that the science of global warming is unsettled.

Unfortunately, this trend continues. In February 2005, the \textit{Wall Street Journal} gave front-page coverage to a study supposedly revealing a
flaw in the calculations underlying the famous hockey stick graph. The hockey stick graph was assembled by Dr. Michael Mann, formerly of the University of Virginia and now Director of the Earth System Science Center at Pennsylvania State University. The graph—assembled from paleoclimatic data and modern temperature measurements—depicts the northern hemisphere’s average temperature holding relatively steady for centuries, and then climbing rapidly in the late twentieth century. As such, the graph resembles a hockey stick on its side with the blade representing the late twentieth century. Although the hockey stick graph is only one of many lines of scientific evidence demonstrating that the increase in temperature over the last fifty years is anomalous and highly unlikely to be attributable to natural causes, it is significant enough to have become a target for industry.

The front-page article in the Wall Street Journal set off a controversy over what should have been quiet climate research. It has been stated that “[d]ecades of research have created a massive body of scientific literature on climate change, and thousands of new studies on the subject appear every year in different science journals.” Yet, the Wall Street Journal—which had published only two other stories based upon new research from scientific journals in the previous year, neither of which were front-page items—placed the anti-hockey stick

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96 See id.
97 Dr. Mann’s defense of the hockey stick graph and response to the study reported by the Wall Street Journal can be found at a web site to which Dr. Mann contributes. See generally Real Climate, Real Climate—Climate Science, http://www.realclimate.org/index.php?author_name=mike (last visited Apr. 3, 2006). The site also includes a link to a recent peer-reviewed paper by Dr. Mann and six other climate researchers reaching the same conclusion as the original hockey stick graph paper but by different methods. See T.M. Cronin et al., Multiproxy Evidence of Holocene Climate Variability from Estuarine Sediments, Eastern North America, 20 PALEOCEANOGRAPHY PA4006, at *1 (Oct. 19, 2005), available at http://www.meteo.psu.edu/~mann/Mann/articles/articles.html; see also Richard A. Kerr, Millennium’s Hottest Decade Retains Its Title, for Now, 307 Sci. 828 (2005) (reporting study by Russian and Swedish scientists affirming unprecedented nature of recent warming trend through independent methodology).
99 Id.
graph article on its front page. A firestorm of criticism, aimed at the hockey stick graph, erupted from individuals including Representative Joe Barton of Texas, Chairman of the U.S. House of Representatives Energy and Commerce Committee, who commenced an inquisition of Dr. Mann and his colleagues based upon the article. Barton is the leading recipient of political cash from the energy industry, and has hired lobbyists from the electric and petrochemical industries to run his committee.

These newest members of the climate skeptics corps—that the Wall Street Journal covered on page one—have limited scientific credentials, if any, but they do have ties to fossil fuel industries. The lead author of the study reported so prominently in the Wall Street Journal is a businessman who has served as director or officer of a number of small public mineral exploration companies, and is currently a consultant for CGX Energy, Inc., an oil and gas exploration company. His education is not in science, but in math as an undergraduate, and in politics, philosophy, and economics at the graduate level. The coauthor of the study is an Associate Professor in the Economics Department at the University of Guelph, Ontario, and a Senior Fellow of the Fraser Insti-
tute in British Columbia—a conservative think tank that received $60,000 from ExxonMobil in 2003. The coauthor is also associated with the George C. Marshall Institute—a conservative organization run by an ExxonMobil lobbyist that espouses the industry view on global warming with self-published “scientific articles” that are not peer-reviewed. The results of their study were provided in a briefing at the George C. Marshall Institute prior to publication in a peer-reviewed journal.

The Wall Street Journal’s front-page coverage of the scientific report attacking the hockey stick graph has been decried by the former page-one editor:

[T]he harshest critic of the whole issue is former Wall Street Journal page-one editor, Frank Allen. He now directs the Institutes for Journalism & Natural Resources in Missoula, Mont. When asked to read the front-page article, he described it to ES& T as a “public disservice” littered with “snide comments” and “unsupported assumptions”. He says he does not understand how the story got past the editors.

“It was a strange story [as] it had this bizarre undertone of being investigative but it didn’t investigate,” says Allen. “And this piece—what I thought was bothersome about it—it purported to be authoritative, and it’s just full of holes.”

While the facts about this and similar episodes have come to light through journalism itself, often, they are found only in smaller publications such as Environmental Science & Technology Online News, which hardly affects the public’s understanding of the global warming issue. Mainstream newspapers like the Wall Street Journal and the New York Times affect public attitudes and beliefs about global warming, especially when such reputable sources provide front-page coverage. Yet, one can search the New York Times in vain for a discussion of this episode, and find nothing more than a short article about Representative Barton’s information request on page A14.
Thus, the campaign of deception and denial that may well have been responsible for derailing progress on global warming throughout the 1990s continues. When the issue is one of scientific fact, reporters have a duty to determine the state of scientific thought and must not simply accept at face value a proffered scientific “dispute” that, upon closer examination, does not exist.

B. Complexity and Other Impediments to Effective Journalism

The media’s problems in covering global warming can be attributed to other factors as well. One major problem is complexity. While the basic story of global warming is not complex—burning of fossil fuels emits carbon dioxide, which traps planetary heat like an atmospheric blanket—the scientific research is multidisciplinary and can be difficult to follow. Often, the problem is compounded by scientists themselves, whose findings are frequently obscured through jargon, or by a different standard of proof.

Scientists tend to withhold judgment until they have a very high confidence level. For example, the Intergovernmental Panel on Climate Change (IPCC) uses “very likely” and “likely” as terms of art meaning a 90–99% chance and a 66–90% chance, respectively. Thus, when the IPCC states that “most of the observed warming over the last fifty years is likely to have been due to the increase in greenhouse gas concentrations,” it is referring to a conclusion that is much more certain than, for example, the preponderance of the evidence standard—more than fifty percent likely—used in civil cases. The nature of scientific inquiry is commendably cautious. However, as Ross Gelbspan has pointed out, a good journalist can learn about the true implications of a scientific study by discussing the issues directly with the scientist:

On the record, scientists typically speak in terms of probabilities and estimates and uncertainties. As a result, they sound to an untrained reporter as vague, wishy-washy, almost indecisive. But off the record, when asked to distill the implications of their findings, many scientists would make such statements as, “This is scary as hell.”

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111 Id. at 10.

112 Gelbspan, supra note 63, at 74.
Another reason for the disconnect between the science of global warming and adequate coverage is the media’s tendency to turn every issue into a political one, thus obscuring the true scientific issues. The political nature of the issue can be political in the literal sense, as when global warming becomes a campaign issue, or in a figurative sense, as when the focus is on who is gaining the upper hand in attacking whom in the world of climate science. Important scientific information can get lost when the focus is on politics and personalities.

A final factor that has been identified as partially responsible for the inadequate coverage of global warming science is the reduction in independent news outlets and the corresponding increase in corporate ownership of the media. \(^{113}\) Independent news outlets are more focused on high-quality news, while corporate owners tend to be profit-focused. \(^{114}\)

III. Reporting on the Global Warming Public Nuisance Case

From a plaintiff lawyer’s perspective, the reporting on the public nuisance case has been mixed. While there have been a few very thoughtful articles, most coverage of the case has been highly superficial. \(^{115}\) Two major problems in the coverage have emerged, both stemming from a failure to grasp legal principles that are not especially difficult to understand.

The first major problem is journalists’ universal failure to understand the joint and several liability theory undergirding the case. \(^{116}\) Media outlets have thus reported that the plaintiffs will need to prove that emissions from particular power plants are causing harm. \(^{117}\) However, this is not the law; rather, in a pollution case in which the defendants’ pollutants mix with those of others and the entire body of pollution is causing the harm, a plaintiff need only prove that the de-

\(^{113}\) Id. at 81–82.

\(^{114}\) See id.


fendant contributed to the overall load of pollutants.\textsuperscript{118} Courts have routinely rejected the contention that a defendant should not be held liable where its pollution alone was insignificant in light of the large number of co-contributors.\textsuperscript{119}

In the global warming public nuisance case, the fact that the power plants at issue are emitting millions of tons of carbon dioxide every year is not going a matter of dispute; the power plants report their emissions of carbon dioxide to the Energy Information Administration every year, pursuant to the Energy Policy Act of 1992.\textsuperscript{120} Plaintiffs, based upon over a hundred years of public nuisance case law, will not need to isolate the impacts of the defendants’ emissions.

The second major problem stems from the difficulty nonlawyers have in understanding the legal doctrine of public nuisance. To a nonlawyer, the word “nuisance” means a small or minor annoyance rather than a severe harm. But in the law, public nuisance is a powerful doctrine with roots in the police power with a far-reaching ability to impose court-ordered changes in conduct. For example, in \textit{United States v. Reserve Mining Co.}, the court issued an injunction under federal common law, requiring the shut down of a facility supplying twelve percent of ore for the nation’s steel production because of massive air pollution from the facility.\textsuperscript{121} The Eighth Circuit Court of Appeals found that, while the pollution was insufficiently interstate to trigger federal common law, injunctive relief was warranted under statutory law; the appellate court modified the injunction to allow the plant to continue operating, but required the expenditure of $243 million on pollution control.\textsuperscript{122} The federal common law of public nuisance is a particularly powerful doctrine; it is grounded in the constitutional right of states and citizens to defend themselves against harmful conduct occurring outside their borders that causes harm inside their borders.\textsuperscript{123} Under the federal common law of public nuisance, when a sovereign state proves that there is harm to which a pri-

\begin{itemize}
\item \textsuperscript{118} See discussion \textit{supra} Part I.B.
\item \textsuperscript{119} See, e.g., Woodyear v. Schaefer, 57 Md. 1, 9–10 (1881).
\item \textsuperscript{120} 42 U.S.C. § 13,385 (2000).
\item \textsuperscript{121} 380 F. Supp. 11, 20–21 (D. Minn. 1974).
\item \textsuperscript{122} Reserve Mining Co. v. EPA, 514 F.2d 492, 536–42 (8th Cir. 1975).
\end{itemize}
vate out-of-state defendant is contributing, a court order requiring the defendant to cease the harmful conduct is necessary.\textsuperscript{124}

Moreover, a “nuisance case” in the lay person’s mind usually means a legal case that is frivolous and has been filed for annoyance in the hopes of extracting a settlement. This has been exploited by those opposed to the lawsuit, who use this pejorative definition of nuisance to disparage the lawsuit.\textsuperscript{125}

\textsuperscript{124} See Tenn. Copper, 206 U.S. at 238–39; Illinois v. City of Milwaukee, 599 F.2d 151, 166 (7th Cir. 1979), rev’d on other grounds, Milwaukee II, 451 U.S. 304, 312, 332 (1981); see also discussion supra Part I.A.

LAW, MEDIA, & ENVIRONMENTAL POLICY: A FUNDAMENTAL LINKAGE IN SUSTAINABLE DEMOCRATIC GOVERNANCE

Zygmunt J.B. Plater*

Abstract: The functional linkages between law and media have long been significant in shaping American democratic governance. Over the past thirty-five years, environmental analysis has similarly become essential to shaping international and domestic governmental policy. Environmentalism—focusing as it does on realistic interconnected accounting of the full potential negative consequences as well as benefits of proposed actions, policies, and programs, over the long term as well as the short term, with careful consideration of all realistic alternatives—provides a legal perspective important for societal sustainability. Because environmental values and norms are often in tension with established industrial interests that resist public interest accountability, they are inevitably forced to play on political battlefields dominated by lobbyists’ spin and corporate stratagems for manipulating public perceptions. The press, to which Thomas Jefferson entrusted the critical task of “informing the discretion” of the populace, is a crucially important and often disappointing resource of democratic governance, not least in the area of environmental law. This Essay surveys these problems and explores the potential for environmental lawyers to improve the relationships among environmental analysis, media, and societal governance at both the “micro” level of daily practice and “macro” level of national policy and law-making.

The free press is an absolute value not only because the unfettered flow of information is essential to the republican system, nor only because the fourth estate serves as a check on the power of the other three, but because public expression is necessary for the communal self-awareness that keeps the body politic alive. . . . The news media do for democracy what liturgy does for religion; what poetry does for experience; what gesture does for feeling. With words out of silence, the press tells you who you are.\(^1\)

**Introduction**

In all modern industrial democracies, and perhaps especially today in this country, law and media are inextricably joined as two fundamental elements of the structure and process of societal governance. The volatility of decisional processes in the legislative and administrative spheres, the systemic role of public opinion polls, and the use of spin in modern governmental decisionmaking, all reflect the significance of perceived public opinion in shaping outcomes in the governance process.

Environmental analysis has also been defining for itself a fundamentally linked role in societal governance, whether or not that role is so recognized. Environmentalism is a strategically rational way of analyzing the changing and interrelated complexities of world conditions, with the hope of navigating our society—through science, law, and government—toward sustainable, long-term survival. Environmentalism is not a narrow, marginalized niche of tree-hugging hippy Luddites.\(^2\) One need only think of global warming and hurricanes, escalating flood hazards caused by wetland destruction and unwise land-use patterns, increases in latent genetic and developmental health hazards, chemical reactions in human hormonal and immune systems, and the far-ranging effects of environmental pollution. For years, these and many other environmental concerns were dismissed


\(^2\) Beginning in the 1970s, an industry-led political initiative to “take America back” from the perceived progressive excesses of the 1960s successfully constructed a movement of coalitions, think tanks, strategic alliances with evangelicals and others distressed by social disruptions, and media specialists to create the potent political force that took over national power in 2000. See Thomas Frank, *What’s the Matter with Kansas: How Conservatives Won the Heart of America* (2004); John Micklethwait & Adrian Wooldridge, *The Right Nation* (2004); Zygmunt J. B. Plater, *Dealing with Dumb and Dumber: The Continuing Mission of Citizen Environmentalism*, 20 J. ENVTL. L. & LITIG. 9 (2005). At the core of this resurgent political movement has been an insistent antiregulatory agenda, reflected in unprecedentedly broad initiatives to undercut environmental and other progressive regulatory protections that prior to the turn of the century had been consolidated into our legal system through forty or more years of bipartisan efforts.
by industry lobbyists and public relations agents as Chicken Little alarmism. Now an avalanche of environmental science is receiving belated public recognition, signaling an inescapably broad, society-wide emphasis on the integration of environmental principles and analysis into public policy.

This Essay examines the relationships among law, media, and environmental analysis, analyzed from a generally public-interest pro-environmental protection perspective, at both the macro level of national and international concern—such as global warming and endocrine disruptors in national food supplies—and the micro level of on-the-ground lawyering in litigation and local governance.

I. AT THE MICRO LEVEL: LAW, MEDIA, AND ENVIRONMENTALISM IN LOCAL PRACTICE

Consider Escamilla v. ASARCO, a classic but unreported law-of-neighbors-type 1993 pollution case from Colorado. Escamilla arose in Globeville, a run-down, low-income, minority neighborhood in the northern fringes of Denver. A number of polluting industries existed

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3 Global warming is a good example. Environmentalists first began to analyze the greenhouse effect of carbon dioxide in 1978. One day in October 1978, Rafe Pomerance, then the young President of Friends of the Earth, burst into the organization’s small Washington D.C. office after an informal briefing with RAND Corporation scientists, and shouted, “Hold onto your hats: Do you know what really’s going to get us all? I’ve just learned: It’s carbon dioxide!” Through Pomerance’s efforts, reporter Phil Shabecoff of the New York Times was the first national journalist to research the story. But, as Chris Mooney notes, the oil, gas, and electric utility industries soon launched a climate change denial campaign which has persevered into the twenty-first century, characterizing the analyses linking global warming with carbon emissions as scientifically unsound radical extremism. See Chris Mooney, Some Like It Hot, Mother Jones, May-June 2005, at 36, 36 (noting how Exxon-Mobil funded more than forty advocacy groups and media task forces to discredit the science of global warming). For several weeks, even the New York Times hesitated about running Shabecoff’s world scoop on global warming, finally printing it with no fanfare in the back pages of the paper. Interview with Philip Shabecoff, Reporter, N.Y. Times, at the Boston College Environmental Affairs Law Review Symposium, in Newton, Mass. (Oct. 6, 2005); see Philip Shabecoff, Scientists Warn U.S. of Carbon Dioxide Peril, N.Y. Times, July 10, 1979, at D7.


5 Plater et al., supra note 4, at 169; Deborah Houy, Trial by Fire: Court Case Against Mining Company, Buzzworm, Jan.-Feb. 1994, at 24, 24. Globeville’s population was comprised of 64% Hispanic, 9% Native American, 5% African American residents, and the remainder was largely Slavic in origin, comprised of low-income workers whose families had come to this country to work in the mines and smelters. Robin Chotzinoff, Globeville Warming: Despite Recent Turf War, Residents Are Deeply Rooted in This Neighborhood, DENVER WESTWORD, Dec. 6, 1995, at 17.
in and around the neighborhood, but the ASARCO smelter was the most notorious. Over the past seventy years it had been emitting arsenic, lead, electrolytic acids, cadmium, and other heavy metals into the air and soils surrounding the plant. Each of these substances is toxic to human beings and other living things, and each substance is physically detrimental to real and personal property. The Globeville neighborhood was heavily polluted, particularly with toxic cadmium in dust form entering plaintiffs’ homes and penetrating deep into the soils of their gardens and yards. The contamination fostered a sense of stigma and powerlessness among the citizens of Globeville.

The opposing parties in the Globeville contamination controversy were so disproportionately situated in terms of resources and political clout that it was likely that the plaintiffs would get little or no satisfaction from the official legal process. The citizens were poor and underrepresented. The company was a major transnational corporation producing materials for the modern industrial economy. The state and federal agencies regulating pollution were seemingly beset with inertia.

In their courtroom effort to halt and clean up ASARCO’s pollution, the citizens were represented by a firm of public interest lawyers who not only had similarly limited resources and political clout, but also had a serious contextual litigation problem: although many community inhabitants exhibited fair to poor health profiles, there was a serious proof-of-causation problem. No clear cases of sicknesses could be readily attributed to ASARCO’s pollution without impossibly expensive epidemiological studies. Additionally, because Globeville


7 See Chotzinoff, supra note 5, at 17.

8 See Johnson, supra note 6, at 590–91.

9 See id. at 590–91, 596.

10 See id. at 590.


12 See Plater et al., supra note 4, at 227. In this regard the Globeville case is typical of many localized toxic contamination cases, including the Woburn well-pollution litigation chronicled in Jonathan Harr’s A Civil Action and the movie by the same name. In the Woburn litigation, because the trial judge polyfurcated the case, the plaintiffs never got to try their case on probable causation of leukemia and other health effects. See Albert P. Bedecarré, Comment, Rule 42(b) Bifurcation at an Extreme: Polyfurcation of Liability Issues in Environmental Tort Cases, 17 B.C. ENVTL. AFF. L. REV. 123, 145–47 (1989).
was a very poor community to begin with, the provable losses of property values attributable to the toxic pollution from ASARCO were relatively trivial. The Globeville community suffered from exposure to potentially dangerous substances, and endured the stigma resulting from such exposure, due to its inability—both politically and economically—to assert effective claims for a clean environment. The prospects for injunctive relief or substantial damage awards, however, appeared poor indeed.

The plaintiffs' attorneys adopted a novel legal approach by focusing on property contamination, and seeking a restoration remedy. In addition to the small diminution of property values caused by contamination, the attorneys also sought actual cleanup costs—restoration of homes and lands in the neighborhood to an uncontaminated level. Actual restoration of the neighborhood to its physical condition prior to contamination, including thorough sanitation of homes and replacement of all polluted soils, was a hugely expensive judicial remedy not at all justified by the relative market values—at least not in cost-benefit terms, or under normative principles of tort law. In light of the social injustice befalling the Globeville residents, however, the attorneys sought to apply section 929 of the Restatement of Torts. Sec-

13 See Plater et al., supra note 4, at 170. The chances of shutting down ASARCO because of unproven health consequences and lowered property values in a community that was already at the bottom of the property value spectrum were low. The value of a contaminated home might be reduced from $30,000 to $25,000 in terms of comparative resale values. This kind of diminution was insignificant in comparison to the multimillion-dollar industrial complex, and was unlikely to result in an award of substantial damages, much less to persuade a court to shut down a contaminating operation. See id. To avoid the accusation that plaintiffs would enjoy a windfall with no real intent to remediate their property once restoration damages were paid, the Escamilla plaintiffs stipulated that members of the litigation who did not contract to remediate would receive damage awards discounted by forty percent. Ultimately, the parties agreed that ASARCO itself would do the neighborhood's physical remediation, resulting in an effective and faster restoration process that was much less costly to defendant. See Zygmunt J.B. Plater et al., Teacher's Manual for Environmental Law & Policy 65–67 (Supplementary Materials, 2d ed. 1998).

14 See Plater et al., supra note 4, at 169–70.
15 See id.
16 See id.
17 See id. at 170.
18 Restatement (Second) of Torts § 929(1)(a) prescribes, as to measure of damages:

[F]or harm to land resulting from a past invasion and not amounting to a total destruction of value, the damages include compensation for (a) the difference between the value of the land before the harm and the value after the harm, or at his election in an appropriate case, the cost of restoration that has been or may be reasonably incurred . . . .
tion 929 could address the social realities of the case far better than standard tort law, and could achieve an expanded internalization of social costs—one of the fundamental strategies of modern environmental law.\textsuperscript{19}

The Globeville plaintiffs’ attorneys realized that media coverage would be strategically helpful, if not absolutely indispensable, for their innovative approach to be taken seriously.\textsuperscript{20} Lacking significant funds to do scientific investigations and technological proofs, they had to leverage the dramatic victimization of a helpless, low-income community, in order to draw serious attention to their novel legal claims.\textsuperscript{21} The plaintiffs’ attorneys consciously shaped a constructive media strategy.\textsuperscript{22} The goal was to project into public opinion an appreciation of the contrast between a huge transnational company, and the abject vulnerability of a low-income community of color, which was being forced to absorb the corporation’s externalized pollution.\textsuperscript{23} Drawing upon increasing public recognition that toxic emissions and toxic waste repositories were generally located in low-income communities of color, the attorneys emphasized the economic deprivations and racial characteristics of the plaintiffs’ neighborhood to the media using the rhetoric of “environmental justice” and “environmental racism.”\textsuperscript{24}

ASARCO, the corporate defendant, reacted quickly to this media strategy.\textsuperscript{25} On motion of defendant’s counsel, the trial judge issued a gag order: plaintiffs’ attorneys were not to mention that this was an environmental justice case with overtones of race and poverty.\textsuperscript{26} In response, the plaintiffs’ attorneys arranged for at least a dozen neighborhood residents to be present each day in the courtroom, sitting together in a highly visible group, naturally representing the minority

\begin{itemize}
\item Id. (emphasis added).
\item \textsuperscript{19} See id.
\item \textsuperscript{20} See Johnson, supra note 6, at 596.
\item \textsuperscript{21} See id. at 596–97.
\item \textsuperscript{22} See id. at 590. The lead attorney was Macon Cowles, Jr., who has litigated a number of significant environmental cases involving air and water pollution and endangered wildlife.\textsuperscript{23} Telephone Interview with Macon Cowles, Jr., Globeville plaintiffs’ lead attorney (Oct. 4, 2005); Telephone Interview with Susan Reardon O’Neal, Globeville plaintiffs’ attorney (Jan. 1992).
\item \textsuperscript{24} Telephone Interview with Macon Cowles, Jr., supra note 23; Telephone Interview with Susan Reardon O’Neal, supra note 23.
\item \textsuperscript{25} See Johnson, supra note 6, at 591.
\item \textsuperscript{26} Telephone Interview with Macon Cowles, Jr., supra note 23; Telephone Interview with Susan Reardon O’Neal, supra note 23.
\end{itemize}
and socioeconomic profile of the town.\textsuperscript{27} Neither the jury nor the reporters watching the trial could fail to see the juxtaposition represented by the plaintiffs’ confrontation with the smelter.

The \textit{Escamilla} attorneys further recognized that exposure on the local evening news would help raise an atmosphere of criticism of the defendant’s smelter.\textsuperscript{28} The lead attorney, Macon Cowles, gave an interview to a local television reporter summarizing the case: “we are \textit{trying to potty-train a Fortune 500 company}.”\textsuperscript{29}

This vivid and effective media quote immediately caught the attention of important editors and producers. The defendant corporation’s attorneys, however, immediately filed a grievance in response to the quote.\textsuperscript{30} According to ASARCO, the plaintiffs’ attorneys were being unprofessional and defamatory.\textsuperscript{31} Cowles’s comments went beyond matters on the court record, which presumably had mentioned nothing about potties.\textsuperscript{32} Such statements were prejudicial to the jury’s consideration of the matter. If the neighborhood plaintiffs could find the means, defendant implied, they were welcome to hire a public relations staff to manage press coverage, as the industrial defendant had done. The plaintiffs’ attorneys, however, could not in good practice act as press agents for the neighborhood by being spokespersons to the media.\textsuperscript{33} The grievance was ultimately rejected, and the trial progressed, with the Globeville contamination becoming a long-running local media story.\textsuperscript{34} Ultimately, the jury got the message, delivering a pioneering “restoration damages” award of approximately $28 million, far in excess of the plaintiffs’ actual market-value losses.\textsuperscript{35}

\section*{II. Some Observations on Environmental Law and Media at the Micro Level}

Media coverage is almost always an affirmative element—and is sometimes an indispensable determinant—for public interest envi-

\textsuperscript{27} Telephone Interview with Macon Cowles, Jr., \textit{supra} note 23; Telephone Interview with Susan Reardon O’Neal, \textit{supra} note 23.
\textsuperscript{28} See Johnson, \textit{supra} note 6, at 596–97.
\textsuperscript{29} Telephone Interview with Macon Cowles, Jr., \textit{supra} note 23.
\textsuperscript{30} Id.
\textsuperscript{31} Id.
\textsuperscript{32} Id.
\textsuperscript{33} Id.
\textsuperscript{34} Id.
\textsuperscript{35} In fact the costs awarded for restoration exceeded the total value of plaintiffs’ property; however, the court nevertheless held that, in these circumstances, the sum was not excessive. \textit{Plater et al.}, \textit{supra} note 4, at 170.
ronmental attorneys in litigation, as well as for those doing legislative, administrative, and political work. This is as true at the local level as at the national level. Surveying a host of local environmental law cases in all three branches of government and in public education political initiatives, in virtually every case there has been a sense of traction—of being taken seriously and building momentum—when press coverage gave these projects intelligent and timely coverage. Conversely, experience also shows that when environmental lawyers cannot persuade the press to examine their issues, or cannot persuade editors to stay with a story, they are often unable to build credibility and hold off the usually better-financed, more-established opponents of state and local environmental protection.

How can environmental attorneys maximize the likelihood of getting useful media treatment? They can prepare and communicate explanations of environmental cases and controversies with graphics and vivid explanations, in terms that will frame the issues for all audiences—ranging from reporters and aldermen to corporate officials, legislators, agency staffers, and the participants encountered in negotiations, judicial proceedings, and political settings. A well-made chart or strategically enlarged photograph hanging on an easel or wall can focus attention, frame issues, and shape the alternative outcomes under consideration. A clearly written exegesis of a controversy can draw attention to the core issue and to the weaknesses of opposing positions. The explanation should always be consolidated on paper in a form that can be handed out and carried away. Particularly effective graphic exhibits should not be presented only in the official forum, but should subsequently be made available in regular page-sized format for reporters as well as members of committees and juries. At one of the earliest state rulemaking hearings at which my students testified, a reporter angrily commented after the excellent testimony that “in the future you should tell them never to come to one of these hearings without a one-page handout that sets out some of the quotations they plan to say, and spells their names right.” All media-based strategies for public interest causes should adopt this advice, and

36 My students and I have worked on issues including billboard removal, erosion and sedimentation controls, regulation of conflicts between fishermen and canoeists on congested rivers, industrial pollution, returnable bottles and beverage cans, land-use conflicts, mining and irrigation problems, state fisheries regulation, wetlands protections, park and recreation issues, among others.

should also include at least one map, chart, or photo in the printed handout. Additionally, every complaint in a public interest environmental case should be drafted so that the first three or four paragraphs of the statement of the case would look suitable at the start of the Associated Press story on the case.\(^{38}\)

At both the local and national level, the ability to frame the public image and context of each issue for the press—and, through the press, the legal process and the public—is an essential element of effective interaction with the media.\(^{39}\) If, for instance, an environmental issue can be framed as “tree-hugging” by its opponents, the effect will be to undercut its credibility. If it can be framed as a matter of public health risk, it is likely to gain traction. If the story of the Globeville residents had been framed as “a group of plaintiffs with no provable health conditions and trivial property losses seek to extort unconscionable damages from a major local employer,” the public reaction would have been far different from the story as it was in fact framed: poor citizens of color, suffering decades of government neglect and overt, acknowledged, toxic pollution from a big company that refuses to take responsibility for its emissions.\(^{40}\)

This use of framing issues to explain media and public reactions to civic issues reflects the realistic perceptions most recently explored by Professor George Lakoff and the Rockridge Institute.\(^{41}\) Lakoff sug-

\(^{38}\) In arguing a case involving a small endangered fish against a purportedly significant federal agency dam, I supplied the clerk of the U.S. Supreme Court with several page-sized reproductions of a lithographed exhibit at trial, which depicted the fish as quite alive and attractive in its natural habitat. When the exhibit was mentioned during oral argument before the Court, the clerk jumped up and distributed a copy of the colored print to each Justice. For a judge to look into the eyes of this creature and sign its death warrant seemed much more difficult than if the case had been presented only in a context of verbal abstractions. Tenn. Valley Auth. v. Hill, 437 U.S. 153 (1978).


\(^{40}\) Had the issue been framed differently, the ultimate judgment likely would have been quite different as well. See Plater et al., supra note 4, at 169–70.

\(^{41}\) George Lakoff, Don’t Think of an Elephant! Know Your Values and Frame the Debate: The Essential Guide for Progressives (2004); see also Lakoff, supra note 39. Professor Lakoff studies how the industrial coalition that organized in the early 1970s with an agenda of building a conservative movement to take power in national politics consistently employed sophisticated techniques of word-spinning so as to make regressive policies seem quite progressive or benign. See generally Lakoff, supra. He follows this framing technique through examples from the current administration’s misleading labels for its regressive policies under monikers such as “Healthy Forests Initiative,” “No Child Left Behind,” “Clear Skies Initiative,” “Endangered Species Recovery,” and “tax relief” efforts. Id.
gests that the way issues in public forums are framed may ultimately be the most important element in determining the resolution.\footnote{42 See Lakoff, supra note 39.}

Awareness and conscious planning of media communication is therefore a frequent necessity in shaping both local practice and national policy. A phone call to a reporter may often yield a fast response and resolution for what otherwise may have taken months to achieve under ordinary procedures.\footnote{43 In working on a project to protect a valley, my students and I learned from an internal leak that the development agency we opposed was starting discussions on siting a regional toxic waste treatment facility in the project area, in order to stimulate revenues. Just one call to the local United Press International reporter, however, was sufficient to generate an avalanche of criticism that ended the ill-conceived proposal within a day. See Steve Holland, Trading Away an Eagle Just to Get an Old Crow, \textit{United Press Int’l}, Sept. 28, 1982.}

Legal professionals working for the public interest must learn how to manage the broad spectrum of the media with greater sophistication.\footnote{44 Professor Charlotte Ryan and John Stanton’s contributions to this Symposium detail some of the pathways for lawyers to develop media effectiveness. Charlotte Ryan & Samuel Alexander, “Reframing” the Presentation of Environmental Law and Policy, 33 B.C. \textit{Envtl. Aff. L. Rev.} 563 (2006); John M. Stanton, Environmental Attorneys and the Media: Guidelines for Effectiveness, 33 B.C. \textit{Envtl. Aff. L. Rev.} 593 (2006).}

Some basic principles about the relationship between law and media apply equally well at the local level and the macro stage of national policy. For example, the process of daily governance at any level—local, state, national, or international—tends to be a process of contending forces.\footnote{45 See Plater \textit{et al.}, supra note 4, at 80 (discussing how major policy issues are contested between blocs of established “insiders” and outsiders).}

Anyone who has practiced law in a political capital and has seen the process of lawmaking—for anything from agriculture to the tax code—has witnessed how the actual political players and true outcomes rarely resemble the fact-based, deliberative form of republican governance portrayed in eighth-grade civics books. The United States theoretically has a “di-polar” system. On the one hand, there are marketplace forces that produce dynamic economic activity and growth but also threaten public welfare.\footnote{46 Id. at 80–81.} On the other hand, government agencies and official structures are supposed to protect civic values and the public interest by maintaining vigilant monitoring and regulation of market failure situations.\footnote{47 Id.}

Political scientists, however, note that over time, a “capture” phenomenon often occurs, in which the official players in the public agencies and the private marketplace structures they are supposed to regulate come together.\footnote{48 See \textit{id.} at 81, 401–02.
Left to their own devices, the public and private “official” players in the di-polar rubric are unlikely to sufficiently enforce the public interest, unless outsiders—members of the public—can effectively force counterpressures and counterarguments into the governing system.\(^{49}\)

Since 1970, active citizen environmentalists have helped create a “multi-centric” governance process and have been a dominant contending force, pushing the creation and enforcement of environmental laws across a wide spectrum of legal processes.\(^{50}\) The heady media eruption that greeted Rachel Carson’s *Silent Spring* and the early celebrations of Earth Day demonstrate how important media relations have been in this process.\(^{51}\) These citizen environmentalists, whether individually or in public interest law firms, have almost always been outsiders with relatively few resources, but have nonetheless played a significant role, shifting America toward a more pluralistic democratic model.\(^{52}\)

The environmental law evolution in the American legal process generally began very much at the micro level, with lawsuits at the community level, often based on public nuisance actions addressing local pollution issues as in *Escamilla v. ASARCO*.\(^{53}\) From the very beginning, media coverage at the local as well as the national level was a critically important part of the development of environmental law, bringing a sense of legitimacy and practicality to efforts that a decade earlier would have been regarded as quixotic and illegitimate.\(^{54}\) In modern governance generally, facts are vital to progressive outcomes, and if full public interest facts are widely perceived, it generally changes and improves the process of determining what will occur in the legal process of governance.

Questions of legal ethics, as well as issues of democratic governance, are raised by attorneys’ interactions with the media, particularly in the courtroom setting. As was the case in *Escamilla v. ASARCO*,\(^{55}\) environmental attorneys’ use of the media in pollution litigation can indeed raise challenging questions of ethics and professional conduct.

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\(^{49}\) See *id.* at 377–78.

\(^{50}\) *Id.*


\(^{52}\) See *Plater et al.* *supra* note 4, at 376–78.

\(^{53}\) See *id.* at 104–07, 169–70.

\(^{54}\) See *Plater et al.* *supra* note 4, at 41–48.

\(^{55}\) No. 91-CV-5716 (D. Colo. Apr. 23, 1993)
Under the then-current Colorado Rules of Professional Conduct, for example, it was not clear to what extent the Globeville plaintiffs’ public interest attorneys could speak to the press on behalf of unempowered clients, beyond matters directly on the public record.

To what extent is it legitimate for attorneys to make conscious use of the media in the course of a trial? Litigation in modern American society is a function of public debate on a larger scale. Therefore, it can be argued that using media techniques to raise public awareness, so as to educate the public, is both acceptable and inevitable. The media’s marketplace of ideas, moreover, can indeed usefully function as a two-way street. For example, on several occasions media coverage of a contested issue encouraged members of the public to bring facts to the attention of the parties and the court that might never otherwise have been known; generally, such functions of media coverage are benign.

But what about an attorney’s use of media to “raise the consciousness” of the judge and jury? In cases of great public controversy, judges often order the sequestration of juries to insulate them from gaining information or slanted analysis from press coverage. In most cases, however, the judge and jury are subjected to the full barrage of media coverage generated by a case, almost inevitably affecting their judgment, no matter how much the judge adjures all to reach decisions solely on the basis of the courtroom record.

It is not considered improper for the press to convey voluminous coverage of a case, provided that the information is derived from listening to the official proceedings or from the media’s own investigation. To what extent, however, is it improper for attorneys to feed this information and analysis, seeking to frame the facts and issues outside the courtroom, to encourage press coverage in one direction? The answer provided under the currently-prevailing codes and rules of professional ethics appears to be that environmental attorneys, acting on behalf of their clients and under the protections of the First Amendment, may comment on cases in a variety of situations beyond the official record—responding to contrary statements or offering information useful to public awareness of risks and other important concerns—provided that they do not pass an indistinct boundary of unprofessional conduct in

57 See id. R. 3.6(b).
59 See generally id.
“materially prejudicing” the court proceedings. This is an unsatisfactory definition of boundaries, but it recognizes the reality that attorneys inevitably operate in a broader forum than the courtroom alone; reverberations of public opinion and public debate are an inevitable part of the process. Moreover, for attorneys representing public interest plaintiffs who lack economic resources, the option of hiring a public relations organization to present the plaintiffs’ case to the public is out of the question. If the public interest attorney cannot present the complexities of the case to the media, in many cases no one in the community of plaintiffs will be able to do so effectively.

Finally, it is important to note that throughout the history of environmental law, much of the media coverage that helped shape judicial decisions was generated by public interest environmental law groups. Whatever the ethics of shaping media coverage to affect a trial directly may be, it is clear that efforts of attorneys to shape a national atmosphere of reaction against environmental pollution is appropriate, inevitable, and quite effective.

III. THE MACRO LEVEL: LAW, MEDIA, AND ENVIRONMENTALISM AT THE NATIONAL LEVEL AND BEYOND

The dynamic interplay between law, media, and environmental analysis seen in environmental cases at the local level similarly occurs at the national and international level. The early years of environmental protection law provide some dramatic examples.

The Allied Chemical Kepone disaster in the 1970s was a local story from Hopewell, Virginia that broke during a slow news week for the national press, and thus found a strategic moment for attracting media attention. Allied Chemical had set up a small production fa-

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60 See Model Rules of Prof’l Conduct R. 3.6 & cmts. 1, 4, 6, 7.
61 As in Escamilla v. ASARCO, Inc., many public interest environmental controversies are characterized by a vast disparity in resources available to the parties. See Escamilla v. ASARCO, Inc., No. 91-CV-5716 (Colo. Dist. Ct. Apr. 23, 1993).
62 See Johnson, supra note 6, at 598–600.
63 See Plater et al., supra note 4, at 48–65; see also William Goldfarb, Kepone: A Case Study, 8 Envtl. L. 645 (1978). The Kepone incident is scarcely visible in reported caselaw.

Within the limited case law reported, some details about the case can be gleaned from a Tax Court decision rejecting Allied’s attempt to write off an in-lieu-of-penalties contribution to an environmental trust fund. Personal injury cases such as Gilbert v. Allied Chem., . . . never resulted in a reported decision. A federal criminal prosecution resulted in a court-ordered criminal settlement. A lawsuit filed by fishermen and seafood processors hurt by closure of the James River and Chesapeake Bay has interesting remedy issues, . . .
ility for processing its feed-stock chemicals to create an exportable pesticide, Kepone, a highly effective neurotoxin designed to kill potato beetles, but so dangerous to humans that it could not be licensed in the United States, even under the minimal standards prevailing prior to the 1970s. In the Kepone facility, workers were regularly covered with toxic dust, carrying it home in their clothes to their families, where the dust could blow throughout the neighborhood, exposing children waiting at school bus stops and playing in the schoolyard. Eventually, a foreign-born doctor, who was not part of the local medical establishment—which had been ignoring the health effects of Kepone for years—blew the whistle on Allied Chemical to the Centers for Disease Control in Atlanta. The workers’ blood samples showed higher Kepone toxicity levels than had ever been recorded in humans, along with evidence of sterility, organ failure, neurological damage, and acute breathing difficulties.

As in Escamilla v. ASARCO, Inc., the defendant chemical giant, a major employer in a part of the state that proudly called itself the “chemical capital of the South,” normally might not have responded to the workers’ conditions. Allied reassured all of the local politicians and the public that none of the workers’ injuries had been scientifically traced to Kepone. But then an army of reporters from New York showed America the intense exposures suffered by the workers and their families, the employer’s casual disregard for safety, and company spokespersons’ evasive interviews. Video feeds of Kepone workers weeping at their kitchen tables as their bodies suffered involuntary

but gives little background on the case. An OSHA administrative penalty case focuses primarily on whether Moore and Hundtofte were personally liable for penalties. A major retrospective symposium on the Kepone incident appears in [the University of Richmond Law Review] 29 U. Rich. L.Rev. 493 (1995).

Plater et al., supra note 4, at 48 n.11 (citations omitted).

64 Plater et al., supra note 4, at 49–50. The satellite production facility was an un-canny precursor to the maquiladora industrial facilities that have sprung up just across the Mexican border since the passage of NAFTA, where American companies can save on labor costs and environmental compliance by moving their production into a much less stringent setting. See id. at 58.

65 Id. at 54–55.

66 Id. at 54.

67 Id. at 54–55.

68 Id. at 48, 57.

69 See Goldfarb, supra note 63, at 645.

70 In one famous incident, Allied complained that a CBS 60 Minutes reporter had “en-trapped” the company spokesman into revealing that Allied had long known of the poisonings and had done nothing to stop it. Telephone Interview with Robert Sand, Esq. (Feb. 1995).
convulsions touched a deep national nerve. Shortly after the media blitz began, the corporation decided to settle all claims without proceeding to trial.\textsuperscript{71} In Congress, the Allied Kepone story played a critical role in the hearings that led to the passage of the federal Clean Water Act Amendments of 1977.\textsuperscript{72}

Love Canal is another famous example of an early, national media occurrence that produced a direct and decisive effect on the framing of national environmental law.\textsuperscript{73} A small group of neighbors was horrified to discover what was happening to their low-income community outside of Buffalo, New York.\textsuperscript{74} An industrial waste dump filled with Hooker Chemical toxins was given to the city, which decided to re-use it as a schoolyard.\textsuperscript{75} Toxic leachate began to seep up to the surface, burning children’s skin, while plumes of subsurface contamination leached through the ground into basements throughout the community.\textsuperscript{76} A neighborhood group, led by homemaker Lois Gibbs, managed to instigate national coverage for the story, and eventually even the White House was forced to take note.\textsuperscript{77} Hooker Chemical was put on the defensive, and the entire chemical industry was tarred with the revelation that disposal practices over dozens of years had been reckless and sloppy, with an “out of sight, out of mind” approach.\textsuperscript{78} Regardless of what the technical details of the arguments might have been,\textsuperscript{79} Love Canal became a media magnet, drawing congressional attention and

\textsuperscript{71} Plater et al., supra note 4, at 59.
\textsuperscript{72} Id. at 57. In 1972, the Federal Water Pollution Control Act Amendments were passed with conspicuous gaps in coverage that were filled by the 1977 amendments creating the Clean Water Act. See William Goldfarb, Changes in the Clean Water Act Since Kepone: Would They Have Made a Difference?, 29 U. Rich. L. Rev. 603, 612 (1995).
\textsuperscript{73} See generally Adeline Gordon Levine, Love Canal: Science, Politics, and People (1982).
\textsuperscript{74} Id. at 27–38.
\textsuperscript{75} Id. at 11–13.
\textsuperscript{76} See generally id.
\textsuperscript{77} See id. at 30, 36–37, 61, 175.
\textsuperscript{78} See id. at 10–11.
\textsuperscript{79} Hooker Chemical argued that much of the waste had come from a U.S. Army military facility, not from their plant, and declared repeatedly that it had warned the local government of potential exposure hazards before it turned over the filled-in waste canal to the city. Associated Press, Court to Examine Role of Army at Love Canal, N.Y. Times, May 19, 1991, at 27. The local government’s negligence led to putting a schoolyard atop the filled-in Love Canal. Cathy Trost, Trading-Off at Hooker Chemical, APF Reporter, 1981, available at http://www.aliciapatterson.org/APF0402/Trost/Trost.html.
prompting the passage of several highly significant pieces of federal toxic control legislation.80

Starting in the early 1970s, the major federal development agencies faced significant public constraints upon their close business-as-usual relationships with industrial coalitions in fields such as timber, ranching, mining, irrigation, agriculture, highway construction, and oil and gas. Media coverage played an important role in applying those constraints. One particularly dramatic example on the national stage was the Bureau of Land Management’s 1967 plan to dam the Colorado River within Grand Canyon National Park—a plan that would back the impounded waters of two reservoirs up through the Canyon.81 By focusing on the imminent desecration of a national monument being driven by narrow commercial gain, environmentalists were successfully able to rally public opinion and political opposition. The public’s dramatically negative reaction to the story led not only to the quashing of the federal agency plans, but also to strengthened public support for protecting wild places in their undeveloped condition.82

These examples and others like them show the underlying reality: media coverage is a behemoth. If the media covers a dramatic factual reality, the government process will be forced to respond.83 In the three examples above, the official players—corporations, organized industry associations, and the federal agencies involved—start out with substantial advantages. Public interest environmental attorneys’ ability to mobilize the media, with coverage that is vivid and persuasive, lev-


82 Media played a crucial role in saving the Grand Canyon Plan impoundment. Full page ads ran in the New York Times, Now Only You Can Save Grand Canyon from Being Flooded . . . for Profit, N.Y. Times, June 9, 1966, at L35. The ad also ran on July 25, 1966. It is remarkable how the early era of populist environmentalism was not compartmentalized into single-issue categories, such as air, water, toxics, wildlife, and resource exploitation; rather, these issues were generally viewed as multiple manifestations of the same systemic syndrome. Popular reactions against one environmental problem often spilled over into activism on other environmental issues.

83 See supra notes 64–82 and accompanying text.
els the playing field and allows the public debate to take place on more equal terms, despite the parties’ dramatic disparity in resources.

The linkages among law, media, and environmentalism at the macro level is most readily seen in the legislative and administrative fora, but the media posture of an issue also likely impacts major judicial decisions. For example, early in the development of environmental law, milestone cases came before district court federal judges who had no prior exposure to the field, and had an inherent skepticism towards citizens challenging established federal and state agencies. When the National Environmental Policy Act (NEPA) came into effect in 1970, for example, very few judges, not to mention President Richard Nixon who signed it, realized that it contained actionable legal requirements.

To understand NEPA in this context, consider the case of National Resources Defense Council v. Grant (Chicod Creek), which arose from a standard situation of collusion between the Weyerhaeuser Corporation and the federal Soil Conservation Service (SCS)—a division within the Department of Agriculture, now called the Natural Resources Conservation Service—to drain ecologically valuable marshes and channelize a serpentine river, in order to produce more acreage for corporate yellow pine plantations. Under Public Law 566, federal taxpayer dollars were regularly channeled into many such projects so marginal that no private owners would ever have spent their own money to construct them. As in many cases, however, despite the protests of local sportsmen and farmers against the Chicod Creek channelization, the federal agency certified the project for funding. The effect on wildlife would have been drastic, and many local farmers would have found their water tables lowered to such an extent, especially in the month of August, that they could not cultivate crops effectively without artificial irrigation. Without environmental law intervention, moreover, there would have been no practical prospect for stopping such a project, despite the fact that it made neither economic nor ecological sense.

85 See Plater et al., supra note 4, at 476–77.
86 341 F. Supp. at 356; see Plater et al., supra note 4, at 479.
87 See Chicod Creek, 341 F. Supp. at 362; see also Plater et al., supra note 4, at 479–80.
88 See Plater et al., supra note 4, at 479.
89 See id. at 506.
90 Confidential Interview with North Carolina Natural Resources Agency, supra note 84.
91 See Plater et al., supra note 4, at 492–93 (discussing how NEPA enables litigation).
The Chicod Creek case was brought before Judge John Larkins, a senior member of the North Carolina federal judiciary. Given his previous record, it may have been expected that he would defer to the official decision of the federal agency that is so closely linked to the state’s agribusiness lobby. With environmentalism being heavily covered in the newspapers and on television, however, Judge Larkins—like judges all over the United States—had increased incentive to take this environmental confrontation seriously. The operative provision of law—requiring an environmental impact statement for major federal action significantly affecting the environment—could well have been interpreted by courts all over the country as a mere technicality to be satisfied by whatever minimal “statement” a federal agency involved in a challenged program or project might wish to present to the court. NEPA’s legislative history clearly shows that Congress had not generally thought or wished that its provisions could be used to block ongoing pork barrel projects, which have been the lifeblood of legislative logrolling since the 1820s. Given the media’s attention to the environment in the early 1970s, however, Judge Larkins was instead prompted and emboldened to treat the statutory provision as a meaningful formal requirement with which the federal agency had to comply, requiring sufficient detail to achieve the environmental analysis objective. Despite protest from the SCS, Judge Larkins directed the agency to do an environmental impact statement, and then when it produced a conclusory, self-justifying statement long on reassurance and short on det-

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92 See Chicod Creek, 341 F. Supp. at 359.
93 See Plater et al., supra note 4, at 483, 492, 503–04.
94 National Environmental Policy Act of 1969 § 102, 42 U.S.C. § 4332(2)(c) (2000). For example, an early Bureau of Reclamation statement for a major project in Galveston, Texas merely said: Palmetto Bend Project, Jackson County, Tex. Proposed construction of a 12.3-mile long, 64-foot high earthfill dam on the Navidad River. The purpose of the project is the supply of industrial and municipal water. Approximately 18,400 acres (11,300 of which will be inundated) will be committed to the project; 40 miles of free-flowing stream will be inundated; nine families will be displaced; fresh water inflow to the Matagorda estuary will be altered; fish and shellfish nursery areas will be impaired; habitat for such endangered species as the Texas red wolf, the American alligator, the Southern bald eagle, the Peregrine falcon, and the Attwater prairie chicken will be lost.
95 See Plater et al., supra note 4, at 476–78.
96 See Chicod Creek, 341 F. Supp. at 368–69.
tails, Larkins rejected the impact statement and enjoined the channelization project, helping to establish a corpus of federal NEPA caselaw that made it one of the most effective environmental protection statutes in the world.  

A. Counter-Reformation in the Politics of Environment, and Dissipation in Media Coverage

Since the early days of the development of environmental law, the interest groups attempting to blunt environmental protection law have become far more successful in the media and public opinion realm than public interest representatives. Starting with the corporate strategy memorandum written by Judge Lewis Powell shortly before he was appointed to the Supreme Court in 1972, industrial coalitions in the United States have crafted a comprehensive and coherent media strategy to reverse the public perceptions of themselves and of their environmental critics. In his memorandum to the U.S. Chamber of Commerce Judge Powell argued:

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\text{\ldots [M]uch of the media—\text{for varying motives and in varying degrees—\text{either voluntarily accords unique publicity to these \text{“attackers [of business]” or at least allows them to exploit the media for their purposes. This is especially true of television, which now plays such a predominant role in shaping the thinking, attitudes and emotions of our people.\ldots}}\\
\text{\ldots}}\\
\text{Most of the media, including the national TV systems, are owned and theoretically controlled by corporations which depend upon profits, and the enterprise system to survive.}}\\
\text{\ldots}}\\
\text{[T]he time has come—indeed, it is long overdue—for the wisdom, ingenuity and resources of American business to be marshaled against those who would destroy it.}}\\
\text{\ldots}}\\
\text{\ldots[I]ndependent and uncoordinated activity by individual corporations, as important as this is, will not be sufficient. Strength lies in organization, in careful long-range planning and implementation, in consistency of action over an}}
\]

\text{97 See id. at 369–70; Plater et al., supra note 4, at 506–07.}\n
\text{98 See Memorandum from Lewis Powell to Eugene B. Sydnor, Jr., Chairman, Education Committee, U.S. Chamber of Commerce (Aug. 23, 1971), available at http://www2.bc.edu/%7Eplater/Newpublicsite05/02.5.pdf.}
indefinite period of years, in the scale of financing available only through joint effort, and in the political power available only through united action and national organizations.

[Business interests should develop a strategy to take back the media, including monitoring of] the national television networks . . . in the same way that textbooks should be kept under constant surveillance. This applies . . . to the daily “news analysis” which so often includes the most insidious type of criticism of the enterprise system. [This has caused] the gradual erosion of confidence in “business” and free enterprise.

This monitoring, to be effective, would require constant examination of the texts . . . of programs. Complaints—to the media and to the Federal Communications Commission—should be made promptly and strongly when programs are unfair or inaccurate.

Equal time should be demanded when appropriate. Effort should be made to see that the forum-type programs (the Today Show, Meet the Press, etc.) afford at least as much opportunity for supporters of the American system to participate as these programs do for those who attack it.

. . .

If American business devoted only 10% of its total annual advertising budget to this overall purpose, it would be a statesman-like expenditure.

. . .

[B]usiness and the [free] enterprise system are in deep trouble, and the hour is late.99

Spurred and guided by this 1972 memorandum, the corporate opponents of progressive civic regulations have monitored and complained of “liberal media bias,” and have developed a sophisticated two-pronged strategy to recapture media momentum in their areas of interest. On the one hand, they have sought to marginalize public interest groups as groups of hippy extremists, rather than representatives of what was perceived in the 1960s and 1970s as a very broad-based, public recognition of deficiencies in official structures of government and corporate America.

99 Id. at 1–12.
On the other hand, the regressive movement learned how to shape and target media coverage so as to blunt the arguments of public interest critics. They used the same media that shaped the progressive 1960s to blunt the next generation’s progressive inclinations on contested issues. Today, according to some observers, up to eighty percent of the public policy-oriented news in the popular media comes from conservative spokespersons, many of them from corporate “think tanks” and other adversarial institutions created by regulated industry.\textsuperscript{100} Citizen public interest initiatives have to deal with a media battleground where the insiders lobbying against environmental protection have limitless resources and know how to play the game.

Led by the oil and gas industries, and receiving additional money from mining, ranching, homebuilding, and corporate agriculture groups, conservative foundations have developed sophisticated media operations and now operate highly-coordinated campaigns over long periods of time, including the payment of large stipends to conservative authors for the production of pro-industry “news” columns and books.\textsuperscript{101} The big, industry-oriented think tanks have fully-equipped television studios on premises, so that their “experts” can provide reporters on a deadline with sound bites that echo their sponsors’ point of view.\textsuperscript{102} Meanwhile, the consolidation of media has taken its toll on the press’s public information role.\textsuperscript{103} Coupled with the business-efficiency marketing model imposed on news departments, which never before had been required to be profit-generating divisions, the effect is to make the press far less aggressive in pursuing public interest cases. Led by Reed Irvine, ultraconservative activists successfully nurtured the cliché of a supposed “liberal media” bias to induce reporters to back off from vigilance and adversarial investigations of public interest issues. Whereas in the 1980s and 1990s many media outlets had environmental reporters as regular members of their staffs, environmental journalism today has been eroded dramatically in both print and electronic media.

\textsuperscript{100} Lakoff, supra note 41, at 107.

\textsuperscript{101} Id.; see Cathy Young, Cleaning House on Opinions for Hire, Boston Globe, Feb. 20, 2006, at A15 (discussing several disgraced columnists, including one who was paid $60,000 by Monsanto Chemical for writing laudatory appraisals in a book on biotechnology).

\textsuperscript{102} Id.

\textsuperscript{103} Laurence Zuckerman, Questions Abound as Media Influence Grows for a Handful, N.Y. Times, Jan. 13, 2000, at C6 (noting that in 1983 more than fifty companies owned most of the nation’s media outlets, but by 2000, this number was reduced to just six).
B. The Current Environmental Journalism Approach

A number of examples from recent environmental stories demonstrate the drastic change in the media’s approach of environmental journalism.

At four minutes after midnight, Friday, March 24, 1989, the M/S Exxon-Valdez grounded hard onto the granite spine of Bligh Reef in the Gulf of Alaska’s Prince William Sound.104 Over the next weeks, at least eleven million gallons of oil from the wrecked single-hulled tanker blew westward, fouling more than one thousand miles of the Alaska coast, destroying stocks of fish and other wildlife, and hitting the economy of the state with a major recession.105

Working with my students for the state of Alaska’s oil spill investigative commission, it became clear that the cause of the oil spill disaster was far more than a captain with a drinking problem. The records from the years prior to the wreck indicated that the Alyeska oil consortium106 and the Coast Guard—the federal agency with primary authority to regulate the safety and environmental compliance of the maritime oil trade—were constantly cutting back on safety measures and response capabilities to allow industry participants to save on operating costs.107 In its report two years after the wreck, the state oil spill commission established that, owing to corporate and governmental “complacency,” the Exxon-Valdez spill had been an accident waiting to happen.108

With respect to this oil spill, however, the industry carefully manipulated the media coverage so that, despite hundreds of images of bedraggled birds and sealife, very few members of the public ever heard the moderated but highly critical conclusions of the official investigators.109 Alyeska and Exxon rented virtually all the local seaworthy

105 Id. at 6–9.
106 The Alaska Pipeline and the Port of Valdez tanker terminal are operated by a “consortium” of seven oil companies that avoid official partnership or conjoint corporate status. The consortium’s dominant participant is British Petroleum (BP). See Gregory Palast, Ten Years After but Who Was to Blame?, GUARDIAN UNLIMITED, Mar. 21, 1999, available at http://www.guardian.co.uk/Columnists/Column/0,,305529,00.html (“Alaska’s oil is BP oil. The company owns and controls a majority of the Alaska Pipeline system, the consortium called ‘Alyeska.’ Exxon is a junior partner, and four others are just along for the ride.”).
108 See id. at 672.
109 See Ott, supra note 104, at 8–9; Palast, supra note 106.
boats so that reporters could not make independent, on-site inspections of the oiled areas in the sound. 110 The media had to rely on officially sanctioned tours, which were careful to show conscientious cleanup operations, and provided interviews with people who would not talk about the systemic failures that produced the accident in the first place. 111 The cleanup of beaches with hot water and chemical emulsifiers was designed to make the visible oil go away, even though scientists desperately urged that the harsh surfactants were far more likely than the oil to damage the subsurface ecology of the beaches and the water column. 112 Public attention instead was directed to a running series of revelations about Captain Hazelwood’s drinking problems over the years and in the hours prior to the tanker’s departure from Port Valdez. 113

The clear implications of the oil spill story, as it was framed, were that the spill was the fault of this captain, but that when the oil was no longer visible the disaster would be resolved and America could move on. The facts and the scientific realities—that the Exxon-Valdez spill resulted from systemic problems linked to corporate and agency culpidity, and that the oil and cleanup chemicals released into the environment would have severe, longer term effects on natural ecosystems and on closely affected human beings 114—have been lost in the smog of spin. In the minds of most of the American public, and thus in the responses of government at both state and federal levels, the Exxon-Valdez oil spill is a story of a drunken captain, and nothing more. 115

As another example, in many parts of the country, and particularly in the Pacific Northwest, forest clearcutting is one of the most drastic technologies for exploiting natural resources. 116 Particularly

110 See Plater, supra note 107, at 671 n.31 (referencing the fact that the consortium limited reporter access to the oil spill disaster sites).
111 See Ott, supra note 104, at 8.
112 For a comprehensive account of the Exxon-Valdez Oil Spill and its consequences, see generally Ott, supra note 104.
114 On one of my flights back from Alaska, I sat next to a worker who had been forced, as he said many others had, to leave the cleanup area because the chemicals they were spraying were causing them to start peeing blood. See also Ott, supra note 104, at 52. The harm to humans working to clean up the visible oil on the rocky beaches has been vociferously denied by the oil industry, but is chronicled in Ott’s book. Id. at 21–181.
115 See Agus, supra note 113; Reuters Media, supra note 113.
116 Clearcutting has recently increased in the hills of the southeastern United States and many parts of the Mississippi and Atlantic drainages, which may be related to increased flooding conditions in these areas, though the correlation is at present only conjecture.
on publicly owned lands, timber companies cut all the living trees in a strand of forest, and, after removing all usable wood, burn the “slash” that remains. The consequence is an ecological nightmare. The number and diversity of native species—an accurate measure of the health of a natural environment—drop dramatically. There are many consequences beyond the clearcut acreage as well, with one of the most drastic being rapid erosive runoff, causing river valleys to fill with silt, sand, and stones, increasing the speed, height, and severity of later downstream flooding. In February 1996, the states of Oregon and Washington experienced extremely severe flooding, with whole villages inundated and homes swept downstream, resulting in a number of fatalities. Flood coverage saturated the media. Yet despite the efforts of environmentalists to link the floods to upstream clearcutting practices that had turned many fragile mountain ecosystems of the Northwest into eroded moonscapes, the national media consistently reported the floods as acts of God. The media failed to consider the contribution to flooding from the widespread upstream forestry practices that, in hydrological terms, were clearly responsible for a substantial portion of the disasters.

The Bush Administration too has repeatedly offered paradigmatic examples of how media can be carefully stewarded to project public messages that are the antithesis of the underlying reality. A leaked copy of the memorandum prepared by GOP consultant Frank Luntz, released in 2003, makes clear how consciously the agenda of cutting back on environmental protection was to be portrayed to the public in the form of opposite illusions.


122 See Memorandum from Frank Luntz (2002), available at http://www.ewg.org/brief- ings/luntzmemo/pdf/LuntzResearch_environment.pdf. The pages available from the leaked memorandum were only 16 of at least 140 pages, but contained dramatic examples of how
the “Clear Skies Initiative,” the “Healthy Forest Initiative,” the “Endangered Species Recovery” bill, and the like. Faced with the avalanche of technical changes undercutting federal environmental protections, and uncertain about the facts, the press tends to report the administration’s explanations for its anti-environmental actions with limited critical analysis, and often with merely a perfunctory quote from an environmental spokesperson saying that the initiative may be environmentally harmful.123

The media’s inertia and general failure to focus on the current unprecedented initiatives against environmental protection has been accomplished in part by the current administration’s conscious decision to do most of its anti-environmental work outside the legislative forum, in the less-visible realms of out-of-court settlements and manipulative tinkering with administrative rules definitions and enforcement procedures.124

The current administration has learned the lessons of history.125 In its assault on environmental statutes in the 1980s, the Reagan Administration tried to undercut existing laws primarily on the floor of Congress, and largely failed because of insistent media coverage and the legislative opposition it rallied.126 In Newt Gingrich’s 104th Congress under the “Contract with America,” the massive corporate initiatives against environmental law were again mostly legislative, and again were repulsed by strong leadership, particularly in the Senate by Republican John Chafee.127

Now, however, in the ongoing third and most comprehensive assault against environmental protection laws,128 the current admini-

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123 See, e.g., Katharine Q. Seelye, Bush Proposes Change to Allow More Thinning of Forests, N.Y. TIMES, Dec. 12, 2002, at A32 (“They make no bones about their attempt to exempt from environmental review whatever they say is going to be beneficial.” (quoting Niel Lawrence, Natural Resources Defense Council)).

124 The 104th Congress’ “Contract with America” focused on the legislative forum, and was substantially blocked by media criticism, as well as a courageous stand in the Senate by Senators such as the late Rhode Island Republican Senator John Chafee.

125 For an analytical history of assaults on federal environmental protection, see generally Plater, supra note 2; see also supra notes 89–98 and accompanying text.


127 Id.

128 The Natural Resources Defense Council (NRDC) continually updates its website cataloging the current Bush Administration’s ongoing initiatives against environmental
stration has acted largely through low-visibility shifts in regulatory definitions and procedures, as well as through litigation settlement strategies.\textsuperscript{129} Consider, for example, the administration’s undercutting of the standards and enforcement of the Clean Air Act’s retrofitting requirements by defining the terms “maintenance” and “modification” to exempt major factory reconstructions from being held to the more stringent requirements of new sources.\textsuperscript{130} In the realm of litigation, the administration welcomes erosive courtroom attacks on preexisting federal regulations by regulated industries, and then fails to defend the regulations against claims that they were illegal, unconstitutional, or lacking in factual support.\textsuperscript{131}

For example, the Boise Cascade timber and paper corporation attacked a Clinton Administration regulation protecting the wilderness status of forests in Utah and in the Northern Rockies by arguing that the designations were invalid because they had not been accompanied by environmental impact statements.\textsuperscript{132} When the case was called for trial, the Bush Administration attorney in the courtroom refused to even enter an appearance in defense of the federal regulation, at which point an environmental attorney successfully requested intervention to present arguments defending the federal government’s own regulation against invalidation.\textsuperscript{133} In most stories involving such collusive capitulations by the federal authorities, however, environmental attorneys were not in a position to intervene. In a number of these cases, regulations have been struck down by district courts and have been subsequently tabled on a nationwide basis by the administration.\textsuperscript{134}

\textsuperscript{129} See id.


\textsuperscript{132} See Kootenai Tribe of Idaho v. Veneman, 313 F.3d 1094, 1106, 1116–17 (9th Cir. 2002); \textit{see also} Parenteau, \textit{supra} note 131, at 395.

\textsuperscript{133} \textit{Kootenai Tribe}, 313 F.3d at 1108; Parenteau, \textit{supra} note 131, at 395–97.

\textsuperscript{134} Alternatively, the federal government and the challenging entity enter into an out-of-court agreement that the regulation will no longer be enforced. Parenteau, \textit{supra} note 131, at 394–401. In \textit{Kootenai Tribe}, the environmental attorney, Professor Patrick Parenteau, took the case to the Ninth Circuit Court of Appeals and successfully defended the federal regulation, despite the federal government’s desire not to defend it. In other cases, however, long-established regulations have been neutered by the administration’s strategy. \textit{See Kootenai Tribe}, 313 F.3d at 1108.
aspect of this occurrence of widespread “collusive capitulation” is the almost complete failure of the media to note this dramatic phenomenon, and how it has undercut environmental law.

More recent examples come from the climatic disasters of 2005. Hurricanes Katrina and Rita focused the attention of the public through intense media coverage of terrible scenes of storm damage in the deep and middle South. Criticism of the administration’s federal emergency management procedures began even before the hurricanes hit. In the storms’ aftermath, realizing the power of public shock and empathy, the administration quickly attempted to deflect media attention onto the environmental movement, seeking both to deflect criticism of its own performance and to accomplish further erosions of environmental regulations. A request went out from the White House through the Department of Justice to U.S. Attorney Offices around the country, asking them to find examples where environmental litigation might have blocked flood-control projects. Soon, the White House-guided media, and the Fox network in particular, was blaming the “Green Left” for the depredations of Hurricane Katrina. It was argued that, in 1976, an environmental group had successfully gone to court to block a levee-building project in a stretch of Louisiana waterfront that could have saved New Orleans. The media reported those incidents.

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135 A CNN interview is representative of this criticism:

CNN Reporter: Are your teams, is FEMA ready for this? . . .
FEMA’s Michael Brown: Well, we have been taxed. . . . But let me say to a whole bunch of critics. We are ready. We’re going to respond and we’re going to do exactly what we did in Florida and Alabama and the other places. We’re going to do whatever it takes to help victims. That’s why we’ve already declared an emergency. President Bush had no reservations about doing that.


As radical environmentalists continue to blame the ferocity of Hurricane Katrina’s devastation on President Bush’s ecological policies, a mainstream Louisiana media outlet inadvertently disclosed a shocking fact: Environmentalist activists were responsible for spiking a plan that may have saved New Orleans. Decades ago, the Green Left—pursuing its agenda of valuing wetlands and

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press releases as if they constituted legitimate news, without investigating the particulars, despite the fact that engineers and environmental law professors quickly produced a factual analysis showing that the criticized litigation did not block control efforts in the subject area, but rather forced the choice of a preferable and more effective alternative.\textsuperscript{139} The conservative media nevertheless continued to imply that environmentalists, rather than federal and state lassitude, bear significant blame for the disasters in Louisiana and Mississippi.

Even more representative of the current dysfunction of environmental media is the use of hurricane shock to justify and shield direct assaults on environmental statutes.\textsuperscript{140} Several statutory exemptions were immediately implemented without any showing of emergency necessity.\textsuperscript{141} Under the cover of public and media preoccupation with the hurricane disasters, moreover, Representative Richard Pombo, a long-standing foe of environmental protection laws, took advantage by advancing low-visibility efforts to undercut two of the most significant federal environmental laws, NEPA and the Endangered Species Act (ESA).\textsuperscript{142} The taskforce in the House Committee on Resources had

topographical “diversity” over human life—sued to prevent the Army Corps of Engineers from building floodgates that would have prevented significant flooding . . . .


A panel of environmental law experts studied the New Orleans flooding and its relationship to prior environmental cases, finding that the cause-and-effect claims were wholly unfounded. See Donald T. Hornstein, et al., \textit{Broken Leves: Why They Failed}, available at http://www.progressiveregulation.org/articles/CPR_special_Levee_Report.pdf (last visited Apr. 23, 2006).

\textsuperscript{139} Hornstein et al., \textit{supra} note 138, at 3–6. However, neither of the alternatives being litigated had been designed to handle a Category 5 hurricane, which Katrina was thought to be. \textit{Id.} at 1. Despite the environmentalists’ desire to have NEPA analysis based on “worst case analysis,” the Corps of Engineers generally designed its projects only to control a Category 3 hurricane or weaker. \textit{Plater et al., supra} note 4, at 508.


\textsuperscript{141} NRDC’s “Media Watch” documents attempts by Congress and the administration to use Katrina and the need to rebuild as justification for waiving environmental protections. In the aftermath of the hurricane, EPA drafted legislation that would allow it to waive provisions of the Clean Air Act, including those concerning toxic emissions and health-based air quality standards nationwide, without public notice or comment if the administration declares an emergency. \textit{See Press Release, Natural Resources Defense Council, White House, Congress Exploiting Hurricane to Weaken Health, Environmental Protections} (Sept. 22, 2005), \textit{available at} http://www.nrdc.org/media/pressreleases/050922a.asp.

\textsuperscript{142} \textit{See} H.R. 3824.
been accumulating industry complaints against NEPA prior to the hurricanes, with the goal of making amendments to dilute NEPA’s environmental impact statement requirement. Once the hurricane struck, Representative Pombo quickly drafted a second bill to undercut significant sectors of the ESA as well.\textsuperscript{143} With no prior publicity, he introduced the bill, held an afternoon hearing two days later, and within ten days brought the bill to the floor, where it passed with only desultory notice in a chamber preoccupied with hurricane disaster relief.\textsuperscript{144} The media could have made quite a story out of Pombo, his bills, and the surprising speed and obscurity of the ESA bill he brought to the floor.\textsuperscript{145} The media, however, barely noticed the maneuver, and despite environmentalists’ dismayed criticism of the ghoulish opportunism under cover of disaster, no media outlet thought it worthy of investigation.

One final example is illustrative of these trends. Working with my students, I spent seven years in a major battle trying to secure the federal ESA and apply it to an ill-considered Tennessee Valley Authority dam project. The diminutive Tellico Dam project was a proposal to condemn more than 300 family farms for a recreational reservoir and land development, with no electric generators, eliminating the last thirty-three miles of flowing, high-quality water left in the eastern Tennessee River system.\textsuperscript{146} Over the seven years, the local citizens ultimately showed not only the illegality of the project under ESA, but also demonstrated its dramatically uneconomic cost-benefit merits; they made it clear that public resources would be far better invested in a river-based program, with sixty square miles of agricultural land returned to farmers.\textsuperscript{147}

The problem with the Tellico Dam controversy was not that the media failed to run stories on the conflict between the dam and a diminutive endangered snail darter fish. Rather, it was that the media sys-

\textsuperscript{143} See id.

\textsuperscript{144} Id.

\textsuperscript{145} Media coverage of Mr. Pombo could have been built on the record of his 1995 hearings against the ESA held around the nation, where orchestrated crowds of ranchers, irrigators, timber industry workers, and others were encouraged to vilify the law and environmentalists, in one case driving to tears a class of third-graders and their teacher. They had come to testify that, with careful and empathic planning in cooperation with ranchers, cattle could coexist with endangered fairy shrimp living in local streams. See Hanna Rosin, Fern Trampling, New Republic, July 3, 1995, at 12.


\textsuperscript{147} See id.
tematically got the story wrong, mischaracterizing the litigation as extremism. As covered in the press, the story was a misbegotten version of David and Goliath, a “three-inch minnow” counterpoised against a “huge federal hydroelectric dam,” with the subtext that, in this iteration, David was illegitimate. Despite the citizens’ best efforts—a relentless series of press packets, press conferences for farmers to tell the true story, letters to editors, and calls to more than 120 reporters—the sobering, impressive facts of the snail darter’s economic case were never covered in the national media. No investigative reporter ever went to Tennessee and reported on the merits of the dam project, even though the story was one of the three most-covered environmental media stories in that decade, and despite the fact that a cabinet-level committee had unanimously concluded that the project was not worth completing in economic terms. From the beginning, the citizen plaintiffs were unsuccessful in framing the story on its actual terms, and the prodevelopment, anti-environmental forces in Washington and nationally were able to use the miscaricature of the putatively ridiculous endangered fish to undercut the legal case in Congress, and to scare President Carter into withdrawing his promise to veto the rider that ordered the finishing of the dam and the elimination of the farmlands and the ecosystems of the Little Tennessee River Valley.

So many of these modern stories present a common puzzle—where is the liberal media? Most often, the problem is not media bias, but rather that many important environmental stories are barely covered or are not covered at all. As Dean John Garvey noted in his introductory comments to this symposium, the modern environmental media often offers a new take on an old philosophical question “if a

148 See id.
149 See id.
150 After an exhaustive review of cost-benefit calculations when the dam was almost completed, the verdict was dramatic: “The interesting phenomenon is that here is a project that is 95 percent complete, and if one takes just the cost of finishing it against the [total] benefits, and does it properly, it doesn’t pay, which says something about the original design!” Charles Schultz, Chairman, Council on Economic Advisers, Endangered Species Committee, Tellico Dam and Reservoir Project 25–26 (1979) (on file with author).

According to a journalism professor at the University of Michigan who analyzed environmental news coverage in that decade, the Tennessee Valley Authority’s Tellico Dam story was one of three top environmental stories in terms of national news coverage, along with Love Canal and the Alaska Lands congressional decisional process. Almost all the coverage, however, was superficial. See Zygmunt J.B. Plater, Essay, Law and the Fourth Estate: Endangered Nature, the Press, and the Dicey Game of Democratic Governance, 32 ENVTL. L. 1, 1 (2002).

tree is cut down in a wilderness area and no one puts it on CNN, has it really happened?"  

The media in the United States has a high calling. As Thomas Jefferson wrote in 1820, “I know no safe depository of the ultimate powers of the society but the people themselves; and if we think them not enlightened enough to exercise their control with a wholesome discretion, the remedy is not to take it from them, but to inform their discretion . . . .”

In our democratic system as it exists today, the virtually exclusive source of material to “inform the discretion of the people” on current events is the media. The shared experience of our national media, moreover, is part of what makes our nation a democratic community. The media is thus arguably the primary source of information for our system of democratic governance. What the media brings into focus will be taken into account in the halls of government because the governors know it is being perceived by the public. Near the end of the battles over the Tellico Dam, all the Members of Congress had a final opportunity to vote on the merits of the case, which, by then, were clear on the official record. Each Member received a letter from the Secretary of Interior as Chairman of the congressionally mandated cabinet-level review committee detailing its findings and unanimous conclusion that the flowing river was still economically preferable to the reservoir. The Senators and Representatives could uphold the law, the Supreme

154 See id.

The free press is an absolute value not only because the unfettered flow of information is essential to the republican system, nor only because the fourth estate serves as a check on the power of the other three, but because public expression is necessary for the communal self-awareness that keeps the body politic alive. You routinely turn to the newspaper each morning not only to learn what happened, but to stroke the otherwise intangible bond you share with the neighbors and strangers in whose company you will spend the day.

Reading the morning paper is like tagging up, a literal “touching wood,” a dispelling of the darkness of night, all done in the knowledge that everyone else is doing the same thing, which gives you not only a place to start the day from, but a reassurance that you are not alone in your concern for the common good. The news media do for democracy what liturgy does for religion; what poetry does for experience; what gesture does for feeling. With words out of silence, the press tells you who you are.

• Carroll, supra note 1, at A15.
Court’s injunction, and the review committee’s record, or they could override the law and allow an economically dysfunctional project, pushed by the pork barrel, to roll on, unhindered. The legislators voted by a wide margin in the House and a narrower margin in the Senate to go with the pork barrel and override the law.\textsuperscript{155} The problem was not that the Members of Congress did not know the economic facts, but that they knew that the American public did not know, and were therefore able to go along with the usual insider pork barrel process.\textsuperscript{156} It is therefore not only disappointing, but also dangerous in a constitutional sense, if the media does not inform the public, in a timely fashion, of the facts and issues that are contending in the legislative forum.

\textbf{IV. Modern Environmental Media Coverage: Why the Shortfall?}

The problem revealed by these and many other environmental law controversies is that, even though an issue has extreme public importance, the media may not cover the story, or it may cover the story and frame it in a way that hides the public interest, as when the industrial lobbies’ press offices spin and frame a story so as to minimize the merits of the issue.\textsuperscript{157} In some cases, the media picks up a story but drops it too soon, abandoning it before the decisive moment of an agency hearing, a committee markup, or a vote on the floor.\textsuperscript{158} At

\begin{footnotesize}

\textsuperscript{156} See id.

\textsuperscript{157} See supra notes 41–52 and accompanying text.

\textsuperscript{158} My students and I worked on an initiative to regulate advertising billboards along state highways in Michigan. The billboard lobby is typically very powerful in state capitals; in this case, to avoid meaningful regulatory constraints, the billboard lobbyists were seeking quick passage of a preemptive bill, Senate Bill 517, that, under the guise of regulation, would specifically allow high-density billboardin, and set maximum billboard sizes at more than 6000 square feet. On the day of the Senate vote, a large group of students, including volunteers from the University of Michigan School of Engineering, traveled up to Lansing and erected a 3000 square foot sign on the capitol lawn with text stating, “If Senate Bill 517 passes, billboards over TWICE this size will be allowed! Keep Michigan Beautiful—Defeat S.B. 517!” University of Michigan Billboard Protest, http://www2.bc.edu/%7Epler/Newpublicsite05/Billboard01Photo.jpg (last visited Apr. 24, 2006). The sign drew the attention of legislators and staff throughout the capitol building and caused radio, television, and print reporters to make this the lead story on every local outlet. As a result, the lobby withdrew the bill for the indefinite future. Three weeks later, when students were in exams and media attention had passed on, the lobbyists had their legislators bring S.B. 517 to the floor again, and it was passed into state law, where it remains.
\end{footnotesize}
other times, the media may pick up the story too late to inform the policy making process.\textsuperscript{159}

Why is it that so many important stories at the macro level of national policy, as well as at the micro level, receive inadequate or skewed coverage from the media, democracy’s most essential information service? There are a host of potential explanations, none of them readily acceptable in a modern industrial democracy:

- **Complexity.** Environmental stories may be too complex to be summarized in a three-second quip or a twenty-second sound bite, forcing reporters or public interest advocates into unsuccessful attempts to distill a comprehensive analysis to a superficial summary, or risk a glazed-over look from an editor or producer conveying the message that “our audience will never understand that.”

- **Uncertainty.** Environmental stories often involve distracting uncertainties—there may be serious risks of harm possible in a given situation, but they may be difficult to prove in terms of probability or scale. The environmental “precautionary principle” argues that a society should worry about major problems which may occur—even without proof that they are certain to occur—if there are reasonable indications that the risk is real.\textsuperscript{160} Faced with industry’s tendency to doubt and minimize most newly perceived technological risks, however, the press often reacts to public-interest warnings, like the global warming story, by emphasizing the uncertainties until very late in the game.

- **Acute-but-chronic.** As Phil Shabecoff has said, an inherent problem with many environmental stories is that the harms they discuss are *acute but chronic*; that is, that they have been in existence and expanding over such a long time that there is not a “milestone moment” to focus the public’s immediate attention on the issue.\textsuperscript{161} Love Canal, the Allied Kepone disaster, and the crash of the Exxon-Valdez each provided a focal moment.\textsuperscript{162} In many environmental cases, however, it is difficult

\textsuperscript{159} For example, throughout the seven years of the snail darter-Tellico Dam controversy, we desperately tried to get the story to the national press corps. Only when the pork barrel rider bill passed and the President failed to veto it did we get a roomful of reporters to attend a press conference. At that session, environmental journalist Phil Shabecoff bitterly stated that the full story just presented “should have been presented to us years ago!” Press packets and data sheets had been repeatedly distributed to all the national news services and newsrooms in Washington over the prior years. Farmers, Cherokees, and Tennesse biologists had come to Washington and sought out press interviews. The press had just never gotten around to paying attention until the case’s conclusion.

\textsuperscript{160} Plater et al, supra note 4, at 14, 1268–72.

\textsuperscript{161} Telephone Interview with Philip Shabecoff, Reporter, N.Y. Times (Sept. 29, 2005).

\textsuperscript{162} See Plater et al, supra note 4, 42–66, 182.
to find strategic news moments. For example, it is difficult to bring public focus upon hormonal changes and other longterm metabolic effects caused by environmental chemical exposures, though their consequences for the sustainable future welfare of human society may be far greater than pollution.\textsuperscript{163}

- **Gloom.** The media is often quick to cover vivid stories of short-term disasters—tsunamis, earthquakes, terrorist attacks, plane crashes, and famines. Environmentalists trying to gain media attention may too often succumb to the temptation to portray their issues as imminent disasters, hoping to attract the press’s fickle eye. This may be twice-disadvantageous because it both encourages hyperbole at the expense of sober factual analysis, and raises cynical doubts about environmentalism generally. It can lead to public “disaster fatigue,” and may evoke an image of environmentalism as the new “dismal science,” dragging us all into lachrymose dudgeon rather than finding bright paths for the future.\textsuperscript{164}

- **Media is now a business.** “Infotainment” means that news must be packaged to sell. Lurking behind much of the disappointing reality of modern media is a fundamental contradiction. On the one hand, the exalted mandate of the media is to provide citizens and government with the essential factual raw materials—and a marketplace of opinions—that will support a full panoply of public issue debates and thus shape dynamic, reasoned, democratic government decisionmaking. On the other hand for a variety of reasons the nation’s press has come to consider local, national, and international news largely as just another revenue-generator, and therefore have reorganized the entire news-providing function as a consumer commodity competing for

\textsuperscript{163} The ignorance of Americans about processes and issues in domestic and international politics is evident in many public polls. For example, a recent Harris poll conducted for the American Bar Association released in December 2005, revealed that only 55% of the American public could correctly identify the three branches of government; 22% named the branches Democrat, Republican, and Independent, and 16% named them local, state, and federal. See Harris Poll Reveals Governmental Knowledge of Many Americans, Daily Record (Rochester, N.Y.), Dec. 13, 2005. Additionally, 29% of the public answered that the role of the judiciary is to advise the President and Congress on the legality of future actions. See id.

\textsuperscript{164} In the snail darter case, for example, reporters demonstrated great reluctance to acknowledge the fallen reality of the contemporary Tennessee Valley Authority, the agency that had been one of the New Deal’s brightest roses, a beacon of progressive social policy now turned to dross. In the course of my seven years of work on the snail darter case, I was repeatedly told by reporters that their previous view of the Tennessee Valley Authority, formed by schoolbooks and magazines, had been of a progressive success story, quite at variance from the reality of a utility-oriented pork barrel political establishment.
maximum market share.\textsuperscript{165} Stories that are too complicated, depressing, or continuations of ongoing stories that are undramatic, are thus deemed not sufficiently attractive to the prized audience sectors. The news shows that will get on the air are those that attract the biggest product-buying audience in the format that attracts them.

- **Media as Marketing.** Is the average American Homer Simpson? One unfortunate cause of the low level of press coverage on matters of public importance may be the media’s general impression that the American audience is unsophisticated scientifically and politically, and uninterested in complex issues of societal governance.\textsuperscript{166} Gauging potential media audience numbers is a process of marketing analysis. For better or worse, the news business today is a business, and its marketing logic often pegs the product at the level and format deemed likely to attract the largest block of American consumers. The perception, it seems, is not necessarily that the American media audience or the American voter is stupid so much as ignorant, in the sense of uninformed and unknowing. An uninformed audience spawns a pernicious spiral: because the consumers of media are uninformed, they lack interest in getting more information about important issues of societal governance. Because the uninformed audience is uninterested, the media businesses that could supply society with important information feel little market pressure to do so.

\textsuperscript{165} Twenty years ago, many or most electronic media news departments and newspapers operated with a professional sense of responsibility as the public’s source of information, despite the substantial cost of maintaining reporters around the world. In 1986, NBC’s News cost the network as much as $100 million a year. See Marc Gunther, *The Transformation of Network News*, Nieman Reports (Special Issue), Summer 1999, at 20, 21; see also Sarah Sun Beale, *The News Media’s Influence on Criminal Justice Policy: How Market-Driven News Promoted the Punitiveness Revolution* (Jan. 2005) (unpublished manuscript, on file with Boston College Environmental Affairs Law Review). The financial burdens were treated as the price of enjoying bandwidth monopolies on the airwaves and recompense for the privilege of operating national networks. Since the early 1980s, however, the traditional news audience has declined precipitously, and network and newspaper consolidation has led to large-scale corporations that expect revenue production from all divisions, and pressures for generating profits. General Electric bought NBC, Capital Cities Communications bought ABC, and Laurence Tisch, a hotel and theater entrepreneur, took over CBS. Subsequently Disney bought ABC and Viacom took over CBS. For a review of these moves and their consequences, see JAMES T. HAMILTON, ALL THE NEWS THAT’S FIT TO SELL: HOW THE MARKET TRANSFORMS INFORMATION INTO NEWS 160–89 (2004). The corps of reporters—especially expensive foreign-posted reporters—has been cut back substantially, and news formats are now dominated by less expensive “infotainment,” “soft” features, with shrunken commitments to actual news reporting. See Beale, *supra* at 20.

\textsuperscript{166} See *supra* note 163 and accompanying text.
The perception of the American audience as uninformed and indiscriminate regarding issues of social policy and governance is unfortunately furthered by the way that American journalists are generally coached in how to present the news. The Fogg Index is an elaborate method by which the text of journalistic stories is scaled in terms of relative education levels. According to several reporters, most American media target the level of their discourse at a Fogg Index of an eighth-grade reading level or lower. Only a few national newspapers target their text at a Fogg Index level of high school graduate or higher. It is true that the complexity or reading level of a text’s syntax does not necessarily equate with the reader’s level of reasoning or analytical and logical ability, but observation of mass media suggests that a convincing case can be made that the material being transmitted is as low in brainpower as it is in syntax.

• **Hooks and legs.** Journalism experts often inform public interest attorneys that a successful news story first needs a “hook,” and then it needs to have “legs.” A hook can be a milestone moment, or a vivid occasion that makes the story immediately saleable in the newsroom. The hook can be a dramatic announcement in a public forum, or a surprising major spokesperson saying it, or a vivid photograph that captures the imagination and pulls in all who see it. In the Exxon-Valdez oil spill, photographs of oiled birds and sealife provided a hook that captured the nation’s imagination. If a hook is not accurately related to the essence of the story, however, it may pull public attention in the wrong direction. The image of a drunken sea captain, the causation hook in the Exxon-Valdez story, is a good illustration.

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Calculations for each story were based on a test of the first 300 words of each. Stories were selected by searching the term “climate change” on each news organization’s website and selecting the most recent story actually about global warming.


170 See Palast, supra note 106.
Once media attention has been brought onto a story, it must also have legs to continue running as long as necessary to build momentum and to register in the ongoing legal and political process. News coverage can be a flash-in-the-pan or can peak too soon. All too often, a story that is dramatically covered one week becomes yesterday’s news, leaving the inside players free to return to the standard operating procedures that caused the problem in the first place.

- **Journalists.** It may also be argued that modern media environmental coverage is poor because many reporters are ignorant about current issues of law and resources policy, vulnerable to Tobacco Institute “scientific data,” and rely on public relations quotes rather than research. One wonders about the curriculum taught in journalism schools. In fact, many of the high-functioning journalists one meets never went to journalism school, and instead come to the press after learning some particular discipline or subject matter. The best journalists become, to some degree, scholars of the fields on which they report. They are quick studies at probing for underlying explanations of what is going on and what it means for society. Many ordinary journalists—and their editors and producers—are satisfied to report the latest press releases from inside players. Too often, they merely present juxtaposed sound bites from opposing sides of an issue, along the lines of this:

  Dr. A., speaking for environmentalists, says “Global warming, caused in significant part by human actions, is an accepted scientific fact in the international community of climatologists, so we must do something about it.”

  On the other hand, Dr. B., speaking from the Heritage Foundation, says “There are serious questions whether global warming exists, and if it does, whether it isn’t just a natural cycle, and in any event the hydrocarbon industry has not been proved to cause it, so we need more studies.”

  The Fable of the Drunken Skipper has served the oil industry well. It transforms the most destructive oil spill in history into a tale of human frailty—a terrible, but one-time, accident. But broken radar, missing equipment, phantom spill personnel, faked tests, the profit-mad disregard of law—all these made the spill disaster not an accident but an inevitability.

  The canard of the alcoholic captain has also provided effective camouflage for British Petroleum’s involvement in the environmental catastrophe . . . .

*Id.*
There you have it: the news on global warming. Good night.

As Ross Gelbspan has said, if a controversy concerns arguments over policy, then of course a reporter should appropriately present quotes from both sides to let the audience follow the debate. If the controversy is over matters of fact, however, reporters have an obligation to look into those facts so as to be able to indicate to their audience which propositions are factual and which are not. To do less is abdicating a societal responsibility, protracting informational dysfunctions, and promoting a system of governance by cynical spin. If the journalistic profession is to respond to Thomas Jefferson’s clarion challenge, it is clear that the press must treat itself as more than a bunch of performers on an infotainment stage.

- **The public, too, is both part of the problem and the solution.** If some of the foregoing is accurate, some of the unfortunate shortcomings of modern media in the environmental field and beyond can be traced not only to the dysfunctional dynamics of the media industry, but also to a national population that fails to demand more from the media. At this level of generality, one can talk about a need for a better national educational system and other systemic issues, but the utility of such perceptions is limited.

- **Looking to the future.** A significant increase in environmental lawyers’ media sophistication may help resolve some of the media realm’s shortcomings. Environmental lawyers at the macro and micro level are not doing enough, or are not doing well enough, in conveying their issues into public opinion. Environmentalists can and should work to improve their ability to communicate important public interest facts and analysis to the public and influence the governance process. At the macro level, the relative lack of media resources for public interest groups, compared to the oppositional groups that are arguing against environmental protection initiatives, is a problem that can and should be addressed by progressive foundations. Given the current revolution in electronic information technology, it may well be time for the creation of an electronic public interest, factual-analysis cyberspace clearinghouse, which, if properly conceived and implemented, could

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171 How, for instance, would a thinking public react to a news story reporting that “The UN released its climate change report on Monday afternoon. On the other hand, the White House said the UN did not release the report. There you have it, the latest news on the climate change report release-date question.” The obvious logical reaction, in such cases of questions of fact, would be to expect journalists to check it out and tell the audience whether the UN report was actually issued.
change the nature of modern political discourse in our embattled pub-
lic interest fields.172

At the micro level, public interest attorneys must learn the mod-
ern skills of media-savvy communication. They must master how to
put together press conferences and press packets with maps, charts,
and other essential information; how to conduct briefings for individ-
ual reporters; how to get coverage through op-ed features, letters to
the editor, and electronic outlets around the country; and how to cul-
tivate relationships with intelligent journalists at all levels. Environ-
mental attorneys must be able to frame and create graphic messages
relevant to their cause.

At every turn, at both the micro and macro levels of governance,
citizens working in the public interest are altogether too likely to face
opponents who are able to deploy far greater press resources. In fun-
damental terms, however, facts are facts, and ultimately society as a
whole must learn how to perceive the important facts of the issues it
deals with, or suffer unfortunate consequences. To make that happen
is part of the environmental lawyer’s job which, if done right, could
usher in a far happier era, where public debate and public policy are
increasingly based not on a dense fabric of agenda-driven spin, but on
thoughtful consideration of important things as they really are.

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172 See Plater, supra note 150, at 35–36.
MODERN MEDIA’S ENVIRONMENTAL COVERAGE: WHAT WE DON’T KNOW CAN HURT US

JANE AKRE*
STEVE WILSON**

Abstract: Jane Akre and Steve Wilson had more than fifty years experience as broadcast journalists before becoming Whistleblowers against Rupert Murdoch’s News Corporation, Fox. Steve has worked as an investigative reporter on the network and local level, a program syndicator and currently is at WXYZ in Detroit as Chief Investigative Reporter. Jane has been an anchor at CNN and at various local stations from California to Atlanta as well as consumer, crime, health and investigative reporter. Together they were the first journalists to blow the whistle on the internal workings of a newsroom.

INTRODUCTION

On May 20, 2005, Jane Akre went into a FedEx/Kinko’s and filled out an envelope addressed to Fox Television in Los Angeles. Inside the envelope Jane placed a check for a small six-figure number—as if six-figures can ever be small. Jane sealed the envelope, dropped it into the bin, and heard a hollow echo signaling the bin was empty. That sound marked the end of years of litigation over an environmental story we produced, but was never aired on the Fox-owned station in Tampa, Florida. In the end, after winning the battle, we lost the war. We ended up paying them.

I. THE LITIGATION

The litigation began in 1997. We were working as investigative reporters for a station in Tampa that was newly acquired by Fox Televis
We have always been interested in environmental issues and environmental health, especially as it affects children. Thus, we chose to report on the bovine growth hormone (rBGH). rBGH is a dairy drug made by a division of the Monsanto Company. The “r” stands for recombinant, which means it is genetically engineered with the help of a culture of bacteria that grows the hormone into one which is nearly identical to a hormone cows produce naturally.

There are important reasons for those working in environmental law to know more about Monsanto. It seems that far too many environmental disasters have Monsanto’s stamp on them. Monsanto is now in the life sciences business, which is a frightening prospect. Monsanto makes rBGH, a genetically engineered drug which was approved by the Food and Drug Administration (FDA) in 1993. This drug, which is injected into the nation’s dairy cows without the public’s knowledge, induces cows to produce more milk. Not that we need more milk—we pay farmers not to make more milk.

Regardless of the need for rBGH, preliminary research indicated that it caused a great deal of harm to cows. rBGH was making the injected cows lame and giving them udder infections called mastitis. Although early studies done by Monsanto showed that the test rats had precancerous cysts and lesions, these harmful effects did not trigger the two-year multigenerational studies that the FDA is supposed to undertake when such adverse results occur. The FDA stated that it had not seen the studies performed by Monsanto. An FDA spokesperson later informed us that the FDA had seen the studies but did not think they were important.

Through our research, we learned that Canadian regulators looked at the Monsanto studies as part of a body of information they were gathering at Health Canada to consider approval of rBGH for use in Canada. Health Canada later voted not to approve the drug in Canada.

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3 See DuPuis, supra note 1, at 285.
5 See Dupuis, supra note 1, at 285.
7 Id.
ada. Today, rBGH remains unapproved for use in Canada, as well as the entire European Union, Japan, and almost every industrialized country in the world.\textsuperscript{8}

Dairy cows injected with rBGH produce milk with a greater amount of spin-off hormone called Insulin-like Growth Factor One (IGF-1).\textsuperscript{9} IGF-1 is a powerful growth hormone that causes all cells, including cancerous cells, to proliferate.\textsuperscript{10} Unlike most hormones, IGF-1 is identical in both humans and bovine.\textsuperscript{11} Despite these early warnings, the Center for Veterinary Medicine—which approves and regulates animal drugs under the FDA—approved rBGH. This struck us as a significant story.

The most important consideration of what makes a good story is that the topic affects many people. Almost everyone consumes dairy, from children to women fighting osteoporosis. Thus, the rBGH issue had the markings of a good story, and got better and better as it developed. As we prepared the story for air, it was given the green light by the new managers of our Fox station.

The story was supposed to air in February 1997. The radio advertisements were running, promoting \textit{The Mystery in Your Milk}, with the main weekday anchor dressed in white, resembling a large glass of milk.

On the eve of its airing, Monsanto wrote several strongly-worded letters to Roger Ailes, the head of Fox News in New York. Though he had no connection at all to Tampa, Roger Ailes is probably a pretty good contact if you are trying to kill a news story at a Fox-owned station. The letter read, “[i]ndeed, some of the points clearly contain the elements of defamatory statements which, if repeated in a broadcast, could lead to serious damage to Monsanto and dire consequences for Fox News.”\textsuperscript{12} We later asked Walsh, in a deposition, what he meant by “dire consequences”; he responded that it was a threat to sue.

Following the receipt of these letters, the rBGH story—which had been prepared for air and was going into editing—was pulled sud-


\textsuperscript{11} See Juskevich & Guyer, supra note 9, at 875.

\textsuperscript{12} Letter from John J. Walsh, Attorney, Cadwalader, Wickersham & Taft, LLP, to Roger Ailes, Chairman & Chief Executive Officer, Fox News (February 28, 1997) (on file with author).
denly for a “re-review.” We were disappointed, but it was understandable. Any station would want to ensure its facts are correct, particularly in light of threatened litigation, though presumably the legal vetting of the script would have adequately addressed this concern. The re-review process lasted eight months. The story underwent eighty-three rewrites, which from a news perspective—where a half-dozen rewrites is commonplace—is far beyond extreme.

During this time, Fox’s lawyers were fully in charge of the editing process, which should never happen. Journalists work in the public interest. Lawyers work for their clients. In this case, Fox was not prepared to work without fear or favor as is the professional standard for journalists. We were mindful that a news organization does have the right to choose not to air a story. As distasteful as this was, Fox News chose to exercise that right.

What they do not have a right to do, however, is what the Fox lawyers were doing with this story. The lawyers did not have a right to massage the facts by removing a reference to cancer and inserting statements we had demonstrated to be false. For example, the lawyers told us to report that Canada had approved the drug, even though it had not. They also told us to report that there were no health concerns about the drug in Europe. However, we had documentation indicating that European officials were concerned about rBGH, and, in fact, had banned the use of the drug because of health concerns. The lawyers also told us to report that the milk was the same wholesome product it had always been, as that was what Monsanto said. Although we did report Monsanto’s contention that the milk was as wholesome as before, we felt it was important to include what our investigation had revealed—that the milk was not the same product. Fox’s lawyers did not want us to provide that explanation, explaining it was over our viewers’ heads. This contentious process continued for eight months.

By standing up for the truthfulness of this story, as journalists are supposed to do, we were facing dismissal or retaliation. A letter from a Fox attorney confirmed that we were being dismissed because of our position. We felt that letter confirmed that Fox was retaliating against us. In response, we filed the first whistleblower lawsuit ever brought by journalists against a news organization. 13 Essentially, we argued that Fox could not lie to the public over the public’s airwaves; 14 it would be a

13 See New World Commc’ns of Tampa, Inc. v. Akre, 866 So. 2d 1231, 1232 (Fla. Dist. Ct. App. 2003), reh’g granted, modified, id.
14 See id.
violation of the law, and a violation of the Federal Communications Commission’s (FCC) prohibition against news distortion. Because the airwaves are a public commodity, they cannot be used to intentionally lie to the public. Whistleblowers have been retaliated against for refusing to participate in something illegal or threatening to report the illegal activity to the authorities, either public or private. We felt our suit met those criteria.

Our labor lawyers told us that this case would take about a year and cost about $50,000. That amount was gone after the defendants took our depositions. During the eight weeks of depositions, attorneys for Fox asked us important questions such as where we went to high school and what we studied during our first year of college. We needed our attorney present throughout these depositions; Fox knew these lengthy depositions would cost us large sums of money. However, eight years later, and many hundreds of thousands of dollars later, we did win. Our trial finally began in July 2000, two years after we filed suit. After a five week trial, a jury of six decided Jane had been retaliated against. The jury verdict states:

[T]hat the Plaintiff Jane Akre has proven, by the greater weight of evidence, that the Defendant through its employees or agents, terminated her employment or took other retaliatory personnel action against her, because she threatened to disclose to the Federal Communications Commission under oath, in writing, the broadcast of a false, distorted, or slanted news report which she reasonably believed would violate the prohibition against intentional falsification or distortion of the news on television, if it were aired.

Jane was awarded $425,000 in damages, which we both considered a great victory. Steve was a coplaintiff, with the same story and circumstances, but he was not awarded anything. We believe this was because he acted pro se. His attorney backed out six weeks before trial, after requesting $50,000, which he knew we could not afford. We

15 See id. at 1233 (recognizing that a series of FCC opinions issued between 1969 and 1973 shaped the “FCC’s news distortion policy.”).
16 See id.
17 See id.
18 See Special Jury Verdict Form, Akre v. New World Commc’ns of Tampa, Inc., No. 98-2439 (on file with author).
19 Akre, 866 So. 2d at 1233.
think he got cold feet because Fox would be represented by the firm of Williams & Connolly at trial.\textsuperscript{20}

We felt the issues of our complaints were the same, that we had achieved a victory, and that we were prepared to put it behind us and go on with our journalism careers. Fox, however, filed an appeal.\textsuperscript{21} They argued that lying to the public over the public’s airwaves was a violation of FCC policy only, and was not prohibited by law, rule, or regulation.\textsuperscript{22} Therefore, we were not really entitled to whistleblower protection. Essentially, Fox argued that there is nothing prohibiting a news station from lying to the public, and that the First Amendment is so broad that courts should not look into Fox’s newsrooms and second guess them. Relying on that argument, the appellate court overturned the jury verdict.\textsuperscript{23} Furthermore, Florida statute provides that an appellate victory can allow the victorious party to collect costs and fees.\textsuperscript{24} Hence after some negotiations, we had to mail Fox a check for their fees and costs in this lawsuit.

\section*{II. Implications for Today}

What are the implications of this for modern media’s environmental coverage? For Monsanto and Fox, this was a story that would have seen very little airing in the Tampa market, which had about one million viewers. At six o’clock in the evening, maybe one hundred thousand people who were cooking dinner and trying to round up their kids would have seen it. Instead, the story got international coverage, was published on the internet, and has been covered in books, including Robert F. Kennedy, Jr.’s \textit{Crimes Against Nature},\textsuperscript{25} Jane Akre’s article in \textit{Into the Buzz Saw},\textsuperscript{26} and in the documentary film \textit{The Corporation}.\textsuperscript{27} Monsanto’s attempt to suppress the story backfired. Frankly, we think this was a good outcome for consumers who have a right to know the contents of the food they serve to their families. For Fox,

\begin{thebibliography}{99}
\bibitem{21} Akre, 866 So. 2d at 1231.
\bibitem{22} \textit{Id.} at 1233.
\bibitem{23} \textit{See id.} at 1232.
\bibitem{24} \textit{See id.}
\bibitem{26} \textit{Into the Buzzsaw: Leading Journalists Expose the Myth of a Free Press} (Kristina Borjesson ed., 2002).
\bibitem{27} \textit{The Corporation} (Big Media Picture Corporation 2003).
\end{thebibliography}
the story backfired as well. The “fair and balanced network” was shown to be something quite different.28

The Food Lion, Inc. v. Capital Cities/ABC, Inc. case emboldened industry to challenge the media and win.29 In that case, fifteen producers from the news magazine 20/20 obtained jobs at a Food Lion supermarket and brought hidden cameras into the grocery store, focusing on the meat department.30 The producers caught on camera scenes of unsafe food-handling practices.31 In the meat department, the producers observed employees pouring bleach on meat, repackaging it with a fresher date, and putting it back on the store shelves.32 In addition, employees failed to clean the meat grinders.33 After the story aired, Food Lion sued the news magazine and its owner, ABC.34 Food Lion won on the basis that the news producers had misrepresented who they were, and the employees violated their duty of loyalty to Food Lion.35 Most of the damages awarded to Food Lion were reversed on appeal.36

Around the same time as Food Lion, food disparagement laws—veggie libel laws—became commonplace.37 By 2005, approximately thirteen states had such laws.38 Food disparagement laws allow an industry with a product that has a limited shelf life to sue any media outlet that causes damage to the industry’s reputation as a result of a news report.39 A recent case involving Oprah Winfrey highlighted this

30 See id. at 510–11.
31 Id. at 511.
32 Id. at 510.
33 Id. at 526.
34 Id. at 510.
35 Food Lion, 194 F.3d at 510.
36 See id. at 524.
38 Sheldon Rampton & John Stauber, Oprah’s Free—Are We? Fairness & Accuracy in Reporting, May-June 1998, http://www.fair.org/extra/9805/oprah-beef.html; see, e.g., Tex. CIV. PRAC. & REM. CODE ANN. § 96.002(a) (Vernon 2005) (“A person is liable . . . if . . . the person disseminates . . . information relating to a perishable food product to the public . . . the person knows the information is false; and the information states or implies that the perishable food product is not safe for consumption by the public.”).
Ms. Winfrey was sued by cattle processors. Although she ultimately prevailed, Ms. Winfrey spent a significant amount of time and money defending herself. Regardless of whether a journalist prevails in these suits, such laws make it difficult for journalists to tell stories for fear of reprisals.

During the last fifteen to twenty years spin and lying by industries has been more widely accepted. It is one thing to spin a story, which public relations practitioners have always done. Monsanto, and many other companies often spin the truth to portray their products more favorably. However, it is very different to say something that is patently false, which, in my opinion, Monsanto has done in the past. It takes reporters to investigate the facts, uncover the truth, and to challenge the companies’ representations. Without the support of a strong news organization that isn’t afraid of challenges, the task is almost impossible.

Sometimes it is difficult to determine where the public stands on an issue. For example, “Astroturf” groups appear to be citizen driven, but are actually staffed and funded by people directly associated with industry. These groups have learned how to use the media to spin a message. Journalists are confused by the appearance of an Astroturf group. Often an inexperienced editor will require a journalist to include the Astroturf’s point of view in the name of fair and balanced coverage, without revealing the industry forces and funding behind the Astroturf group.

Consolidation of the media is a major factor fueling the independent media movement occurring in this country. When there are basically only four or five owners of major media in this country, journalism becomes more of a bottom-line oriented business than a public service. Questions of journalistic value and public interest are

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40 Winfrey, 11 F. Supp. 2d 858.
41 The Oprah Winfrey Show (CBS television broadcast Apr. 15, 1996) (“It has just stopped me cold from eating another burger!”) (transcript available at http://www.mcspotlight.org/media/television/oprah_transcript.html).
42 Winfrey, 11 F. Supp. 2d at 858.
44 For information on Astroturf groups, see http://www.sourcewatch.org.
45 See Laurence Zuckerman, Questions Abound as Media Influence Grows for a Handful, N.Y. TIMES, Jan. 13, 2000, at C6 (noting that six companies control most of the media consumed by Americans).
replaced with questions of how much can be made, and how quickly. The people with experience, who might question authority, are often the ones with the highest salaries. The experienced journalists can be replaced by younger coworkers, with less experience who are less likely to question authority.

The final issue regarding the state of the media today is self-censorship by people working in newsrooms. The journalists perceive the lack of support from the top, and consequently, they shut up and do what is in their best interest. This behavior is understandable even for the most altruistic of journalists. We understand that better than anyone else. But these forces present an ethical dilemma to newsroom journalists. Do they take the ethical high road? Quit? Speak out? These are questions many professionals will face in their fields, hopefully without consequences as severe as we faced.

Since this happened to us, we have had the privilege of talking to some of the best and the brightest students at some of the nation’s top schools. After a combined fifty years as investigative reporters fighting with lawyers over freedom of information issues, we often ask ourselves if we really need more lawyers.

However, we believe at this time society needs more lawyers doing public interest and government work. We applaud lawyers who take that path because there are easier ways to make a living than standing up for what is right. When Steve took his first television job thirty years ago, television news was something broadcasters did for free. They did not expect to make much money. They did it because it was a repayment for the right to be able to use the public airwaves to make fortunes on the *Johnny Carson Show*, *What’s My Line*, *Ed Sullivan*, and other entertainment shows. They did a respectable job providing the news, discussed important issues, and did not expect to make a profit.

Television changed for the worse when executives discovered that news programs could turn a profit. A similar realization, to a lesser extent, was made in the print media.

Important stories, such as the piece on the adverse health effects of bus emissions—a legitimate investigative piece—were sensationalized in television promotions. Every time viewers turned on their televisions, they were greeted with advertisements such as “Killer Buses—Film at Eleven.” Indeed, nobody wants to miss killer buses. The television business has outsmarted itself by promoting issues that people do not care about. By producing stories that mean very little to viewers, the industry has caused smart, intelligent people to turn off their television sets.
The number of homes using televisions is decreasing rapidly. In any other business in America, if you make a product that people stop buying, you might stop to think about what is wrong. Apparently this is not the case in television. What is left is what we refer to as the “Jerry Springer audience.” These are viewers who like to watch Geraldo, and similar talk shows, which discuss trivial issues.

Recently the entertainer Lindsay Lohan was on the front page of a newspaper. She had crashed her Mercedes into a man while attempting to evade the paparazzi. This story was on the front page of the Star Tribune, a reputable newspaper. Meanwhile, global warming was on page nineteen, if it appeared at all.

Consultants now advise the television industry about what viewers want to see. Consultants believe that viewers have short attention spans, so even the Lindsey Lohan story should get only twenty seconds. For a story on global warming, consultants would allot a minute and a half.

After what happened to us, we came to the conclusion that respectable television news is gone. For example, Dateline used to investigate corporate misdeeds, such as the Food Lion story, in primetime. They have succumbed to marketing pressures, and now advertise stories with such statements as “They went on a vacation, he ended up missing. Did she throw him overboard on the cruise ship? Tonight on Dateline.” This type of story embarrasses my former colleagues who now work at Dateline. The editors do it though because consultants tell them that viewers want to see these stories.

After we had given up, Steve got a call from a news director in Detroit, inviting Steve to head their investigative unit. He promised Steve that he could take the time and the resources to do environmental stories, consumer issues, corruption, and the other important issues.

Steve was skeptical when the news director informed him that he could take twelve minutes on the six o’clock evening news for investigative reporting while the entire newscast is only fifteen minutes long. As it turned out, this television station is unlike many others these days, permitting this kind of reporting.

Conclusion

We still believe in television and its potential. We still believe that the kinds of environmental stories that need to be told can be told—and often are best suited—for television. Television can do things that

print cannot, and a picture truly is worth a thousand words. We encourage people not to give up on reporters in general, and television reporters in particular. Some reporters can still occasionally get a decent story on the air.

Great work is being done even though the corporate media is owned by several large corporations that do not know the light bulb division from the television news division. To them, it is all money. Their questions are how much is it going to cost us to tell this story? If we are going to get sued and have to defend the truth, how much will it cost? If we are going to lose an advertiser, how much will it cost? Add all of that up and the corporate media might well decide that a story is not worth doing. These are the fights that we have on a regular basis in the television business, but rest assured there are people working in mainstream newsrooms who, like those in independent media, still want to make a difference.
“REFRAMING” THE PRESENTATION OF ENVIRONMENTAL LAW AND POLICY

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Abstract: In 1995, Congress, with the support of the Clinton administration, passed the Personal Responsibility and Work Opportunity Reconciliation Act, a sweeping welfare reform designed to appease conservative critics of 1960s War on Poverty programs. In the last decade, conservatives have intensified a comparable campaign to dismantle environmental programs and regulatory agencies established during the 1970s through the efforts of the environmental movement. Conservatives’ calls for market forces to replace governmental environmental protection programs echo the arguments of conservative opponents of welfare. Similarly, contemporary battles over environmental policy are being waged in the mass media arena. Therefore, it behooves environmental advocates to review the public discourse that surrounded the welfare debates of the 1990s. Using frame analysis, this Essay describes the evolution of media discourse in Massachusetts from 1990 through 1994 regarding the role of government and its responsibility in providing public welfare programs. The Essay then draws lessons from welfare reform that are relevant to current environmental debate.

Introduction

In 1996, Congress, with support from the Clinton administration, passed the Personal Responsibility and Work Opportunity Reconciliation (Welfare Reform) Act, a sweeping welfare reform designed to appease conservative critics of the 1960s War on Poverty programs. In
the last decade, conservatives have intensified a comparable campaign to dismantle environmental programs and regulatory agencies established during the 1970s through the efforts of the environmental movement.²

Despite scientific evidence suggesting that environmental problems—such as global warming, water accessibility, and air quality—are worsening,³ conservatives are pressing for significant changes in tort law, regulatory standards, and conservation efforts, all likely resulting in lesser governmental involvement in environmental protection. They argue that reducing governmental oversight will unleash market forces, thereby engendering more creative ways to protect the environment.⁴

Conservatives’ calls for market forces to replace environmental protection programs strongly echo the arguments of conservative policy analysts that governmental welfare programs should be eliminated. Reiterating the three recurring themes of conservative rhetoric, welfare opponents in the 1990s argued that government programs should be eliminated, reduced, or recast, either because they perversely worsened the problems they were established to address, or because they wasted taxpayer money and amounted to little more than futile gestures.⁵ Appealing to proponents of cost-benefit analysis, this argument further suggests that the continued existence of such programs is hazardous to the overall health of society and perhaps hazardous to the very individuals that the programs intend to help. In place of governmental intervention, Secretary Norton has called for market-driven solutions that “favor human freedom [and] human creativity.”⁶

There are a number of parallels between the legislative and regulatory struggle over welfare cuts in the 1990s and the current struggles over environmental and regulatory programs. In both cases, government-based solutions were initially established after surges of social mobilization, in the 1960s and 1970s, respectively. In both cases, pro-

⁶ Redal, supra note 4 (quoting Gale Norton, Sec. of the Interior).
gram opponents have argued that market forces could address existing problems more effectively than governmental programs. Both debates concern the role of government in protecting the most vulnerable, be they children, the poor, or endangered species. In addition, cost-benefit analysis has been promoted as a reliable means of resolution for both of these debates, with opposing sides debating the definitions of terms: Are taxes a cost or an investment? How does society weigh short-term costs against long-term impacts? How does society evaluate benefits and losses? Finally, how does society balance who benefits and who loses in any social planning equation?

Like the contemporary battles over environmental policy, the battle over welfare reform was waged in the mass media arena—the master forum of our historical epoch. Following the writings of Charles Murray, a policy analyst at the conservative Manhattan Institute, opponents of welfare programs posed individual accountability—personal responsibility—as the antidote to a bloated, incompetent welfare state that wasted taxpayers’ money by encouraging dependency on the government.

Over time, mainstream media began to shape its coverage to the contours of this account. As Washington Post writer Juan Williams acknowledged at the time, “‘[n]ow we no longer ask how the federal government can help people who need it, but why should the government have to support these people at all.’” According to Williams, the view of “right-wing social scientist Charles Murray” had “insinuated itself into our coverage here and especially that of The New York Times and the networks. . . . Once you win that argument in an editor’s mind, you undermine a lot of stories before they’re ever assigned or written.”

Social welfare proponents were faced with a predicament in which media coverage played a critical role in the debates over policy at both the state and national levels, but failed to perform its alleged primary function of exposing incorrect information. This predicament is similar to the one that confronts environmental advocates today. One of the most salient aspects of the successful conservative argument in the debate over social welfare was the extent to which it was divorced from the realm of legitimate fact. As one analyst con-

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7 William A. Gamson, Social Movements and Cultural Change, in From Contention to Democracy 57, 76–77 (Marco G. Giugni et al. eds., 1998).
9 Id. (quoting Juan Williams, Reporter, Wash. Post).
10 Id. (quoting Juan Williams, Reporter, Wash. Post).
cluded, “what was most striking about the coverage was its sheer superficiality.”

In a similar description of national debates, policy scholar and advocate Frances Fox Piven noted, “I am struck by how little evidence matters in talk about welfare.”

For all of the foregoing reasons, it behooves environmental advocates to review the public discourse that surrounded the 1990s social welfare battles and to draw lessons from it for current environmental debates. Using the analytical tools of framing theory, this Essay describes the evolution of media discourse in Massachusetts from 1990 to 1994 regarding the role of government and its responsibility in providing programs. This critical period led up to the federal Welfare Reform Act of 1996. The Essay begins by introducing some tools from framing theory and the underlying libertarian metaframe that infused conservative rhetoric on this issue. The Essay concludes by offering lessons relevant to environmental policy debates today.

I. Frame Analysis

Recently, framing has gained popularity as a means to help policy analysts and advocates understand the way their issue is being shaped, or framed in the media. Some theorists and policy analysts think of a frame in classic rhetorical terms, treating any logical argument documented by fact and illustration as a frame. Others equate frames with policy stances, presenting each policy outcome as a different frame even if the policies have common ideological roots.

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12 Frances Fox Piven, Don’t Blame Welfare Mothers for Society’s Ills, ST. PETERSBURG TIMES, May 8, 1994, at 8D.
13 For previous discussions of frames and frame contests, see generally WILLIAM A. GAMSON, TALKING POLITICS (1992); CHARLOTTE RYAN, PRIME TIME ACTIVISM: MEDIA STRATEGIES FOR GRASSROOTS ORGANIZING (1991). This Essay builds upon the themes elaborated in both works.
15 See Ryan, supra note 13, at 53.
16 See Gamson, supra note 13, at 1–12.
17 See Ryan, supra note 13, at 68.
A. Defining “Frames” and “Framing”

We define a frame as a thought organizer. Like a window frame, it focuses the viewer’s attention on some part of the world, highlighting certain events and facts as important and rendering others invisible. However, a frame is not always cited explicitly. Like the skeletal frame of a building that holds things together but is covered by insulation and walls, a frame provides coherence to an array of symbols, images, and arguments. It makes one story relevant and another not.

We also distinguish between frames and framing. Framing is a ubiquitous process through which people read or interpret their experiences in the world. All citizens are active framers. Building on our direct experience, our community’s values, and the opinions of our peers and our broader society—as learned via cultural institutions such as churches and media—we interpret our experiences, feelings, and cultural or religious assumptions to make sense of social conflicts. Framing is the process of mapping one’s social reality, whereas a frame is the product of that mapping—the underlying thought organizer through which we relate events and stories.

Frames focus the reader, listener, or audience on what the frame sponsor thinks is the key element of an issue. Frames are not narrowly focused, but they do concentrate an argument and suggest the key elements of an issue, the key actors, and a range of acceptable solutions. For example, to the conservative right, the key elements in an environmental regulatory struggle may be individual responsibility and the potential of free enterprise to replace the failings of bureaucratic government interventions. On the other hand, an environmental activist may approach the same regulatory struggle as an illustration of the need for collective political or social action to create stable environments, ensure sustainable communities, and protect the most vulnerable.

Advocates must understand the distinction between frames as thought-organizers and framing as the universal interpretive process through which they are constructed. Without understanding this distinction, advocates might assume that they can craft and disseminate a winning frame—for example, a frame that moves people to see the world from the position of the advocate—and so mobilize people to support the reform that the advocate proposes. Frames only emerge after sustained dialogue with impacted constituencies. They are a product of the process of talking politics with strategically relevant constituencies. As such, they cannot simply be imposed by an enlight-
ened, benevolent advocate—even one armed with an effective marketing strategy.

While recognizing that framing as a process enhances efforts to mobilize allies, framing is a part of—not a replacement for—the process of building social networks and strategic alliances. Despite the urgency of the crises facing environmental advocates, there is simply no way to avoid this need for network building in conjunction with message building.

B. Frame Contests

Frame contests are struggles for power in the determination of what things mean. If power is control over rules, resources, and meanings, framing contests are struggles to decide whose accounts will matter. In any framing contest, frame sponsors are trying to convince audiences of their world view or perspective. Sponsors employ certain frame construction tools repetitively in these debates. These tools include: switchpoint cases, standard bearers, claims-making activities, torpedos, and issue-attention cycles.

1. Switchpoint Cases

British policy analysts Peter Golding and Sue Middleton tracked the cycles of governmental programs in British history over four centuries. In most cases, attacks on governmental programs were cultivated by media coverage of “switchpoint” cases—single cases that evoked the program opponents’ frame masterfully. These cases are easily sensationalized in the press and function as switchpoints by diverting public attention from structural analyses of the situation toward secondary issues, such as the morality of the individuals involved.

Readers and viewers of switchpoint cases tend to assume that the cases are common and representative. Conservative campaigns attacking governmental regulatory or subsistence programs routinely highlight switchpoint cases that feature welfare cheaters, drug abusers, neglectful parents, and various other malefactors. Switchpoint cases in the 1990s welfare reform debates were selected to lend credibility to

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19 See id. at 60–67 (discussing the media’s reaction to an English case in the 1970s).
21 See id. at 64–66.
the line, “What she needs is a job!” Today, opponents of environmental regulation would seek switchpoint cases that epitomize boondoggles—situations in which massive governmental spending devolved into special interest profiteering and taxpayer loss, while producing scant environmental gain.

2. Standard Bearers

Standard bearers are key spokespersons in positions of authority, such as elected officials or academic experts, who use their position to advocate their frames.22 Reporters will not trust frames that lack such sponsorship. Progressives have particular problems with journalists’ approaches to standard bearers, since reporters do not typically recognize that someone can become an “expert” through life experiences or a well-reasoned political stance.

3. Claims-Making Activities

As part of frame building, key facts are marshaled to make an argument. Often these are repeated until they are assumed to be correct, even if they are not. Examples of such facts include oft-repeated claims of rising teenage pregnancy, illegitimate births, and welfare fraud rates. When a recognized standard bearer makes claims that reinforce a pre-existing storyline and way of thinking—for example, “government is inefficient” or “welfare keeps teens pregnant”—and attaches those claims to switchpoint stories, reporters are likely to repeat the stories.23 When that effect is multiplied by a national conservative public relations apparatus—comprised of experts, researchers, think tanks, publicists, and politicians—making timely news hooks by proposing legislation, a major ideological war ensues.

4. Torpedoes

Some cultural beliefs have such credibility that the person who evokes them—particularly if that individual is a standard bearer—is rarely questioned. “There’s no money,” for instance, is a simple, believable message to audiences who frequently find their own bank accounts dwindling. We will return to this concept in the coming discus-

22 See id. at 78.
sion of the evolution of the Weld administration’s framing of the social welfare issue.24

5. Issue-Attention Cycles

One additional news routine that affected coverage is the notion of an issue-attention cycle, which has been elaborated by the public policy scholar, Anthony Downs.25 Positing a five-stage cycle—pre-problem; heightened media attention; recognition of complexity attending genuine resolution; declining media attention; and dormancy—Downs highlights the very fickle nature of media attention.26 Issue-attention cycle was decisive in the coverage of the policy debates in the early 1990s; after four months of heightened coverage of funding of programs, coverage of welfare debates dwindled.27 Media scholar Herbert Gans calls this the “repetition taboo”: an issue deemed overexposed will be avoided for one to two years.28

II. Case Study: The Massachusetts Welfare Framing Battle

Massachusetts legislative debates over welfare policy between 1991 and 1994 foreshadowed national debates that produced the Welfare Reform Act of 1996.29 A historically liberal state with an ascendant, self-proclaimed liberal Republican governor—William Weld—Massachusetts had been resistant to cuts in programs that had passed in other states. The Weld administration’s approach reflected this reticence. When Weld cut several programs in 1991, his tone was one of regret as he announced that the state did not have adequate funds, even for the deserving poor.30 In embarking on this cautious course, Weld demonstrated a reluctance to engage in what would become a hallmark of struggles to gut social welfare programs: challenging the validity of poor people’s demands. While drug addicts and alcoholics

24 See infra Part III.A.
26 See id. at 110–12.
being carried on welfare were demonized to some extent, the Weld administration primarily defended cuts as fiscal necessities—the state simply had no money.\textsuperscript{31}

By 1994, with his national ambitions swelling in an increasingly conservative climate, Weld changed course and began branding welfare mothers as “undeserving poor.”\textsuperscript{32} In one notorious switchpoint case, Weld arranged a media blitz around a single instance of welfare abuse.\textsuperscript{33} He then pushed reforms through a previously resistant Democratic-dominated state legislature.\textsuperscript{34}

The case involved a twenty-six-year-old single mother, Claribel Rivera Ventura, who was accused of scalding her four-year-old child and leaving his wounds untreated for weeks.\textsuperscript{35} Ventura represented every stereotype of a faulty welfare system. First, as a mother of six pregnant with her seventh child, she was framed as a baby factory.\textsuperscript{36} Second, she represented the stereotype of multigenerational dependency—the notion that welfare begets welfare. Claribel’s mother had raised seventeen children on welfare, fourteen of whom were now collectively raising seventy-four children on welfare.\textsuperscript{37} Third, she embodied the stereotype of welfare mothers as negligent drug addicts, since she had a history of drug addiction and her children had been removed by the state several times.\textsuperscript{38} Ventura’s case symbolized the stereotypical “welfare queen” who drains public coffers to live in idle extravagance.\textsuperscript{39}

Governor Weld acknowledged that Ventura and her family were not representative of Massachusetts welfare recipients.\textsuperscript{40} Nevertheless, Weld sent all state lawmakers copies of the media coverage of the Ventura case and passed the story along to leading national conservatives,

\begin{itemize}
\item \textsuperscript{31} See id.; see also infra Part III.A.
\item \textsuperscript{32} See infra Part III.A.
\item \textsuperscript{33} Don Aucoin & Scot Lehigh, Weld Using Story on Welfare Family to Aid His Case on Need for Reform, BOSTON GLOBE, Feb. 25, 1994, at 14.
\item \textsuperscript{34} See Charles M. Sennott, Whatever Happened to Claribel? Looking for the Poster Child of the Welfare Reform Movement in Massachusetts, 10 Years Later, BOSTON GLOBE, Apr. 11, 2004, at D1.
\item \textsuperscript{35} Id.
\item \textsuperscript{36} Id.
\item \textsuperscript{37} Charles M. Sennott, Surrender of Mother Wanted in Scalding of Child Is Delayed, BOSTON GLOBE, Aug. 20, 1994, at 23.
\item \textsuperscript{38} Charles M. Sennott & David Armstrong, Kin Feel Abuse Suspect Has Fled; Say Ventura Called from Puerto Rico, BOSTON GLOBE, Apr. 12, 1994, at 25.
\item \textsuperscript{39} State officials estimated that the extended Ventura family alone cost taxpayers close to one million dollars each year. Sennott, supra note 37, at 23.
\item \textsuperscript{40} Aucoin & Lehigh, supra note 33, at 14.
\end{itemize}
such as Jack Kemp and William Bennett.\textsuperscript{41} Within Massachusetts, Weld and conservative Democrats used the case to demand conservative welfare policies, including the privatization of social services, cuts in benefits, and changes in how the state would relate to national welfare programs.\textsuperscript{42} A punitive legislature, which had become toughened against the plight of welfare families, passed legislation that had been unthinkable only a few years earlier.\textsuperscript{43}

Weld used his standing as a public official to establish himself as a standard bearer. He received ample media space for his views, while welfare mothers were treated as no more than the human-interest flesh on his analysis, and all opposed were labeled as special interests, rather than analytical experts. In sheer numbers, governmental officials in Massachusetts promoting cuts in welfare services were quoted seventeen times more often than welfare recipients and thirty-four times more often than social welfare workers—two constituencies with direct experience of the problem at hand.\textsuperscript{44} Public interest advocates fared slightly better, but were still out-quoted by a ratio of six to one.\textsuperscript{45}

By the time of the second Weld administration in 1994, a national media campaign against programs was in full swing in preparation for the latest welfare reform bill.\textsuperscript{46} The Weld administration’s comments now focused far more commonly on constituencies than on government or societal problems. Following the cues given in the Claribel Ventura debacle, public debate would question the worthiness of welfare mothers rather than search for the most appropriate response to poverty. This constituency-centered attack made social welfare activists’ task far more difficult. Human service advocates were frequently consumed by the task of defending constituencies as “deserving poor.”\textsuperscript{47}

Even when advocates and activists focused remarks on problems like poverty rather than on vulnerable constituencies like the poor, news norms made it difficult to introduce frames that highlighted the structural sources of problems and possible structural resolutions. In short, the Weld administration, backed by a national claims-making effort, effectively extended the characterization of the Ventura switch-

\textsuperscript{41} Id.
\textsuperscript{42} See Sennott, supra note 34, at D1.
\textsuperscript{43} Mass. Gen. Laws ch. 118, § 2 (2004); see Sennott, supra note 34, at D1.
\textsuperscript{44} See Sullivan, supra note 11, at app. D.
\textsuperscript{45} See id.
\textsuperscript{46} See Sennott, supra note 34, at D1.
point case to demonize an entire constituency that lacked a wide base of support. In part, his administration was able to accomplish this by inserting anger-provoking caricatures into the public consciousness and cutting programs during the resulting furor. The conservatives’ success in Massachusetts was repeated in other states and softened opposition to welfare reform nationally, even though public opinion research showed that sixty-four percent of the American public thought government spent too little on poor children.

In summary, the use of switchpoints, standard bearers, and consistently repeated claims had a cumulative effect. Additionally, there were critical resource disparities between the sponsors of conservative frames and the sponsors of frames supporting social welfare and the public sector. Sponsors of the conservative frames were building on a trend promoted by a national conservative movement which, through key powerful figures, crucial think tanks, and their journals, brokered access into national trend-setting media, such as *Time*, *Newsweek*, the *New York Times*, the *Washington Post*, *Reader’s Digest*, and *Nightline*. In contrast, social welfare supporters had no national or local movement of comparable strength, had fewer advocates in positions of power, and had far less access to trend-setting media.

However, this discussion of short-term framing tactics—switchpoints, standard-bearers, and claims-making techniques—cannot fully explain how a frame develops into a viable representation of reality. The conservative movement targeted cuts in governmental programs and their replacement by market initiatives shortly after the War on Poverty began in the 1960s. While some date the campaign to eliminate welfare as having begun with the Goldwater campaign in 1964, the

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49 Id.
1984 publication of *Losing Ground*, which was conservative policy analyst Charles Murray’s call to dismantle welfare, marked a new initiative.\(^{55}\) By 1988, Ronald Reagan could devote a portion of his State of the Union address to challenging the federal welfare program: “My friends, some years ago, the Federal Government declared war on poverty, and poverty won.”\(^ {56}\)

The conservatives’ approach was comprehensive. When independent evaluations of War on Poverty programs failed to prove the programs’ futility, conservatives developed a series of “think tanks” designed to manufacture and disseminate research promoting the use of market initiatives to replace government programs. Political analyst David Callahan explains:

> [T]he big development of the 1990s is that conservative institutes have had spectacular new success in tapping business money to fund ideologically charged policy research.

> Over the past 10 years, a huge influx of private sector money has allowed conservative think tanks and advocacy groups to grow by leaps and bounds. Not only are well-known organizations like CATO, the American Enterprise Institute and the Heritage Foundation more flush with cash than ever, but giving by corporations and wealthy businessmen—all of which is tax-deductible—has underwritten the rise of a new generation of smaller and often brasher conservative think tanks like the Competitive Enterprise Institute (CEI) and the Reason Foundation. Corporate money has also fueled the explosive growth of dozens of state-based conservative think tanks, of which the Independent Institute is a prime example. In 1996 . . . the top 20 conservative think tanks spent $158 million, more than half of it contributed by corporations or wealthy businessmen.\(^ {57}\)

The top twenty conservative think tanks—including the Manhattan Institute, the Heritage Foundation, the American Enterprise Institute, and the Cato Institute—were the brainchildren of “conservative groups that were often backed by big business, conservative founda-


tions, and similar interests."\(^{58}\) These institutions funded research aimed at establishing legitimate grounds for conservative stances. While the issues were numerous, many of them reinforced conservatives’ desire to downsize government and remove it from the sphere of social problem solving.\(^{59}\)

However, top-down conspiracy theories do not do justice to conservatives’ strategic operations. Conservative gains accrued from a highly effective melding of conservative thinkers and corporate-subsidized think tanks capable of strategically promoting an agenda that utilized social science research, lobbying operations, public relations dissemination systems,\(^{60}\) and direct organizing in venues such as evangelical churches, local elections, and universities.\(^{61}\) National think tanks were supplemented by the establishment of institutional infrastructure on the state and local level. For example, of the more than $254 million worth of public policy grants made by conservative foundations between 1999 and 2001, the National Committee for Responsive Philanthropy (NCRP) estimated that:

\[\text{[F]ully 46 percent of funding ($115.9 million) went directly to national and state public policy think tanks. This is telling. The fact that conservatives concentrate on policymaking at both the national and state levels signals a departure from most left-leaning and centrist foundations, which generally only focus on national issues. All told, conservatives poured $21.4 million into state-centered institutions during the study period, and The State Policy Network, funded by the Roe Foundation, exists to encourage cooperation among free-market think tanks in the network. . . . [T]his program has seen some serious growth over the last 15 years: “In 1989 there were only 12 market-oriented state-based think tanks. This number has more than tripled in the past decade, and}\

\(^{58}\) Robert Sahr, Credentialing Experts: The Climate of Opinion and Journalist Selection of Sources in Domestic and Foreign Policy, in Media and Public Policy 153, 161 (Robert J. Spitzer ed., 1993).


\(^{60}\) Modern public relations systems include computerized media databases, clipping services, and staff dedicated to executing long-term strategic communication plans. See generally Philip Kotler & Gary Armstrong, Principles of Marketing (2001).

\(^{61}\) Himmelstein, supra note 59, at 28–62.
there are now 40 groups in 37 states promoting free market solutions to policy problems and challenges.”

Additionally, conservatives took seriously the issue of leadership development and began creating internships, training, and networking opportunities for young conservatives.

The issue of research dissemination deserves particular attention. Reflecting the principles of social marketing, many conservative and progressive think tanks package their research for busy journalists: “Although marketing social change is much more difficult than marketing commercial products, the basic premise is the same: Develop a solid, strategic approach by positioning and packaging the product . . . and framing messages about it to address the needs, wants, and values of target audience members.”

As is standard practice in public relations, think tank public relations departments distribute easily digested executive summaries of research reports to a wide range of media outlets using well-maintained media databases, and then make follow-up calls to journalists in major media markets. In some cases, think tanks hold conferences inviting carefully selected scholars to discuss the findings of the think tank’s own scholars. The marketing of Richard Herrnstein and Charles Murray’s *The Bell Curve* provides a case in point. As the editors of the scholarly journal *Contemporary Sociology* explain:

First, Charles Murray, with the support of the American Enterprise Institute (AEI), handpicked a set of people who were given a chance to read the book before its release. And not only to read it, but then to come to Washington (expenses paid by the AEI) for a two-day seminar (October 1–2), where they could hear the reactions of other scholars, work through the evaluations of the book by a group intended to be suppor-

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tive, and do so in interaction with selected media stars—a tremendous head start.

. . . .

Second, the rest of the world had trouble even getting hold of the book. Nor was this accidental. The Wall Street Journal (October 20, 1994, p. B1) reports that the book was “swept forward by a strategy that provided book galleys to likely supporters while withholding them from likely critics.” . . . Evidently we here at Contemporary Sociology were counted as likely critics—certainly we had a great deal of trouble getting hold of the book. We submitted a normal order months before the book appeared, but our copy never came. Even after the book appeared we had to make repeated phone calls, were promised three copies but received only one, were promised delivery in two days but waited two weeks, etc.

The result was that, in the crucial weeks immediately after the book’s release, supporters knew the book far better than critics.67

While some think tanks spend roughly one-third of their budgets on such activities, others hire public relations firms to disseminate self-published, nonpeer-reviewed research.68

Washington now supports a number of public relation firms which provide corporate or think tank-initiated campaigns with integrated marketing that cover everything from research development to favorable polling, lobbying, and grassroots canvassing. Calling this “democracy for hire,” William Greider concludes, “[a] major industry has grown up in Washington . . . devoted to concocting facts and opinions and expert analysis, then aiming them at the government.”69 The democratic discourse is now dominated by such transactions.70

During the years leading up to welfare reform Sally Covington, Director of the Democracy and Philanthropy Project of the National Committee for Responsive Philanthropy, estimated that the top twelve conservative foundations with $1.1 billion in assets at their disposal awarded $300 million in grants and targeted another $210 million for

69 Greider, supra note 52, at 35.
70 Id.
institutions and special projects. The grants targeted “government rollback through the privatization of government services, deregulation of industry and the environment, devolution of authority from the federal to state and local governments, and deep cuts in federal anti-poverty spending.”

By 1995, conservative institutions were mentioned in media almost eight times more often than liberal or progressive think tanks—8000 and 1152 citations, respectively. Covington added that the combined 1995 budgets for the top eight liberal or progressive groups were less than a quarter of the budgets for the top five conservative think tanks. She concludes, “While revenue base may be only one factor underlying (or contributing to) organizational capacity and effectiveness, surely it is a critical one.”

Describing the efforts of those twelve foundations as “impressively coherent,” Covington lists a series of initiatives aimed at challenging what conservatives “regard as the institutional strongholds of modern American liberalism: academia, Congress, the judiciary, executive branch agencies, major media, religious institutions, and philanthropy itself.” She particularly notes policy initiatives, support for conservative scholars and academic programs, and funds “targeted to recruit and train the next generation of right-wing leaders in conservative legal principles.” Finally, she highlights efforts to establish “a conservative media apparatus, support pro-market legal organizations, fund state-level think tanks and advocacy organizations, and mobilize new philanthropic resources for conservative policy change.”

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72 Id. at 7.
73 Id. at 11.
74 Id. at 14.
75 Id.; see also Jean Hardisty, Mobilizing Resentment: Conservative Resurgence from the John Birch Society to the Promise Keepers 15–16 (1999) (explaining that liberal and progressive resources went towards social services rather than movement-building”).
76 Covington, supra note 71, at 7.
77 Id. at 7; see also Philip H. Burch, Introduction to Reagan, Bush, and Right-Wing Politics: Elites, Think Tanks [sic], Power, and Policy, 16 Res. in Pol. Econ. 91, 91–128 (1997).
78 Covington, supra note 71, at 7.
79 Id. at 7. For more extensive treatment of this topic, see generally Trudy Lieberman, Slanting the Story: The Forces That Shape the News (2000); Stauber & Rampton, supra note 68. For an emphasis on the incorporation of modern marketing and public relations tactics, see Himelfstein, supra note 59, at 144–51.
When Governor Weld took on social welfare policy in the 1990s, he was availing himself of conservative groups’ fifteen years of framing work. As a result, Massachusetts conservatives promoting the cuts were able to fit the issue into a cohesive frame stressing personal responsibility. We outline that frame below, building on our analysis of Massachusetts welfare cuts in 1990 and 1994 to 1995. We then discuss the “personal responsibility frame” in relationship to a broader, libertarian metaframe that is currently being mobilized by opponents of environmental programs and regulation.

III. The Personal Responsibility Frame

Conservative groups working to cut Massachusetts social welfare programs sponsored a consistent, multilayered message—or frame—which prompted the following answers to these recurrent questions:

- What’s wrong with American society?
  The decline of family, the lack of individual accountability, the rise of the welfare state, big regulatory bureaucracies, big unions, and big spending; and

- What should be done about it?
  Individual responsibility, no free lunch, privatization, deregulation, tax cuts, free the market, put a bootstrap in every pot.

At the core of this frame is a standard conservative call to replace government with free market mechanisms coupled with calls for personal or individual responsibility—the personal responsibility frame. As with environmental protection, the conservative frame builds on an individualistic, libertarian notion of freedom that asserts progress depends on unleashing the market and freeing the individual taxpayer. The conservative frame also fuels resentment of the unemployed by the working poor and feeds mistrust of the public sector. Republican political consultant Todd Domke comments that “[m]iddle-class taxpayers are suspicious of professional lobbyists for the poor.”

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80 Peter J. Howe, Warnings of Doom Backfire With Some; Advocates for Needy Meet Skepticism Though Worst State Cuts Are to Come, BOSTON GLOBE, Apr. 30, 1991, at 1 (quoting Todd Domke, Republican political consultant).
A. Torpedoes

The personal responsibility frame is often not fully presented. Rather, it is subtly suggested by a number of “torpedoes”—subthemes that serve to insert an issue into the personal responsibility frame:

1. Undeserving poor
   - “Don’t you know a person on welfare who rips people off”;
   - “Government is full of corrupt, special interests”;
   - “There’s no money”;
   - “Free the taxpayer” and “No new taxes.”

2. Volunteerism
   - “Thousand points of light”;
   - “Welfare begets welfare”;
   - “Down with big government.”

3. Efficiency
   - “Americans deserve a leaner, tighter safety net.”

4. Bootstrappers:
   - “People who don’t appreciate things that are done for them just need self-help.”

5. Entrepreneurial government
   - “Government by the free market.”

B. Conservative Characterizations

As part of the frame contest, the conservative analysis characterizes each relevant social actor as “good guys” or “bad guys.” Thus, the personal responsibility frame can “frame” each public sector and social welfare-related constituency. It also “frames” each conservative ally:

<table>
<thead>
<tr>
<th>Conservative Constituencies</th>
<th>Characterization</th>
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<tbody>
<tr>
<td>Public employee unions</td>
<td>Special interests</td>
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<tr>
<td>Service providers</td>
<td>Special interests</td>
</tr>
<tr>
<td>Service recipients</td>
<td>Undeserving bootstrappers—cut welfare</td>
</tr>
<tr>
<td>Taxpayers</td>
<td>Hardworking, noble victims</td>
</tr>
<tr>
<td>Corporations</td>
<td>Free market will raise all boats</td>
</tr>
<tr>
<td>Government</td>
<td>Bloated fat cats; bureaucrats fostering dependency to stay in business</td>
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</table>
Even Governor Weld’s early strategy of nondemonizing complaints about budget shortfalls frequently appealed to these divisive characterizations. Television advertisements carried the “There’s no money” message by showing an average family balancing its checkbook at the kitchen table. The implicit and sometimes explicit message was, “On your paycheck, can you afford to support people who don’t want to work?”

An intense upsurge of resentment between the working poor and poor appeared in a sample of articles discussing cuts in the clothing allowance. Following a largely sympathetic Patriot Ledger article on clothing allowance cuts,81 twenty-three of twenty-four letters to the editor attacked a welfare-mother quoted in the article. The writers, self-described working men and women, argued that welfare recipients expected the government to provide a level of support that they—working poor and middle class individuals—lacked.82 In the twenty-fourth letter, the quoted welfare mother attempted to explain her position.83

IV. LESSONS FOR ENVIRONMENTAL ADVOCATES

Advocates entangled in current policy debates over environmental protection can draw rich lessons from the social policy battles of the 1990s. These lessons pertain to what conservatives opposing welfare did effectively, as well as to what social welfare supporters failed to do. As noted above, starting in the 1960s, conservatives poured resources into a multipronged effort at rolling back New Deal and War on Poverty programs. They funded conservative think tanks and electoral campaigns for over a decade before achieving major advances. Conservative funding also helped to establish an impressive national and international communications infrastructure. In addition to internships offered by think tanks and electoral campaigns, conservatives bankrolled training programs for college-aged leaders.

In short, conservatives knew that they had embarked on a long-term war to position themselves, rather than a series of short-term maneuvering battles. At least temporarily, internal divisions between different wings of the conservative movement—libertarians and evangelical Christians in particular—were held at bay as conservatives united around a message that government welfare programs had perversely weakened the families the programs sought to help. Social welfare policy was a strategically selected issue on which conservatives could now win thanks to the social and organizational resources accumulated since the 1960s.

By contrast, social welfare defenders—public sector advocates and human service supporters—were underresourced and disorganized. They tended to launch defensive battles on single issues, rarely contributing to a longterm vision. Each stopgap battle left the social welfare defenders feeling enervated. Their crisis-response mode to single-issue battles provided difficulties in building a stronger infrastructure, developing longterm alliances, and creating a deeper base. Divisions among social welfare advocates were also deepened by defense strategies that left each constituency to defend itself independently, while the other constituencies avoided tainting by the conservative “scalpel attacks.” Some coalition members were far better resourced and networked than others, with welfare activists and the homeless often being the most marginalized. Faced with the demonization of a coalition ally,

84 See supra notes 58–59 and accompanying text.
85 See Greider, supra note 52, at 300.
86 See Schneider, supra note 63, at 28.
advocates focused on saving their own less demonized program—decisions that created serious tensions.

While recognizing that these issues merit fuller treatment, we turn to framing lessons for environmentalists. In the social welfare policy battles, conservatives found an issue that could advance an underlying libertarian metaframe that stressed three points:

- Freedom of the individual from governmental constraints. Following Isaiah Berlin, Hirschman describes this as “negative liberty”—“the individual’s ‘freedom from’ certain interferences on the part of other individuals or authorities”—in contrast to “positive liberty”—“the ‘freedom to’ exercise traditional republican virtue by means of participation in public affairs and in the political life of the community.”

- Free market competition. This was seen as the source of human progress and creativity.

- The need to restrict government’s role. This would, in turn, free individuals and the market.

The issue of welfare was ideal for reinforcing the libertarian metaframe’s central themes. Standard bearers, such as Governor Weld—valuable precisely because he claimed to be a liberal Republican from the liberal bastion of Massachusetts—drove home the libertarian metaframe in the switchpoint case of Claribel Ventura. As mentioned above, that case perfectly facilitated the caricature of welfare programs as encouraging multigenerational dependency and as ineffective government programs run by out-of-touch bureaucrats.

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87 We do not fully address lessons regarding resource accumulation, base-building, coalition strategies, the shifting roles of political parties, and the infrastructural work entailed in establishing and sustaining relations with journalists.

88 Evangelical Christian frames united with libertarians in opposing social welfare programs; in their view, welfare undermined the traditional family by supporting single women who bore children out of wedlock. However, there were and remain divisions. For example, faith-based supporters of social welfare programs have strongly lobbied their conservative counterparts to consider the welfare of children as the primary objective of social welfare programs. Environmental advocates may expect similar splits as conservatives debate the meaning of stewardship of the earth—a responsibility many faith-based conservatives take seriously as a mandate from God. See Michael Janofsky, When Cleaner Air Is a Biblical Obligation; Evangelical Groups Join Call for Tougher Environmental Laws, N.Y. Times, Nov. 7, 2005, at A17.


90 Hirschman, supra note 5, at 87.

91 See supra notes 35–43 and accompanying text.
In general, social welfare activists and advocates did not promote an opposing frame. There was no unifying vision for the relative roles and responsibilities of the family, labor, corporations, and the public sector to oppose that of the personal responsibility frame. Instead, activists responded in a piecemeal fashion, reacting defensively to each conservative attack and often staying within the logic set by the conservative frame. In other words, conservatives framed human service recipients as “undeserving poor,” people who are burdens to hardworking taxpayers, stultified by their dependency on government programs. Typically, human service defenders responded by attempting to prove that there were “deserving poor,” rather than to reframe the issue.

Generally, the problem with arguing within a frame is that it restricts the field of debate, thereby forcing opponents to operate within the definition of the issue set by the frame sponsors. In this case, the “deserving poor” response left in place the issues of the efficacy of welfare programs, including the issue of continued dependency on government programs interested in self-perpetuation. The “deserving poor” argument also failed to acknowledge that the economic gains since the mid-1970s had largely benefited the upper twenty percent of American households and bypassed the working class and working poor. This created the material basis for the politics of resentment that conservatives so carefully fanned. In sum, welfare advocates were calling on the desperate to be charitable to the more desperate, while not acknowledging how cuts in public education and other federal programs had already shifted a major tax burden to the states.

Underlying social welfare advocates’ defensive posture was a lack of unity on an ideological level. They shared no metaframe and were divided regarding what to say about the very real problems of the existing welfare state. They differed on whether to highlight the widening gaps between rich, poor, and working poor. Furthermore, they were not able to respond to libertarian characterizations of big labor—such as self-serving, undemocratic budget breakers—or big government and the public sector as being bureaucratic, inefficient, special-interest oriented, and corrupt. While some polls suggested that taxpayers were willing to pay for services but did not trust the public sector to spend

92 See supra Part III.A.
their money wisely, social welfare advocates did not respond adequately to this concern. No one framed taxes as community investment or spoke of education as investment in the nation’s future. The positive meaning of liberty as freedom to engage in community building was lost. Silencing such a response before it could even be articulated was the classic conservative torpedo: “There’s no money.”

In sum, the libertarian metaframe convinced the public that democracy was freedom from responsibility towards community. Retreating to the defense of individual programs, social welfare proponents often did not present a well-woven frame that countered the libertarian metaframe. Single-issue campaigns and single-program defenses did not hold together as a complete vision.

There are several possible reasons for the failure of welfare proponents. First and foremost, there were issues of underdevelopment. Alternative framings needed more repetition, elaboration, and illustration in order to seem as “real” to the reporter as market-driven economic frames. Alternative frames regarding economic development or a progressive role for government were skeletal. Social welfare supporters also lacked the resources, networks, and infrastructure to develop and sustain a frame contest.

Social welfare supporters also lacked strong standard bearers. Advocates had weak legislative support, which also weakened their credibility as standard bearers. Moreover, reporters looked to the state legislature as the arena defining the legitimate range of views to be debated. While social welfare programs had some legislative backing, these elected sponsors were not outspoken; they felt outgunned by legislators supporting cuts who were seen by mainstream media as the more legitimate sources. As Juan Williams explained, media professionals had adopted the libertarian metaframe that presented taxes as restrictions on both market growth and individual wealth. Reporters no longer accepted as valid the framing of taxes as investments in a community’s present, and a nation’s future, well-being. Within their dominant frame, the citizen-taxpayer’s self-interest rested not in community sustainability, but in cutting taxes.

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94 Garin et al., supra note 50, at 46.
95 See supra note 75 and accompanying text.
96 See Hertsgaard, supra note 8, at 33 (quoting Juan Williams, Reporter, Wash. Post) (discussing the shift in media perspective); supra notes 9–10 and accompanying text.
V. Framing Environmental Policy

Secretary of the Interior Gale Norton has been unusually explicit in avowing her adherence to the libertarian metaframe. In a November 23, 2004 speech at the University of Colorado at Boulder, Norton described herself as firmly committed to market approaches to solving environmental problems.\(^\text{97}\) Norton explained that her positions as Secretary of the Interior were informed by “a fairly libertarian perspective.”\(^\text{98}\) She continued:

“That’s a part of why I try to find approaches that are not government coercion-based. I favor approaches that favor human freedom, human creativity.”

“Market forces . . . establish . . . a way for people to be creative as they’re making decisions about environmental protections. So it’s not just top-down regulation after regulation from the Environmental Protection Agency. It is people who are given a standard they need to meet and can come up with all kinds of different ways to meet that standard.”\(^\text{99}\)

Speaking from the perspective of an environmental advocate, economist Charles Levenstein provides a critique of Norton’s framing of environmental issues:

A dominant notion in the world today is that the way to human progress is the private market and that virtually anything interfering with market forces results in declines in human welfare. Government is viewed as inherently inefficient, bureaucratic, and undesirable—an intrusion on the liberties of free people. In only the most limited circumstances may government intervene in the marketplace. Politics are viewed as corrupt and degraded by special interests, while the market is seen to reflect the true desires of rational individuals. The less government, the better; the less interference, the better.

\(^{97}\) See Redal, supra note 4.

\(^{98}\) Id. (quoting Gale Norton, U.S. Sec’y of Interior, Address at University of Colorado at Boulder (Nov. 23, 2004)).

\(^{99}\) Id. (second alteration in original) (quoting Gale Norton, Sec’y of Interior, Address at University of Colorado at Boulder (Nov. 23, 2004)).
For a democracy, this is a strange and debilitating rhetoric.\textsuperscript{100}

Environmental advocates, such as Levenstein—the editor of \textit{New Solutions: A Journal of Environmental and Occupational Health Policy}\textsuperscript{101}—list as the outcome of such debilitating rhetoric the increasingly common assumption of U.S. citizens that freedom means individual freedom from taxes, which frees market forces from governmental regulation. As cultural resonances to support the argument, some draw on the tax rebellions that accompanied the American Revolution.\textsuperscript{102} In each environmental policy debate, conservatives work to fit the given issue into this “freedom as market competition” paradigm, which is the libertarian metaframe.

The appeal of framing lies in its ability to suppress the opposition’s best arguments. For example, the libertarian perspective does not have to argue against community investment, risk prevention, and longterm conservation. In discrediting and derailing government as the institution that thinks longterm, protects the most vulnerable, and dares challenge the most powerful when they act contrary to community interests, the libertarian metaframe simply moves these issues to the background. The environment is another spreadsheet item that will respond to the “creative” forces of the market. If there were a market for environmentalism, it would happen.

As in the case of social welfare policy, environmental advocates can anticipate finding themselves facing libertarian-based initiatives on the many fronts inherent to environmental policy:

\begin{itemize}
\item Energy issues and biodiversity may pit individual freedom—for both persons and corporations—against governmental regulation;
\item Shortterm profits against longterm environmental planning;
\item Risk assessment grounded in cost-benefit analysis against risk-prevention strategies based on social health measures.
\end{itemize}


\textsuperscript{101} \textit{Chemical Risk Assessment and Occupational Health}, supra note 100, at 270.

\textsuperscript{102} See, e.g., Citizens for a Sound Economy, About the U.S. Tea Party, http://www.cse.org/tea/about.php (last visited Mar. 16, 2006). The organization links current efforts to cut taxes to the 1773 Boston Tea Party, calling for “a modern-day tax protest in the spirit of the original Boston Tea Party.” \textit{Id.} (follow “Tell a Friend About the Tea Party” hyperlink). The site explains, “Like those patriots in 1773, Citizens for a Sound Economy feels it is time for another symbolic protest in the best tradition of our Founding Fathers.” \textit{Id.}
To survive and succeed, environmental policy advocates must succeed where social welfare advocates fell short. They must establish a deeper base of support and transcend the specifics of individual policy battles. Reflecting on past campaigns—and in dialogue with the full panoply of local, regional, and national organizations that comprise an impressive, if fragmented, chorus of pro-environmental voices—environmental policy makers need to reestablish a commitment to positive liberty.103

This course of action will allow environmental policy analysts to establish proactive themes. Environmental advocates should not respond to libertarian claims that “government is incompetent, if not corrupt,” with a mechanical counterclaim of “government is not corrupt.” Instead, a proactive metaframe would allow environmental advocates to reframe issues in terms of balancing individual freedom from interference with positive freedom to build community, invest in the nation’s global commons, and function as collective citizens who participate in political processes as intentional actors concerned with the community’s longterm interests.

Standard bearers emerge from such political activism. The ability to make claims grows as social networks become more dense, and switchpoint cases present themselves when collective citizens are ready to use them.104 Hurricane Katrina provides a case in point. In an attempt to counter the libertarian metaframe as applied to the environment, environmental advocates are posing Hurricane Katrina as the switchpoint case that illustrates America’s failure to address environmental concerns, such as wetland protection. Some advocates further argue that the post-Katrina humanitarian disasters represent the failure of the Republicans to invest in social infrastructure.105 The positive role of government can now be seen in its absence. No one in government, the argument goes, is thinking about longterm environmental planning, no one is planning for disaster relief, and even after the disaster, no one is interested in protecting the most vulnerable communities.

103 See Hirschman, supra note 5, at 87.
104 It is important to remember that switchpoint cases are human fabrications. They are shaped by active social agents who engage in a whole set of activities to sponsor an event as a switchpoint. Whether or not they succeed depends on the fit of the particular case to the particular situation and on the readiness of the social agent to sponsor the case. See supra Part I.B.1.
105 See, e.g., Paul Krugman, The Price of Ideology and Cronyism: Katrina’s Victims Have Paid for the Right’s Hostility to the Public Sector, GUARDIAN (Manchester, U.K.), Sept. 6, 2005, at 22.
Environmentalists conclude that the debacles surrounding Katrina demonstrate what happens when societies move environmental policy decisions out of government hands and into private initiatives, be they market-driven alternatives to environmental regulation or volunteer substitutes for environmental planning and disaster relief. Environmentalists are attempting to use Katrina as a switch-point case to argue the limits of market-driven environmental planning:

[L]et us reflect on an important fact: different populations are not affected equally by environmental disaster. The effects of severe weather events disproportionately affect the poor and powerless, who have fewer resources to respond to calamity. In New Orleans, helicopters airlifted victims from the roofs of private hospitals while charity hospitals pleaded desperately for help. Those in well-appointed neighbourhoods escaped in their own cars; the poor, predominantly black, citizens from low-lying areas were typically not so lucky.

If the unequal distribution of safety along social and racial lines in New Orleans has shocked us, we should not forget that in many corners of the world marginalized populations suffer disproportionately both from environmental disaster and from gradual climate change. In part, this is because the fruits of science and technology are not distributed equally. In the failure to maintain the levees despite the disaster-modelling of engineers, in the failure to install a tidal wave warning system in earthquake-prone regions (except those adjacent to our developed world), in the failure to advance a truly global pandemic-preparedness plan against avian influenza, similar mechanisms of selfishness and shortsightedness are at work.

From this position, environmentalists can ask a number of questions that serve to reframe their issue. How should citizens in a democracy assign power over longterm planning regarding conservation and preservation? Who should decide how much environmental risk should be assumed, and who should assume that risk? Who will prepare to prevent disasters and to respond to them when they cannot be

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107 Id.
prevented? Furthermore, who will protect a free press and free scientific inquiry from coercion so that those who might alert citizens to environmental dangers are not silenced by those with shortterm and contrary interests?

Framing contests are just that, contests. There are always other players contesting to control the field in order to gain the public’s attention. If environmental advocates fail to establish a shared metaframe and solidify its application in many concrete policy initiatives, they yield ground to their opponents. Again, the example of Katrina is instructive. To the environmental advocate, Katrina appears as a no-brainer. It is the perfect clarion call for environmental conservation, reduction in emissions, and disaster planning. However, conservatives have also been swift in applying the libertarian metaframe. The result is a conservative issue frame that is striking in its resemblance to the personal responsibility frame of the 1990s. For example, a vice president of the Heritage Foundation has gone so far as to cite the Katrina disaster as proof that New Deal-era government programs “were failing anyway.”

It is important to note that this frame—which clearly points to the ineffectiveness of underfunded governmental programs as evidence that the programs should never have been instituted—has had concrete policy implications in the aftermath of Katrina. The Bush administration’s solutions have focused on “freeing the market” through such deregulatory action as releasing federally-funded contractors from the requirement that they meet average wage requirements. The administration has also vowed to recuperate funds that have been allocated in response to this crisis through massive spending cuts, “with programs like Medicaid and food stamps especially vulnerable.” The conservative tactics deployed here should be familiar given the above discussion of the 1990s battle over welfare cuts: the common sense torpedo of “there’s no money”—working in conjunction with the libertarian assumption that government can only worsen the situation—clears the way for a scalpel attack that begins by targeting the most vulnerable citizens.

109 *Id.*
110 *Id.*
111 See supra Parts II, III.
The response of commentator Bill O’Reilly, as reported by radio host Ira Glass, typifies one frame sponsored by conservatives immediately following Katrina: “First, he said, you can’t rely on government. And second, he said, the problems that we saw in New Orleans weren’t about race, they were about class.” Glass replayed the following representative quote from O’Reilly—its ferocity predictably veiled in “common sense” rhetoric:

If you’re poor, you’re powerless. Not only in America, but everywhere on earth. If you don’t have enough money to protect yourself from danger, danger’s gonna find you. The aftermath of Hurricane Katrina should be taught in every American school, if you don’t get educated, if you don’t develop a skill and force yourself to work hard, you’ll most likely be poor, and sooner or later you’ll be standing on a symbolic rooftop waiting for help. Chances are, that help will not be quick in coming.

In response to O’Reilly’s framing, Glass included the response of eighteen-year-old New Orleans resident Ashley Nelson, who was read the O’Reilly quote by Glass’s producer, Alex Blumberg:

ASHLEY NELSON: That’s what he [O’Reilly] said?
ALEX BLUMBERG: Yeah.
ASHLEY NELSON: He said that[?]
ALEX BLUMBERG: On TV. Yeah. To you, what’s the thing that stands out the most about that?
ASHLEY NELSON: Basically saying if you’re rich, you live, if you’re poor, you die. And I didn’t have no idea that it was a crime to be poor, and the punishment was death.

Nelson’s quotation, which amounts to no less than a powerful reframing of Katrina, invokes the terrifying vision of a planet of individuals uncommitted to community investment, longterm planning, and protection of the vulnerable. In its effectiveness, it also highlights the need for advocates to create real dialogue with those directly affected by environmental crises to incorporate the experiences of those most affected into existing sophisticated frames, and to promote those frames through collaborative movement-building.

113 Id.
114 Id.
CONCLUSION: TEN PRACTICAL STEPS FOR ENVIRONMENTAL LEGAL ADVOCATES

- All effective media strategies should build on sustainable organizing strategies that target one or more arenas—whether legislation, regulation, electorate, or media.
- Treat the media arena as worthy of time, research, and resources in its own right.
- Take the long view. Learn from conservatives who positioned themselves through small skirmishes and often lost. Place individual maneuvers within a broader war of position.
- Prepare for the long haul by establishing a communications infrastructure.
- Build leadership capacity by institutionalizing a media caucus. Everyone in your organization must be a communicator. Everyone must learn how to apply a generic shared view of the environment to the given issue or crisis of the day.
- Apply to the media arena the skills used in preparing cases and making arguments to a jury.
- Think about audiences and, in fact, multiple audiences. A key decisionmaker is an audience of one.
- Read and watch what your audiences read and watch. Know what they’ve heard.
- Do not take your allies for granted. Communicate and build coalitions.
- Frame messages about the environment to convey a broader message about the importance of citizen-driven government. Restore the notion of taxes as investment in community.
ENVIRONMENTAL ATTORNEYS AND THE MEDIA: GUIDELINES FOR EFFECTIVENESS

John M. Stanton*

Abstract: It is often difficult for a public interest advocate to compete with wealthy interests that have vastly greater resources at their disposal and opposing policy preferences. In order to level this playing field, advocates can effectively employ media strategies that allow the public to participate in the public policy debate. This public awareness can often be very effective in influencing the course of the debate and sensitizing policy makers to the competing interests at stake. Accordingly, media tools and goals should be considered at the outset of strategy development, and should inform everything from a project’s title to its budget. Public involvement, made possible through media coverage, can play a pivotal role in influencing policymaking proceedings in the judicial, executive, and legislative branches of government.

Introduction

Working with the media involves some of the most challenging and effective work for a public interest attorney. Currently, in Washington, where few public policy outcomes advance public health and environmental protection, there are still opportunities to make progress by devising and executing effective media strategies that bring vital attention to these issues. Attempts to implement public policy that repeals or threatens health safeguards and environmental protections are most successful when they escape media attention and public scrutiny. Therefore, the role of a media strategy is to thwart these efforts by bringing the public into the debate.

This Essay takes a clinical perspective on how to get media attention for an advocacy project. The advocate should think about media goals as a first principle and should include them in initial strategy deliberations. Media strategy should guide what the advocate does from the beginning of any matter. In some cases, it may be that media

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coverage is undesirable. For example, if an advocacy organization is involved in litigation and anticipates a loss, media coverage of the outcome may harm the organization’s cause. Regardless of the desired attention, a coherent strategy to establish that end is required.

I. MEDIA ADVOCACY IN THE JUDICIAL BRANCH: A BALANCING ACT

Appropriate media strategies can be tailored for each branch of government. In the judicial branch, due largely to the legacy of the O.J. Simpson trial, there is increasing media coverage of litigation. High profile cases have become a popular media playground; as a result, overt media strategies are increasingly prevalent. Thus, even in a judicial branch setting, where decorum is at a premium, it is important to devise a media strategy that is considered as early as drafting the complaint.

Working with the judicial branch of government is unique because of the dictates of the Rules of Professional Conduct (Rules).\(^1\) Attorneys are “Officers of the Court” and “Members of the Bar” and, as such, must follow specific, mandatory rules regarding their conduct.\(^2\) These Rules may pose practical limitations.\(^3\)

While a detailed examination of these constraints is outside the scope of this Essay, it is sufficient to state that the advocate must strike a balance between several competing interests. A lawyer has a duty to provide zealous, diligent representation to his client.\(^4\) However, a lawyer may not make extrajudicial statements that could threaten the impartiality of a judge or jury.\(^5\) Ultimately, the advocate must be aware of and comply with the limits imposed by the Rules.

\(^1\) See generally Model Rules of Prof’l Conduct (2005).
\(^2\) See id.
\(^3\) See id.
\(^4\) Id. R. 1.3 cmt. 1 (“A lawyer must . . . act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client’s behalf.”).
\(^5\) See id. R. 3.6(a).

A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

Id.
II. MEDIA ADVOCACY IN THE LEGISLATIVE AND EXECUTIVE BRANCHES: OPEN SEASON

Legislative and executive branch strategies are a completely different matter. Zealous media strategies may be very effective in these branches. There are three ways to prevail in Washington: deliver cash, votes, or pain. For public health and environmental advocates, effective use of the media is essential. These advocates rarely have the means to deliver significant campaign and political party contributions. Furthermore, they cannot deliver votes because public health and environmental issues do not get most voters to choose one candidate over another. Therefore, often the most effective way to secure the support of elected officials is through “pain”—embarrass the official into doing the right thing by calling attention to an indefensible position on a sensitive matter. Commonly, wealthy corporate interests are behind these “indefensible” positions, delivering both campaign contributions and support at the ballot box.

An example of this is a recent rulemaking that the White House Office of Management and Budget (OMB) proposed. OMB was seeking to finalize obscure regulations that would allow a “thumb-on-the-scale” approach during routine cost-benefit analysis of public health regulations. Cost-benefit ratios factor heavily in determining the ultimate fate of public health safeguards. OMB sought to finalize a rule providing that people over sixty years of age would be considered forty percent less “worthy” for monetary valuation purposes than younger people. The effect would have been dramatically less public “benefit” for the same industry cost associated with rulemakings. Because of the discriminatory nature of the rulemaking, it was crucial that the public be informed of the debate.

Public health advocates launched a media strategy to bring the public into the debate. The strategy included advertisements in Capitol Hill periodicals depicting senior citizens wearing “sale tags” reading “For Sale—40% off.” Consequently, Congress became sensitized to the issue and prohibited OMB from finalizing the “Senior Death Discount” devaluation rulemaking.

By generating unflattering attention, a highly cost-effective media strategy effected a correction in public policy. OMB could not defend a

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7 See id.
8 See id.
rule that advanced the notion that grandparents are less valuable than their grandchildren, despite overwhelming business community and Bush administration support. Absent a compelling media strategy, it would have been nearly impossible for public health interests to prevail on a very obscure valuation issue in the area of cost-benefit analysis.

III. Basic Media Strategies: Paid and Earned

Generally speaking, there are two dominant types of media: paid and earned. Paid media consists of buying advertising space and running professionally produced advertisements. Paid media’s role should be very limited because it is resource-intensive. It almost always requires costly, professional assistance in order to be effective. Paid media is appropriate in limited instances, predominantly for political statements. For example, if, after working with the chairman of a legislative committee, legislation is going to be marked up or revised in committee, it might be appropriate to run an advertisement in a specialty newspaper like Congress Daily, or Roll Call on the day of the markup. The placement can pay a compliment or make a statement about the importance of the legislative development. Nonetheless, as a general matter, paid media is a luxury in a world of limited resources. Part of this is due to the “saturation effect.” A viewer usually needs to see an advertisement repeatedly before it will have any enduring effect, and public interests rarely have sufficient resources to accomplish this level of repetition.

However, there are times when it is necessary and appropriate to purchase advertising. For instance, after the war in Iraq commenced, the Bush administration tried to use an Iraq supplemental appropriations bill to repeal protections for military personnel concerning exposure to toxic chemicals at military installations. The National Environmental Trust ran compelling advertisements in Congress Daily and the offending legislative provisions were pulled. In another case, the Iraq supplemental appropriations bill was used to try to repeal protections in the Marine Mammal Protection Act, which prohibits sonic boom testing in the ocean. After targeted advertising, the provisions were similarly pulled from the bill.

Earned media differs from paid media because it requires the advocate to convince a publication or program to produce and run a given story. But for the advocate’s efforts, the story would not have come to light and made it to the press. The task for the advocate is often difficult, however, in convincing a correspondent and their publication that something is of sufficient public importance and interest to merit coverage.

An advocate can “earn media” through a variety of means; however, they all entail convincing a reporter that the issue is important and that the public cares about its resolution. For instance, most data generated by the government is not generally accessible to the media or the public. To compensate for this shortcoming, an advocate can issue a report or white paper that analyzes and interprets the government data and presents it in a user-friendly format. Providing this value-added information to just one reporter may convince the reporter that it is newsworthy, and may generate coverage of the issue.

Another way to earn coverage is to reveal information before someone else does. For instance, an advocate can use the Freedom of Information Act to obtain documents that are provided to a reporter on an exclusive basis. The advocate then works with the reporter to develop and break the story. Often this means that the advocate is the primary researcher and does a significant amount of work. The obvious goal of these efforts is front-page placement with maximum public education and constituency pressure. As stated earlier, it is often this public awareness that has a sanitizing effect on the conduct of government officials, forcing them to retreat to more defensible policy positions.

In the world of earned media, there is the “gold standard” and the “reality standard.” Advocates often seek coverage in top-tier opinionmaker media outlets such as the Washington Post, New York Times, and NewsHour with Jim Lehrer. However, depending on the target audience, this may be the least effective strategy. For lawmakers in very conservative or rural parts of the country, this type of coverage may be irrelevant. Instead, the best strategy may be to concentrate in secondary media markets—such as a Kansas City newspaper—where your target audience is sensitive to local press attention and constituency perceptions.

Good reporter relationships are essential to any earned media strategy. To develop these relationships, the advocate must treat re-
porters like the most valuable clients. The advocate must drop every-
thing when they call and do anything possible to service the reporter’s
needs and make the reporter’s job easier. Often, three or four hours
are spent doing work at the behest of a reporter. However, this service
mentality is necessary in order to be successful. By building individual
relationships, the advocate can, in time, develop a robust list of media
professionals who will rely on the advocate, and to whom the advocate
can turn when media coverage is needed.

IV. CASE STUDIES IN GENERATING COVERAGE

A. The Cold Start

About ten years ago, it became evident that electricity generating
power plants were underregulated and disproportionately responsible
for air pollution in the country. In addition, further advances in re-
ducing adverse public health impacts from air pollution could be ac-
complished most cost-effectively through the reduction of power plant
pollution. Public opinion research conducted internally by the Na-
tional Environmental Trust indicated that a strong majority of Ameri-
cans had no idea where their electricity came from, and harbored deep
misperceptions about how electricity was generated. In sum, the public
and the press were unaware of the most basic information surrounding
electricity generation. Therefore, one of the challenges to making pro-
gress on reducing emissions was to begin a media education process on
the fundamentals of power plants and electricity generation.

To accomplish this, the National Environmental Trust put out a
guide for reporters, editorial boards, and policy makers that con-
tained all of the basic facts concerning electricity production. In or-
der to be credible, every assertion had to be meticulously footnoted
and referenced. The media cannot accept information that cannot
be cross-checked, verified, and corroborated.

Therefore, on a complex issue like electricity generation, the Na-
tional Environmental Trust needed to start at ground zero. The Trust
assembled a very detailed desk-reference manual addressing every as-
pect of the issue. The next step was background briefings and one-on-

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14 See Steven Ferrey, Inverting Choice of Law in the Wired Universe: Thermodynamics, Mass,
15 See CLEAR THE AIR, NAT’L ENVT'L. TRUST, CLEANING UP AIR POLLUTION FROM AMER-
room/release.vtml?id=27196.
16 See id. at 82–85.
one meetings to further educate key reporters. The goal of the outreach was to create an educated media that could file stories quickly when breaking news about the electricity sector developed. Because of the complicated subject matter, the key to generating favorable media coverage was educated reporters who could question what they were told so as to avoid being misled by administration officials.\textsuperscript{17}

\textbf{B. Compelling Graphics}

In smaller, secondary media markets, where editors are often starved for local news, it may be a picture or graphic that drives coverage. The compelling picture causes an editor to say “that’s great—now file a story to go with it.” Surprisingly, however, the opposite is not often true. Editors do not say, “That is an important public policy issue of concern, so find a picture to go with it.” The picture or graphic actually drives the story, with the localized nature of the portrayal making all the difference.

There are different ways of generating graphic content for media outlets. The easiest is to have some type of standardized “prop” that can be transported to different media markets and used repeatedly in press conferences. For instance, when the National Environmental Trust was dramatizing deaths caused by air pollution, the trust created a fifteen-foot tombstone. The goal is to generate a standard, local press conference template, and replicate it repeatedly during a media tour. Over the course of a summer, for example, this type of strategy can generate hundreds of local news stories.

\textbf{C. The Right Local Messenger}

Often, the messenger, but not the message, matters most. Different media markets require different spokespeople for a message to resonate. For instance, many elected officials in the Rocky Mountain West continue to be unconvinced of the need to address global warming. In order to reach this audience, the advocate must have a meaningful local impact conveyed by a credible local messenger. The strategy the National Environmental Trust employed was to focus on summer drought due to decreased winter snowpack, directly attributable to global warming. The vehicle to convey the message was a report released by district

water managers. Combining the right messenger with an important local impact generated significant earned media coverage that local elected officials could not ignore.

V. Editorial Board Outreach

Another effective way for the advocate to convey a message is to generate editorial page coverage favoring his position. Once successful in getting regional and national newspapers to cover the issue, the advocate is ready to approach editorial boards. Editorial boards will be more inclined to speak on an issue that has recently been in the press. Additionally, many people in government are particularly interested in and influenced by their local papers’ position on an issue.

Conclusion

Consider media goals at the outset of any legal strategy development. This is true whether you are filing a complaint or trying to move legislation. Media strategy should inform everything from the project’s title to the budget. Know the boundaries of your arena and pay special attention to any applicable rules of professional responsibility. Guard your credibility, because reporter relationships are built on trust. Only use paid media in rare instances. And finally, when in doubt, hire a media professional to help guide your strategic choices.

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NEPA AND ENVIRONMENTAL JUSTICE: INTEGRATION, IMPLEMENTATION, AND JUDICIAL REVIEW

UMA OUTKA*

Abstract: The purpose of the National Environmental Policy Act (NEPA) is to assure “for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings,” a goal that is essential to environmental justice. Although NEPA provides the structure for federal environmental decisionmaking, is it effective as a tool for addressing environmental justice concerns? This Essay addresses NEPA’s limitations and potential for this purpose, and assesses the role of case law and judicial review in shaping this integrative process. To do so, it considers the environmental justice implications of NEPA’s structural gaps—including exemptions, categorical exclusions, and so-called “functional equivalents”—and evaluates judicial review of agencies’ environmental justice analyses to date.

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INTRODUCTION

Environmental justice formally entered the federal lexicon in 1994 when President Clinton signed an Executive Order addressing “Environmental Justice in Minority and Low-Income Populations.” The Order was an acknowledgment that exposure to environmental hazards is related to race and income levels. It mandated federal agencies to develop strategies for “identifying and addressing . . . [the] disproportionately high and adverse human health or environmental effects of [their] programs, policies, and activities on minority populations and low-income populations . . . .” As a result, federal

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1 There is no fixed definition of environmental justice. According to the Environmental Protection Agency (EPA):

Environmental Justice is the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies. EPA has this goal for all communities and persons across this Nation. It will be achieved when everyone enjoys the same degree of protection from environmental and health hazards and equal access to the decision-making process to have a healthy environment in which to live, learn, and work.


3 See Mank, supra note 2, at 103.

4 Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, 59 Fed. Reg. at 7629. (requiring “each Federal agency [to] make achieving environmental justice part of its mission by identifying and addressing, as ap-
agencies took up the task of integrating the concern for environmental justice into their decisionmaking procedures, though the Order did not provide a private cause of action to enforce its mandates. An obvious place to inject this new consideration was into agencies’ preexisting analytic frameworks for implementing the National Environmental Policy Act of 1969 (NEPA). NEPA has long required federal agencies to assess the environmental impacts of proposed major federal actions and their alternatives as part of its goal of encouraging “productive and enjoyable harmony” between human activities and the environment. In 1997, the Council on Environmental Quality (CEQ) issued guidance to assist the integration of environmental justice into NEPA analyses. Other agencies, such as the Environmental Protection Agency (EPA), developed their own tailored guidance documents, building upon the CEQ foundation.

A review of the years following these developments raises the question: How effective is NEPA as a tool for addressing environmental justice concerns? This Essay considers NEPA’s limitations and potential for this purpose, and assesses the role of case law and judicial review in shaping this integrative process. Part I provides a brief overview of NEPA and the environmental justice guidance issued by

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5 See id.; Mank, supra note 2, at 107–23. The Order is clear in its language:

This order is intended only to improve the internal management of the executive branch and is not intended to, nor does it create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies, its officers, or any person.


7 Id. §§ 4321, 4332.


CEQ and EPA. Part II addresses the environmental justice implications of NEPA’s structural gaps, including exemptions, categorical exclusions, and so-called functional equivalents. Part III evaluates judicial review of agencies’ environmental justice analyses to date.

I. NEPA AND THE GUIDANCE

Under NEPA, federal agencies must prepare an Environmental Impact Statement (EIS) for “major Federal actions significantly affecting the quality of the human environment.”\(^\text{10}\) The definition of “major Federal actions” includes: federal activities, such as establishing government policies and regulations; undertaking or authorizing federal projects, issuing federal permits, activities “which are potentially subject to Federal control and responsibility,” for example, through the dispensation of federal funds; and an agency’s “failure to act” when such omission is reviewable by courts.\(^\text{11}\) NEPA regulations provide for a preliminary Environmental Assessment (EA) where the significance of the environmental impact of a given action is unclear.\(^\text{12}\) By preparing an EA, an agency should be able to determine whether the potential for significant environmental impact warrants a full-scale EIS or whether it can safely declare a Finding of No Significant Impact (FONSI) and conduct no further environmental review.\(^\text{13}\) The significance of an action’s impacts will depend upon intensity as well as context—there must be “a reasonably close causal relationship’ between the environmental effect and the alleged cause.”\(^\text{14}\) NEPA requires that these inquiries be conducted “at the earliest possible time” in an agency’s planning process to ensure that the impacts and alternatives considered can truly inform decisionmaking.\(^\text{15}\)

When an EIS is necessary, NEPA regulations direct agencies to consider “all reasonable alternatives” to the proposed action, includ-

\(^\text{10}\) 42 U.S.C. § 4332(C) (2000).
\(^\text{11}\) 40 C.F.R. § 1508.18 (2005). However, funding received solely as general revenue sharing funds does not supply the requisite control necessary to trigger NEPA. Id. For an argument that courts should interpret major federal action more broadly or that NEPA should be revised to expand its reach, see Browne C. Lewis, What You Don’t Know Can Hurt You: The Importance of Information in the Battle Against Environmental Class and Racial Discrimination, 29 Wm. & Mary Envtl. L. & Pol’y Rev. 327, 361–68 (2005).
\(^\text{12}\) 40 C.F.R. § 1501.3.
\(^\text{13}\) Id. § 1501.4.
\(^\text{15}\) 40 C.F.R. § 1501.2.
ing the alternative of “no action,” and explore possible mitigation strategies.\textsuperscript{16} The scope of the analysis must extend to direct, indirect, and cumulative impacts on health, as well as ecological, aesthetic, historical, cultural, economic, and social resources.\textsuperscript{17} However, economic and social effects can only trigger an EIS to the extent that they are interrelated with the physical environmental effects of an action.\textsuperscript{18} When a draft EIS is completed, the agency must solicit and respond to comments from the public—specifically and affirmatively from “those persons or organizations who may be interested or affected”—and other relevant federal, state, or local agencies.\textsuperscript{19} In addition, agencies must “make diligent efforts to involve the public” by way of notification, public disclosure of comments and underlying documents, and public hearings or meetings.\textsuperscript{20} The final EIS must include the agency’s responses to comments and is followed by a record of decision selecting one of the alternatives.\textsuperscript{21} Importantly, NEPA contains no substantive requirement that agencies select the most environmentally sensitive alternative among those considered.\textsuperscript{22} Thus, NEPA is “essentially procedural,” its goal is “to help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment,” without requiring them to do so.\textsuperscript{23} This is the fundamental limitation of NEPA as a tool for environmental justice and other forms of environmental protection.\textsuperscript{24} However, NEPA is widely regarded as an invaluable, if indirect, protective measure because it makes environmental considerations a central part of federal decisionmaking and opens the process to public dialogue and scrutiny.\textsuperscript{25}

\textsuperscript{16} Id. § 1502.14.
\textsuperscript{17} Id. §§ 1508.25, 1508.14, 1508.8. For the definition of direct and indirect effects, see id. § 1508.8. Impacts and effects are used synonymously. Id. Cumulative impacts refer to the “incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions.” Id. § 1508.7.
\textsuperscript{18} Id. § 1508.14.
\textsuperscript{19} Id. § 1503.1.
\textsuperscript{20} Id. § 1506.6. EPA regulations require at least one public meeting on all draft EISs. Id. § 6.400(c).
\textsuperscript{21} 40 C.F.R. §§ 1502.9, 1505.2.
\textsuperscript{22} See id. § 1505.2.
\textsuperscript{24} See Council on Envtl. Quality, supra note 8, at 10.
\textsuperscript{25} See 40 C.F.R. §§ 1500.1(c), 1506.6.
The Council on Environmental Policy (CEQ) Guidance “interprets NEPA as implemented through the CEQ regulations in light of Executive Order 12898.” 26 Environmental justice is consistent with—and even implicit in—the stated goals of NEPA, most notably the goal of assuring “for all Americans safe, healthful, productive, and aesthetically and culturally pleasing surroundings.” 27 Environmental justice provides the practical and conceptual specificity needed to lend content to this otherwise abstract ideal. 28 To this end, the CEQ Guidance sets forth several core principles that should supplement agencies’ existing NEPA analyses: (1) consideration of the demographic composition of the affected area; (2) review of health data addressing multiple or cumulative exposure to environmental hazards; (3) recognition of social, economic and other “factors that may amplify the . . . environmental effects of the proposed agency action”; (4) development of strategies for overcoming “barriers to meaningful participation”; and (5) inclusion of “diverse constituencies” from affected communities into the NEPA process. 29 Nevertheless, the CEQ Guidelines remind agencies that under NEPA, identifying a disproportionate or adverse impact will “not preclude a proposed agency action from going forward, nor does it necessarily compel a conclusion that a proposed action is environmentally unsatisfactory.” 30

The EPA Guidance is significantly more detailed, providing definitions for key terms—such as “minority population”—and a long list of demographic, economic, historical, and other factors for analysts to make part of their NEPA considerations. 31 It identifies “three vantage points” from which to approach an environmental justice analysis: “1) whether there exists a potential for disproportionate risk; 2) whether communities have been sufficiently involved in the decisionmaking process; and 3) whether communities currently suffer, or have historically suffered, from environmental and health risks or hazards.” 32 This focus on disparate impact, along with the section describing “methods and tools for identifying and assessing disproportionately high and adverse effects,” sets the EPA Guidance apart from

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27 Id. at 7 (emphasis added) (quoting 42 U.S.C. § 4331(b)(2) (1994)).
28 See id. at 8–10.
29 Id. at 8–9.
30 Id. at 10.
31 See EPA Guidance, supra note 9, §§ 2.0–2.3.
32 Id. § 2.3.
CEQ Guidance. The EPA Guidance specifically calls for environmental justice concerns to be identified and addressed in both EA and EIS documents.

To the extent that the NEPA process leads to better federal decisionmaking, raising and investigating environmental justice issues is a positive development. Against the backdrop of NEPA’s inherent limitation in being procedural rather than substantive, a desirable benefit is that analysts and decisionmakers will recognize and reject proposals that will result in disproportionate adverse impacts in low-income and minority areas. The political scrutiny that agencies can expect whenever a project touches on environmental justice will inevitably serve a similar protective function. Through increased efforts and improved strategies for public outreach, investigation of environmental justice issues will facilitate political scrutiny at the local level. NEPA does not remedy past injustices, but rather has the potential to help agencies avoid existing patterns of inequality. By addressing environmental justice concerns, federal agencies better serve NEPA’s “twin aims” of ensuring that agencies “consider every significant aspect of the environmental impact of a proposed action” and “inform the public that it has indeed considered environmental concerns in its decisionmaking process.”

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33 Id. § 5.0.
34 Id. § 3.1.
36 See Calloway & Ferguson, supra note 35, at 1173.
37 See id. at 1174.
38 See COUNCIL ON ENVTL. QUALITY, supra note 8, at 13; EPA GUIDANCE, supra note 9, §§ 4.0–4.2; Sheila Foster, Impact Assessment, in LAW OF ENVIRONMENTAL JUSTICE, supra note 2, at 256, 285; see also Stephen M. Johnson, NEPA and SEPA’S in the Quest for Environmental Justice, 30 LOY. L.A. L. REV. 565, 567–68 (1997).
II. GAPS IN NEPA

Even if it is assumed that agencies will fully integrate environmental justice into NEPA, its usefulness is limited by express and judicially recognized exceptions to NEPA’s requirements, as well as structural gaps within the statutory and regulatory framework.41

A. Public Participation

At its best, public participation can improve government decisionmaking by increasing government accountability, educating officials about the local impacts of their decisions, bringing the full range of stakeholder viewpoints into dialogue, and shaping end results to better serve the public interest.42 Unfortunately, the timing and structure of public participation under NEPA raise doubts about whether environmental justice concerns will be brought to bear on agencies’ substantive decisionmaking.43 This is problematic because public participation is important to agencies’ understanding of environmental justice issues, and because CEQ and EPA guidance rely heavily on it as a method for addressing inequity.44

1. Environmental Assessments

Determining whether NEPA requires an EIS for a proposed action may be the most crucial step in the NEPA process.45 Through the EA, an agency decides whether or not the action will significantly affect the environment; the agency will go forward with an EIS or issue a FONSI.46 NEPA’s implementation underscores the importance of the EA.47 As Professor Stephen M. Johnson notes, “approximately ninety-nine percent of the actions reviewed by agencies under NEPA each year are reviewed in the context of an EA, rather than an EIS.”48 Although NEPA regulations call on agencies to involve the public in preparing EAs, public participation is only required by NEPA after the

41 See Anchorage v. United States, 980 F.2d 1320, 1328 (9th Cir. 1992); Webb v. Gorsuch, 699 F.2d 157, 159–60 (4th Cir. 1983).
42 See generally Sheila Foster, Public Participation, in LAW OF ENVIRONMENTAL JUSTICE, supra note 2, at 185, 185–229.
43 See id. at 197.
44 See COUNCIL ON ENVTL. QUALITY, supra note 8, at 13; EPA GUIDANCE, supra note 9, §§ 4.0–4.2; Foster, supra note 42, at 185.
45 See Foster, supra note 42, at 196–97.
46 Id. at 196.
47 Id.
48 Johnson, supra note 38, at 575; see also Foster, supra note 38, at 292 n.35.
EA is completed, through the notice and comment provisions for an EIS.\textsuperscript{49} Thus, fixed opportunities for public involvement become available only if an EA reveals a potentially significant impact on the environment and the agency proceeds to scope and draft an EIS.\textsuperscript{50} However, the EPA Guidance acknowledges that in practice, “there has been limited public involvement before and during EA preparation by EPA unless there is a question of significance . . . or some particular public interest.”\textsuperscript{51} From an environmental justice perspective, this is troubling, because if the agency issues a FONSI without public involvement in its EA process, no meaningful opportunity remains.\textsuperscript{52} FONSIs are made public once complete, but no public decisionmaking occurs thereafter.\textsuperscript{53} As was clear in \textit{Society Hill Towers Owners’ Ass’n v. Rendell}, this fact is not lost on the public.\textsuperscript{54} In \textit{Rendell}, residents of a Philadelphia neighborhood, the proposed site of a city-sponsored hotel and parking garage construction project, claimed that the public hearings in which they were allowed to review the FONSI “were little more than a charade.”\textsuperscript{55} It was clear to the residents that “the project was a ‘done deal’ \textit{before} public hearing was held.”\textsuperscript{56}

2. Notice and Comment

After an agency decides to prepare an EIS, CEQ regulations require that a notice of intent be published in the Federal Register before the agency begins “scoping” the issues it plans to address.\textsuperscript{57} Once it has completed a draft EIS, the agency must solicit comments from the public, “affirmatively soliciting comments from those persons or

\begin{itemize}
\item \textsuperscript{49} See 40 C.F.R. § 1506.6(a) (2005).
\item \textsuperscript{50} Foster, \textit{supra} note 42, at 196.
\item \textsuperscript{51} EPA Guidance, \textit{supra} note 9, § 4.1; \textit{see also} Soc’y Hill Towers Owners’ Ass’n v. Rendell, 210 F.3d 168, 174 (3d Cir. 2000) (noting that “public hearings may or may not be required during an EA”).
\item \textsuperscript{52} See Foster, \textit{supra} note 42, at 196.
\item \textsuperscript{53} \textit{Id.}
\item \textsuperscript{54} 210 F.3d at 180.
\item \textsuperscript{55} \textit{Id.} at 179.
\item \textsuperscript{56} \textit{Id.} The residents cited statements by the Executive Director of the City Planning Committee and the Vice President of the Philadelphia Industrial Development Corporation, each referring to the project as “a done deal.” \textit{Id.} However, the court, after stating that “we understand why the Residents might feel that their opposition fell upon deaf ears even though they were finally able to voice it,” decided that the “decision to forego an EIS was [not] ‘arbitrary and capricious’ or ‘without observance of procedure required by law’ under the [Administrative Procedures Act].” \textit{Id.} at 180.
\item \textsuperscript{57} 40 C.F.R. § 1501.7 (2005).
\end{itemize}
organizations who may be interested or affected.” However, given the limited amount of public participation that takes place at the EA stage, these opportunities come late in the decisionmaking process. Notice and comment offers an opportunity for the public to learn and express opinions about a proposed project, and for the agency to see which alternatives are politically sensitive; there is only a negligible chance that an agency will choose the no action alternative at this stage. Naturally, an agency will not be inclined to let the time, effort, and expense that went into a draft EIS go to waste because the investment and institutional momentum are powerful forces behind the project. As one commentator has observed, “the agency usually ends up defending its plan instead of taking citizens’ comments and actually formulating a plan based on the citizen concerns. . . . [T]here is no way for the agency and the public to develop any sort of meaningful discourse.”

Therefore, the value of public involvement in NEPA is significantly limited by the structure and timing of its public participation provisions. The minimal outreach at the crucial EA stage, combined with a project’s momentum by the notice and comment stage, creates an impression that the public is appeased rather than an actual part of the decisionmaking process. This is particularly limiting in the environmental justice context, in which agency expertise and familiarity have historically lacked depth and mistrust of government is common. The CEQ Guidance documents recognize the inadequacy of typical government outreach methods and recommend a range of new approaches that, if used, will be a step in the right direc-

58 Id. § 1503.1(a)(4).
59 EPA Guidance, supra note 9, § 4.1; Foster, supra note 42, at 196.
61 See id.
62 Id. at 213–14 (citations omitted).
63 See Foster, supra note 42, at 196–97 (noting that public participation is only mandatory during the scoping of the EIS, after the EA has been prepared).
64 See, e.g., Soc’y Hill Towers Owners’ Ass’n v. Rendell, 210 F.3d 168, 183 (3d Cir. 2000) (discussing that the City of Philadelphia dismissed the residents’ concerns for nonlegitimate reasons, such as costliness).
tion. Nevertheless, it is important to understand the limitations of the overall structure in which these approaches will be applied.

B. State Programs Implementing Federal Environmental Statutes

NEPA’s reach is limited under environmental statutes that states may elect to administer with EPA approval, such as the Federal Water Pollution Control Act, commonly known as the Clean Water Act (CWA), Resource Conservation and Recovery Act (RCRA), or the Clean Air Act (CAA). In effect, these statutes allow delegations of federal authority to the states; however, as Johnson notes, when a state agency issues a permit under such a program, “that action is probably not a federal action for NEPA purposes.” Likewise, even where EPA may be authorized to review state permitting decisions under such programs, the simple act of review does not indicate the degree of federal control or responsibility likely to trigger NEPA.

Sixteen states have adopted their own versions of NEPA—commonly referred to as SEPAs—and many have incorporated environmental justice within those frameworks. There is no similar parallel for any of the remaining thirty-four states that administer federal environmental requirements. This does not imply that states without SEPAs have done nothing to address environmental injustice in decisionmaking, though their initiatives are inevitably fragmented. One key benefit of NEPA or a state equivalent is that it applies to the full spectrum of government agencies—notwithstanding how their missions may vary—whenever their activities significantly affect the environ-

66 See Council on Env’tl. Quality, supra note 8, at 13; EPA Guidance, supra note 9, §§ 4.0–2.
67 See Foster, supra note 42, at 196.
71 Johnson, supra note 38, at 595 n.126.
72 Id.
73 See Rechtschaffen, supra note 1, at 120; see also Johnson, supra note 38, at 566–67 (commenting that a number of SEPAs are stronger than NEPA and that NEPA would benefit from emulating the states’ innovations).
74 See Rechtschaffen, supra note 1, at 120; see also Johnson, supra note 38, at 597–99 nn.135–41.
75 See generally ABA Section of Individual Rights & Responsibilities et al., Environmental Justice for All: A Fifty-State Survey of Legislation, Policies, and Initiatives (Steven Bonorris ed., 2004) (documenting state efforts to integrate environmental justice into policymaking).
ment.76 Where neither NEPA nor an equivalent state environmental review applies, it is less likely that environmental justice will consistently be a part of official decisionmaking.77

C. Statutory Exemptions

The CWA and the CAA explicitly exempt EPA from NEPA compliance when acting under the authority of those laws.78 Section 511 of the CWA provides that “no action of the [EPA] Administrator taken pursuant to [the Act] shall be deemed a major Federal action significantly affecting the quality of the human environment within the meaning of [NEPA].”79 Similarly, the Energy Supply and Environmental Coordination Act of 1974 provides that “[n]o action taken under the Clean Air Act shall be deemed a major federal action significantly affecting the quality of the human environment within the meaning of [NEPA].”80

With respect to § 511 of the CWA, there has been some debate as to whether the section achieves a complete exemption from NEPA’s requirements or a partial exemption excusing only the preparation of an EIS, while retaining the consideration of alternatives.81 In the words of the Ninth Circuit Court of Appeals in Anchorage v. United States:

[D]etermining the precise scope of section 511’s exemption places this panel squarely on the horns of a dilemma. A complete exemption from NEPA requirements would enable EPA to act more expeditiously in fulfilling its purpose of protecting the environment. . . . However, “it cannot be assumed that EPA will always be the good guy.” Indeed, some have

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76 See Johnson, supra note 38, at 570.
77 See id. at 568–69.
78 EPA Guidance, supra note 9, § 1.2.1. Section 309 of the CAA requires EPA to “review and comment in writing on the environmental impact of any matter relating to duties and responsibilities” arising from a range of federal sources, such as legislation, proposed regulations, and certain federal projects. Clean Air Act § 309, 42 U.S.C. § 7609(a) (2000). The Executive Order specifically directed EPA to use § 309 review to ensure that agencies analyze environmental justice issues; however, the EPA Environmental Justice Guidance expressly does not apply to that review. EPA Guidance, supra note 9, § 1.2.2.
81 See Anchorage v. United States, 980 F.2d 1320, 1328 (9th Cir. 1992) (refusing to decide the question as a matter of law); Webb v. Gorsuch, 699 F.2d 157, 161 (4th Cir. 1983) (suggesting that EPA is excused from considering alternative actions when it is not required to prepare an EIS).
suggested that a complete exemption from NEPA requirements for EPA will result in no one policing the police.\footnote{980 F.2d at 1328 (quoting Portland Cement Ass’n v. Ruckelshaus, 486 F.2d 375, 384 (D.C. Cir. 1973)). Here, the court read § 511 broadly to exempt a memorandum of agreement between EPA and the Army Corps of Engineers, finding that participation of an agency other than EPA did not affect the scope of the exemption. Id. Such memoranda could apply to a wide range of water-dependent projects with environmental impacts that raise environmental justice concerns. See id. (discussing the broadness of § 511’s exemption). Exemptions have been justified in much the same way as functional equivalents as a means of avoiding duplication of effort. See id. at 1329; infra Part II.D. As the Anchorage court noted, § 404 of the CWA required EPA “to consider many of the same things that NEPA would require . . . .” 980 F.2d at 1329. In that case, the court also supported its conclusion by noting that “the Corps must perform an EIS and comply with the other requirements of NEPA when issuing a permit pursuant to the guidelines” even if EPA did not. Id.}

Under either approach, the exemption may eliminate the environmental justice review that NEPA might otherwise compel.\footnote{See Anchorage, 980 F.2d at 1328.} Neither the CWA nor the CAA matches NEPA’s full spectrum of considerations or emphasis on public participation.\footnote{See EPA GUIDANCE, supra note 9, § 1.2.1.} This need not imply that environmental justice will be ignored in both the CWA and the CAA contexts; but, by comparison, its integration into permitting and application review will be haphazard and less reliable.\footnote{See id.}

D. “Functional Equivalents”: Judicial Exemptions

Courts have long held that if a statute contains the “functional equivalent” of NEPA’s review process, a NEPA review would be redundant and unnecessary.\footnote{See Envtl. Def. Fund, Inc. v. EPA, 489 F.2d 1247, 1256 (D.C. Cir. 1973).} The first case to recognize this concept was \textit{Environmental Defense Fund, Inc. v. EPA}.\footnote{Id. at 1257; see also Merrell v. Thomas, 807 F.2d 776, 778–79 (9th Cir. 1986) (holding NEPA inapplicable where Federal Insecticide, Fungicide, and Rodenticide Act provided more specific pesticide registration requirements). But see Limerick Ecology Action, Inc. v. U.S. Nuclear Regulatory Comm’n, 869 F.2d 719, 729 & n.7 (3d Cir. 1989) (rejecting Nuclear Regulatory Commission’s assertion that a finding of “adequate protection of public health and safety” precluded the need for further consideration under NEPA).} In that case, the D.C. Circuit Court of Appeals held that the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) contained review provisions functionally equivalent to NEPA, thereby relieving EPA of dual responsibilities under both statutes.\footnote{Envtl. Def. Fund, 489 F.2d at 1254–57.} Similarly, the Eighth Circuit Court of Appeals held that no EA or EIS was required before EPA declared a three thousand acre aq-
uifer exempt from the Safe Drinking Water Act (SWDA) standards because SWDA procedures and analysis “covered the core NEPA concerns.”

Although EPA has considered environmental justice issues when acting under the authority of these statutes, the NEPA review approach outlined in the CEQ Guidance will not apply. In addition, while the analytical components of environmental impact assessment under other statutes may be similar, not all “functionally equivalent” statutes require consideration of key NEPA factors relevant to environmental justice. For example, environmental justice advocates doubt the purported functional equivalence between NEPA and RCRA, under which EPA issues operating permits to hazardous waste facilities. In Alabama ex rel. Siegelman v. EPA, the state of Alabama and environmental organizations challenged EPA for issuing a permit for “the nation’s largest commercial hazardous waste management facility” without complying with NEPA. The Eleventh Circuit Court of Appeals held that although “RCRA does not require EPA to consider every point the agency would have to consider in preparing a formal EIS under NEPA,” RCRA was functionally equivalent and the “more specific counterpart of NEPA.” The court explained that the rationale for “limiting the sweep of NEPA stems, in part, from the traditional view that specific statutes prevail over general statutes dealing with the same basic subjects.” However, as with the statutory exemptions for the CAA and the CWA, there are key differences between RCRA’s permitting procedures and NEPA. For example, unlike NEPA, RCRA does not require consideration of socioeconomic impacts or indirect effects of its actions, “even when related to physical environmental impacts.” Furthermore, RCRA does

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89 W. Neb. Res. Council v. EPA, 943 F.2d 867, 868–69, 872 (8th Cir. 1991) (affirming EPA’s approval of the exemption which was “sought to permit injection-process mining of uranium ore deposits located in the aquifer”).
91 See Envtl. Def. Fund, 489 F.2d at 1256; Foster, supra note 38, at 278–79; Johnson, supra note 38, at 589–90.
92 See Johnson, supra note 38, at 589–93.
93 911 F.2d 499, 504 (11th Cir. 1990).
94 Id. at 504–05. However, the fact that “some overlap” exists between the considerations required under NEPA and another statute is not enough to support functional equivalency. Limerick Ecology Action, Inc. v. U.S. Nuclear Regulatory Comm’n, 869 F.2d 719, 730 (3d Cir. 1989).
95 Siegelman, 911 F.2d at 504.
96 See Foster, supra note 38, at 278.
97 See id.; Johnson, supra note 38, at 589–90 (criticizing Siegelman as “a poorly reasoned decision”).
not require consideration of alternatives and its public participation provisions are weaker than NEPA’s.\textsuperscript{98} Since most states now administer RCRA, the more significant limit to NEPA with regard to waste facility permitting is that these actions are not “major federal actions.”\textsuperscript{99} However, the comparison demonstrates the potential weakness of the functional equivalency doctrine when applied to statutes that may appear similar to NEPA, but have substantive differences with environmental justice implications.\textsuperscript{100} Professor Johnson advocates revising NEPA regulations to improve upon case law, claiming that to be functionally equivalent, the alternative decision-making process must consider the same factors as NEPA, “including socioeconomic impacts, mitigation, and alternatives. The regulations should further provide . . . opportunities for public participation that are substantially similar to those required by NEPA.”\textsuperscript{101}

E. Categorical Exclusions

The CEQ regulations authorize each federal agency to define categories of actions within its jurisdiction “which do not individually or cumulatively have a significant effect on the human environment” to be wholly excluded from the requirements of NEPA.\textsuperscript{102} The efficiency value of this provision is obvious—generally, actions taken within a categorical exclusion will not warrant the time and expense of environmental analyses.\textsuperscript{103} Although these technical gaps in NEPA are unlikely to harm the environment or implicate environmental justice, the possibility should not be ruled out. For example, it may be appropriate for the Secretary of the Treasury to create a categorical exclusion for the clarification of tax rules, though expansion of a tax credit for use of gasoline-ethanol blends was challenged under NEPA in \textit{Florida Audubon Society v. Bentsen}.\textsuperscript{104} Florida Audubon Society argued that an EIS should have been prepared because an incentive to increase ethanol production would lead to increased agricultural use.

\textsuperscript{98} See Foster, \textit{supra} note 38, at 278–79.
\textsuperscript{99} Johnson, \textit{supra} note 38, at 595 n.126; see Foster, \textit{supra} note 38, at 279.
\textsuperscript{100} See Johnson, \textit{supra} note 38, at 596.
\textsuperscript{101} \textit{Id.}
\textsuperscript{102} 40 C.F.R. §§ 1500.4(p), 1508.4 (2005); \textit{see} City of Grapevine v. Dep’t of Transp., 17 F.3d 1502, 1504 (D.C. Cir. 1994) (construing 40 C.F.R. § 1508.4).
\textsuperscript{103} \textit{See} 40 C.F.R. §§ 1500.4(p), 1508.4.
\textsuperscript{104} 94 F.3d 638, 662 (D.C. Cir. 1996); \textit{see} Calloway & Ferguson, \textit{supra} note 35, at 1163.
of forest lands. In *Friends of Pioneer Street Bridge Corp. v. Federal Highway Administration*, residents of Montpelier, Vermont unsuccessfully challenged the Federal Highway Administration’s categorical NEPA exclusion of a bridge replacement project. The proposed action involved removing a historic bridge from the site, moving it to a new location, and replacing it with a new bridge, which the residents claimed would increase traffic, alter development patterns, and raise environmental justice concerns.

Although these cases are rare, if a categorical exclusion applies to a proposed federal action, it may be difficult for environmental advocates to convince a court to require environmental review of potential impacts. Courts afford “substantial deference” to agency decisions to categorically exclude projects from NEPA’s requirements.

**F. Statutory and Other Legal Conflicts**

When there is “clear and unavoidable conflict” between NEPA and other statutory authority, it is NEPA that gives way because “‘NEPA was not intended to repeal by implication any other statute.’” Therefore, agencies are excused from compliance with NEPA under such circumstances. To the extent that the agency in question has not adopted environmental justice guidelines or regulations, any environmental justice review that might have been performed under NEPA is eliminated.

Courts have been hesitant to recognize such conflicts, however. For example, in *Limerick Ecology Action, Inc. v. U.S. Nuclear Regulatory Commission*, the Third Circuit Court of Appeals held that the Atomic Energy Act could not be read to “preclude application of NEPA by implication.” Rather, the court was clear that “compliance with NEPA is required unless specifically excluded by statute or existing law makes

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105 *See Bentsen*, 94 F.3d at 662. The merits of this claim were never considered because the court ruled that plaintiffs lacked standing. *Id.* at 665–69 (explaining the determination of “standing in an EIS matter”).


107 *Id.* at 651–53.

108 *City of New York v. Interstate Commerce Comm’n*, 4 F.3d 181, 186 (2d Cir. 1993).


110 *See id.* at 791.

111 *See Johnson*, supra note 38, at 593.

112 869 F.2d 719, 729 (3d Cir. 1989).
compliance impossible.” Only where statutory provisions “necessarily collide with NEPA” will an agency implementing the competing statute be relieved of the NEPA duty to assess environmental impacts. Similarly, in *Davis v. Morton*, the Tenth Circuit Court of Appeals declined to find a statutory conflict between NEPA and 25 U.S.C. § 415—a statute regulating leases on Indian lands—holding that “unless the obligations of another statute are clearly mutually exclusive with the mandates of NEPA, the specific requirements of NEPA will remain in force.”

NEPA has given way to other statutes and will likely do so again in the future, with the probable result of limiting review of environmental justice concerns. For example, in *Flint Ridge Development Co. v. Scenic Rivers Ass’n*, the U.S. Supreme Court found a conflict between NEPA and the Interstate Land Sales Full Disclosure Act, which required the Secretary of Housing and Urban Development to allow statements of record to take effect within thirty days of being filed. Because it would be impossible for an EIS to be completed in such a short period of time, the Disclosure Act superceded NEPA’s requirements.

In addition, other legal conflicts may relieve an agency of NEPA compliance if the conflict would render NEPA review meaningless. In *Department of Transportation v. Public Citizen*, the Court held that NEPA did not compel the Federal Motor Carrier Safety Administration (FMCSA) to consider the environmental effects of its rules for lifting a moratorium on certain cross-border Mexican trucking operations. The Court reasoned that because the President ordered the moratorium lifted pursuant to the North American Free Trade Agreement (NAFTA), FMCSA had no authority “categorically to ex-

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113 *Id.* (finding that “[t]he directive to agencies to minimize all unnecessary adverse environmental impact obtains except when specifically excluded by statute or when existing law makes compliance with NEPA impossible” (citing Pub. Serv. Co. v. NRC, 582 F.2d 77, 81 (1st Cir. 1978)))).

114 *Id.* at 730 (quoting Pub. Serv. Co., 582 F.2d at 81).

115 *Id.* at 598 (10th Cir. 1972); see also Catron County Bd. of Comm’rs v. U.S. Fish & Wildlife Serv., 75 F.3d 1429, 1436 (10th Cir. 1996) (holding that the Endangered Species Act’s critical habitat designation provision does not conflict with NEPA); cf. Pac. Legal Found. v. Andrus, 657 F.2d 829, 841 (6th Cir. 1981) (holding that NEPA conflicts with the Endangered Species Act provisions for listing species as threatened or endangered).


117 *Id.* at 788–92.

118 *See id.* at 790.


120 *Id.* at 773.
clude Mexican motor carriers from operating within the United States.”121 Thus, even if FMCSA were to comply fully with NEPA, other statutory obligations would be violated if it were to refuse to authorize the increased cross-border activity based on environmental impacts discerned in an EIS: “FMCSA simply lacks the power to act on whatever information might be contained in the EIS.”122 According to the Court, “[i]t would not . . . satisfy NEPA’s ‘rule of reason’ to require an agency to prepare a full EIS due to the environmental impact of an action it could not refuse to perform.”123 In other words, FMCSA’s action was not “the legally relevant cause of the entry of the Mexican trucks”; rather, it was “the actions of the President in lifting the moratorium and those of Congress in granting the President this authority while simultaneously limiting FMCSA’s discretion.”124

Whatever the effects of a federal action may be, “a ‘but for’ causal relationship is insufficient to make an agency responsible for a particular effect under NEPA . . . .”125 This case is important from an environmental justice perspective, since no one questioned that air quality degradation would result from increased cross-border activity of highly polluting Mexican trucks, especially in impoverished border communities.126 Because of statutory and separation-of-powers conflicts, environmental review under NEPA gave way to economic and foreign policy considerations at the heart of the President’s NAFTA decision.127 The decision was made without analyzing alternatives, mitigation possibilities, cumulative impacts on border communities, or health effects of degraded air quality, all of which would have been central to NEPA review.128

### III. Judicial Review

This Part focuses on how well NEPA functions in the hands of environmental justice advocates. Unlike many of the major environmental statutes, NEPA does not contain a citizen suit provision for.

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121 Id. at 766.
122 Id. at 768.
123 Id. at 769.
124 Id. Actions of the President, such as international treaties like NAFTA, are not “major federal action” subject to NEPA because they are not “reviewable by courts or administrative tribunals under the Administrative Procedure Act or other applicable law as agency action.” 40 C.F.R. § 1508.18 (2005).
125 Dept. of Transp., 541 U.S. at 767.
126 See generally id.
127 See id. at 766.
128 See id. at 764–70.
private enforcement. Instead, NEPA challenges must be advanced under the Administrative Procedures Act (APA), which provides a general private right of action to seek judicial review of final agency actions. The APA authorizes a reviewing court to “compel agency action unlawfully withheld or unreasonably delayed” and to “hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . . [or] without observance of procedure required by law . . . .” This standard is deferential to agency decisions, leaving the burden of convincing a court that a decision should be disturbed upon the plaintiff. The role of the court is not to interject itself into the agency’s “area of discretion . . . as to the choice of the action to be taken,” but simply to “insure that the agency has taken a ‘hard look’ at environmental consequences.” Thus, courts will uphold administrative action if the agency “has considered the relevant factors and articulated a rational connection between the facts found and the choice made.”

NEPA challenges typically attack one or more of the following issues: the appropriateness of a FONSI, procedural compliance, or the adequacy of EIS analyses. To challenge a FONSI, a plaintiff must show that it was arbitrary and capricious for the agency to conclude that the proposed project would have no significant impact on the environment. Environmental justice may be relevant to whether an agency’s estimation of “significance” is accurate, though such challenges may only succeed if they raise environmental justice concerns that are closely related to the physical harm of a natural resource.

Process challenges enforce compliance with NEPA’s procedural requirements and ensure that an EA or EIS occurs early enough in the process to be instructive to decisionmakers, rather than a post-hoc

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130 Id.
131 Id. § 706.
134 Balt. Gas, 462 U.S. at 105 (citations omitted).
135 See Foster, supra note 42, at 196.
136 Dept. of Transp., 541 U.S. at 763.
137 EPA Guidance, supra note 9, § 3.2.
rationalization or a meaningless bureaucratic exercise. In this category, environmental justice concerns are most likely to bear on the adequacy of public participation in the NEPA process.

To challenge the adequacy of analysis under NEPA, cases have focused on the scope of assessment, the agency’s analytical methods of choice, the range of alternatives considered, or whether the agency properly considered cumulative or indirect impacts. Environmental justice should inform the notion of analytical “adequacy” in a number of ways. For example, the “affected environment” the agency must investigate will determine the geographic scope of impact analysis; how broadly or narrowly it is defined determines whether disproportionate risks or burdens can be identified. Environmental justice may clarify which alternatives should be selected for indepth consideration or weigh in favor of certain impact assessment tools. In addition, it should enrich cumulative impact evaluations by increasing awareness of how such impacts are experienced and by whom.

The foregoing categories of NEPA challenges were available before Executive Order 12,898 and the CEQ and EPA Guidance documents explicitly recognized environmental injustice as a problem. Indeed, many environmental justice actions were brought under

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138 CEQ regulations require agencies to “integrate the NEPA process with other planning at the earliest possible time to insure that planning and decisions reflect environmental values . . . .” 40 C.F.R. § 1501.2 (2005).

An agency shall commence preparation of an environmental impact statement as close as possible to the time the agency is developing or is presented with a proposal . . . [and] shall be prepared early enough so that it can serve practically as an important contribution to the decisionmaking process and will not be used to rationalize or justify decisions already made.

- 40 C.F.R. § 1502.5.

139 See 40 C.F.R. §§ 1501.2, 1502.5.


141 See Morongo Band of Mission Indians, 161 F.3d at 575; Warren County, 528 F. Supp. at 291, 296.

142 See Council on Envtl. Quality, supra note 8, at 14; see also EPA Guidance, supra note 9, § 1.2.

143 See Morongo Band of Mission Indians, 161 F.3d at 575 (noting that, “[a]n agency . . . is ‘entitled to identify some parameters and criteria . . . for generating alternatives to which it would devote serious consideration.’” (quoting Res. Ltd. v. Robertson, 35 F.3d 1300, 1307 (9th Cir. 1993))).

144 See Council on Envtl. Quality, supra note 8, at 14; EPA Guidance, supra note 9, § 1.2.
NEPA without framing their claims in those terms.\textsuperscript{145} Although the Order, EPA Guidance, and CEQ Guidance were significant statements of policy, none created a private right of action to compel environmental justice review under NEPA.\textsuperscript{146} The Order explicitly states that it “shall not be construed to create any right to judicial review involving the compliance or noncompliance of the United States, its agencies, its officers, or any other person with this order.”\textsuperscript{147} Likewise, the CEQ Guidance “interprets NEPA as implemented through the CEQ regulations in light of Executive Order 12898,” but “does not create any rights, benefits, or trust obligations, either substantive or procedural, enforceable by any person, or entity in any court . . . .”\textsuperscript{148} The EPA Guidance is also clear: “Compliance with this guidance will not be justiciable in any proceeding for judicial review of agency action.”\textsuperscript{149} In light of these disclaimers, a key question is what, if anything, these new mandates add to judicial review in NEPA challenges.

After the Executive Order went into effect—and despite the provision precluding judicial review—numerous parties sought unsuccessfully to enforce its mandate in court.\textsuperscript{150} In \textit{Morongo Band of Mission Indians v. FAA}, the tribe challenged a FONSI for a new airport landing route directly over their reservation for failing to sufficiently consider alternative pathways.\textsuperscript{151} The tribe charged FAA with violating NEPA, as well as the Department of Transportation’s Environmental Justice

\textsuperscript{145} For example, in \textit{Warren County}, the county challenged a PCB landfill siting decision by seeking judicial review of the adequacy of the State’s EIS for the project. 528 F. Supp. at 280. Though unsuccessful, many regard this case as the one that launched the environmental justice movement. See Robert D. Bullard, \textit{Dumping in Dixie: Race, Class, and Environmental Quality} 35–38 (1990). For a more recent case, see Tex. Comm. on Natural Res. v. Van Winkle, 197 F. Supp. 2d 586 (N.D. Tex. 2002) (discussing challenge of an Army Corps of Engineers’ EIS for the Dallas Floodway Extension project by environmental groups).


\textsuperscript{147} \textit{See generally} Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, 59 Fed. Reg. at 7633.

\textsuperscript{148} \textit{Council on Envtl. Quality}, \textit{supra} note 8, at 21.

\textsuperscript{149} EPA Guidance, \textit{supra} note 9.


\textsuperscript{151} 161 F.3d 569, 575 (9th Cir. 1998).
Order and Executive Order 12,898. The Ninth Circuit Court of Appeals reviewed the NEPA claim because NEPA’s regulations require agencies to “‘[r]igorously explore and objectively evaluate all reasonable alternatives.’” However, it disregarded the Department of Transportation and Executive Orders out of hand, noting that each specifically stated that “they do not create any right to judicial review for alleged noncompliance.” This has been the common judicial response to such attempts, although some courts have claimed jurisdiction under the APA if an agency has included environmental justice in a NEPA document.

In Communities Against Runway Expansion, Inc. v. FAA, the D.C. Circuit Court of Appeals paraphrased the language of the Executive Order to explain that “an ‘environmental justice’ analysis [is] intended to evaluate whether the project would have disproportionately high and adverse human health or environmental effects on low-income or minority populations.” It reasoned that “FAA exercised its discretion to include the environmental justice analysis in its NEPA evaluation, and that analysis therefore is properly subject to ‘arbitrary and capricious’ review under the APA.” The federal district court in Vermont followed suit in Senville v. Peters, noting that a private cause of action was not necessary because the court had “jurisdiction over [Plaintiffs’] claim pursuant to its ability under the APA to review environmental documents for compliance with NEPA.” Because “[d]efendants chose to include an environmental justice analysis in their evaluation . . . [the] analysis is therefore subject to review . . . under the APA.” Other courts have merely reviewed environmental justice analyses included by agencies in their EISs without addressing the source of review authority.

152 Id.
153 Id. (alteration in original) (quoting 40 C.F.R. § 1502.14(a) (1994)).
154 Id.
156 355 F.3d 678, 688 (D.C. Cir. 2004).
157 Id. at 689.
159 Id.
160 See infra notes 161–63.
the NEPA context] is to determine whether a project will have a disproportionately adverse effect on minority and low income populations. To accomplish this, an agency must compare the demographics of an affected population with demographics of a more general character . . . .” The court in Friends of Pioneer Street Bridge Corp. v. Federal Highway Administration did not hesitate to evaluate the Federal Highway Administration’s (FHWA) consideration of environmental justice, but was careful not to say that it was required. The courts that have reviewed NEPA challenges based upon environmental justice have readily deferred to agencies’ assessments as adequate.

Though these courts have uniformly focused on agencies’ discretion to consider environmental justice under NEPA, judicial review should be available whether or not an agency voluntarily included such analysis. One need not look beyond existing NEPA regulations to see that environmental justice inquiries are amply supported in the regulations’ focus on “the natural and physical environment and the relationship of people with that environment,” including economic and social impacts stemming from environmental harm. What the federal government now knows about environmental injustice and how to assess such impacts project-by-project gives content to this regulatory language. Although the CEQ Guidance is a weak substitute for expressly adding environmental justice considerations to NEPA regulations—in

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161 345 F.3d 520, 541 (8th Cir. 2003).
163 See, e.g., Cmtys. Against Runway Expansion, 355 F.3d 678, 689 (D.C. Cir. 2004) (deferring to the agency’s choice of methodology for defining the area potentially affected by new airport runway, finding it reasonably and adequately explained); Mid States Coal. for Progress, 345 F.3d at 554 (deferring to agency’s method for analyzing demographic impacts of rail line extension project); Coliseum Square Ass’n v. HUD, No. Civ.A. 02-2207, 2003 WL 1873094, at *4 n.7 (E.D. La. Apr. 11, 2003) (holding that a HUD consultant’s finding that “net positive effect on the minority and low-income population” was satisfactory to show that environmental justice was adequately considered for NEPA purposes); Friends of Pioneer St. Bridge Corp., 150 F. Supp. 2d at 652 (finding it sufficient that, after plaintiffs raised the environmental justice concerns with FHWA in a letter, the project manager attached an analysis to the CE reevaluation stating “that the properties did not constitute a ‘low-income neighborhood’”).
164 See Cmtys. Against Runway Expansion, Inc., 355 F. Supp. at 688–89; Mid States Coal. for Progress, 345 F.3d at 554; Coliseum Square Ass’n, 2003 WL 1873094, at *4 n.7; Friends of Pioneer St. Bridge Corp., 150 F. Supp. 2d at 652.
which case all courts would review agency compliance according to the same standards—courts should recognize that environmental justice is an inherent aspect of “the relationship of people with th[e] environ-
ment.”

Whether a proposal will “significantly” affect the environment has long involved consideration of context and cumulative impacts. The concept should not have to be outlined in the regulations in order to inform judicial review of the adequacy of FONSI s, public outreach, scoping, or analysis and alternatives in an EIS, especially now that there is institutional awareness of the importance of these issues. Both the EPA Guidance and CEQ Guidance documents add substantial depth to the federal government’s understanding of environmental justice and demonstrate significant comprehension of what is necessary to fully integrate these concerns into the NEPA process. Thus, despite CEQ’s assertion that the Executive Order did “not change the prevailing legal thresholds and statutory interpretations under NEPA and existing case law,” judicial evaluation of an agency’s environmental justice analysis ensures that judicial review keeps pace with agency understandings of socioeconomic impacts. At least with respect to alternatives, the U.S. Supreme Court has suggested the concept of adequacy to be “an evolving one, requiring the agency to explore more or fewer alternatives as they become better known and understood.”

Under the APA standard—“arbitrary, capricious, [or] abuse of discretion”—a strong case may be made that to neglect to investigate a project’s impacts from an environmental justice perspective would be an abuse of discretion and a capricious choice. Agencies may not be required by law to consider environmental justice under NEPA, but they are obliged to fully consider and analyze direct, indirect, and cumulative effects on the “human environment.” Without question, that obligation is enforceable by a reviewing court. Wher-

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166 Id.
167 Id. § 1508.27.
168 Id.
169 See generally COUNCIL ON ENVTL. QUALITY, supra note 8; EPA GUIDANCE, supra note 9.
170 COUNCIL ON ENVTL. QUALITY, supra note 8, at 10.
practice analysis, that analysis should be required as a component of this most basic NEPA mandate.

**Conclusion**

The promise of NEPA as a tool for environmental justice depends on how seriously federal agencies use it for that end. Judicial review under NEPA has shaped agencies’ approach to compliance not by forcing particular results on a case, but by keeping agencies honest and clarifying their NEPA obligations. If courts begin to include environmental justice in their NEPA review with less apprehension, the depth of agencies’ treatment of the issue will likely improve incrementally, just as it has in other areas reflected in the vast body of NEPA case law.

This Essay highlights the limits of NEPA’s reach and how integrating environmental justice into NEPA does not ensure that it will be addressed consistently for all federal activities. At the same time, there is hope that environmental justice will continue to grow as a federal and state concern so that it finds its way into all government decisionmaking, regardless of whether NEPA applies to structure the process. As one commentator has observed, “environmental justice principles . . . increasingly are becoming part of the environmental decisionmaking fabric” and “hold the promise of making environmental law more ethical.”174 Environmental justice teaches the true racial and socioeconomic character of NEPA’s “human environment.” Through judicial review, courts can assist agencies to better serve NEPA’s core goals and help ensure that those facing environmental injustice will have a voice in NEPA decisionmaking.

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174 Clifford Rechtschaffen, *supra* note 1, at 125.
ATTORNEYS’ FEES AND THE CONFLICT BETWEEN RULE 68 AND THE CLEAN WATER ACT’S CITIZEN SUIT PROVISION

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Abstract: Environmental “citizen suit” statutes provide incentives for citizens to bring enforcement actions by awarding successful plaintiffs reasonable attorneys’ fees. Defendants have attempted to use Federal Rule of Civil Procedure 68 to block a successful plaintiff’s recovery of attorneys’ fees. Under Rule 68, defendants may offer to allow a judgment to be issued against them for a fixed dollar amount. Plaintiffs may either accept this judgment offer or proceed to trial. If plaintiffs proceed to trial, however, they must receive a judgment more favorable than the offer or pay the defendants’ litigation costs. Defendants argue that the word “costs” as used in Rule 68 applies to attorneys’ fees in addition to other litigation costs. If so, the use of Rule 68 can have a great influence on the economics of citizen suit litigation. This Note explores whether or not Rule 68 should be read to apply to attorneys’ fees in citizen suits under the Clean Water Act and other environmental statutes.

Introduction

In February 2002, two environmental organizations in North Carolina sued the owners of a tract of land—adjacent to wetlands—for alleged violations of various provisions of the Federal Water Pollution Control Act,1 commonly known as the Clean Water Act (CWA).2 The plaintiffs in North Carolina Shellfish Growers Ass’n v. Holly Ridge Associates3 were among the many citizens and environmental groups to have utilized section 505 of the CWA, which allows any person to file a “citizen suit” against persons or entities who violate the Act and awards successful plaintiffs reasonable attorneys’ fees for their efforts.4

* Symposium Editor, Boston College Environmental Affairs Law Review, 2005–06.
3 Id.
4 33 U.S.C. § 1365(d).
Approximately nine months later, the defendants served upon the plaintiffs an offer of judgment pursuant to Rule 68 of the Federal Rules of Civil Procedure in which the defendants offered to enter into a consent decree to settle the suit.\(^5\) If the plaintiffs had rejected the offer and received a judgment less favorable at trial, Rule 68 takes from plaintiffs the award of attorneys’ fees to which they would have otherwise been entitled.\(^6\)

Because attorneys’ fees often represent a significant amount of money, the plaintiffs responded by filing a motion for a declaration that the Rule 68 offer was null and void.\(^7\) The plaintiffs argued that Rule 68 “would have a chilling effect upon the willingness of plaintiffs to maintain [citizen suits] and would therefore frustrate the purposes of Congress” in enacting the citizen suit provision.\(^8\) However, the U.S. Supreme Court’s decision in *Marek v. Chesny* appears to reject this argument.\(^9\) In this 1985 decision, the Court rejected a similar argument with regards to the Civil Rights Attorney’s Fees Awards Act (Civil Rights statute). When the result at trial is less favorable than the offer of judgment, the Court held that Rule 68 operates to deny plaintiffs any award for attorneys’ fees for work done after the offer is rejected.\(^10\) However, in *Holly Ridge*, the court virtually ignored *Marek* and found Rule 68 inapplicable to citizen suits under the CWA.\(^11\) As a result, the plaintiffs could reject the defendants’ offer to enter a consent decree and be confident that, even if the result at trial was less favorable, there would be no adverse effect on the award of post-offer attorneys’ fees.

This Note argues that the *Holly Ridge* court erred by failing to apply the *Marek* holding to the CWA. While many valid criticisms have been levied against the *Marek* decision, it is still good law. Furthermore, its reasoning, though flawed, applies to section 505 of the CWA.

Part I of this Note explores the history and policies underlying environmental citizen suit statutes and the treatment of attorneys’ fees under those statutes. Part II examines the workings of Rule 68, the limits imposed by the Rules Enabling Act under which Rule 68 was promulgated, and the key cases interpreting Rule 68. Part III de-

\(^{5}\) *Holly Ridge*, 278 F. Supp. 2d at 666.
\(^{6}\) Id. at 666–67.
\(^{7}\) Id. at 666.
\(^{8}\) Id.
\(^{9}\) See 473 U.S. 1, 10, 11 (1985).
\(^{10}\) Id. at 10.
\(^{11}\) See *Holly Ridge*, 278 F. Supp. 2d at 668–69.
scribes three cases in which courts have examined how Rule 68 interacts with section 505 of the CWA with respect to attorneys’ fees. Finally, Part IV argues that section 505 of the CWA is indistinguishable from the U.S. Supreme Court’s analysis of the Civil Rights statute in Marek. This Note concludes by suggesting that a change in the law of Rule 68 is desirable, but the Marek holding controls the interaction of Rule 68 and the CWA until such a change is made. The Marek holding requires that when a plaintiff rejects a Rule 68 offer and obtains a judgment that is less favorable than the Rule 68 offer, he is not entitled to receive attorneys’ fees for post-offer work.12

I. Citizen Suits Under the Clean Water Act

Many federal statutes—especially environmental statutes—contain citizen enforcement provisions.13 These “citizen suit” provisions enable private citizens to supplement administrative enforcement of these statutes with a judicial remedy. Therefore, by “standing in the shoes of the government,” plaintiffs who file citizen suits provide a public service by ensuring that the laws are enforced.15 An example of a citizen suit provision is section 505 of the CWA.16 This Part will explore the policies which led to the enactment of section 505 and the history and development of citizen suit provisions in general. It will then explore one of the fundamental elements of a citizen suit statute—the allocation of attorneys’ fees.

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12 See Marek, 473 U.S. at 10.
A. History and Development of Environmental Citizen Suit Statutes

Environmental enforcement prior to 1970 was “cumbersome and ineffective” because administrative agencies suffered from a combination of inadequate resources and lack of political will.\(^\text{17}\) Citizen enforcement of public rights was not a new concept at this time—in fact, the term “private attorney[ ] general” was used as early as 1943 to refer to citizens who sued to enforce public rights.\(^\text{18}\) For issues where an applicable cause of action existed, such as in the civil rights context, the citizen suit was a valuable tool.\(^\text{19}\) Unfortunately, interested citizens often lacked an appropriate cause of action to resolve many environmental issues, and therefore had to rely upon common law causes of action with varying degrees of success.\(^\text{20}\)

This situation changed, however, in 1970 when a citizen suit provision was added to the Clean Air Act (CAA).\(^\text{21}\) This citizen suit provision, contained in section 304 of the CAA, served as a model for many of the citizen suit provisions subsequently enacted including section 505 of the CWA.\(^\text{22}\) Proponents of the CAA citizen suit provision thought it would promote greater enforcement not only by providing direct enforcement against polluters, but by causing administrative agencies, such as the Environmental Protection Agency (EPA), to act.\(^\text{23}\)

\(^\text{18}\) Michael D. Axline, Environmental Citizen Suits § 1.02, at 1-3 (1995) (concluding that “if Congress could authorize the Attorney General to bring an action . . . to enforce a public right, Congress also could authorize citizens to bring such actions” (citing Associated Indus. v. Ickes, 134 F.2d 694 (2d Cir. 1943))). However, this suit involved industrial coal consumers who had an economic interest in the outcome. Id. They were not seeking to protect public rights in which they had a noneconomic interest. Id.
\(^\text{19}\) See id. § 1.02, at 1-4.
\(^\text{20}\) See id. For example, qui tam and public nuisance actions were common in the late 1960s. Id.
\(^\text{21}\) 42 U.S.C. § 7604 (2000); Miller, supra note 17, at 4; Axline, supra, § 1.02, at 1-4. Axline points out the importance of the U.S. Supreme Court’s approval of citizen standing to enforce environmental and aesthetic interests in Sierra Club v. Morton, 405 U.S. 727 (1972). Axline, supra note 18, § 1.02, at 1-4 to 1-5.
\(^\text{22}\) Lucia A. Silecchia, The Catalyst Calamity: Post-Buckhannon Fee-Shifting in Environmental Litigation and a Proposal for Congressional Action, 29 Colum. J. Envtl. L. 1, 11 (2004). For a description of the legislative history of the CAA, see Miller, supra note 17, at 5–6. Miller describes how Congress had a tendency to “lift” section 304 of the CAA and insert it into other environmental statutes without much independent debate concerning its enactment. Id.
B. Text and Underlying Policies of the Clean Water Act Citizen Suit Provision

Section 505 of the CWA permits any citizen to commence a suit against any person who violates an effluent standard or limitation of the CWA, or against the Administrator of EPA (Administrator) for failing to perform any nondiscretionary duty. Prior to filing suit, the citizen is required to give notice to the Administrator and to the state in which the violation occurs. Then, the Administrator or state may file a separate enforcement action. This furthers the policy that the enforcement action should be initiated by the administrative agency, but that the citizen right of action serves as a check on that agency. If the agency action is inadequate or nonexistent, the citizen may then supplement that action with a citizen suit.

In addition to their equitable powers, courts are permitted to impose civil penalties of up to twenty-five thousand dollars. However, these amounts are not paid to the citizen suit plaintiff, but are instead paid to the United States Treasury. Therefore, in order to encourage citizens to undertake the substantial financial burden of bringing an enforcement action, section 505, like most citizen suit statutes, permits the recovery of attorneys’ fees. The court may award costs—including reasonable attorney and expert witness fees—to any “prevailing or substantially prevailing party” whenever the court determines such award is appropriate. In response to concern that an award of attorneys’ fees

25 Id. § 1365(b).
28 See id., as reprinted in 1972 U.S.C.C.A.N. at 3745–46. Through the citizen suit provision, courts are only required to enforce compliance with minimum water quality standards established by EPA, or nondiscretionary actions by the Administrator. See id. at 79, as reprinted in 1972 U.S.C.C.A.N. at 3745. Use of such objective enforcement criteria is intended to simplify citizen enforcement of the CWA in the courts. See id., as reprinted in 1972 U.S.C.C.A.N. at 3745.
29 33 U.S.C. §§ 1319(d), 1365(a).
31 33 U.S.C. § 1365(d); see Axline, supra note 18, at § 8.01, at 8-2; see also S. Rep. No. 92-414 at 81, as reprinted in 1972 U.S.C.C.A.N. at 3747 (explaining that courts should award litigation costs to parties who bring legitimate actions because they are performing a public service).
to plaintiffs encourages abuse of the statute, the legislative history indicates that the “whenever appropriate” language allows fees to be awarded to prevailing defendants when the action is frivolous or harassing. Therefore, the attorneys’ fees provision in section 505 serves both to encourage citizens to bring meritorious suits as a public service, while penalizing those who bring harassing or frivolous suits.

C. Treatment of Costs and Attorneys’ Fees

Citizen suits are critical to the effective enforcement of environmental laws, just as the ability of plaintiffs to recover attorneys’ fees is critical to the effectiveness of citizen suits. The “American Rule” is that each side in litigation pays its attorneys’ fees. While there are some common law exceptions, most departures from the American Rule are statutory. This Part explores how Congress and the courts allocate the costs of litigation in citizen suits in the absence of Rule 68.

1. The American Rule

The common law American Rule requires each party to bear its own attorneys’ fees. The rule has been justified on the grounds that: (1) a system in which the loser pays would deter individuals from bringing claims because of the risk of having to bear the opponent’s litigation costs; (2) the legal merits of a claim are difficult to judge prior to instituting an action; and (3) litigation is more efficient under the American Rule because it does not require a separate proceeding to determine a fee award.

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34 See id.
35 See Florio, supra note 23, at 712.
36 See Axline, supra note 18, at § 8.01, at 8-2. “[W]ithout some method of compensating citizens for the expense of bringing citizen suits, statutes authorizing citizens to bring such suits would be virtually meaningless, because no one could afford to exercise the power granted.” Id.
38 See discussion infra Part I.C.3.
39 See Alyeska Pipeline, 421 U.S. at 245; Silecchia, supra note 22, at 6–7.
40 Silecchia, supra note 22, at 7.
41 Id. at 7–8.
42 Id. at 8.
2. Judicial Exceptions to the American Rule

Despite these arguments in favor of the American Rule, the courts have recognized that, in some circumstances, shifting attorneys’ fees is desirable. Consequently, the courts have developed a “bad faith” exception to the American Rule that allows fees to be assessed against parties who act in bad faith. A second exception to the American Rule is the “common benefit” exception, which spreads the cost of litigation to those persons benefiting from its success.

Despite the existence of these judicial exceptions, the U.S. Supreme Court has stated that any further exceptions to the American Rule must derive from Congress, not the judiciary. However, prior to 1975, the courts recognized a “private attorney general” exception to the American Rule, under which fees could be awarded to litigants who act to vindicate important statutory rights of all citizens. The Court in *Alyeska Pipeline Service Co. v. Wilderness Society*, however, ruled that only Congress could fashion such a “far-reaching” exception to the American Rule beyond the narrow circumstances found at common law. The Court’s historical analysis of the American Rule found implicit congressional acceptance of the bad faith and common benefit exceptions, but ultimately led it to conclude that any further deviations should emanate from the legislature, not the judiciary.

3. Statutory Exceptions to the American Rule

The Court’s ruling in *Alyeska Pipeline* left untouched the many federal statutes which provided for attorneys’ fees. Courts have looked to the language in these statutes and their legislative histories to determine whether to award attorneys’ fees in a given case. Further, because the U.S. Supreme Court has held that similar statutory phrases are to be interpreted consistently, courts also look to similarly

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43 *Alyeska Pipeline*, 421 U.S. at 270–71.
44 Id. at 245.
45 Id.
46 Id. at 260, 271.
47 Id. at 245.
48 Id. at 247.
49 *Alyeska Pipeline*, 421 U.S. at 260, 271.
50 See id. at 263, 271. For a sampling of the many statutes which award attorneys’ fees sorted by the type of statutory language used, see the appendix to Justice Brennan’s dissenting opinion in *Marek v. Chesny*, 473 U.S. 1, 44–51 (1985).
worded statutes for interpretive guidance.52 Thus, while the law of attorneys’ fees may not be entirely uniform, there is consistency among statutes. Most attorneys’ fees statutes use one or both of two formulations:53 the “prevailing or substantially prevailing party” formulation54 or the “whenever appropriate” formulation.55

A plaintiff is a “prevailing or substantially prevailing party” if the plaintiff is successful on “any significant issue in litigation which achieves some of the benefit the part[y] sought in bringing suit.”56 Plaintiff awards must be reduced if the plaintiff achieves only limited success in relation to the relief sought or fails on certain claims that are distinct from the successful claims.57 It is not entirely clear from the statutes whether forms of success other than a court judgment will constitute “prevailing” under statutes with this formulation.58 One court decision suggests that only plaintiffs who obtain judicial relief are “prevailing parties.”59 However, the question over what constitutes “prevailing” should not be relevant in the context of Rule 68, since a judgment must be reached in order for the rule to operate.60

The “whenever appropriate” formulation on its face appears to grant a greater level of discretion to the court in determining fee awards than does the “prevailing party” formulation.61 However, this discretion has been bounded by several decisions and has different ramifications for parties depending on whether they are plaintiffs or defendants.62 Even though the statute in question may not explicitly require a party to prevail, the U.S. Supreme Court has ruled that it is never appropriate to award attorneys’ fees to plaintiffs whose claims are

52 See Ruckelshaus, 463 U.S. at 691.
53 See Silecchia, supra note 22, at 12–13; Florio, supra note 23, at 716.
56 Hensley, 461 U.S. at 433 (quoting Nadeau v. Helgemoe, 581 F.2d 275, 278–79 (1st Cir. 1978)).
57 Id. at 440.
58 Silecchia, supra note 22, at 13.
59 See Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep’t of Health and Human Res., 532 U.S. 598, 600 (2001); see also Silecchia, supra note 22, at 13 (noting that the language of attorneys’ fees statutes does not specifically address whether plaintiffs can prevail only by winning in court, or also by other forms of success short of a court judgment).
60 See Fed. R. Civ. P. 68.
61 See Florio, supra note 23, at 731–32.
62 Id.
wholly unsuccessful. Rather, this language differs from the “prevailing party” language by allowing courts discretion to grant attorneys’ fees to a party who partially prevailed. As long as plaintiffs prevail, however, courts will find it “appropriate” to award fees to these plaintiffs, unless “special circumstances” exist. Therefore, the “whenever appropriate” language permits a court to award fees to a partially prevailing plaintiff and, under special circumstances, to divest a prevailing plaintiff of an attorneys’ fees award, but never to confer an attorneys’ fees award upon a nonprevailing plaintiff.

Prevailing defendants may only recover attorneys’ fees from unsuccessful plaintiffs when a suit is frivolous, unreasonable, or without foundation, even though it may not have been brought in subjective bad faith. The Supreme Court in *Christiansburg Garment Co. v. Equal Employment Opportunity Commission* found that the attorneys’ fees provision in the Civil Rights Act of 1964, which allowed a court to use its discretion in awarding attorneys’ fees, only allowed an award to defendants in these limited circumstances. In making this ruling, the Court explicitly noted that the provision in question was similar to section 505 of the CWA in that it allowed courts discretion in implementing the statutory policy. Therefore, by implication, section 505 also restricts fee awards to defendants only in situations where a suit is frivolous, unreasonable, or without foundation.

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64 See id. at 688.

65 *Newman v. Piggie Park Enters.*, 390 U.S. 400, 402 (1968); see *Christiansburg Garment Co v. Equal Employment Opportunity Comm’n*, 434 U.S. 412, 416–17 (1978). For an example of these special circumstances, see *Chastang v. Flynn & Emrich Co.*, 541 F.2d 1040, 1045 (4th Cir. 1976). In *Chastang*, the court refused to make defendant, the trustee of a retirement plan, liable for plaintiff’s attorneys’ fees. *Id.* The court found that the defendant engaged in no discriminatory act, its liability only occurred due to a change in the law, and an award would only serve to hurt innocent plan participants. *Id.*

66 *Christiansburg*, 434 U.S. at 421.

67 *Id.* at 413–14, 421.

68 *Id.* at 416 & n.7.

69 See *id.* at 416 & n.7, 421. The Court also noted that:

In applying these criteria, it is important that a district court resist the understandable temptation to engage in *post hoc* reasoning by concluding that, because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation. This kind of hindsight logic could discourage all but the most airtight claims, for seldom can a prospective plaintiff be sure of ultimate success.

*Id.* at 421–22.
Section 505 contains both statutory formulations, allowing costs including reasonable attorneys’ fees to be awarded to “any prevailing or substantially prevailing party, whenever the court determines such an award is appropriate.” Therefore, prevailing or partially prevailing plaintiffs are presumptively entitled to attorneys’ fees absent special circumstances. However, attorneys’ fees may only be awarded to prevailing defendants when a suit is frivolous, unreasonable, or without foundation.

4. Calculation of Reasonable Attorneys’ Fees

Most attorneys’ fees statutes, including section 505, refer to “reasonable” attorneys’ fees. A reasonable fee is determined first by multiplying the number of hours reasonably expended by a reasonable hourly rate. The party seeking the award submits evidence of the hours worked. The court then makes adjustments by excluding hours not reasonably expended because they were excessive. This starting point is commonly referred to as the “lodestar” amount.

After establishing this starting point, the court can make further adjustments—upward or downward—based upon the result of the case. Where a plaintiff has achieved excellent results, an attorney should recover a full compensatory fee. Conversely, if a plaintiff has achieved only partial or limited success—succeeding on only some of his claims, or receiving only part of the requested relief—then the lodestar amount may be excessive, and the court should reduce it.

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70 Federal Water Pollution Control Act, 33 U.S.C. § 1365(d) (2000). Some argue that the addition of the “prevailing or substantially prevailing party” language to the “whenever appropriate” language is somewhat redundant because the provisions are interpreted similarly. See Brief of Sierra Club et al. as Amici Curiae Supporting Plaintiff-Appellees at 7–14, Marbled Murrelet v. Babbitt, 182 F.3d 1091 (9th Cir. 1999) (No. 98-15788), available at 10 Newburg on Class Actions, App. X-B (WL, CLASSACT database); Silecchia, supra note 22, at 13.

71 See supra note 65 and accompanying text.

72 Christiansburg, 434 U.S. at 421.


75 Id.

76 Id. at 434.


78 Hensley, 461 U.S. at 434.

79 Id. at 435.

80 Id. at 436–37.
The reasonableness inquiry does not lend itself to any precise mathematical rule or formula, but rather relies on a court’s discretion to apply the various factors relevant to a particular case, subject to the bounds of the “prevailing party” and “whenever appropriate” language.\textsuperscript{81}

5. Treatment of Costs Other than Attorneys’ Fees

Rule 54 of the Federal Rules of Civil Procedure allows the prevailing party to recover its costs, “unless the court otherwise directs.”\textsuperscript{82} These costs are taxable by the clerk of the court upon one day’s notice, though no definition of costs appears in the rules.\textsuperscript{83} However, costs are statutorily defined and includes fees for the court clerk, marshal, court reporter, printing and witnesses, copies, docket fees, and court appointed experts and interpreters.\textsuperscript{84}

Prior to 1993, the federal rules were silent with regard to attorneys’ fees as well.\textsuperscript{85} The 1993 amendments to Rule 54(d) were designed “to provide for a frequently recurring form of litigation not initially contemplated by the rules—disputes over the amount of attorneys’ fees to be awarded.”\textsuperscript{86} Rule 54(d)(2) now contains the procedural method used to determine any award of attorneys’ fees;\textsuperscript{87} but the grounds for such an award are determined by the appropriate substantive statute.\textsuperscript{88} The former language of Rule 54 was revised to explicitly exclude attorneys’ fees from the enumeration of taxable costs routinely awardable to the prevailing party on one day’s notice.\textsuperscript{89}

\textsuperscript{81} Id. The court also emphasized that “[a] request for attorney’s fees should not result in a second major litigation,” and that the fee applicant has the burden of establishing entitlement to the fees by proper documentation of hours and rates. Id. at 437.

\textsuperscript{82} Fed. R. Civ. P. 54(d)(1).

\textsuperscript{83} See id.


\textsuperscript{85} See Fed. R. Civ. P. 54(d) advisory committee’s note to 1993 amendment.

\textsuperscript{86} See id. This comment undercuts one of the principal arguments advanced by the U.S. Supreme Court in Marek v. Chesny, which contended that the drafters of Rule 68 contemplated a definition of costs that would, at least in some contexts, include attorneys’ fees. See 473 U.S. at 8–9.

\textsuperscript{87} Fed. R. Civ. P. 54(d)(2).

\textsuperscript{88} See id. at (d)(2)(B).

\textsuperscript{89} Id. at (d)(1) (awarding “costs other than attorneys’ fees”).
II. Offers of Judgment Under Federal Rule of Civil Procedure 68

Rule 68 is a mechanism intended to encourage settlement of claims and avoid litigation.\(^{90}\) It was designed to accomplish these goals by encouraging litigants to “evaluate the risks and costs of litigation, and to balance them against the likelihood of success upon trial on the merits.”\(^{91}\) Specifically, Rule 68 provides a disincentive to plaintiffs who reject reasonable offers of settlement by requiring them to pay any costs incurred by defendants after the offer is made.\(^{92}\)

Rule 68 states, in pertinent part:

\[\text{[a]t any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against the defending party for the money or property or to the effect specified in the offer, with costs then accrued. If within 10 days after the service of the offer the adverse party [accepts the offer], thereupon the clerk shall enter judgment. . . . If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer.}\(^{93}\)

Evidence of a rejected offer is admissible only in a proceeding to determine costs.\(^{94}\)

Therefore, the terms of Rule 68 indicate that an offer is usually irrelevant to the judicial proceeding until a final judgment is entered.\(^{95}\) A court must then determine whether a judgment is more favorable than the rejected offer.\(^{96}\) However, when cases involve injunctive relief, the effect of Rule 68 is less predictable,\(^{97}\) causing “inherent difficulty” both for courts and plaintiffs who must quantify the relief obtained.\(^{98}\)

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\(^{91}\) Id.
\(^{92}\) See Fed. R. Civ. P. 68.
\(^{93}\) Id.
\(^{94}\) Id.
\(^{95}\) Thomas L. Cubbage III, Note, Federal Rule 68 Offers of Judgment and Equitable Relief: Where Angels Fear to Tread, 70 Tex. L. Rev. 465, 469 (1991). But see infra note 171 and accompanying text (noting that some plaintiffs have been successful at obtaining declarations that Rule 68 offers are null and void while cases are still pending).
\(^{96}\) Cubbage, supra note 95, at 470.
\(^{97}\) See id.
\(^{98}\) Marek v. Chesny, 473 U.S. 1, 33 n.48 (1985) (Brennan, J., dissenting). For a discussion of how courts should approach the problem of determining whether an offer is more
This Part will look at the history and policies behind Rule 68, U.S. Supreme Court decisions interpreting the rule, and the limits on rulemaking power imposed by the Rules Enabling Act in order to determine if Rule 68 “costs” include attorneys’ fees in a given situation.

A. History and Policies Behind Rule 68

The central purpose behind Rule 68 is to encourage settlement.\(^99\) Since plaintiffs are presumptively entitled to costs under Rule 54(d),\(^100\) the Rule 68 penalizes plaintiffs who choose to continue litigating after refusing a settlement offer which was greater than the final judgment.\(^101\) These plaintiffs must bear their own post-offer costs and must pay any post-offer costs incurred by the defendant.\(^102\)

While the Federal Rules of Civil Procedure were enacted in 1938, as recently as 1983 the Advisory Committee acknowledged that the rule “ha[d] rarely been invoked and has been considered largely ineffective in achieving its goals.”\(^103\) One possible reason for this ineffectiveness—suggested by the Advisory Committee—is that plaintiffs’ costs were ordinarily too small to provide an effective incentive for litigants.\(^104\) Other reasons may include that only defendants make Rule 68 offers, and that defendants have a greater incentive to defer judgment and earn interest on their money rather than to avoid costs.\(^105\) Subsequent decisions by the U.S. Supreme Court clarified the interpretation of Rule 68. In particular, \textit{Marek v. Chesny} increased the incentive for defendants to use Rule 68 when their case involves a statute that define “costs” to include attorneys’ fees.\(^106\) After \textit{Marek}, Rule 68

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\(^{100}\) Fed. R. Civ. P. 54(d). “[C]osts other than attorneys’ fees shall be allowed as of course to the prevailing party unless the court otherwise directs . . . .” Id. (d)(1).

\(^{101}\) See 12 Wright et al., supra note 99, § 3001.

\(^{102}\) See id.


\(^{104}\) See Simon, supra note 77, at 891; 12 Wright et al., supra note 99, § 3001.

\(^{105}\) See Simon, supra note 77, at 891.

\(^{106}\) See infra Part II.B.
applies to attorneys’ fees when such statutes are involved.107 In these cases, the economics of litigation can be profoundly altered by this “little known rule of court.”108

B. Significant U.S. Supreme Court Precedent for Rule 68

In *Roadway Express, Inc. v. Piper*, the U.S. Supreme Court held that the word “costs” did not include attorneys’ fees for purposes of a procedural statute which imposed costs upon attorneys who unreasonably and vexatiously multiplied the proceedings in any case.109 While the underlying dispute involved a civil rights statute that allowed for the award of attorneys’ fees “as part of the costs” of litigation,110 the Court held that—based upon the history of the provision—the word “costs” should be read to mean the definition contained in 28 U.S.C. § 1920, rather than the substantive statute.111 The Court favored the “uniform” approach to awardable costs contained in § 1920.112 Furthermore, the Court did not find any evidence of legislative intent to impose attorneys’ fees upon individual attorneys in the substantive statute—it merely referred to the ability to impose attorneys’ fees upon other parties.113

In *Delta Air Lines, Inc. v. August*, the Court held that the plain language of Rule 68 limited its application to only those cases where a plaintiff prevails.114 Rule 68 does not apply to cases where judgment was entered in favor of the defendant who made the offer; in that case, the defendant is presumptively entitled to costs under Rule 54, subject to the court’s discretion.115 Therefore, the only possible effect of Rule 68 would be to divest judges of their discretion in awarding costs when the defendant prevails, but there was no indication that the legislature intended this result.116 This ruling was intended to avoid situations in

107 *See infra* Part II.B.
110 *Piper*, 447 U.S. at 756.
111 *Id.* at 759–60. Section 1920 did not include attorneys’ fees as costs, while the Civil Rights statute, the substantive law in the case, did include attorneys’ fees as costs. *Id.* at 761.
112 *Id.* at 760–61.
113 *Id.* at 761.
115 *Id.* at 352–53.
116 *See id.*
which a defendant makes a small Rule 68 offer—which was unlikely to be accepted—for the purpose of obtaining “cheap insurance” against costs should the defendant prevail.\textsuperscript{117}

While \textit{August} did not involve the question of whether attorneys’ fees were recoverable as costs, Justice Rehnquist examined this question in his dissent.\textsuperscript{118} He argued that the Court should look to the contemporaneous meaning of the word as it was understood when the statute was enacted.\textsuperscript{119} Justice Rehnquist further argued that the legislative history of Rule 68 did not indicate that Congress meant to refer to attorneys’ fees as part of the taxable costs of litigation.\textsuperscript{120}

However, in \textit{Marek}, Justice Rehnquist changed his position on this issue,\textsuperscript{121} and agreed with the Court that when the underlying statute defines attorneys’ fees as costs, they should be included for purposes of Rule 68.\textsuperscript{122} The Court reasoned that the drafters of Rule 68 were well aware that there were statutes that allowed recovery of attorneys’ fees “as part of costs,” and that it was unlikely that the lack of a definition of costs was mere oversight.\textsuperscript{123} The Court distinguished \textit{Piper} by stating that the § 1927 provision included its own definition of costs in § 1920, while Rule 68 contained no definition of costs.\textsuperscript{124}

After discussing its “plain language” interpretation of Rule 68, the Court proceeded to analyze the policy ramifications of their conclusion.\textsuperscript{125} Contrary to the appeals court, the majority did not think that its result would frustrate Congress’ objective of “ensuring that civil rights plaintiffs obtain effective access to the judicial process” because Rule 68 was neutral and “favor[ed] neither plaintiffs nor defendants.”\textsuperscript{126} Therefore, the policy of Rule 68 favoring the settlement of litigation did not conflict with the policy of the Civil Rights statute authorizing attorneys’ fees in order to encourage meritorious suits.\textsuperscript{127}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{117} \textit{Id.} at 349 n.4 (quoting August v. Delta Air Lines, Inc., 600 F.2d 699, 701 (7th Cir. 1979)).
\item \textsuperscript{118} \textit{See id.} at 376–80 (Rehnquist, J., dissenting).
\item \textsuperscript{119} \textit{Id.} at 377.
\item \textsuperscript{120} \textit{See August}, 450 U.S. at 377–78 (Rehnquist, J., dissenting).
\item \textsuperscript{121} 473 U.S. 1, 13 (1985) (Rehnquist, J., concurring).
\item \textsuperscript{122} \textit{Id.} at 9 (majority opinion).
\item \textsuperscript{123} \textit{Id.} at 8–9.
\item \textsuperscript{124} \textit{Id.} at 9 n.2; \textit{see also} Simon, \textit{supra} note 77, at 913 (distinguishing \textit{Piper} and \textit{Marek} by noting that history required that the statute be read together with § 1920 which did not include attorneys’ fees as “costs”).
\item \textsuperscript{125} \textit{See Marek}, 473 U.S. at 10.
\item \textsuperscript{126} \textit{Id.} (internal quotation omitted).
\item \textsuperscript{127} \textit{Id.} at 11.
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\end{footnotesize}
In his dissenting opinion, Justice Brennan sharply criticized the majority for its apparent inconsistency with *Piper* and its creation of a shifting definition of Rule 68 “costs” that would change depending on the relevant statute.\textsuperscript{128} He argued that the limited history of Rule 68 suggested that § 1920 contained the proper definition of “costs.”\textsuperscript{129} Justice Brennan further argued that if Rule 68 costs were defined by the substantive statute to include attorneys’ fees, then Rule 68 would conflict with the rule that defendants only received attorneys’ fees when the suit was vexatious, frivolous, or harassing, fundamentally altering the Civil Rights statute.\textsuperscript{130}

Justice Brennan chastised the majority for carrying the “plain language” approach of statutory construction to absurdity, observing that many fee-shifting statutes contained slightly different wording that would have pronounced effects with no rational justification.\textsuperscript{131} He criticized the majority for abandoning the “reasonableness” analysis of attorneys’ fees awards in favor of an automatic, per se rule,\textsuperscript{132} and for its assertion that its interpretation of the rule was “neutral.”\textsuperscript{133} Instead, he argued that its application will have a deterrent effect on civil rights plaintiffs in contravention of Congress’ goals,\textsuperscript{134} and therefore, Rule 68 would violate the judiciary’s rulemaking authority under the Rules Enabling Act (REA).\textsuperscript{135}

C. The Rules Enabling Act and the Sibbach-Hanna Doctrine

When the *Marek* Court held that the word “costs” in Rule 68 included attorneys’ fees for purposes of the Civil Rights statute, it called

\textsuperscript{128} Id. at 16, 19 (Brennan, J., dissenting).
\textsuperscript{129} Id. at 18.
\textsuperscript{130} Id. at 22.
\textsuperscript{131} *Marek*, 473 U.S. at 23–24 (Brennan, J., dissenting). (“[Congress] sometimes has referred to the awarding of ‘attorney’s fees as part of the costs,’ to ‘costs including attorney’s fees,’ and to ‘attorney’s fees and other litigation costs.’ . . . . Congress frequently has referred in other statutes to the awarding of ‘costs and a reasonable attorney’s fee,’ of ‘costs together with a reasonable attorney’s fee,’ or simply of ‘attorney’s fees’ without reference to costs.”). Section 505 of the CWA is one of the many fee-shifting statutes which refers to litigation costs “including reasonable attorney and expert witness fees.” Federal Water Pollution Control Act, 33 U.S.C. § 1365(d) (2000).
\textsuperscript{132} *Marek*, 473 U.S. at 28–29. (Brennan, J., dissenting).
\textsuperscript{133} Id. at 31.
\textsuperscript{134} Id. at 31–32.
\textsuperscript{135} Id. at 35; see Rules Enabling Act, 28 U.S.C. § 2072(b) (2000) (mandating that rules “shall not abridge, enlarge or modify any substantive right”).
attention to the debate between substance and procedure. 136 The Federal Rules of Civil Procedure are promulgated by the U.S. Supreme Court pursuant to a legislative grant of authority. 137 This authority is limited by the REA, under which these rules are promulgated. 138 The REA limits the judiciary’s rulemaking ability to only procedure and not substance. 139

Two important U.S. Supreme Court decisions illustrate the difficulty in articulating a test of whether a rule affects a substantive right and violates REA. The first was Sibbach v. Wilson & Co., which determined that the rule authorizing medical examinations during pretrial discovery was procedural, rather than substantive. 140 The Court attempted unsuccessfully to define a substantive right; instead, the Court implied that if the rule was procedural, then it did not abridge a substantive right. 141 The Court said that the test “must be whether a rule really regulates procedure,—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them.” 142 However, this decision was guided by the policy of achieving uniform federal procedure, rather than concerns for modifying congressional statutes. 143

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137 28 U.S.C. § 2072(a); see also Note, The Conflict Between Rule 68 and the Civil Rights Attorneys’ Fees Statute: Reinterpreting the Rules Enabling Act, 98 Harv. L. Rev. 828, 829 n.7 (1985) (describing conflicting views over whether the U.S. Supreme Court possesses an inherent power to make procedural rules, whether a statutory delegation of authority is necessary, and how to resolve conflicts between the two).


139 Id. The line between substance and procedure is important in numerous ways; however, this Note will focus on how the distinction affects the judiciary’s ability to make rules which conflict or potentially conflict with federal statutory policies. See Carrington, supra note 136, at 284–88. Carrington describes other uses of the distinction between “substance” and “procedure”—the most notable of which are the conflicts in Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938), between federal procedural rules and state substantive law. See Id. at 285–86. In federal diversity cases, courts will often find attorneys’ fees to be a “substantive” right such that courts will apply the state law rather than federal law. See, e.g., Montgomery Ward & Co. v. Pac. Indem. Co., 557 F.2d 51, 55–58 (3d. Cir. 1977); Woods Masonry, Inc. v. Monumental Gen. Cas. Ins. Co., 198 F. Supp. 2d 1016, 1045 (N.D. Iowa 2002). For a thorough explanation of the distinction between the Sibbach-Hanna doctrine and the Erie doctrine, see 19 Wright et al., supra note 99, § 4508.

140 312 U.S. 1, 11, 16 (1941); Carrington, supra note 136, at 285 n.29.

141 See Sibbach, 312 U.S. at 11–14; Note, supra note 137, at 830.

142 Sibbach, 312 U.S. at 14.

143 Note, supra note 137, at 834.
This test proves insufficient because the line between substance and procedure is unclear. In Hanna v. Plumer, the Court further explained the limits imposed by the REA. In Hannah, the Court considered whether a Massachusetts rule for service of process governed the case at bar or whether Federal Rule of Civil Procedure 4(d)(1) should govern. Therefore, the Court had to determine whether Rule 4(d)(1) was within the scope of the rulemaking authority conferred by the REA.

The Court in Hanna reaffirmed that the analysis in Sibbach was the proper method for evaluating the validity of a federal rule of civil procedure. The Court resolved the controversy by creating a presumption that the federal rules were procedural—and therefore valid—because of the Congressional approval process required to enact a new rule. This presumption could be overcome only if the Advisory Committee, the Court, and Congress “erred in their prima facie judgment that the Rule in question transgresses neither the terms of the [REA] nor constitutional restrictions.”

For the purposes of this Note, it is not necessary to define the full scope of a substantive right. It must only be determined whether Rule 68’s cost-shifting provision modifies or abridges a substantive right when it is interpreted to include attorneys’ fees. However, it is difficult to determine whether attorneys’ fees are a substantive right for the purpose of REA, since “[s]tatutory fee shifting provisions reflect congressional intent ‘to encourage private enforcement of

144 See Hanna v. Plumer, 380 U.S. 460, 472 (1965) (stating that Congress has the “power to regulate matters which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either”).
145 See id. at 463–64.
146 Id. at 461–62. Service of process had been accomplished by leaving the court papers with the respondents’ wife, which complied with Rule 4(d)(1), but conflicted with the Massachusetts rule. Id.
147 Id. at 464.
148 Id. at 470–71.
149 Note, supra note 137, at 831; see Hanna, 380 U.S. at 471.
150 Hanna, 380 U.S. at 471; see Note, supra note 137, at 831–32.
151 Attorneys’ fees statutes have been interpreted as substantive in other settings. See supra note 139. Whether Rule 68, when interpreted to include attorneys’ fees, abridges a substantive right may depend upon which fee-shifting statute interacts with Rule 68; while the Marek Court found no conflict between the Civil Rights statute and the REA, courts have not yet found the Marek analysis applicable to section 505 of the CWA. See Marek v. Chesny, 473 U.S. 1, 7–11 (1985); infra Part III. However, this Note argues that with respect to Rule 68, the CWA is indistinguishable from the Civil Rights statute in Marek. See infra Part IV.B.
statutory substantive rights, be they economic or non-economic, through the judicial process.’”

The *Marek* Court sidestepped the REA question, asserting that there was no conflict between the Civil Rights statute and Rule 68. The Court reasoned that the Civil Rights statute only awarded “reasonable” fees, and that because the plaintiff’s post-offer legal services resulted in a judgment eight thousand dollars less than the offer, fees for these post-offer services were per se unreasonable. Therefore, Rule 68 did not conflict with the Civil Rights statute because it only divested plaintiffs of fees for services which were unreasonably incurred—fees to which they were not entitled regardless of whether Rule 68 “costs” included attorneys’ fees. Thus, claiming to follow the rule of *Hensley v. Eckerhart*, the Court looked only to the end result of the litigation to determine what fees were reasonable.

However, Justice Brennan argued that the Civil Rights statute gave the courts discretion to determine reasonable fees. He reasoned that there were some circumstances under which a plaintiff could reject a Rule 68 offer, prevail at trial for an amount less than the offer, and still be entitled to attorneys’ fees. In effect, the majority’s per se rule divested these plaintiffs of fees to which they would be entitled in the absence of Rule 68. This modified the structure of incentives inherent in the citizen suit provision of the Civil Rights stat-

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153 Margulies, supra note 77, at 422 & n.61; see Marek, 473 U.S. at 10–11; see also 12 Wright et al., supra note 99, § 3001 n.31 (noting that by asserting that Rule 68 was neutral and favored neither plaintiffs nor defendants, the court was able to avoid the REA challenge to its interpretation of Rule 68).
154 See Marek, 473 U.S. at 11.
155 See id.
156 See id.
157 See id. at 37–38 (Brennan, J., dissenting).
158 See id. at 37.
159 See id.

As interpreted by the court, [Rule 68] will operate to divest a prevailing plaintiff of fees to which he otherwise might be entitled under the reasonableness standard simply because he guessed wrong, or because he did not have all the information reasonably necessary to evaluate the offer, or because of unforeseen changes in the law or evidence after the offer.

*Id.*
ute. Therefore, Justice Brennan argued that Rule 68 modified a substantive right of the Civil Rights statute in violation of the REA.

Accordingly, divesting a prevailing plaintiff of reasonable attorneys’ fees appears to conflict with REA. Therefore, how one defines “reasonable” attorneys’ fees becomes the key question. Should “reasonable” attorneys’ fees be defined by whether a plaintiff’s rejection of a Rule 68 offer was reasonable at the time of rejection, or should “reasonable” attorneys’ fees be defined by whether, in hindsight, the end result was more or less favorable than the Rule 68 offer? The U.S. Supreme Court decided in *Marek* that the latter approach should be taken for the Civil Rights statute and found no conflict with the REA. This Note examines whether this approach should also apply to section 505 of the CWA.

## III. Cases Involving Section 505 and Offer of Judgment Rules

Three federal court decisions have examined the interaction of section 505 of the CWA and offers of judgment. First, in *Public Interest Research Group of New Jersey, Inc. v. Struthers-Dunn, Inc.*, the court held that Rule 68 was inapplicable to citizen suits under section 505 of the CWA. Similarly, in *Friends of the Earth, Inc. v. Chevron Chemical Co.*, a local offer of judgment rule—similar to Rule 68, though enacted under the Civil Justice Reform Act (CJRA)—was held inapplicable to the CWA. More recent is the decision in *North Carolina Shellfish Growers Ass’n v. Holly Ridge Associates*, which is similar to the *Struthers-Dunn* case. The plaintiffs in each case sued for violations of the CWA, and in each case the offer of judgment rule was held not to apply.

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161 *Id.* at 37–38.
163 *See Marek*, 473 U.S. at 10–11.
167 1988 WL 147639.
A. The Struthers-Dunn Decision

In *Struthers-Dunn*, the parties settled their claims for prospective injunctive relief; the litigation focused upon monetary penalties for past violations of the CWA.\(^{169}\) The defendant tendered a Rule 68 offer while motions by both sides were pending.\(^{170}\) Plaintiffs responded by moving for a declaratory judgment that the defendant’s offer was null and void.\(^{171}\)

In granting the plaintiffs’ motion, the court noted that the textual approach of *Marek v. Chesny*\(^ {172} \)—examining the statute to determine if “costs” were defined to include attorneys’ fees—would result in a denial of attorneys’ fees for plaintiffs if they obtained a verdict less favorable than the Rule 68 offer.\(^ {173}\) The court distinguished *Marek* on the grounds that CWA citizen suit plaintiffs were on a different footing than civil rights plaintiffs because the former would not keep any money ultimately paid by the defendant.\(^ {174}\) Therefore, the incentives for plaintiffs to hold out for greater penalties to the defendant were offset by the greater risk of bearing costs.\(^ {175}\) Thus, for CWA plaintiffs, “there is no ‘upside’ benefit . . . if they reject defendant’s offer, while there is a substantial ‘downside.’”\(^ {176}\)

This application of Rule 68 was inconsistent with the legislative intent of the CWA because “[s]uch an impingement on a Congressional statute through the application of a federal rule of civil procedure is barred by the [REA].”\(^ {177}\)

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\(^{170}\) Id. at *1, 18 Envtl. L. Rep. (Envtl. L. Inst.) at 21,399.

\(^{171}\) Id. at *1, 18 Envtl. L. Rep. (Envtl. L. Inst.) at 21,399. The procedural posture of this case is noteworthy, especially for plaintiffs faced with Rule 68 offers. By succeeding on the merits at the trial court level in nullifying the effect of Rule 68 prior to judgment, and therefore eliminating the risk of losing an attorneys’ fees award, the plaintiffs may have significantly enhanced their bargaining position early in the litigation process. Conversely, the Rule 68 issue in *Marek v. Chesny* was decided only after the plaintiffs had obtained a judgment on the merits which was less favorable than the offer, triggering the applicability of Rule 68. See 473 U.S. 1, 4 (1985).

\(^{172}\) 473 U.S. at 7–10.


\(^{174}\) Id. at *4, 18 Envtl. L. Rep. (Envtl. L. Inst.) at 21,400.

\(^{175}\) Id., 18 Envtl. L. Rep. (Envtl. L. Inst.) at 21,400.

\(^{176}\) Id., 18 Envtl. L. Rep. (Envtl. L. Inst.) at 21,400.

\(^{177}\) Id. at *5, 18 Envtl. L. Rep. (Envtl. L. Inst.) at 21,400.
B. The Chevron Decision

The decision in *Chevron* involved the interaction of section 505 of the CWA and an offer of judgment rule enacted by the district court under the authority granted by the CJRA.\(^{178}\) Unlike the court in *Struthers-Dunn*, the *Chevron* court did not have to decide whether the district court’s rule included attorneys’ fees as costs, because the rule specifically included reasonable attorneys’ fees.\(^{179}\)

As a result, the court only had to consider whether the offer of judgment provision “would directly conflict with and frustrate the purpose of citizen suits under the [CWA].”\(^{180}\) The court noted that in a section 505 action, the “[p]laintiff is acting as a private attorney general performing a public service. . . . In performing this public service, a citizen has no profit interest; rather, a citizen may only be reimbursed for her costs and attorney’s fees.”\(^{181}\) Therefore, the hazard of paying a defendant’s attorneys’ fees and costs would have an undesirable “chilling effect” on the effectiveness of section 505.\(^{182}\)

The analysis of the rule’s effect on CWA citizen suits was similar to that of Justice Brennan\(^ {183}\) and *Struthers-Dunn*,\(^ {184}\) although unlike Rule 68, this rule did confer discretion on courts to reduce the award of litigation costs to avoid undue hardship to a party.\(^ {185}\)

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\(^{178}\) 885 F. Supp. 934, 936 (E.D. Tex. 1995). The Fifth Circuit Court of Appeals later ruled that the district court rule was not authorized by the CJRA. Ashland Chem. Inc. v. Barco Inc., 123 F.3d 261, 265–68 (5th Cir. 1997). The local rule was different from Rule 68 in certain respects, though not in ways that are relevant to the court’s analysis or for purposes of this Note. See *Chevron*, 885 F. Supp. at 936 n.1. For example, both parties may make offers under the local rule and the final judgment must be less than the offer by more than ten percent in order to trigger application of the rule. *Id.*

\(^{179}\) *Chevron*, 885 F. Supp. at 936 n.1; see *supra* notes 169–77 and accompanying text (describing the *Struthers-Dunn* decision).

\(^{180}\) *Chevron*, 885 F. Supp. at 939.

\(^{181}\) *Id.*

\(^{182}\) *Id.*


\(^{185}\) *Chevron*, 885 F. Supp. at 940.
C. The Holly Ridge Case

The most recent case analyzing the conflict between Rule 68 and section 505 of the CWA is *Holly Ridge*. The defendants served plaintiffs with their offer, causing the plaintiffs to subsequently file a motion to declare the offer null and void. The court agreed with the analyses of *Struthers-Dunn* and *Chevron*, and granted plaintiffs’ motion. The court concluded that because plaintiffs, acting as “private attorneys general,” could not be awarded damages for successful claims, they were in a different position than other civil litigants. The benefit of the CWA suit would inure to the public instead of the plaintiffs. Therefore, application of Rule 68 would conflict with Congress’ intent “that enforcement of [CWA] provisions be immediate, that citizens should be unconstrained to bring these actions, and that the courts should not hesitate to consider them.” This conflict was a violation of the Rules Enabling Act.

The court noted that their characterization of the plaintiffs as “private attorneys general” may appear inconsistent with the standing requirement. While plaintiffs need to have a personal stake in the outcome for standing purposes, the citizen suit serves a broader public purpose. The broader public purpose—clearly contemplated by the legislature—conflicts with Rule 68.

IV. The Effect of Rule 68 upon Attorneys’ Fees Awards Under Section 505 of the CWA

This Part explores the effect of a rejected Rule 68 offers upon the allocation of attorneys’ fees in citizen suits under section 505 of the CWA. First, this Part examines whether the holding in *Marek v.*

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187 *Holly Ridge*, 278 F. Supp. 2d at 666, 668.
188 *Id.* at 667–68.
189 *Id.* at 668. (internal quotation marks omitted).
190 *Id.*
192 See *id.* at 667.
193 *Holly Ridge*, 278 F. Supp. 2d at 668.
194 *Id.*
195 *Id.*
Chesny applies to section 505. Second, this Part explores the two principal rationales behind the Court’s decision in Marek and applies them to section 505. Through this comparison, this Part explains that the reasoning in Marek is equally applicable to section 505 of the CWA. The distinction between the Civil Rights statute in Marek and section 505 at best illustrates that the case was wrongly decided, but fails to remove section 505 from the scope of the Marek holding. Finally, this Part concludes by suggesting an alternative approach based upon Justice Brennan’s focus on the reasonableness of a rejection of a Rule 68 offer. This alternative framework would retain the positive aspects of the Marek decision—encouraging plaintiffs to accept reasonable offers—while reducing the “chilling effect” on environmental citizen suits and providing uniformity to the law of Rule 68.

A. Critique of Rule 68 and the Marek Decision

There has been significant academic inquiry into Rule 68 following the Marek decision. The rule has been criticized because: (1) it does not permit plaintiffs to make a counteroffer; (2) offers must be accepted within ten days; (3) an offer can be made before discovery is complete, forcing plaintiffs to make a critical decision with incomplete information; and (4) the rule’s mandatory nature leaves no room for judicial discretion. One article notes that “Rule 68 is a sleeping giant because its enormous potential to bring civil disputes to an early resolution is presently overshadowed by its undefined terms, confusing time frames, and many troublesome intricacies.”

The Marek decision added new complexity to Rule 68 by holding that when the underlying statute defines the word “costs” to include attorneys’ fees, those fees are considered costs for purposes of Rule 68. Both an argument based upon the “plain meaning” of the statutory text, and a policy argument support the Court’s

197 473 U.S. 1, 9 (1985) (holding that Rule 68 applied to “costs properly awardable” under the relevant statute).
198 See infra Part IV.B.
200 See generally Bonney et al., supra note 99; Margulies, supra note 77; Simon, supra note 77, at 921.
201 See Simon, supra note 77, at 921.
202 Bonney et al., supra note 99, at 430.
203 Marek, 473 U.S. at 9.
204 See id. at 7–9.
holding. Peter Margulies writes that the Marek problem involves the interaction of three related policies: (1) vindicating important statutory and constitutional rights; (2) promoting settlement through alternative dispute resolution; and (3) reducing uncertainty. He argues that every possible approach to the Marek problem involves sacrificing one of these values. This Part will evaluate the Marek approach based upon these values.

1. The Textual Argument

The textual argument in Marek can be characterized as follows: (1) Rule 68 refers to “costs”; (2) the drafters of the federal rules knew that there were many statutes that referred to attorneys’ fees as “costs” when Rule 68 was enacted; and (3) for these statutes, the Rule 68 drafters intended that attorneys’ fees be included in Rule 68 costs. Because the drafters chose not to define the word “costs,” the Court found that “the most reasonable inference is that the term ‘costs’ in Rule 68 was intended to refer to all costs properly awardable under the relevant substantive statute . . . .”

Justice Brennan criticized the majority for failing to explain why the definition of “costs” in 28 U.S.C. § 1920 was not applicable, since it is a statute that was designed to “standardize the treatment of costs in federal courts.” He asserted that the majority’s “plain meaning” argument, while “in a sense logical,” would “produce absurd variations in Rule 68’s operation based on nothing more than picayune differences in statutory phraseology. Neither Congress nor the drafters of the Rules could possibly have intended such inexplicable variations in settlement incentives.”

The Advisory Committee’s notes to

205 Id. at 10–11.
206 Margulies, supra note 77, at 415, 421–31.
207 Id. at 415–16, 431. Margulies focuses upon “hybrid” cases in which a given case involves multiple fee-shifting statutes, some of which define attorneys’ fees as costs, while others define attorneys’ fees as separate from costs. See generally id. The situation described is similar to the one faced by the Marek Court, which arguably made a policy-based decision without clear textual guidance. See 473 U.S. at 10–11.
208 See Marek, 473 U.S. at 7–9.
209 Id. at 8–9.
210 See id. at 17–18 (Brennan, J., dissenting) (quoting Roadway Express, Inc. v. Piper, 447 U.S. 752, 761 (1980)).
211 See id. at 16 (quoting Chesny v. Marek, 720 F.2d 474, 478 (7th Cir. 1983), rev’d, 473 U.S. 1 (1985)).
212 Id. at 14–15. Margulies notes:
the 1993 amendment to Rule 54 also supports the conclusion that Congress did not consider attorneys’ fees to be included in costs.\textsuperscript{213} The “plain meaning” approach in \textit{Marek} may produce inexplicable differences between statutes.\textsuperscript{214} However, it reduces uncertainty by simplifying interpretation of other statutes—one need only focus on whether the statutory language is similar to the language at issue in \textit{Marek}.\textsuperscript{215} Furthermore, adherence to the “plain meaning” approach comports with Rule 68’s central goal of promoting settlement and promotes the interests of defendants who wish to settle.\textsuperscript{216} However, achieving these goals results in less effective enforcement of the laws.\textsuperscript{217}

2. The Policy Argument

The U.S. Supreme Court’s conclusion in \textit{Marek} would have been particularly questionable had it merely relied upon the textual argument outlined above. As Justice Brennan pointed out, “plain meaning” can only be carried so far.\textsuperscript{218} Thus, while the textual argument explains why Congress intended the result the Court reached, the policy argument attempts to explain why such a result makes sense.

The \textit{Marek} Court identified the degree of success obtained as “the most critical factor” of reasonableness of attorneys’ fees.\textsuperscript{219} The Court implied that the rejection of an offer that is more favorable than the judgment is per se unreasonable,\textsuperscript{220} despite the caution in \textit{Hensley v.
Eckerhart against “mathematical approaches.” However, Justice Brennan and others reject a per se approach, contemplating that a plaintiff who obtains a judgment that is less than the Rule 68 offer may still have acted reasonably in rejecting the offer.222

Many commentators have argued that the per se approach will have a “negative distributional effect” or “chilling effect” on plaintiffs.223 Judge Richard Posner has developed an economic analysis to argue that Rule 68 will not increase settlements, but rather transfer wealth from plaintiffs to defendants.224 While plaintiffs who have more to lose from litigation may demand smaller settlements, defendants will offer less in settlements, having less to lose from going to trial.225 The per se approach ignores the greater risk aversion of plaintiffs faced with the possibility of paying costs, especially when those costs include attorneys’ fees that they would not otherwise have to bear in the absence of Rule 68.226

If plaintiffs can act reasonably and still lose under the Rule 68 calculation, then it is plausible that they may be willing to accept reduced settlement offers to avoid losing awards of attorneys’ fees. Thus, the basic difference between the majority approach and Justice Brennan’s

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221 Hensley, 461 U.S. at 435 n.11 (internal quotation marks omitted); see Marek, 473 U.S. at 28–29 (Brennan, J., dissenting).

222 See Marek, 473 U.S. at 30 (Brennan, J., dissenting) (arguing that the per se rule of Marek “will require the disallowance of some fees that otherwise would have passed muster under §1988’s reasonableness standard”); Simon, supra note 98, at 500 n.123 (suggesting circumstances in which a plaintiff who acts reasonably may have obtained a judgment less favorable than the Rule 68 offer, such as “a key plaintiff’s witness may die, disappear, or change her story after the offer is rejected, or a persuasive judicial opinion damaging to the plaintiff’s case may be handed down after a rule 68 offer is rejected”).


224 Posner, supra note 223, § 21.12, at 592–93. “The plaintiff would not turn down a Rule 68 offer unless he expected to do better at trial. . . . So the rule penalizes the plaintiff only for a mistake.” Id., § 21.12, at 593.

225 Id.; see Miller, supra note 223, at 94, 105; see also Bonney et al., supra note 99, at 406 (encouraging defendants to make Rule 68 offers at the earliest possible time for an amount equal to the lowest possible outcome).

226 Posner, supra note 223, § 21.12, at 593.
approach may lie in whether or not plaintiffs can act reasonably and still lose in the Rule 68 calculation.\textsuperscript{227} The majority in \textit{Marek} said that a plaintiff who fails to obtain a judgment that is greater than the settlement offer receives no benefits from the post-offer services of an attorney and, therefore, is not entitled to attorneys’ fees for this work.\textsuperscript{228} By accepting a per se approach the Court ignores instances in which a plaintiff acts reasonably and still loses under Rule 68, promoting settlement over the goal of rights vindication.\textsuperscript{229} This Note will now examine how \textit{Marek} affects the interaction of Rule 68 and section 505 of the CWA—whether CWA citizen suit plaintiffs are bound by the \textit{Marek} Rule 68 post-offer attorneys’ fees decision.

B. \textit{Is There a Difference Between the Clean Water Act and the Civil Rights Attorneys’ Fees Awards Act with Respect to Rule 68?}

Based upon the “plain meaning” argument of \textit{Marek}, there may be no difference between section 505 and the Civil Rights statute, since both statutes define the word “costs” to include attorneys’ fees.\textsuperscript{230} Accordingly, one may expect an uphill battle for citizen suit plaintiffs seeking to avoid the operation of the \textit{Marek}. However, in every reported case dealing with this issue, courts have not found Rule 68 applicable.\textsuperscript{231}

Of the three major cases discussed above, only the decision in \textit{Public Interest Research Group of New Jersey, Inc. v. Struthers-Dunn, Inc.} devoted any significant discussion to distinguishing \textit{Marek}.\textsuperscript{232} The court first invoked the argument that plaintiffs must face the choice of either accepting a judgment they deem inadequate or risking loss of

\textsuperscript{227} See supra Part II.C.
\textsuperscript{228} \textit{Marek v. Chesney}, 473 U.S. 1, 11 (1985).
\textsuperscript{229} See supra notes 206–07 and accompanying text.
\textsuperscript{231} See supra Part III.
Rule 68 would, therefore, have a “chilling effect” on citizen suits in violation of the policy underlying section 505. However, this argument was squarely rejected in *Marek*. The court attempted to distinguish the Civil Rights statute on grounds that, while a civil rights plaintiff would personally benefit from rejecting a settlement offer if the judgment was higher, this would not be true for CWA plaintiffs because any penalties imposed upon the defendant would be paid to the U.S. Treasury. Thus, there is no monetary upside benefit to plaintiffs, while there is a substantial downside. The defendant in *Struthers-Dunn* urged that this reality makes a CWA plaintiff no different than a civil rights plaintiff who seeks injunctive relief. However, the court responded that even in a civil rights case, the “value” of injunctive relief still inures to the plaintiff—not to a CWA plaintiff—and is, therefore, considered in the Rule 68 calculus for civil rights plaintiffs. Nevertheless, it is unlikely that the court meant that CWA citizen suit plaintiffs derived no benefit from these suits. Otherwise, as the *North Carolina Shellfish Growers Ass'n v. Holly Ridge Associates* court pointed out, these plaintiffs may not have had standing to sue in the first place.

Courts may try to vacillate and dodge criticism with this “personal benefit” argument, but ultimately it resembles the “chilling effect” argument—Rule 68 makes it harder for plaintiffs to bring citizen suits when it includes attorneys’ fees as costs and, therefore, contradicts the policy underlying citizen suits. The U.S. Supreme Court rejected this argument, though it was likely in error. Furthermore, even if the “chilling effect” argument counsels against mechanically applying the “plain meaning” approach from *Marek*, it does not address the other

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233 Id. at *4, 18 Envtl. L. Rep. (Envtl. L. Inst.) at 21,400.
234 Id. at *3, 18 Envtl. L. Rep. (Envtl. L. Inst.) at 21,400.
235 473 U.S. 1, 10–11 (1985) (stating that “[c]ivil rights plaintiffs—along with other plaintiffs” will not recover attorneys’ fees under this ruling, and that it would require plaintiffs to “think very hard” about whether continued litigation is worthwhile) (emphasis added) (internal quotation marks omitted).
237 Id. at *4, 18 Envtl. L. Rep. (Envtl. L. Inst.) at 21,400.
238 Id. at *5, 18 Envtl. L. Rep. (Envtl. L. Inst.) at 21,400.
242 See supra Part IV.A.
rationale in *Marek*—that attorneys’ fees incurred in obtaining a judgment less favorable than the Rule 68 offer are not “reasonable” attorneys’ fees, regardless of whether the plaintiff benefits personally from the judgment of the underlying dispute.\(^{243}\) While judging reasonableness in this way may be erroneous,\(^{244}\) courts must follow *Marek* so long as it is still good law.

**C. A “Reasonable” Proposal to Reconcile Rule 68 with Section 505 of the CWA**

The courts in *Struthers-Dunn*\(^{245}\) and *Holly Ridge*\(^{246}\) strained to distinguish the cases from *Marek*; given the shortcomings of *Marek*, this may be desirable.\(^{247}\) However, when the lower courts held that *Marek* and Rule 68 did not apply to *Struthers-Dunn* and *Holly Ridge*, they may have done injustice to the defendants who made at least a nominal effort to settle their dispute.\(^{248}\)

This section describes an alternative framework for assessing the impact of Rule 68 upon fee-shifting statutes that use the “reasonable” language, regardless of whether these statutes define “costs” as attorneys’ fees. This framework evaluates Rule 68 as one element in the reasonableness calculation—not because the word “costs” in Rule 68 includes attorneys’ fees, but rather because an offer of judgment represents an opportunity to avoid the costs of litigation so plaintiffs should be encouraged to act reasonably.\(^{249}\)

Regardless of *Marek*, much would remain unchanged from the current U.S. Supreme Court jurisprudence on attorneys’ fees, even if this framework were adopted. If the defendant prevailed in a suit, the plaintiff would not be entitled to fees.\(^{250}\) But, the defendant could still recover fees from the plaintiff when the plaintiff continued to litigate

\(^{243}\) See *Marek*, 473 U.S. at 11.
\(^{244}\) See supra Part IV.A.
\(^{247}\) This Note does not address the ethical question of whether lower courts should dutifully apply U.S. Supreme Court precedent that may produce seemingly unjust results.
\(^{248}\) See Margulies, supra note 77, at 425. Neither opinion provides the amount of the offer, so it is impossible to evaluate the significance of these efforts to settle. See *Holly Ridge*, 278 F. Supp. 2d at 666; *Struthers-Dunn*, 1988 WL 147639, at *1, 18 Envtl. L. Rep. (Envtl. L. Inst.) at 21,399.
\(^{249}\) See *Marek v. Chesny*, 473 U.S. 1, 28–30 (1985) (Brennan, J., dissenting) (defining a reasonableness standard that focuses on the plaintiff’s conduct in rejecting or accepting a Rule 68 offer).
a frivolous, unreasonable, or groundless suit. Plaintiffs would be entitled to reasonable attorneys’ fees where the judgment was more favorable than the Rule 68 offer, absent special circumstances.

Therefore, the only change would occur where a plaintiff receives less at trial than offered by the defendant. Accordingly, the court should examine the facts of the case to determine whether the plaintiff’s decision to reject the offer of judgment was reasonable at the time the decision was made. The court could establish a rebuttable presumption that fees for post-offer services are not reasonably incurred, but allow the plaintiff to demonstrate that circumstances made it reasonable to reject the offer. The court could consider factors including: (1) the difference between the offer and the actual judgment, where a small difference points towards reasonableness and a large difference points towards unreasonableness; (2) whether discovery was complete when the decision was made; and (3) whether there was a change in circumstances after the offer was rejected, such as the death of a key witness or a detrimental judicial opinion. Furthermore, a court may consider awarding post-offer fees to a defendant when a plaintiff’s decision to prolong litigation after a Rule 68 offer could be characterized as unreasonable or frivolous. This structure would provide plaintiffs with more security; as long as a plaintiff can show that rejecting an offer was reasonable, there should be some recovery of post-offer fees, subject to the criteria.

Peter Margulies suggests valid criticisms of the reasonableness approach, such as tensions with the work-product rule and attorney-client privilege that would occur when an attorney must prove what information was known at different times. The problems he identifies with the reasonableness approach are decisional uncertainty and lack of predictability in the outcomes a court will reach. While problem-

253 See Marek, 473 U.S. at 28–31 (Brennan, J., dissenting).
254 Margulies, supra note 77, at 438–40.
255 Simon, supra note 98, at 500 n.123.
256 See Christiansburg, 434 U.S. at 422. Since a plaintiff presumably would still be entitled to pre-offer fees, and a judgment on the merits, this fee award to defendants could offset the other amounts paid to plaintiffs.
258 Margulies, supra note 77, at 430–31.
259 Id. at 439–40. Margulies notes that the decisional uncertainty caused by the reasonableness approach can “discourage settlement, drain judicial resources, and threaten judicial legitimacy.” Id. at 430. While these are valid criticisms, they are inherent in the regime.
atic, these issues are small in comparison with the problems associated with the *Marek* framework. Although the reasonableness approach may cause a drain in judicial resources, this slight drain will result in greater protection of the statutory rights served by citizen suits. Margulies suggests a percentage-based approach that would key a reduction of plaintiff fee awards to the judgment as a percentage of the offer.\textsuperscript{260}

One need only look to decisions under statutes that do not define costs to include attorneys’ fees to find examples of the reasonableness approach. For example, in *Haworth v. Nevada*, the court had to decide how Rule 68 interacted with the Fair Labor Standards Act, a statute that does not define costs as attorneys’ fees.\textsuperscript{261} The court found that *Marek* did not apply because of the difference in statutory language, but held that the rejected offer must be considered on remand in determining the reasonableness of awarding post-offer fees.\textsuperscript{262} The court followed the textual approach of *Marek*.\textsuperscript{263} However, if the *Haworth* court had followed the policy reasoning of *Marek*, it would have found—without need for remand—that because the offer of judgment was more favorable than the judgment at trial, any post-offer fees incurred were per se unreasonable.\textsuperscript{264}

of statutes relying upon the “reasonable attorney fee” language, which requires scrutiny of the attorneys’ services for reasonableness. *See supra* Part I.C.4. This may be a workable legislative change to the current Rule 68 regime—trading a reduction in decisional uncertainty in exchange for an arbitrary bright-line rule.\textsuperscript{260} Margulies, *supra* note 77, at 441–42.\textsuperscript{261} 56 F.3d 1048, 1051 (9th Cir. 1995).\textsuperscript{262} Id. at 1051, 1052.\textsuperscript{263} *See id.* at 1051; *cf. Marek v. Chesny*, 473 U.S. 1, 7–9 (1985) (presenting the Court’s textual argument).\textsuperscript{264} *Haworth*, 56 F.3d at 1051–52; *cf. Marek*, 473 U.S. at 10–11 (presenting the Court’s policy argument). This illustrates another shortcoming of *Marek*—that depending upon which approach a court applies, inconsistent results may be reached. The failure of a statute like the Fair Labor Standards Act to define costs as attorneys’ fees—under the plain meaning, textual approach—could be interpreted as legislative intent not to include attorneys’ fees as Rule 68 costs. *See supra* Part IV.A.1.
The reasonableness method is a preferable analysis for the interaction of Rule 68 with citizen suits because it harmonizes the disparate treatment between statutes that define attorneys’ fees as costs and statutes that do not. The approach also reduces the “chilling effect” on citizen suit plaintiffs, while being fair to defendants, because it retains incentives for plaintiffs to accept reasonable offers. Moreover, this approach avoids any conflict with the Rules Enabling Act (REA) by focusing on the reasonableness of the fee award instead of the text of Rule 68.

Conclusion

Citizen suits are important to the enforcement of the CWA and many other environmental statutes. Congress has granted the courts discretion to use the attorneys’ fee awards contained in these statutes to encourage meritorious citizen suits, while discouraging frivolous ones. The rigid, mechanical application of Rule 68 in *Marek v. Chesny* eliminates the courts’ discretion and divests plaintiffs of attorneys’ fees even in cases where the plaintiff has acted reasonably in rejecting the offer of judgment. As a result, *Marek* causes a “chilling effect” on the effectiveness of citizen suits. Furthermore, because of this “chilling effect,” CWA plaintiffs faced with Rule 68 offers attempt to avoid *Marek*’s holding by seeking declarations that Rule 68 does not apply to the CWA. These plaintiffs have been successful. Three district courts have agreed that the CWA is distinguishable from the *Marek* analysis; no appellate court has ever considered the issue in any reported decision. However, in spite of these decisions, the reasoning in *Marek* applies with equal force to the CWA as it does to the Civil Rights statute. The district court decisions to the contrary appear to be made in order to avoid the “chilling effect” that *Marek* would have on CWA citizen suits, not because of a meaningful distinction between the CWA and the Civil Rights statute.

Courts should not have to choose between precedent and the policies underlying citizen suit statutes. A change is desirable. One bill, which progressed very little in the legislature, would have exempted the CWA from Rule 68’s operation. Such an approach

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265 See supra Part I.C.3.
266 See supra Part III.
would only add to the “schizophrenic” interpretation of Rule 68,\textsuperscript{268} and detract from the goal of having uniform rules of civil procedure.\textsuperscript{269} It also would fail to address the interaction of Rule 68 with citizen suit provisions other than section 505 of the CWA. A better legislative solution would be to amend Rule 68 and define costs so as not to include attorneys’ fees. This would render \textit{Marek} moot, but still allow courts the discretion to apply the reasonableness approach as contemplated by the drafters of section 505. In the absence of legislative change, the U.S. Supreme Court would have to overrule its own precedent. For such an issue to reach the U.S. Supreme Court, a trial court will likely have to find against plaintiffs—often national groups that repeatedly bring citizen suits\textsuperscript{270}—in order to give a party sufficient incentive to carry a suit that far.

Until change is made, district courts may continue to exercise the judicial gymnastics that distinguish section 505 of the CWA from the Civil Rights statute. However, fairness to defendants requires that these courts still evaluate the reasonableness of rejecting a Rule 68 offer when calculating reasonable attorneys’ fees, even if Rule 68 is found inapplicable to CWA citizen suits.

\textsuperscript{268} Marek v. Chesny, 473 U.S. 1, 19 n.9, 21–22 (1985) (Brennan, J., dissenting).
\textsuperscript{269} See \textit{id.} at 18 (citing \textit{Fed R. Civ. P. 1}).
SHIFTING THE BURDEN: POTENTIAL APPLICABILITY OF BUSH V. GORE TO HAZARDOUS WASTE FACILITY SITING

ALISON E. HICKEY*

Abstract: Since its inception in the 1980s, advocates of the environmental justice movement have attempted to remedy the disproportionate siting of hazardous waste facilities in minority neighborhoods by employing the Equal Protection Clause. These lawsuits have thus far been largely unsuccessful because of litigants’ inability to prove intentional discrimination by government actors in such siting decisions. However, in the 2000 decision issued by the U.S. Supreme Court in Bush v. Gore, the mere potential for discriminate impact of a decision made by government actors was sufficient to trigger a strict scrutiny analysis under the Equal Protection Clause. While the decision was declared to have little precedential value outside the voting rights context, this Note examines the potential for application of this novel approach to the Equal Protection Clause in future environmental justice claims arising under the Fourteenth Amendment.

Introduction

On the morning of December 12, 2000, Americans waited in anticipation for the U.S. Supreme Court to issue its opinion in Bush v. Gore. Under immense time pressure, the Court issued a controversial opinion specifically delineated as having no precedential value beyond the boundaries of the case. The ruling, which redefined long-held precedent regarding the application of the Fourteenth Amendment’s Equal Protection Clause to the U.S. Constitution, upheld the election of George W. Bush as the President of the United States.3

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1 See generally Bush v. Gore: The Court Cases and the Commentary 253–77 (E.J. Dionne Jr. & William Kristol eds., 2001) (hereinafter Cases and Commentary] (compiling editorials and commentary written from the days leading up to the decision).


3 See id. at 145–46 (Breyer, J., dissenting) (finding that “since time was, and is, too short to permit the lower courts to iron out significant differences through ordinary judicial
Many constitutional scholars contend that it would be naive to expect the Supreme Court to begin applying this method of equal protection analysis—whereby proof of potentially discriminate impact of government actions is sufficient to trigger strict scrutiny—to future litigation arising under the Equal Protection Clause, because the Court has steadfastly applied a different standard for nearly twenty years. However, the Court’s willingness to depart from its own well-established standards in *Bush* created new hope for plaintiffs who have been unable to prevail on equal protection claims because of an inability to prove the intentional discrimination necessary to trigger strict scrutiny.

The dilemma of proving intentional discrimination has been a major roadblock to the environmental justice (EJ) movement, which was brought to national attention as the result of vocal opposition to hazardous waste facility siting in minority neighborhoods in the early 1980s. The movement, however, could face renewed hope if EJ proponents can successfully use the *Bush* brand of Equal Protection analysis as a viable argument for burden shifting. Although many scholars and constitutional advocates believe that the *Bush* opinion was motivated more by politics than by the Constitution, the constitutional system trusts the Supreme Court Justices to put aside their individual political review . . . I agree that, in these very special circumstances, basic principles of fairness should have counseled the adoption of a uniform standard to address the problem”); Richard A. Epstein, *Constitutional Crash Landing: No One Said It Would Be Pretty*, Nat’l Rev. Online, Dec. 13, 2000, *reprinted in Cases and Commentary*, supra note 1, at 284.


5 *See* Eric Foner, *Partisanship Rules*, The Nation, Jan. 1, 2001, at 6–7, *in Cases and Commentary*, supra note 1, at 293 (“[B]y extending the issue of equal protection to the casting and counting of votes, the Court has opened the door to challenging our highly inequitable system of voting, . . . But *Bush v. Gore* may galvanize demands for genuine equality of participation in the democratic process that legislatures and a future Court may view sympathetically.”).

6 *See* Carolyn M. Mitchell, *Environmental Racism: Race as a Primary Factor in the Selection of Hazardous Waste Sites*, 12 Nat’l Black L.J. 176, 183 (1993) (asserting that the “burden [of proving intent] is difficult because plaintiffs often have the least access to evidence of racial bias”); Rachel D. Godsil, *Note, Remedying Environmental Racism*, 90 Mich. L. Rev. 394, 410 (1991) (finding that “[t]he establishment of intent as the *sine qua non* of racial discrimination has created a quite onerous burden of proof for plaintiffs”).


8 *See* Foner, supra note 5, at 293 (asserting that “[t]he Court, to be sure, has always been political, but rarely as blatantly as today”).
beliefs for the sake of constitutional uniformity. Thus, the reasoning of the *Bush* decision, though claimed to have no precedential value, cannot be held meaningless. Rather, the reasoning could affect future equal protection litigation for EJ advocates.

This Note focuses on the difficulty EJ advocates face when litigating racial discrimination claims related to the siting of hazardous waste facilities. Objective data illustrating the discriminatory impact of government actions supports the racially discriminatory effect of siting decisions. Nevertheless, courts have continuously refused to apply a strict scrutiny analysis to siting decisions. If the equal protection analysis of *Bush* becomes precedent for future racial discrimination cases, its application to EJ litigation would mirror that used by lower courts in other areas of the law over the past thirty years. Part I of this Note examines the history and evolution of the modern EJ Movement. Part II discusses the barrier EJ plaintiffs face in proving intentional discrimination by government actors in hazardous waste facility siting decisions. Part III examines the *Bush* decision in depth and draws an analytical link between *Bush* and the EJ movement. The conclusion argues that while *Bush* has yet to be directly applied outside of the voting rights context—and even has limited applicability within voting rights—it leaves room for a novel approach to EJ litigation and renew hope for the burden shifting potential of equal protection for EJ litigants.

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9 See U.S. Const. art. III, § 2 (enabling the Court to decide only issues which “arise[e] under this Constitution”).

10 See *Lapointe*, supra note 4, at 480–81.

11 See id.


I. THE ENVIRONMENTAL JUSTICE MOVEMENT

A. Warren County, North Carolina

In 1978, more than 30,000 gallons of oil laced with polychlorinated biphenyl (PCB), a toxin, were covertly dumped along a 210-mile stretch of North Carolina’s roadways, contaminating the roadside soil. Four years later, North Carolina Governor James B. Hunt made an executive decision to construct a PCB landfill in Warren County to bury the nearly 32,000 cubic yards of contaminated soil. Warren County is one of the poorest counties of North Carolina, comprised of an eighty-four percent minority population. Civil Rights activists, political leaders, and local residents came together to protest the construction of the proposed PCB landfill, bringing national attention to the race- and class-based inequities of hazardous waste facility siting, and launching the modern EJ movement. More than five hundred protesters were arrested, but their efforts were not futile. The protests prompted Congressman Walter E. Fauntroy—an active participant in the protests—to initiate a study of hazardous waste facility siting in the South by the U.S. General Accounting Office (GAO). The study, along with its successors, have objectively demonstrated that an overwhelming percentage of hazardous waste facilities have been, and continue to be, sited in minority and low-income communities. While the findings of such studies have yet to compel judicial remediation, recent developments in Equal Protection Clause jurisprudence may provide new hope.

14 See Bullard, supra note 7, at 30. Subsequently, the owners were sent to jail for criminal dumping, but the problem of the contaminated soil persisted. See id.
15 See id.
18 Benjamin F. Chavis, Jr., Foreword to Confronting Environmental Racism: Voices from the Grassroots 3 (Robert D. Bullard ed., 1993).
19 See Bullard, supra note 16, at 91.
20 For a discussion of the studies and their findings, see infra Part II.C.
21 See generally GAO REPORT, supra note 12.
B. The Evolution of Environmental Justice

Throughout American history, the natural environment has been a source of national pride in poetry, journalism, and political ideals. Such representations of a pristine environment may reflect the reality of affluent landowners, but they turn a blind eye to the environmental hazards and poor public health conditions in disadvantaged communities. Minority and low-income Americans have continually suffered the burdens of the environment’s shortcomings, such as the toxic waste facility proposed in Warren County. Toxic dumping and hazardous waste facilities are a result of industrial development throughout the country, and while these burdens of development ought to be spread across all communities, facility siting decisions have followed the “path of least resistance,” resulting in disproportionate siting in minority and low-income communities.

Over the past thirty years, national attention has been brought to the distributive and political justice—or injustice—involved in environmental decisionmaking. Advocates for the EJ movement argue “for an equitable distribution of the costs and benefits of maintaining a suitable environment in which to live.” When a decision harms a minority group that is not represented in the decisionmaking process, political justice is compromised. Some scholars hypothesize that unwanted land uses, such as hazardous waste facilities, are concentrated in poor communities rather than affluent suburbs because wealthier neighborhoods are able to leverage the political and economic power

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22 See William A. Shutkin, The Concept of Environmental Justice and a Reconception of Democracy, 14 VA. ENVTL. L.J. 579, 580–82 (1995). Shutkin points to Thomas Jefferson’s belief that the fertile lands of America would be the birthplace of the nation’s democratic identity, historian Frederick Jackson Turner’s “frontier hypothesis,” poet Walt Whitman’s conception of America as a “new social order founded upon nature,” and urban planner Frederick Law Olmsted’s design of urban parks to “lessen the divisions caused by industrial, urban society and provide occasional relief from its rampant social strife” to make this point. Id.

23 See id. at 583–84.

24 See Kaswan, supra note 7, at 230.


26 See Bullard, supra note 7, at 3; Lazarus, supra note 25, at 807–08.

27 See Kaswan, supra note 7, at 231–38 (discussing EJ in both its distributive and political capacities).


29 See Kaswan, supra note 7, at 233–38 (defining political justice as the equal representation of all citizens’ interests in the decisionmaking process at the local, state, and federal level).
necessary to prevent unwanted land uses in their communities, while poor communities are comparatively powerless.\textsuperscript{30} Public opposition is much stronger in affluent neighborhoods than in low-income neighborhoods, because residents of affluent communities are more likely to be members of local government, are more aware of the decisions affecting them, and are better able to organize resistance to locally unwanted land uses.\textsuperscript{31} However, public opposition should not be a consideration in the decisionmaking process.\textsuperscript{32}

Nevertheless, government and industry choose to site facilities in locations where they will meet the least amount of resistance; consequently, they target lower-income, minority communities.\textsuperscript{33} Not only are these communities poor, with little political leverage, but they are frequently located near industry and transportation routes, which are attractive characteristics for toxic waste facility owners.\textsuperscript{34} The result has been a disproportionate concentration of such facilities in predominantly minority communities.\textsuperscript{35} The EJ movement emerged from the desire of constitutional rights advocates and environmentalists to remedy this inequity and ensure that environmental burdens are dispersed equally, with a blind eye to issues of race and income.\textsuperscript{36} Injustices in environmental decisionmaking in this country are not new—when European settlers arrived in America over five hundred years ago, they displaced Native Americans, confiscated their land and redefined land use relationships.\textsuperscript{37} The fact that EJ concerns are not new, however, does not mean that they are not redressable.\textsuperscript{38}


\textsuperscript{31} See Mohai & Bryant, supra note 30, at 163–64; Austin & Schill, supra note 30, at 70–71.

\textsuperscript{32} See Mohai & Bryant, supra note 30, at 163–64; Austin & Schill, supra note 30, at 70–71.

\textsuperscript{33} See Mohai & Bryant, supra note 30, at 163–64.


\textsuperscript{35} See Evans, supra note 16, at 1228. See generally Been, supra note 34, at 1015–27.

\textsuperscript{36} See Been, supra note 34, at 1005.


\textsuperscript{38} For a discussion of lawsuits brought to remedy this situation, see infra Part III.
C. Civil Rights as the Foundation for Environmental Justice

According to Robert Bullard, the inequitable distribution of environmental burdens in certain communities cannot be explained by class alone, but is a product of “[r]acial barriers to education, employment, and housing [which] reduce mobility options available to the black underclass and the black middle class.” While racism has been prohibited by law, racist attitudes—both conscious and subconscious—persist. These attitudes have contributed to a nonuniform, noncolor-blind distribution of hazardous waste facilities. As one author states, “the evidence so compellingly suggests that the people who most often bear the dangers of living near the excreta of our acquisitive industrial society are the very same ones who have been most abused throughout our history.” Racial minorities have been the persistent victims of discrimination in America and today possess significantly less power in society, the marketplace, and the political sphere.

While environmental inequities cannot be reduced to either economic or racial factors, subconscious racial biases have been shown through numerous studies to be linked to the perpetuation of unequal environmental quality between white communities and communities of color. The protests in Warren County brought national attention to the plight of minority communities, and numerous protests, demonstrations, pickets, boycotts, and petition drives have followed during the past twenty-five years. This opposition has incorporated strategies used by the Civil Rights movement of the 1950s and 1960s to bring attention to the subversive racism underlying siting decisions. The protests evolved from the efforts of the same institutions, organizations, leaders and networks, which facilitated the Civil

39 Bullard, supra note 7, at 6.
40 Lazarus, supra note 25, at 807.
41 See Bullard, supra note 7, at 99–101; Lazarus, supra note 25, at 807–08.
44 See Robert D. Bullard, Introduction to Confronting Environmental Racism, supra note 18, at 11.
45 See Bullard, supra note 7, at 8; Evans, supra note 16, at 1245, 1247.
As a result, the EJ movement has provided the basis for one of the “fastest growing areas of legal scholarship”: environmental racism. This concept includes “any policy, practice, or directive that differentially affects or disadvantages (whether intended or unintended) individuals, groups, or communities based on race or color.” The term was coined during the Warren County protests, and subsequent studies have provided objective proof of its existence. These studies have found that the burden of living with hazardous waste has fallen “more heavily on poor than on well-to-do, more heavily on black and brown than on white.”

1. The First Investigation

Following the protests at Warren County, the GAO conducted a study entitled “Siting of Hazardous Waste Landfills and Their Correlation with Racial and Economic Status of Surrounding Communities.” The GAO study examined the racial and economic makeup of the communities in which the four hazardous waste landfills in the southeastern United States were sited. The study offered proof of an “irrefutable nexus between the presence of hazardous waste or industrial facilities and minority communities.” Census data showed that at three of the four sites, the majority of the population was African-American, and at all four sites the mean income for African-American people living near the facilities was lower than the mean income for all races combined. This study was the first of its kind to examine the racial and economic situation surrounding hazardous waste facility siting.

47 According to Bullard, the EJ movement was organized by “[i]ndigenous black institutions, organizations, leaders, and networks . . . coming together against polluting industries and discriminatory environmental policies.” Bullard, supra note 7, at 5.


49 Bullard, supra note 7, at 98; see Chavis, supra note 18, at 3.

50 See Bullard, supra note 7, at 98 (“Environmental racism is real; it is not merely an invention of wild-eyed sociologists or radical environmental justice activists.”); Evans, supra note 16, at 1225; Saleem, supra note 37, at 221 (finding that the protest at Warren County “infused civil rights organizations into the environmental movement”).


52 See GAO Report, supra note 12; see Bullard, supra note 16, at 91.

53 See GAO Report, supra note 12, at 1.

54 Evans, supra note 16, at 1227.

and raised the question of whether this problem was unique to the Southeast or pervasive to the entire United States.\footnote{See Charles Lee, Beyond Toxic Wastes and Race, in Confronting Environmental Racism, supra note 18, at 41, 43.}

2. Beyond the GAO Study

Following the GAO Study, in 1987 the United Church of Christ’s Commission on Racial Justice (“UCCRJ”) conducted a more comprehensive study, entitled “Toxic Wastes and Race in the United States,” which analyzed community demographics to ascertain the relationship between race and hazardous waste facility siting nationwide.\footnote{Mahoney, supra note 17, at 368–69; see UCCRJ Study, supra note 12, at 167–68.} According to Reverend Ben Chavis, Commission Director, the study showed that “race has been a factor in the location of commercial hazardous waste facilities in the United States”\footnote{UCCRJ Study, supra note 12, at 169.} This study, widely cited by EJ advocates, found that race was the predominant factor correlated to these siting decisions, surpassing socioeconomic status.\footnote{See Lazarus, supra note 25, at 801–02; Mahoney, supra note 17, at 369.} Some of its most conclusive findings included that: (1) three out of five African-American and Latinos live in communities with toxic waste facilities; (2) four times as many minorities live in areas with toxic waste facilities than live in areas without such sites; and (3) three out of five of the largest commercial hazardous waste facilities are located in predominantly African-American or Hispanic communities.\footnote{See UCCRJ Study, supra note 12, at 168–69; Boyle, supra note 43, at 968–69.}

The UCCRJ study alleges that it is “virtually impossible” that this discrepancy in siting occurred by chance, and concludes that the discrepancy was created by underlying factors of distributive and political justice inextricably related to race, including inexpensive land located in minority communities, lack of local opposition, and immobility of residents due to poverty.\footnote{See Mohai & Bryant, supra note 30, at 163–64.}

In 1994, a compilation of studies found that these racial discrepancies continued to exist.\footnote{See Benjamin A. Goldman et al., Toxic Wastes and Race Revisited: An Update of the 1987 Report on the Racial and Socioeconomic Characteristics of Communities with Hazardous Waste Sites I, 13–18 (1994), in Manaster, supra note 12, at 174–79.} Of sixty-four studies conducted after the UCCRJ study, sixty-three documented various similar environmental disparities as a result of race or income that continued to exist.\footnote{See id. at 175.} Data from incongruous study, which found that there was no correlation

\footnote{56 See Charles Lee, Beyond Toxic Wastes and Race, in Confronting Environmental Racism, supra note 18, at 41, 43.}
between race or economic status and siting decisions, yielded results consistent with the other studies when analyzed using the methods of the other studies.\textsuperscript{64} The most extreme data, from a 1993 study, indicated that people of color were 47\% more likely than whites to live near a commercial hazardous waste facility.\textsuperscript{65}

3. The Government’s Response

The Clinton administration was the most recent government organization to take official action related to EJ.\textsuperscript{66} The Administration made EJ “a centerpiece of its environmental program.”\textsuperscript{67} In 1994, following the results of the UCCRJ study and subsequent analysis, the Administration promulgated Executive Order 12,898, “Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations,”\textsuperscript{68} which directed federal agencies to identify and address the effects of their environmental programs and policies on minority and low-income populations.\textsuperscript{69} President Clinton further enforced the Administration’s commitment to EJ in a separate memorandum that directed every federal agency to promote enforcement of health and environmental statutes, particularly in minority and low-income areas, by developing and implementing EJ strategies.\textsuperscript{70} The memorandum directed agencies to conduct all programs substantially affecting human health or the environment “in a manner that will not exclude populations from participation in, or denying the benefits of, or subjecting persons to discrimination because of race, color or national origin.”\textsuperscript{71}

\textsuperscript{64} See id. at 176. The incongruous study was a 1994 study by sociologists at the University of Massachusetts, Amherst, which found that there was no correlation between race or economic status and siting decisions. Id. The researchers did not use the entire United States as a comparison group but rather focused solely on communities that were home to commercial hazardous waste sites. Id. Furthermore, the study classified communities based on census tracts rather than zip codes, which created a narrower definition of community for examination purposes. Id. These results were consistent with all of the rest of the studies once examined through the broader, more inclusive lens. Id.

\textsuperscript{65} Id. at 174.


\textsuperscript{67} Kevin, supra note 48, at 121 (quoting G. Marc Whitehead, Toxic Tort Litigation: Developing Issues and Their Impact on Case Preparation and Presentation, C921 A.L.I.-A.B.A. 525, 537 (1994)).


\textsuperscript{69} See Kevin, supra note 48, at 128.

\textsuperscript{70} See id.

\textsuperscript{71} Id. at 128–29; see EPA, supra note 66.
Executive Order 12,898 fell short, however, as it did not define a method or test by which agencies could measure the disproportionate effects of their activities. Although the Order was designed to bring attention to the environmental injustices in low-income and minority communities, its lack of guidance for agencies responsible for implementing amelioration programs has resulted in little response from parties interested in the EJ movement. Numerous proposed pieces of legislation, including the Environmental Equal Rights Act of 1993, have attempted to incorporate demographic material into site selection criteria, but none have been enacted.

II. Litigating Environmental Justice Cases

Civil rights claims in EJ lawsuits can be forceful and powerful tools to educate the public and the government about occurrences of environmental injustice and environmental racism in particular. High profile cases have been brought under Title VI and Title VII of the Civil Rights Act of 1964. In addition, almost every EJ case has alleged a violation of the Equal Protection Clause of the Fourteenth Amendment. This Note focuses on how the U.S. Supreme Court’s holding in Bush v. Gore could give new light to equal protection litigation for EJ plaintiffs.

A. The Equal Protection Clause

The Fourteenth Amendment provides that neither federal nor state government is permitted to “deny to any person within its jurisdiction the equal protection of the laws.” The purpose of this clause, as recognized by many constitutional scholars, is to secure to every American the right to freedom from intentional and arbitrary dis-

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73 See Popescu & Gandy, supra note 28, at 150.
75 See Kevin, supra note 48, at 130–31.
79 See Cole, supra note 76, at 538.
80 U.S. CONST. amend. XIV, § 1; see Bolling v. Sharpe, 347 U.S. 497, 500 (1954) (holding that the Equal Protection Clause applies to the federal government through the Due Process Clause of the Fifth Amendment).
crimination by government actors.\textsuperscript{81} In the context of individual rights, the Equal Protection Clause is heralded as “among the most important constitutional sources.”\textsuperscript{82} It originated in response to the emancipation of slaves after the Civil War to ensure equality and protection of the law.\textsuperscript{83} The philosophy of the Equal Protection Clause is that all Americans—whether white or of color, rich or poor—are entitled to equal protection under U.S. law.\textsuperscript{84}

Through the Equal Protection Clause, citizens may challenge a governmental action when that action either draws a distinction among people based on characteristics or discriminates as to the exercise of a fundamental right.\textsuperscript{85} Challenges are brought when individuals or groups of individuals perceive that the government has been acting in a manner which demonstrates vindictiveness, unjustifiable standards, or arbitrary classifications.\textsuperscript{86} A lawsuit alleging that a law is racially discriminatory may challenge the law as either facially discriminatory or as having a discriminatory impact or purpose.\textsuperscript{87} Either challenge requires a strict scrutiny analysis by the reviewing court; the court will uphold the challenged law only if the government, which has the burden of proof, demonstrates that the questioned action is necessary to achieve a compelling public purpose.\textsuperscript{88}

However, to trigger strict scrutiny the plaintiff must first provide proof of a discriminatory purpose on the part of the government in enacting the law.\textsuperscript{89} The disproportionate impact of a governmental action—without corroborating evidence—has been held insufficient to trigger a strict scrutiny analysis throughout the past thirty years.\textsuperscript{90} According to Justice White, writing for the majority in \textit{Washington v. Davis}, the Court has never held “that a law or other official act, with-

\textsuperscript{82} Id. at 267.
\textsuperscript{83} Lapointe, \textit{supra} note 4, at 446; see Strauder v. West Virginia, 100 U.S. 303, 310 (1879) (stating that the Fourteenth Amendment’s “design was to protect an emancipated race, and to strike down all possible legal discriminations against those who belong to it”).
\textsuperscript{84} See Bullard, \textit{supra} note 7, at 7.
\textsuperscript{86} See McGuinness, \textit{supra} note 81, at 269.
\textsuperscript{87} See Chemerinsky, \textit{supra} note 85, at 644–45.
\textsuperscript{88} See id. at 645.
\textsuperscript{89} Id. at 682.
\textsuperscript{90} See Washington v. Davis, 426 U.S. 229, 242 (1976) (holding that there must be proof of discriminatory purpose as well as impact to find an equal protection violation); Chemerinsky, \textit{supra} note 85, at 682.
out regard to whether it reflects a racially discriminatory purpose, is unconstitutional solely because it has a racially disproportionate impact." This decision differs in its discrimination analysis from the Courts’ decision just five years earlier in *Griggs v. Duke Power Co.* that, at least for a Title VII claim, a reviewing court must look to results and not intent or purpose to determine whether there is evidence of discrimination. The *Davis* Court found the *Griggs* decision, which examined a case brought under Title VII, was nonbinding in other racial discrimination circumstances. The Court rationalized that the different application results from a fear that examining impact alone may actually be more burdensome to the poor than to the affluent, thereby having the opposite of the intended effect. The Court found, therefore, that strict scrutiny is triggered only by the plaintiff’s demonstration of intentional or purposeful discrimination.

Since *Davis*, the government need not offer a racially neutral explanation for laws with a discriminatory impact. Instead, the burden rests on the plaintiff to prove the discriminatory intent of government actors. Professor Robert Bennett suggests that this heavy burden on plaintiffs is justified, as he believes the goal of the Equal Protection Clause is to stop discriminatory acts, not necessarily to bring about equal results. However, this question is central to literature regarding the proper application of the Equal Protection Clause, and was contradicted by the Court’s recent holding in *Bush v. Gore*.

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91 426 U.S. at 239.
93 See Lapointe, *supra* note 4, at 453–54 (examining the application of *Davis*, as compared to *Griggs*, in subsequent cases).
94 See *Davis*, 426 U.S. at 248.

A rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white.

*Id.*

95 See Kevin, *supra* note 48, at 146–47.
96 See Chemerinsky, *supra* note 85, at 684.
97 See *id.* at 682.
Laurence Tribe argues the other side, advocating that “‘the goal of the equal protection clause is not to stamp out impure thoughts, but to guarantee a full measure of human dignity for all.’”100 This approach to equal protection analysis has been litigated in EJ lawsuits brought under the Fourteenth Amendment, and is the focus of this Note.

B. Difficulty in Litigating Equal Protection for Environmental Justice Plaintiffs

The standard of intent since Davis, where the Court placed the burden of proof on plaintiffs to prove intentional or purposeful discrimination by government actors, has been a major roadblock for plaintiffs litigating EJ cases under the Equal Protection Clause.101 Plaintiffs have less access than government officials to documentation disclosing the intent of lawmakers in sanctioning government actions, assuming this documentation exists and accurately reflects the reasoning behind the decisions.102 Furthermore, siting decisions regarding hazardous waste facilities can often be justified by facially neutral factors, and any documentation which plaintiffs could provide might tend to reflect these alternate justifications.103

In cases which have challenged the siting of a hazardous waste facility under the Equal Protection Clause, disparate distributional effects have been insufficient to meet the plaintiff’s burden of proof.104 The courts have found that reliance on concrete statistical evidence, such as the UCCCRJ and GAO studies, does not suffice to prove the intent of government actors.105 Reviewing courts, therefore, have never reached a strict scrutiny analysis; the challenged laws and actions have been perceived as constitutional without the government having to prove that the resulting discriminatory effect of an action was fundamentally necessary to achieve a compelling public purpose.106 For EJ litigants, this barrier has been insurmountable thus far, and disparate

100 Id. at 685 (quoting Laurence H. Tribe, American Constitutional Law 1516–19 (3d ed. 1988)).
101 See Mitchell, supra note 6, at 183; Godsil, supra note 6, at 410.
102 See Mitchell, supra note 6, at 183; Boyle, supra note 43, at 964–65.
103 See Torres, supra note 46, at 606; Boyle, supra note 43, at 965.
105 See Evans, supra note 16, at 1280.
106 See Chemerinsky, supra note 85, at 684–85.
impacts have been allowed to continue from a constitutional standpoint.\textsuperscript{107}

1. The Plaintiff’s Burden of Proof

To prove the discriminatory intent of a governmental actor, the plaintiff must demonstrate more than that the government took a given action with knowledge that it would have discriminatory consequences.\textsuperscript{108} While Professor Larry Simon contends that a concrete showing of significant disproportionate impact in a particular minority group ought to be enough to force the government to explain that the action was taken for reasons other than prejudice, this burden, as it currently stands, rests on the plaintiff.\textsuperscript{109} The Supreme Court delineated several ways in which the plaintiff may prove discriminatory purpose in a leading EJ case brought under the Equal Protection Clause, \textit{Village of Arlington Heights v. Metropolitan Housing Development Corp.}\textsuperscript{110}

In \textit{Arlington Heights}, the Metropolitan Housing Development Corporation ("MHDC") entered into a contract with the Clerics of St. Viator to construct racially integrated low- and moderate-income housing on the clerics’ land in Arlington Heights, Illinois.\textsuperscript{111} The contract was contingent upon the MHDC’s ability to secure zoning clearances from the Village, as the development did not conform to local zoning laws that allowed only single-family residential housing.\textsuperscript{112} To consider the MHDC’s proposal, the Commission held public meetings during which the community spoke both for and against the rezoning.\textsuperscript{113} Many of the comments focused on the reasons for which the area had been zoned single-family, though a significant number also addressed concerns about the “social issues” involved in this particular proposed project—the desirability or undesirability of introducing racially integrated low- and moderate-income housing to a predomi-

\textsuperscript{107} See Evans, \textit{supra} note 16, at 1280.

\textsuperscript{108} See Pers. Adm’r. v. Feeney, 442 U.S. 256, 279 (1979) (holding that “‘[d]iscriminatory purpose’ . . . implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group.” (citations omitted)).


\textsuperscript{111} \textit{Id.} at 255–57; see John J. Delaney, \textit{Addressing the Workforce Housing Crisis in Maryland and Throughout the Nation}, 33 U. BALT. L. REV. 153, 186 (2004).

\textsuperscript{112} \textit{Arlington Heights}, 429 U.S. at 255–58.

\textsuperscript{113} See \textit{id.} at 257.
nantly white, affluent community.\textsuperscript{114} Despite the admission of race being a factor in the decision, the village refused to rezone the clerics’ land and denied the proposal.\textsuperscript{115} In response, the clerics brought a claim in district court under the Equal Protection Clause.\textsuperscript{116}

The U.S. District Court for the Northern District of Illinois held that the government’s decision was not motivated by discriminatory intent but rather was based on legitimate zoning purposes.\textsuperscript{117} The Court of Appeals for the Seventh Circuit Court of Appeals subsequently reversed the district court’s decision, finding that the refusal would have a disproportionate impact on minorities and failed to serve a compelling governmental interest.\textsuperscript{118} The U.S. Supreme Court subsequently granted certiorari to determine the issue of intent.\textsuperscript{119} In its analysis, the Court delineated several different ways in which discriminatory purpose can be proven by plaintiffs in an equal protection action, including: (1) the discriminatory effect of the action; (2) the historical background of the decision; (3) the specific sequence of events leading up to the challenged decision; (4) the departures from the normal procedural sequence; (5) the departures from the normal substantive standards; and (6) the legislative or administrative history of the decision.\textsuperscript{120} In addition, the Court suggested that statistical proof of discrimination toward a particular group may give rise to a finding of intent.\textsuperscript{121}

The Court went on to find that once there is proof that a decision has been motivated, even in part, by a discriminatory purpose, the burden shifts to the government—consistent with strict scrutiny—to prove that “the same decision would have resulted even had the impermissible purpose not been considered.”\textsuperscript{122} If a reviewing court is convinced that there is a discriminatory purpose, the law is treated as racially motivated and thus is invalid under the Equal Protection

\textsuperscript{114} Id.
\textsuperscript{115} See id. at 254, 258–59.
\textsuperscript{116} See id.
\textsuperscript{120} See Arlington Heights, 429 U.S. at 266–68; Michael Daniel, Using the Fourteenth Amendment to Improve Environmental Justice, 30 Hum. RTS., Fall 2003, at 15, 15, available at http://www.abanet.org/irr/hr/fall03/tools.html.
\textsuperscript{121} See Arlington Heights, 429 U.S. at 266 n.13.
\textsuperscript{122} See id. at 270 n.21.
Clause.\textsuperscript{123} Disproportionate impact may be weighed as evidence of discrimination, but impact alone, under \textit{Arlington Heights}, is not enough to prove intent or trigger strict scrutiny.\textsuperscript{124} Ultimately, while the Court in \textit{Arlington Heights} acknowledged the existence of references to social issues in the history of the decision, it did not find that the evidence demonstrated that the refusal to rezone was racially motivated, and thus concurred with the District Court to deny MHDC’s application.\textsuperscript{125}

C. \textit{Theory in Practice: The Intent Hurdle for Environmental Justice Litigants Challenging Siting of Hazardous Waste Facilities}

Despite the difficulties experienced in proving a violation of the Equal Protection Clause in \textit{Arlington Heights}, equal protection remains “at the core of environmental justice, pulling together diverse themes of fairness in decisionmaking processes and substantive outcomes.”\textsuperscript{126} Litigating under the Equal Protection Clause has been—and continues to be—the primary method of introducing civil rights into the realm of EJ where the government is the discriminatory actor.\textsuperscript{127} However, since the burden continues to rest on the plaintiff once the government has produced a plausible, nonracially motivated justification for its action, this hurdle has been overwhelming thus far.\textsuperscript{128}

Plaintiffs, however, continue to file and argue equal protection claims in EJ litigation.\textsuperscript{129} The decision to file rests on the belief that the intent standard demonstrates a misconception of the causes of racial discrimination, whereby racist decisions are assumed to be overt and made on a conscious level which can be detected by a showing of the decisionmaker’s state of mind.\textsuperscript{130} EJ advocates remain hopeful that continuing to file such lawsuits will ultimately force the Court to realize that subconscious racism is a pervasive problem in modern society.\textsuperscript{131} The need to modernize the intent analysis by holding those

\textsuperscript{123} See Chemerinsky, \textit{supra} note 85, at 690.
\textsuperscript{124} See Kevin, \textit{supra} note 48, at 147.
\textsuperscript{125} See \textit{Arlington Heights}, 429 U.S. at 269–71.
\textsuperscript{126} See Daniel, \textit{supra} note 120, at 15.
\textsuperscript{127} See Cole, \textit{supra} note 76, at 538.
\textsuperscript{128} See Been, \textit{supra} note 34, at 1004; Cole, \textit{supra} note 76, at 538–41. The lawsuits have not been successful, and promise little success, because of the \textit{Arlington Heights} requirement that plaintiffs must prove discriminatory intent. Been, \textit{supra} note 34, at 1004.
\textsuperscript{129} See Cole, \textit{supra} note 76, at 541.
\textsuperscript{131} See Boyle, \textit{supra} note 43, at 963–64.
who discriminate liable regardless of intent is in line with the ultimate goal of the Equal Protection Clause: to improve minority conditions and protect all people as equal under the law. In hazardous waste facility siting decisions, it should not make a difference whether government actors are intending to discriminate. Rather, the focal point of the litigation, as it was in Bush, should be remedying the objectively measurable discriminatory impact that these decisions have produced.

The first major EJ case challenging hazardous waste facility siting under the Equal Protection Clause was Bean v. Southwestern Waste Management Corp. In Bean, residents living near a proposed site for a solid waste landfill facility argued that the selection of that particular site—located in a census tract with minorities comprising 70% of the population, rather than another equally viable site where minorities comprised only 18.4% of the surrounding population—was part of a pattern of racial discrimination by the Texas Department of Health. The plaintiffs’ case rested on population statistics of the sites as they existed at the time of the case, which showed that 15% of Houston’s solid waste sites were located in areas with over 70% minority populations. However, the reviewing court refused to consider these statistics, opting instead to look at the population statistics of the surrounding areas on the day each site opened.

Looking at the facts presented in Bean, the court found that the plaintiffs had failed to establish the stark pattern of discrimination necessary to meet the plaintiff’s burden of proof following Arlington Heights. The decision acknowledged that statistical data concerning Houston’s solid waste sites at the time may have shown a pattern of discrimination in violation of the Equal Protection Clause, but the court refused to issue a preliminary injunction to stop the construction of the landfill. The court did, however, acknowledge that, “the plaintiffs have established that the decision to grant the permit was

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132 See Charles R. Lawrence III, The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism, 39 Stan. L. Rev. 317, 337–38 (1987). “Individuals learn cultural attitudes and beliefs about race very early in life, at a time when it is difficult to separate the perceptions of one’s teacher (usually a parent) from one’s own.” Id.
134 See id. at 677–78.
135 See id. at 678.
136 See id. at 677.
138 See Bean, 482 F. Supp. at 680.
The court questioned why the city chose to place a solid waste landfill within 1700 feet of a primarily minority-attended high school and only a slight distance from a residential neighborhood. This questioning ultimately led to a victory for the EJ movement, as the city subsequently restricted the dumping of garbage near public facilities such as schools and prohibited city-owned trucks from dumping at the landfill. Furthermore, the Texas Department of Health began requiring demographic data regarding proposed landfill sites. However, the facility at issue was still built in a minority census tract.

Another lawsuit in which the Equal Protection Clause provided the basis for EJ litigation was *East Bibb Twiggs Neighborhood Ass’n v. Macon-Bibb County Planning & Zoning Commission*. In that case, community residents living near a proposed private landfill site alleged that the site selection had both a discriminatory impact and, like *Bean*, was demonstrative of the defendant’s pattern of siting waste facilities in minority communities. The plaintiffs in *East Bibb Twiggs* contended that the defendant’s decision to site this facility in this particular neighborhood—which was roughly seventy percent minority residents—was part of a history of discrimination, as detailed in newspaper articles reporting a series of Planning and Zoning Commission decisions. In addition, the plaintiffs submitted evidence of the legislative history of the decision, including statements made by commission members regarding the initial denial of another proposed site for reasons including “adjacency to a residential area” and “increased traffic and noise.” Although siting the facility at East Bibb Twiggs would create similar effects in the surrounding neighborhood, the proposal was approved. The plaintiffs thus contended that there must have been an “individuous racial purpose . . . [that] motivated the commission to reconsider its decision and to approve that use which was at

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139 Id.
140 See id. at 679.
141 See Popescu & Gandy, supra note 28, at 168–70.
142 See id.
143 See *Bean*, 482 F. Supp. at 680–81; Lazarus, supra note 25, at 831–32.
144 706 F. Supp. 880 (M.D. Ga. 1989), aff’d, 888 F.2d 1573 (11th Cir. 1989). Though this case was heard by the Appellate Court, this Part relies upon the District Court opinion because it presents the facts and legal analysis in greater depth.
145 See id. at 884–85.
146 See id. at 885.
147 Id. at 886.
148 See id.
first denied.” However, the reviewing court failed to find these reasons indicative of intent and held that there had been no deprivation of equal protection.

Despite the demonstrable historical patterns of discrimination and clearly disproportionate effects, courts continue to deny relief under the Equal Protection Clause absent a showing of intentional or purposeful discrimination. Both Bean and East Bibb Twiggs demonstrate the reluctance of courts, following Arlington Heights, to provide relief to plaintiffs, even though the site selections in those two cases appear facially discriminatory. However, recent case developments suggest that intentional environmental discrimination is not necessarily an insurmountable hurdle when it comes to the requisite proof of intent, giving new hope to litigators that arguing for constitutional protection in environmental cases is not a lost cause.

In Miller v. City of Dallas, residents of the Cadillac Heights area of Dallas brought a claim against the City for intentional racial discrimination in the provision of municipal services. The plaintiffs alleged that lawmakers discriminated against residents of Cadillac Heights—98.5% of whom are minorities and 46% of whom live in poverty—with respect to flood protection, zoning, industrial nuisances, landfill practices, streets and drainage, and federal funding for housing and community development. The plaintiffs provided historical and demographic evidence that strongly supported claims of impermissible race-based zoning, similar to the evidence presented in Arlington Heights, Bean, and East Bibb Twiggs. For example, they presented evidence that the city refused to enforce local and state laws regarding the harmful effects of lead pollution from smelters in Cadillac Heights, yet used zoning authority to protect white residents from the same effects. Ultimately, the court denied summary judgment for the defendants, finding that the plaintiffs had presented sufficient facts to

149 See id.
150 See East Bibb Twiggs, 706 F. Supp. at 887.
151 See Saleem, supra note 37, at 225.
152 See id.
155 See id.
156 See id. at *4–15.
157 See id. at *8.
show a genuine issue for trial. However, the case was never fully litigated as the result of a monetary settlement.

A similar result occurred in Calvary Pentecostal Church v. Town of Freetown, a dispute involving discriminatory zoning and permitting decisions that plaintiffs alleged were the result of historical practices of intentional discrimination. In Calvary, the plaintiffs were Cape Verdean residents of the Braley Road section of Freetown, Massachusetts. According to the complaint, Freetown, along with many other towns in Southeastern Massachusetts, subjected minority residents to discrimination through the attempted enforcement of Jim Crow laws. Cape Verdeans make up approximately 0.7% of Freetown residents, but virtually all of the Cape Verdean residents live in the Braley Road section of the town. The complaint refers to discriminatory zoning decisions—such as a failure of the town to provide adequate water facilities to Braley Road, as well as a 1996 decision by the Town Zoning Board to zone Braley Road as “industrial,” despite the residential character of the neighborhood. In 2000, the board approved the development of an asphalt plant, a concrete plant, and an 800,000-square-foot warehouse and distribution center to be built on Braley Road. Residents protested the projects, and the plans to build the warehouse were withdrawn. While the board alleged that the development of Braley Road was motivated solely by the recent zoning changes, members recognized that past boards had not been sensitive to the needs of residents.

The District Court hearing Calvary referred the issue to alternative dispute resolution, thereby indicating that the court felt there were sufficient facts to hear the case but wished to save its resources if the parties could come to a mutual resolution. While they were never fully

158 See id. at *1–2 (referring to the process of summary judgment established in Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986)).
159 See Daniel, supra note 120, at 15.
160 See Hoffer, supra note 153, at 982.
161 See id.
162 See id.
163 See id.
164 See id. at 982–83.
165 See id. at 983.
166 See Hoffer, supra note 153, at 983.
167 See id. at 983–84.
168 See id. at 983. Many states are experimenting with sending certain controversies to alternative dispute resolution because of “burgeoning court queues, rising costs of litigation, and time delays.” See Legal Information Institute, Alternative Dispute Resolu-
litigated, both of these cases have been significant in demonstrating courts’ willingness to hear constitutional challenges to environmental laws when plaintiffs have brought forth affirmative evidence of disparate impact, regardless of the government’s intent. 169 Though litigating an EJ claim under the Equal Protection Clause has thus far proven difficult, there are benefits to bringing these cases. 170 Most notably, these lawsuits have brought environmental injustices—such as the disparate impact of hazardous waste facility site selection—to national attention. 171

D. Despite the Challenges, Bringing Cases Under the Equal Protection Clause Continues to Benefit the Environmental Justice Movement

While litigating an EJ claim under the Equal Protection Clause has thus far proven difficult, there are numerous benefits to bringing these cases. 172 Each case pushes the courts to recognize the disparate impact of environmental decisions, which affect low-income and minority communities. 173 Furthermore, the cause gains support through publicity and education of both the judiciary and the public. 174 By bringing these lawsuits, environmental injustices such as the disparate impact of hazardous waste facility site selection and exclusionary zoning practices across the country are brought to the forefront of national attention and discussion. 175

As Professor Gerald Torres suggests, reasons for distributional inequality may be the result of a combination of historical decision-making and market dynamics beyond racism. 176 An emphasis on racism may shift the focus of the EJ movement away from the achievement of equality in politics and distribution of negative environmental impacts, and instead “seems designed to begin a relatively fruitless search for a wrong-doer, or in other words, the bad person with evil

169 See Hoffer, supra note 153, at 980.
170 See Cole, supra note 76, at 541–44.
172 See Cole, supra note 76, at 541–44.
173 See Saleem, supra note 37, at 227.
174 See Cole, supra note 76, at 541–44.
175 See id.
176 See Torres, supra note 46, at 604–05, 607–08.
The goal of the Equal Protection Clause is to improve and guarantee equal treatment for all people, not to punish racists. If real equality is to result from the EJ movement, framing existing disparities as solely the result of racism or discrimination will not be a successful avenue. Alleging racism may gain publicity for instances of apparent racism, as it did in Warren County. However, this type of intentional bias and purposeful discrimination need not be explicit for environmental injustice to occur.

Framing environmental injustice as the result of racism is not the most effective means of bringing about equality. Jumping to an accusation of racism as a motivating force for environmental policymaking is not only difficult to prove, but can alienate critical decisionmakers who may otherwise be sympathetic to the existence of disparate impacts. Furthermore, it may have the opposite effect by creating sympathy for those accused of discriminating as “victims” of the so-called unsubstantiated claims. Thus, putting aside a claim of racism and instead litigating on the existence of disparate effects, whether intentional or unintentional, is likely to be more palpable to a reviewing court.

To bring about real change and equality, the government should be subject to strict scrutiny as soon as a plaintiff objectively proves disparate impact of a governmental action. In the recent U.S. Supreme Court decision Bush v. Gore, the Court did just that by basing a decision on the effect and potentially disparate impact of the decision, not on the intent of the actors. While the specific facts of the decision differed from the EJ context, the factors which the Court considered to determine the constitutionality of the act in question are the same. This decision gives new hope to EJ advocates and litigants that the Court may be willing to see the flawed burden of proof standard in its Equal Protection Clause jurisprudence.

177 See id. at 602. See generally UCCRFJ STUDY, supra note 12, at 165–70.
178 See Boyle, supra note 43, at 964.
179 See Kaswan, supra note 7, at 280–81. “Communities who believe they have been treated unfairly must find ways to communicate their cause in a manner that stimulates the broader community to greater accountability.” Id. at 280.
180 See Bullard, supra note 7, at 30–32.
181 See Kevin, supra note 48, at 126.
182 See Torres, supra note 46, at 603–04.
183 See Kaswan, supra note 7, at 281.
184 See id.
185 See id. at 280–81.
187 See Lapointe, supra note 4, at 474–77.
III. A Breath of Fresh Air in the Equal Protection Doctrine

EJ litigants have been stonewalled in challenging race-based decisions for hazardous waste facility siting under the Equal Protection Clause because of the burden of proving intent. While this standard is daunting in many cases, there are instances in which the racial bias of a given decision is evident and proof is readily available; those claims, according to one author, “should be pursued without hesitation.” In light of the general societal disapproval of racism, however, racially discriminatory decisions are not likely to be overtly race-based. As a result, civil rights lawyers have become frustrated and have begun to consider these types of claims “certain losers.” Nevertheless, there may still be hope for these types of claims given recent developments in the U.S. Supreme Court’s interpretation of the Equal Protection Clause.

On December 12, 2000, the Supreme Court issued an opinion in *Bush v. Gore*, which disregarded the proof of intent requirement delineated in *Arlington Heights v. Metropolitan Housing Development Corp.* Instead, the opinion, written by Justice Scalia, makes a decision under equal protection by considering the rudimentary requirements of uniform rules and nonarbitrary treatment, and never addresses the plaintiff’s burden of demonstrating intent. While the mainstay of Equal Protection Clause claims in voting rights cases—like the racial discrimination cases from which the fundamental right to vote emanated—has been the establishment of an intentional violation of equal protection by a state actor, neither the counties nor any voter even alleged such discrimination in *Bush*. Despite a lack of proof—or even so much as an allegation—of governmental intent to discriminate, the Court found a violation of the Equal Protection

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188 See Evans, *supra* note 16, at 1280. For a discussion of this hurdle, see *supra* Part II.
190 See Karlan, *supra* note 130, at 124.
194 See *Bush*, 531 U.S. at 104–05; McGuinness, *supra* note 80, at 292.
195 See *Lapointe*, *supra* note 4, at 482; see also *infra* Part III.A.
196 See *Bush*, 531 U.S. at 110; *Lapointe*, *supra* note 4, at 476.
Clause. In doing so, however, the Court reverted to a prior interpretation of what triggers strict scrutiny in a racial discrimination case: the disparate impact and effects test of the early 1970s, articulated in the Court’s decision in *Griggs v. Duke Power Co.*

The decision in *Bush* has the potential for monumental impact in the realm of EJ litigation, as the effects and disparate impacts of hazardous waste facility siting decisions have been repeatedly proven with statistical data. Proving that these effects were “nonarbitrary” may provide a new hurdle in EJ litigation, as it remains unclear what standards are constitutionally required to prove arbitrariness. However, this Note focuses on how the relaxed burden of proving intent in *Bush* has the potential to make the hurdle less daunting to EJ advocates.

### A. Easily Triggered Strict Scrutiny: A Reconsideration of the Equal Protection Requirements

In *Bush*, the Supreme Court effectively decided the 2000 United States presidential election between George W. Bush, Governor of Texas and then-Vice President Al Gore. On November 7, 2000, Vice President Gore won the popular vote in the presidential election, but the outcome of the Electoral College remained uncertain, dependent entirely on election results from the State of Florida. Governor Bush was declared an early winner in Florida, but Vice President Gore subsequently requested a recount in the counties of Volusia, Palm Beach, Broward and Miami-Dade. The recount was permissible under Florida state law, allowing either candidate to request a recount should an election appear to be decided by less than one-half of one percent of votes counted.

After numerous lawsuits regarding the proper application of Florida laws in recount procedures, Vice President Gore filed a complaint in the U.S. District Court for the District of Leon County, contesting the certification of results in the Florida election and arguing that the

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197 See *Bush*, 531 U.S. at 110.
199 For a discussion of the statistical evidence, see *supra* Part III.
200 See *Epstein*, *supra* note 3, at 286–87.
201 See *Chemerinsky*, *supra* note 85, at 860.
202 See *id.*
203 See *id.*
manual recount ought to continue until all votes were counted. His arguments rested on the principles clearly delineated in *McPherson v. Blacker*, in which the Court held that once the state legislature vests the right to vote for presidential electors in the people, it becomes a fundamental right whereby equal weight must be accorded to each vote. Vice President Gore went on to argue that by discontinuing the manual recount, whereby each vote was counted and the intent of each voter discerned, the state was, through arbitrary and disparate treatment, valuing one person’s vote over that of another. While he asserted that votes were being treated differently in different counties as a result of nonuniform procedures, the complaint did not ever allege that these arbitrary procedures were the result of intentional discrimination by government actors—the traditional burden of intent requirement after *Washington v. Davis* and *Arlington Heights*.

The trial court decided against Vice President Gore, who subsequently appealed. On appeal, the Florida Supreme Court ordered that the manual recounts continue. The U.S. Supreme Court granted certiorari and oral arguments were heard on Monday, December 11, 2000. The Court issued a majority opinion stopping the manual recount less than twenty-four hours later. In its opinion, the Court addressed equal protection and the importance of respecting the intent of every voter. The Court did not decide whether there could be variation among counties and districts regarding the recount procedures; rather, it decided whether the implementation and effect of those procedures had sufficient constitutional safeguards.

The Florida Supreme Court ordered that the intent of each voter be discerned. The U.S. Supreme Court reversed, finding that the
rules—or lack thereof—being used to ensure that the intent of each voter was properly discerned across all counties were insufficient to ensure voter rights under the Equal Protection Clause.\(^{217}\) The Court found that since the process for determining intent was unclear, the decisions being made were arbitrary and thus the process itself was a violation of the Equal Protection Clause, permitting unequal treatment of voters.\(^{218}\) Writing for the majority, Justice Scalia declared:

\[W\]e are presented with a situation where a state court with the power to assure uniformity has ordered a statewide recount with minimal procedural safeguards. When a court orders a statewide remedy, there must be at least some assurance that the rudimentary requirements of equal treatment and fundamental fairness are satisfied.\(^{219}\)

Without considering the intent of the Florida government when it created these procedures, the Court found that the procedure in place was a violation of the Equal Protection Clause, “inconsistent with the minimum procedures necessary to protect the fundamental right of each voter,” finding that the lack of procedural safeguards in itself was enough to trigger strict scrutiny.\(^{220}\)

The Court clearly limited the decision to the facts of *Bush*, but it is unclear whether the interpretation of the requirements of equal protection may be viable as precedent in cases outside the voting rights context.\(^{221}\) Voting rights questions arising under the Equal Protection Clause are traditionally analyzed using strict scrutiny as voting has been deemed a fundamental right: the same analysis generally used by the courts in reviewing allegations of racial discrimination.\(^{222}\) In order to get to the strict scrutiny test in the EJ context, *Arlington Heights* made it clear that the plaintiff must first clear the intent hurdle.\(^{223}\) In *Bush*, however, it appears that the Court did not consider the government’s intent; instead, it immediately applied strict scrutiny, shifting the burden to the government to prove that the standards being used

\(^{217}\) See *id.* at 106–08.

\(^{218}\) See *id.* at 107.

\(^{219}\) *Id.* at 109.

\(^{220}\) See *id.*

\(^{221}\) See Vance, *supra* note 192, at 914–16.

\(^{222}\) See Chemerinsky, *supra* note 85, at 645.

to conduct the vote recount were uniform and nonarbitrary, based solely on the potentially disparate impact of the recount procedures.\textsuperscript{224}

\textit{Bush} is contextually distinct from the hazardous waste facility siting decisions challenged under the Equal Protection Clause by EJ advocates, but its holding has the potential to change the face of EJ litigation by lessening plaintiffs’ heavy burden to prove discriminatory intent of government actors.\textsuperscript{225} The Court, in reviewing \textit{Bush}, plainly asserted that its decision was limited to the facts of the case.\textsuperscript{226} However, “[a] desire for speed is not a general excuse for ignoring equal protection guarantees.”\textsuperscript{227} Time pressure cannot be used as a justification for ignoring or misapplying the fundamental guarantees and safeguards of the Equal Protection Clause.\textsuperscript{228} In making the statement “[o]ur consideration is limited to the present circumstances,” the Court attempted to foreclose the possibility of using the decision as precedent outside the facts of the particular case before it.\textsuperscript{229} It is the duty of the Court, though, to interpret the Constitution and apply it uniformly to cases or controversies arising out of questions of law.\textsuperscript{230} The Court is bound by the decisions it makes, and “cannot simply depart from precedent and simultaneously erase that departure as if it never happened.”\textsuperscript{231}

Opinions issued by the Court cannot be declared “constitutional” and simultaneously have no precedential value, especially when a decision departs from precedent.\textsuperscript{232} If that were the case, the Court would lose all credibility.\textsuperscript{233} Thus, the \textit{Bush} analysis cannot be considered entirely inapplicable outside of the voting rights context.\textsuperscript{234} Even if the decision stands only for the holding that the Equal Protection Clause demands assurances of equal treatment and fundamental fairness, or that people—or, in this case, votes—in similar circumstances

\textsuperscript{224} See \textit{Bush}, 531 U.S. at 106.
\textsuperscript{225} See Lapointe, \textit{supra} note 4, at 481–82.
\textsuperscript{226} See \textit{Bush}, 531 U.S. at 109.
\textsuperscript{227} Id. at 108.
\textsuperscript{228} See \textit{id}.
\textsuperscript{229} Id. at 109; see Lapointe, \textit{supra} note 4, at 479–80.
\textsuperscript{230} See U.S. Const. art. III, § 2 (stating that “[t]he judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority”).
\textsuperscript{231} See Lapointe, \textit{supra} note 4, at 480.
\textsuperscript{232} See \textit{id.}; Foner, \textit{supra} note 5, at 294.
\textsuperscript{233} See Lapointe, \textit{supra} note 4, at 480.
\textsuperscript{234} See \textit{id}. 
must be treated similarly, its holding must apply uniformly to all cases unless and until it is overturned at some future date.235

B. Similarities Between Voting Rights Cases and Environmental Justice Cases

During oral arguments in Bush, but prior to the decision, numerous commentaries dissected the potential implications of the decision in light of the Equal Protection Clause.236 The authors of one commentary urged that:

if [the decision in the case] comes down for the justices to the 14th Amendment and the promise of equal protection, one can only hope for the sake of the country that they consider how not counting all the votes mirrors too closely the habits of heart and mind that brought us slavery and segregation—the original sins of our nation that the equal protection clause sought to repair.237

Voting rights evolved from the very guarantees of equal protection, which EJ advocates argue are ignored in hazardous waste facility siting decisions with disparate impacts on minority communities.238

During the height of the Civil Rights movement, the Court in Gomillion v. Lightfoot made clear that any voting rights statute that had the impermissible effect of “despoil[ing]” African-American citizens of their right to vote was constitutionally impermissible.239 In Reynolds v. Sims, the Court found that, consistent with the “one person, one vote” principle established in McPherson, “the right of suffrage can be denied by a debasement or dilution of the weight of a citizen’s vote just as effectively as by wholly prohibiting the free exercise of the franchise.”240 Subsequently, in Harper v. Virginia Board of Elections, the Court found that a poll tax, though neutral on its face, had the impermissible effect of discrimination based on wealth, and the brunt of this discrimination was borne by African-American citizens.241

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235 See Vance, supra note 192, at 915.
236 See generally Cases and Commentary, supra note 1, at 253–77 (compiling commentaries from various news sources).
238 See McGuinness, supra note 81, at 266–67.
These cases demonstrate that the Court has been unwilling to uphold laws or decisions by government actors that have a disparate impact on racial lines in the voting rights context.\textsuperscript{242} The decision in \textit{Bush}, however, did not bring a voting rights question into play.\textsuperscript{243} The plaintiff did not challenge an attempt by government to prohibit or restrict any citizen’s right to vote.\textsuperscript{244} Instead, the Court’s decision extended equal protection to the casting and counting of votes, and “opened the door to challenging our highly inequitable system of voting. Claims of unequal treatment by voters in poorer districts are not likely to receive a sympathetic hearing from the current majority.”\textsuperscript{245} The decision also opened the door to challenges outside of the voting rights context, giving new ammunition to plaintiffs who feel that they have been wrongfully victimized on racial lines by governmental actors.\textsuperscript{246} The Court’s willingness to shift the burden to decisionmakers to justify the disparate impact of their decisions, if applied in the EJ framework, would significantly lessen the daunting proof of intent hurdle for EJ litigants.

\textbf{C. Is the EJ Movement Just One Step Behind? Triggering Strict Scrutiny in Employment Discrimination Claims}

As early as 1974, the First Circuit Court of Appeals, in a post-\textit{Davis} but pre-\textit{Arlington Heights} decision, recognized the need for the courts to remedy racially disproportionate impacts without proof of discriminatory intent as a major hurdle for plaintiffs.\textsuperscript{247} In \textit{Boston Chapter, N.A.A.C.P., Inc. v. Beecher}, an employment discrimination case involving a Massachusetts Division of Civil Service requirement that firefighters pass a written multiple-choice test before entering the firefighting academy, the court found that parties challenging an employment test for civil servants:

[M]ust establish its disproportionate impact by demonstrating that, for whatever reason, it is more of a hurdle for minority members than for others; once this is shown, the test’s proponents acquire a burden of justification and must “prove that the disproportionate impact was simply the result of a proper

\begin{itemize}
\item \textsuperscript{242} See Lapointe, \textit{supra} note 4, at 482.
\item \textsuperscript{243} See Epstein, \textit{supra} note 3, at 285.
\item \textsuperscript{244} See id.
\item \textsuperscript{245} Foner, \textit{supra} note 5, at 294.
\item \textsuperscript{246} See Lapointe, \textit{supra} note 4, at 481–82.
\item \textsuperscript{247} See Boston Chapter, N.A.A.C.P., Inc. v. Beecher, 504 F.2d 1017, 1019 (1st Cir. 1974).
\end{itemize}
test demonstrating lesser ability of black and Hispanic candidates to perform the job satisfactorily.”

The court found that objective data of disparate impact was sufficient to shift the burden to the government to substantiate the action in question. The finding required for burden shifting was even stricter than the burden shifting found sufficient twenty-five years later in Bush—requiring only the potential for discriminatory impact to shift the burden of proof and trigger strict scrutiny analysis.

The court in Beecher found that census figures demonstrating the disproportionately few minority members of a fire department—as compared to minority representation in the community which the department serves—were weak when used to show the discriminatory impact of the hiring exam in question. However, the figures were enough to justify a burden shifting to the government actors to justify the use of the exam. While the court in Beecher was deciding the burden of proving intent before the Arlington Heights standards set by the Supreme Court, this minimal showing of discriminatory impact was sufficient to require governmental justification, and the result was never overturned. However, the data set forth was significantly less concrete and objective than the statistics set forth in the GAO and UCCRF studies.

While courts have been consistently unwilling to recognize objective data in EJ litigation as sufficient to overcome the plaintiff’s burden of proof, relaxing the Arlington Heights standards would allow the use if such data to overcome this burden. In Bush, the Court applied this relaxed standard. A decree from the Supreme Court, such as that in Bush, that even the potential for disproportionate impact violates the Equal Protection Clause, may be

\[\text{248 See id. (quoting Vulcan Society v. CSC, 490 F.2d 387, 392 (2d Cir. 1973)).}\]
\[\text{249 See id.}\]
\[\text{251 See Beecher, 504 F.2d at 1020.}\]
\[\text{252 See id.}\]
\[\text{253 In fact, courts have continued to apply the Beecher doctrine as viable precedent in determining the burden of intent for employment discrimination cases. See, e.g., Quinn v. City of Boston, 325 F.3d 18, 29 (1st Cir. 2003) (applying the Beecher doctrine in an affirmative action case involving the proportionality of hiring practices relative to general community).}\]
\[\text{254 See discussion supra Part II.C.}\]
\[\text{255 See Lapointe, supra note 4, at 480; Foner, supra note 5, at 294.}\]
\[\text{256 See Lapointe, supra note 4, at 480; Foner, supra note 5, at 294.}\]
sufficient precedent to lessen the intent hurdle for EJ litigants and trigger strict scrutiny.257

D. The Potential Significance of Bush for Environmental Justice Litigants

The Supreme Court, in reviewing Arlington Heights, was confronted by a government zoning decision whose legislative history showed clear references to “social issues” as being motivating factors.258 However, rather than using that to trigger strict scrutiny and shift the burden of proof to government to justify the disparate impact of their decision, they found that this proof was insufficient for the plaintiff to show that the government action was intentionally discriminatory.259 In both Bean v. Southwestern Waste Management Corp. and East Bibb Twiggs Neighborhood Ass’n v. Macon-Bibb County Planning & Zoning Commission, reviewing courts found again that evidence of clear patterns of discrimination by government actors was insufficient to meet the plaintiffs’ burden of intent.260 If, after Bush, disparate impact—as evidenced by objective data supplied to the Court—is sufficient to trigger strict scrutiny and shift the burden to the government to justify its own actions, legislative history clearly referencing “social issues” as a factor in the decisionmaking would be difficult for the government to circumvent.

The Court should hold to its words under stare decisis, and there the showing of proof—or even the possibility—of discriminatory impact should trigger strict scrutiny.261 This would then place the burden on government to justify its own actions, and the potential for a different outcome for EJ litigants would be immense.262 Requiring that the government implement standards to provide “assurance that the rudimentary requirements of equal treatment and fundamental fairness are satisfied,” would mean that additional safeguards would be available to EJ advocates.263 In Bush, the potential for disparate impacts of varying vote counting procedures was found to be a violation

257 See Lapointe, supra note 4, at 480; Foner, supra note 5, at 294.
259 See id. at 270–71.
262 See id.; Evans, supra note 16, at 1280.
263 See Bush, 531 U.S. at 109.
of the Equal Protection Clause.\footnote{264 See id. at 109–10.} The statistical evidence, from studies such as the UCCRJ Study and the GAO Report highlight disparate impacts that are more than merely potential.\footnote{265 See GAO Report, supra note 12; UCCRJ Study, supra note 12. For a discussion of the findings of these studies, see supra Part II.} In both Miller v. City of Dallas and Calvary Pentecostal Church v. Town of Freetown, reviewing courts gave credibility to this type of statistical data in their site-specific analyses, but refused to allow it to suffice as strong enough to fulfill the plaintiff’s burden of proving government intent.\footnote{266 See Miller v. City of Dallas, No. CIVA 3:98-CV-2955-D, 2002 WL 230834, at *8–9 (N.D. Tex. Feb. 14, 2002); Hoffer, supra note 153, at 982–83; supra Part II.C.} The refusal of reviewing courts to grant summary judgment in favor of the government in both cases demonstrates a recent willingness to recognize the disparate impacts presented by EJ plaintiffs.\footnote{267 See Miller, No. CIVA 3:98–CV–29550D, 2002 WL 230834, at *8–9 (N.D. Tex. Feb. 14, 2002): Hoffer, supra note 153, at 984.} The redefinition of the requirements for triggering strict scrutiny under Bush may be just what litigants need to legitimize remedying the disproportionate siting of hazardous waste facilities in minority neighborhoods.\footnote{268 See Mitchell, supra note 6, at 183; Godsil, supra note 6, at 410.}

Conclusion

The Supreme Court’s decision in Bush v. Gore to apply an equal protection-based strict scrutiny analysis to a governmental action based upon the potential for racially discriminatory impact provides new hope for EJ advocates. Cases brought under the Equal Protection Clause for discriminatory siting of hazardous waste facilities, as proven by objective data from numerous studies, have been unsuccessful because of the heavy burden of proof after Arlington Heights v. Metropolitan Housing Development Corp. that plaintiffs establish by affirmative, positive evidence—more than objective studies—of government’s intent to discriminate in decisionmaking.

The decision in Bush reverts back to a standard previously announced by the Court in Griggs Griggs v. Duke Power Co. which considered disparate impact as sufficient to overcome the burden of proof. While the Bush decision was made under immense time pressure, and was self-declared to have no precedential value, it is in line with a general tendency of reviewing courts to depart from the strict standard in Arlington Heights. Thus, while the decision may claim to have no precedential value, it provides new insight for EJ advocates seeking to
remedy the disproportionate burden of hazardous waste facilities in low-income and minority communities and should be a starting point in future Equal Protection Clause litigation.
THE PROJECT BIOSHIELD PRISONER’S DILEMMA: AN IMPETUS FOR THE MODERNIZATION OF PROGRAMMATIC ENVIRONMENTAL IMPACT STATEMENTS

DAVID M. SHEA*

Abstract: Passage of the Project BioShield Act of 2004 evinced an executive and legislative desire to increase government-controlled laboratory space dedicated to studying dangerous pathogens. Pursuant to this Act, the National Institutes of Health (NIH) awarded generous construction grants to research universities nationwide. Unsurprisingly, sitting disputes have subsequently arisen over the placement of several of these proposed laboratories in densely populated areas. Because NIH chose not to complete a programmatic environmental impact statement (PEIS), the potential litigation endgames are suboptimal. This fuels a larger debate over the relevance of PEISs in general in light of their recognized value but sporadic invocation. This Note uses a game theory model to argue that initial completion of a thorough PEIS would have led NIH to propose laboratories in areas with comparatively lower population densities. This preferable but currently unattainable outcome demonstrates the need for reform. To that end, this Note concludes with recommendations for legislative, executive, and judicial modernization of PEISs.

The primary hazards to personnel working with Biosafety Level 4 agents are respiratory exposure to infectious aerosols, mucous membrane or broken skin exposure to infectious droplets, and autoinoculation. All manipulations of potentially infectious diagnostic materials, isolates, and naturally or experimentally infected animals, pose a high risk of exposure and infection to laboratory personnel, the community, and the environment.  

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* Articles Editor, BOSTON COLLEGE ENVIRONMENTAL AFFAIRS LAW REVIEW, 2005–06.
[The Rocky Mountain Laboratories] campus is located in rural western Montana, well removed from major population centers. The location of the laboratory reduces the possibility that an accidental release of a biosafety level-4 organism would lead to a major public health disaster.  

Introduction

Biosafety level 4 (BSL-4) organisms, including Ebola and several other African, Asian, and South American viral hemorrhagic fevers, are those determined by the Department of Health and Human Services to be “[d]angerous/exotic agents which pose high risk of life-threatening disease, aerosol-transmitted lab infections; or related agents with unknown risk of transmission.” While these pathogens cause the most dangerous diseases known to man, the amount of laboratory space devoted to their study is comparatively small. In the wake of the September 2001 terrorist attacks and the October 2001 anthrax letter scares, President George W. Bush announced a major initiative—Project BioShield—to swiftly fund additional BSL-3 and BSL-4 (BSL-3/4) laboratory space across the country.

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3 See Biosafety Guidelines, supra note 1, at 53. Biosafety levels one through four, from lowest to highest required security measures, are assigned to microbiological laboratory facilities based upon the types of diseases studied there. Id. at viii.

4 Less-secure BSL-3 laboratories are allowed to handle organisms which cause diseases as serious as anthrax, tularemia, severe acute respiratory syndrome (SARS), acquired immunodeficiency syndrome (AIDS), smallpox, and plague. See Nat’l Insts. of Health, U.S. Dep’t of Health & Human Servs., Draft Environmental Impact Statement, National Emerging Infectious Disease Laboratories, Boston app. 2 (Oct. 2004) (on file with author) [hereinafter BUMC DEIS].

5 While the BSL-1 designation may be assigned to “undergraduate and secondary training and teaching laboratories” with no more safety measures than “a sink for hand-washing,” there are currently only four operational BSL-4 laboratories nationwide. Biosafety Guidelines, supra note 1, at 11–12; Nat’l Inst. of Allergy and Infectious Diseases, U.S. Dep’t of Health and Human Servs., The Need for Biosafety Laboratory Facilities (Feb. 2004), http://www.niaid.nih.gov/Factsheets/facility_construction.htm.

6 See Address Before a Joint Session of the Congress on the State of the Union, 39 Weekly Comp. Pres. Doc. 109, 113 (Jan. 28, 2003) [hereinafter 2003 State of the Union Address]; see also discussion infra Part I.A. To raise public support for this funding initiative, President Bush warned the American public of the extreme dangers posed by BSL-
In September 2003, Boston University Medical Center (BUMC) received $120 million toward the construction and operation of a BSL-3/4 research facility, after being selected as one of nine institutions to be awarded generous federal grants under Project BioShield. Many local politicians supported the proposed project, based partly on the government’s assurance that the risk involved is “negligible.”

Despite this self-serving administrative assurance, recent media coverage has documented numerous scenarios involving non-negligible amounts of risk at existing BSL-3/4 laboratories, including: the potential spread of pathogens due to power loss; the release of pathogens inside a laboratory; the misplacement of pathogens; the release of pathogens during transit; and the accidental transmission of pathogens to laboratory workers. One can easily conceive of a disaster scenario in downtown Boston rivaling or surpassing the 2002 SARS epidemic in Southeast Asia. This Note does not take the radical view that accidents of this nature are certain to occur if the proposed BUMC laboratory is built; rather, it assumes that the siting of a BSL-3/4 labora-

3/4 organisms, stating: “It would take one vial, one canister, one crate slipped into this country to bring a day of horror like none we have ever known.” See 2003 State of the Union Address, at 115.


8 See Michael Blanding, Fear in the Air, BOSTON MAG., June 2004, http://www.bostonmagazine.com/index.cfm/fuseaction/articleview/articleID/421a74a5-106d-44d3-b752-01e93a75b1ef (stating that Mayor Thomas Menino, Governor Mitt Romney, and Senator Edward Kennedy have all pledged their support).

9 See BUMC DEIS, supra note 4, at 4-6 to 4-14; see also discussion infra Part V.B.

10 See Marc Santora, Power Fails for 3 Hours at Plum Island Infectious Disease Lab, N.Y. TIMES, Dec. 20, 2002, at B1. Fortunately, a potential disaster was averted when quick-thinking workers at the center “sealed the [laboratory] doors with duct tape.” Id.


13 See Associated Press, Virus Box Explodes at Ohio FedEx Site, N.Y. TIMES, Mar. 20, 2003, at A31 (“The package, from the Ohio Department of Health and being sent to . . . the University of Texas, held brain and kidney tissue from a bird that had tested positive for the [West Nile] virus . . . .”).


15 See Brown, supra note 14 (detailing the unsettling innocence with which an outbreak’s initial carriers can spread SARS, a BSL-3 pathogen).
tory in such a densely populated area would, contrary to the government’s assertion, necessarily constitute some nontrivial amount of risk.¹⁶

Two local groups—Alternatives for Community & Environment (ACE) ¹⁷ and Safety Net ¹⁸—share this assumption, including it among their claims in various response letters written during public comment periods throughout the federal and state environmental review

¹⁶ See Alternatives for Cmty. & Env’t/Safety Net, Which One Does Not Belong? (Mar. 12, 2004), http://www.ace-ej.org/BiolabWeb/Biolabdocs/WhichOneDoesNotBelong3-12-04.pdf. Statistics compiled by a community environmental group cite the local population density for the proposed BUMC laboratory as being more than four times higher than that of any of the four BSL-4 laboratories already in existence. See id.

Where many are familiar with Love Canal, Three-Mile Island, and the Exxon-Valdez oil spill, the government’s contention that no meaningful risks would be posed by the transportation and study of Ebola and SARS viruses in a densely populated, urban neighborhood rings hollow. Moreover, documents and regulations exist which belie the executive branch’s professed view on the innocuousness of BSL-3/4 laboratories. See, e.g., 42 C.F.R. § 73.17 (2005) (tacitly recognizing the possibility of the “theft, loss, or release,” of a selected agent or toxin by listing agencies’ notification requirements in such scenarios); Office of Inspector Gen., U.S. Dep’t of Health & Human Servs., Summary Report on Select Agent Security at Universities 1–3 (Mar. 2004) (documenting “serious weaknesses” at all eleven universities studied in preventing unauthorized entry and removal of infectious substances from university “hot labs”), available at http://org.hhs.gov/oas/reports/region4/40402000.pdf.


EPA defines environmental justice as “the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.” EPA, Environmental Justice, http://www.epa.gov/compliance/environmentaljustice/index.html (last visited May 4, 2006). The environmental justice movement has gained recognition over the last few decades as it has become apparent to many that communities with higher percentages of minority and low-income populations are often asked to bear disproportionate numbers of locally unwanted land uses (LULUs). See, e.g., Richard J. Lazarus, Pursuing “Environmental Justice”: The Distributional Effects of Environmental Protection, 87 NW. U. L. REV. 787, 796–806 (1993); Lawrence E. Susskind, A Negotiation Credo for Controversial Siting Disputes, 6 NEGOTIATION J. 309, 309–10 (1990). Importantly, LULUs such as nuclear power plants and toxic waste dumps are often associated with heightened levels of environmental and health risk. See Daniel C. Wigley & Kristin S. Shrader-Frechette, Environmental Racism and Biased Methods of Risk Assessment, 7 RISK 55, 57 (1996).

¹⁸ Safety Net describes itself as being “comprised of public housing residents and others in Roxbury who came together in 2000 to develop a voice and vision for a sustainable Roxbury and equitable metropolitan development.” December ACE Letter, supra note 17, at 1. Because the proposed BSL-3/4 laboratory will be “located near their densely populated urban neighborhood,” members of Safety Net believe that it “will have adverse environmental, health, safety, and economic impacts.” Id.
processes.\textsuperscript{19} As of the date of publication, these groups were involved in an ongoing lawsuit challenging the final state environmental certification.\textsuperscript{20} This Note foregoes analysis of the local matters and focuses instead on the legal challenges surrounding the federal environmental certification once it becomes final, because these findings will be more relevant to other proposed laboratory sites.\textsuperscript{21} In addition, if the state litigation were to block the proposed BUMC BSL-3/4 laboratory, the analysis in this Note will remain relevant should the federal government choose to redirect its munificence.

While the local groups’ missives offer a potential road map for future Project BioShield litigation, they also raise pertinent questions about the future of environmental review in general. In particular, one of the environmental plaintiffs’ central claims—that the government failed to complete a programmatic environmental impact statement (PEIS)\textsuperscript{22} for Project BioShield as a whole before choosing specific locations for the proposed BSL-3/4 laboratories\textsuperscript{23}—is a frequent point of contention in environmental litigation.\textsuperscript{24} Indeed, uncertain-


\textsuperscript{21} For a list of these proposed laboratory sites, see infra note 42.

\textsuperscript{22} One of the foremost authorities on environmental litigation describes PEISs—also known as “program,” “cumulative,” and “comprehensive” EISs—as follows:

Cases arise in which an impact statement on a group of related actions or an agency program that may lead to later individual actions, may be helpful. The impact statement that is prepared in situations of this kind is known as a program environmental impact statement (PEIS). . . . Often it is difficult to examine the cumulative impact of a number of individual but related actions when they are reviewed one at a time. The [PEIS] can help overcome this problem by considering a group of related actions together or by reviewing the implications of an agency’s program comprehensively before it produces actions that will be reviewed individually.

\textsuperscript{23} See December ACE Letter, supra note 17, at 2.

ties as to how and when to complete PEISs have recently led one government task force to call for their modernization, as some agencies "struggle[d]" with this "valuable decisionmaking tool[]."25

This Note supports the need for PEIS modernization; the predictions made herein regarding the impending Project BioShield litigation also bolster the need for this Note’s proffered remedies. Part I details the recent political events leading up to the present controversy. Part II establishes the foundation for the plaintiffs’ “Failure to Complete a PEIS” claim by discussing the statutory and regulatory foundation behind PEISs, as well as related case law from the past three decades. Part III examines two relevant branches of plaintiffs’ “Inadequate EIS” claim: failure to adequately consider project alternatives, and inadequate risk-assessment methodologies.

In an effort to catalog probable litigation outcomes, Parts IV and V analyze the backgrounds from Parts II and III, respectively, as they apply to Project BioShield litigation. While Part IV concludes that a court reviewing the siting of any of the proposed laboratories is not likely at this point to mandate a PEIS for Project BioShield, Part V examines the potential Boston litigation specifically and concludes that a reviewing court may indeed invalidate the BUMC EIS, either for inadequate consideration of project alternatives or inadequate risk-assessment methodologies.

Part VI applies the litigation predictions from Parts IV and V to a well-known game theory model entitled the prisoner’s dilemma. This model demonstrates that the optimal outcome would have required agency completion of a thorough PEIS at Project BioShield’s inception. Since the panacea of agency-environmentalist cooperation is shown to be realistically unattainable, this Part concludes that Congress, the executive appointee in charge of promulgating environmental regulations, and the courts should nonetheless strive for the best possible outcome by attempting to force concessions from both sides.

Finally, Part VII offers recommendations to all three branches of government on how to modernize PEISs. Although significant im-

provement from any individual branch would require overcoming the powerful inertia of the status quo, clarifying regulations from the executive branch would have the most welcome effect on agencies’ PEIS interpretations. This Part argues that such interpretive regulations are unlikely to be forthcoming in the absence of sincere judicial censure of agencies’ current EIS shortcomings and PEIS reticence. As the prisoner’s dilemma analysis demonstrates, Project BioShield litigation presents the judiciary with just such an opportunity.

I. SETTING THE STAGE FOR LITIGATION

In order to prepare the United States for a potential bioterrorism attack, President George W. Bush has authorized a major funding initiative intended to increase the amount of research space dedicated to the study of potential bioterrorism agents. Due to the inherently dangerous nature of the bioterrorism agents, local siting disputes have arisen at several of the newly proposed laboratories.

A. Project BioShield and the Push for More BSL-3/4 Space

President Bush first mentioned Project BioShield during his January 2003 State of the Union Address. Shortly thereafter, details of the plan revealed that Project BioShield would consist of $6 billion in funding, a large part of which would be allocated for “research and development on bioterrorism threat agents.” Eighteen months later President Bush signed into law the Project BioShield Act, stating, “Our goal is to translate today’s promising medical research into drugs and vaccines to combat a biological attack in the future—and now we will not let bureaucratic obstacles stand in the way.”

As a result of the President’s initiative, the National Institutes of Health (NIH) has seen its prominence—and its funding—increase.

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26 See discussion infra Part I.A.
27 See discussion infra Part I.B.
28 2003 State of the Union Address, supra note 6, at 113.
dramatically in the past four years.\textsuperscript{32} From an annual budget of almost $50 million for “anti-bioterrorism research” in fiscal year 2001,\textsuperscript{33} NIH has seen its coffers balloon to nearly $1.7 billion in estimated fiscal year 2005 funding for “biodefense research”—an increase of 3,400%.\textsuperscript{34}

Regardless of which public relations moniker is used, the research in question has traditionally been conducted by a specific branch of NIH: the National Institute for Allergy and Infectious Diseases (NIAID).\textsuperscript{35} Shortly after the September 11, 2001 terrorist attacks, and the October 2001 anthrax attacks that killed five people, NIAID convened a blue ribbon panel on “Bioterrorism and Its Implications for Biomedical Research,” which concluded that “[a]ccess to [BSL-3/4] facilities . . . is limited and must be expanded.”\textsuperscript{36} Although this viewpoint has been disputed by some,\textsuperscript{37} the passage of the Project BioShield Act makes it clear that both the executive and legislative branches believe that there is an imminent public health threat that the swift proliferation of BSL-3/4 laboratories can help allay.

B. NIAID Responds, Amid Controversy

To this end, NIAID undertook two laboratory expansion initiatives with its new-found capital. First, it sought to enhance and upgrade the existing BSL-3/4 space as much as possible at its intramural


\textsuperscript{33} Id. at 1272.


\textsuperscript{35} See Nat’l Inst. of Allergy & Infectious Diseases, NIAID’s Role in Biodefense, http://www2.niaid.nih.gov/Biodefense/About/niaids_role.htm (last visited May 5, 2006) (“[NIAID], part of the National Institutes of Health, conducts and supports much of the research aimed at developing new and improved medical tools against potential bioterrorism agents.”).


\textsuperscript{37} See, e.g., Miller, supra note 36 (“Dr. Richard H. Ebright, a professor of Chemistry at Rutgers, who is a lab director at its Waksman Institute of Microbiology . . . called much of the Level 4 construction overkill, as well as a misdirection of scarce resources.”); Merrill Goozner, Bioterror Brain Drain, Am. Prospect, Oct. 1, 2003, at 32 (“It’s distracting from global health . . . . We’ll learn some things [from bioterrorism research] that are relevant, but not much.” (quoting Dr. Carol Nacy, founder of the Sequella Global Tuberculosis Foundation) (alteration in original)).
laboratories—sites already under federal control.\textsuperscript{38} Believing that these improvements would not result in a large enough increase in laboratory capacity, NIAID also attempted to locate willing extramural institutional partners by issuing a Broad Agency Announcement (BAA) in late 2002.\textsuperscript{39} This document stated that any “Domestic (U.S.), Non-Federal, Public or Private Non-Profit Organizations that Support Biomedical Research [were] eligible to apply” for funding to run “Regional Biocontainment Laboratories (RBL[s]) and National Biocontainment Laboratories (NBL[s]).”\textsuperscript{40} Institutions selected to receive RBLs would build BSL-2 and BSL-3 space with one-time federal construction grants ranging from $7 to $21 million each, while institutions awarded NBLs would be required to build BSL-2, BSL-3, and BSL-4 space with grants of $120 million each.\textsuperscript{41}

On September 30, 2003, in what former Secretary of Health and Human Services Tommy G. Thompson hailed as “a major step towards being able to provide Americans with effective therapies, vaccines and diagnostics for diseases caused by agents of bioterror,” NIAID awarded nine RBLs and two NBLs to selected universities across the nation.\textsuperscript{42}

Not everyone shares the former Secretary’s exuberance for the proposed BSL-3/4 laboratories, however. For a variety of reasons,\textsuperscript{43} protests have sprung up in a number of communities where laboratories—both intramural and extramural—have been proposed.\textsuperscript{44}


\textsuperscript{40} Id. at 1.

\textsuperscript{41} Press Release, Nat’l Insts. of Health, supra note 7. Interestingly, each institution also would be contractually bound to be “utilized for biomedical research purposes as determined by NIAID program needs for at least 20 years.” NIAID RFP, supra note 39, at 7.

\textsuperscript{42} Press Release, Nat’l Insts. of Health, supra note 7 (quoting Tommy G. Thompson, Sec’y, Dep’t of Health \& Human Servs.). RBLs were awarded to Colorado State University, Duke University, Tulane University, the University of Alabama at Birmingham, the University of Chicago, the University of Medicine and Dentistry of New Jersey, the University of Missouri, the University of Pittsburgh, and the University of Tennessee. Id. NBLs were awarded to the University of Texas Medical Branch at Galveston and the Boston University Medical Center. Id.

\textsuperscript{43} See discussion infra Parts II, III; see also infra note 225 and accompanying text.

\textsuperscript{44} See, e.g., Jocelyn Kaiser, Citizens Sue to Block Montana Biodefense Lab, 305 Sci. 1088, 1088 (2004) (“Montanans have gone to federal court . . . to block construction of [an NIH] biodefense laboratory . . . .”); Andrew Lawler, Boston Weighs a Ban on Biodefense Studies, 304 Sci. 665, 665 (2004); Louise Richardson, Buying Biosafety—Is the Price Right?, 350
effort to predict the outcomes of potential lawsuits, the following Parts discuss several of the major claims likely to be made by environmental plaintiffs.

II. Litigation Background: “Failure to Complete a PEIS” Claim

A December 2004 letter from two environmental groups, detailing the shortcomings of NIH’s draft environmental review for the proposed BUMC NBL, articulates the environmental plaintiffs’ first major claim: NIH’s failure to complete a PEIS before proceeding with the site-specific EIS process. This topic is relevant to Project BioShield as a whole because initial completion of a PEIS would have rendered this claim moot nationwide.

Although the broad language of the nation’s most important environmental law does not specifically mention PEISs, the Council on Environmental Quality (CEQ)—established to aid in the statute’s interpretation—has recognized the existence of PEISs and has issued regulations defining their relevance. The courts, in turn, have validated CEQ’s view that PEISs are legitimate undertakings, and have even stated that, under certain circumstances, PEISs are required. Although courts often defer to federal agencies’ determinations regarding whether to prepare a PEIS, a line of cases indicates that research into nominally beneficial but potentially damaging new technology should require a PEIS.

A. Statutory Authority: The National Environmental Policy Act’s “Broad Brush”

Upon its inception in 1969, the National Environmental Policy Act (NEPA) was considered “the most important and far-reaching environmental and conservation measure ever enacted by the Congress.”


See discussion infra Parts IV, V.

See discussion infra Parts II, III.

See December ACE Letter, supra note 17, at 2; see also supra note 23 and accompanying text.

See discussion infra Part II.A.

See discussion infra Part II.B.


See discussion infra Part II.C.

At that time, the legislative talk of a “comprehensive national [environ-
mental] policy” was in part a reference to the scope of review that government agencies were henceforth required to conduct upon the proposal of any “major Federal actions significantly affecting the quality of the human environment.” This broad review—known as an Environmental Impact Statement (EIS)—is a “detailed” report on, inter alia, “the environmental impact of the proposed action.”

Although an EIS must be detailed, the language of NEPA itself remains purposefully vague, reflecting the legislators’ intent to replace what had been a piecemeal approach among the agencies towards environmental planning with a more “rationalized, comprehensive system.” NEPA’s broad language does not specifically mention PEISs, leaving the interpretation of its provisions to the appropriate regulatory authority. Importantly, the federal government is directed to “use all practicable means, consistent with other essential considerations of national policy” in exercising their discretion with respect to environmental decisions.

B. Regulatory Authority: CEQ’s PEIS Recommendations

CEQ was created by NEPA in 1969 and was charged with reviewing, investigating, and reporting back to the President on environmental issues. Due to early confusion over how much weight agencies were required to give CEQ’s guidelines, President Carter issued an Executive Order in 1977 empowering CEQ to interpret NEPA’s procedural provisions and issue its findings as regulations. These regulations became binding upon all federal agencies in November 1977.

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55 Id. § 4332(2)(C)(i).
58 42 U.S.C. § 4331(b).
59 See id. §§ 4342, 4344.
1979, and have been interpreted by the U.S. Supreme Court to be entitled to “substantial deference.”

The CEQ regulations make numerous positive references to the overarching policy theory behind PEISs: if disparate federal actions are sufficiently related, a broad PEIS should be conducted if it will serve to “avoid duplication and delay” in the long run. Echoing NEPA’s statutory language, the regulations list “systematic and connected agency decisions allocating agency resources to implement a specific statutory program or executive directive” as a recognized “Federal action[].” Once this threshold has been met, the regulations further state that an EIS “may be prepared, and [is] sometimes required” for the project as a whole—the very definition of a PEIS.

When preparing statements on these expansive actions, agencies are encouraged to consider preparing a PEIS for proposals which have “common timing, impacts, alternatives, methods of implementation, media, or subject matter.” Similarly, and perhaps more relevant to Project BioShield, a PEIS on federal proposals that are at the same “stage of technological development including federal or federally assisted research . . . for new technologies” may be required “before the program has reached a stage of investment or commitment to implementation likely to determine subsequent development or restrict later alternatives.”

Lastly, CEQ regulations devote a subsection to the definition of “tiering”: the discretionary process by which an agency may choose to file a PEIS discussing broad program objectives before following up with site-specific EISs referencing the general findings.

C. Case Law

NEPA is aptly described as a statute more concerned with looking at the forest than the trees. In spite of—or perhaps because of—its broad language and purpose, NEPA’s legislative history has often

62 See 40 C.F.R. §§ 1502.4(d), 1508.25(a)(3); see also id. § 1502.4(a) (“Proposals or parts of proposals which are related to each other closely enough to be, in effect, a single course of action shall be evaluated in a single impact statement.”).
63 Id. § 1508.18(b)(3) (interpreting 42 U.S.C. § 4332(2)(C)).
64 Id. § 1502.4(b).
65 See id. § 1502.4(c)(2).
66 See id. § 1502.4(c)(3). Whether this phrase is a requirement is subject to debate. See discussion infra Part IV.A.1.
67 See 40 C.F.R. § 1508.28.
played a secondary role to case law in court decisions.\textsuperscript{68} At the highest level, the U.S. Supreme Court has been disappointingly silent on the applicability of PEISs, issuing its lone defining opinion on the matter—\textit{Kleppe v. Sierra Club}—three decades ago.\textsuperscript{69} Following the Supreme Court’s lead,\textsuperscript{70} lower courts have generally refused to take a serious look at the PEIS issue in the context of NEPA’s legislative history, leading one observer to note that “it is difficult to successfully challenge an agency’s decision to forego a programmatic assessment.”\textsuperscript{71} In one line of cases, however, a circuit court has held that PEISs are indeed required for certain national research programs.\textsuperscript{72}

1. \textit{Kleppe v. Sierra Club}

One year before its precedential \textit{Kleppe} decision, the U.S. Supreme Court decided \textit{Aberdeen \& Rockfish Railroad Co. v. Students Challenging Regulatory Agency Procedures (SCRAP)}.\textsuperscript{73} In \textit{SCRAP}, the Court paved the way for \textit{Kleppe} by acknowledging the existence of different types of EISs corresponding in breadth to the type of proposed federal action.\textsuperscript{74} A regional or national federal action would therefore warrant an EIS of correspondingly regional or national scope: a PEIS.\textsuperscript{75}

Subsequently, the Court’s decision in \textit{Kleppe} specifically stated that PEISs of a national scope were indeed legitimate undertakings.\textsuperscript{76} Citing \textit{SCRAP}, the Court observed that, although these PEISs would

\begin{itemize}
\item \textsuperscript{68} See Terence L. Thatcher, \textit{Understanding Interdependence in the Natural Environment: Some Thoughts on Cumulative Impact Assessment Under the National Environmental Policy Act}, 20 \textit{Envtl. L.} 611, 614 n.11 (1990) (declaring—16 years ago—that, “[a]fter 20 years and a recent tendency for courts to drift further away from the purposes Congress intended to serve, it may be time again to examine NEPA’s parentage”).
\item \textsuperscript{69} 427 U.S. 390 (1976).
\item \textsuperscript{71} See Cooper, supra note 24, at 98.
\item \textsuperscript{72} See discussion infra Part II.C.3.
\item \textsuperscript{73} 422 U.S. 289 (1975).
\item \textsuperscript{74} See id. at 322.
\item \textsuperscript{75} See id.
\item \textsuperscript{76} See \textit{Kleppe v. Sierra Club}, 427 U.S. 390, 398–415 (1976). The Court refers to PEISs as “comprehensive impact statements.” \textit{Id.} at 409.
\end{itemize}
likely “bear little resemblance” to site-specific local EISs,\textsuperscript{77} they would be valid in either case since the “bounds of the analysis are defined.”\textsuperscript{78} Moreover, the \textit{Kleppe} Court ruled that NEPA’s “action forcing” EIS obligation “may require a [PEIS] in certain situations where several proposed actions are pending at the same time.”\textsuperscript{79} In the words of Justice Powell, “[W]hen several proposals for . . . actions that will have cumulative or synergistic environmental impact . . . are pending concurrently before an agency, their environmental consequences \textit{must} be considered together.”\textsuperscript{80} The Court cited the statute’s lofty policy objectives in determining Congress’s original intention to require “all agencies to assure consideration of the environmental impact of their actions in decisionmaking.”\textsuperscript{81}

2. Reconciling \textit{Kleppe} with a Deferential Standard of Review

Though \textit{Kleppe} is still good law after thirty years, the Court’s finding that a PEIS is required in certain circumstances has proven difficult to implement in lower courts.\textsuperscript{82} This is due in large part to the deferential “arbitrary or capricious” standard of review for agency actions.\textsuperscript{83} Indeed, in \textit{Kleppe} itself, the Court stated that, for a plaintiff to prevail on a charge of failure to complete a PEIS, she “must show that [an agency has] acted arbitrarily in refusing to prepare one comprehensive statement on [an] entire region . . . .”\textsuperscript{84}

One year after \textit{Kleppe}, a ruling of the U.S. District Court for the District of Columbia heralded the lower courts’ frequent response to PEIS challenges.\textsuperscript{85} \textit{Environmental Defense Fund, Inc. v. Adams} addressed a major revision of the National Airport System Plan that sought to upgrade public airports across the nation.\textsuperscript{86} Citing \textit{Kleppe}, the district court found that the plan was indeed a “proposal for a major federal

\textsuperscript{77} Id. at 402 n.14.
\textsuperscript{78} See id.
\textsuperscript{79} Id. at 409 n.18 (discussing the Senate’s use of the phrase “action forcing” in reference to certain NEPA sections).
\textsuperscript{80} Id. at 410 (emphasis added).
\textsuperscript{81} Id. (citation omitted).
\textsuperscript{82} See Cooper, supra note 24, at 98 (“The Supreme Court . . . has set a high threshold before requiring the preparation of a [PEIS]. . . . Thus, it is difficult to successfully challenge an agency’s decision to forego a [PEIS] . . . .”).
\textsuperscript{84} \textit{Kleppe}, 427 U.S. at 412.
\textsuperscript{86} Id. at 404.
action” with a national scope, and therefore required preparation of a PEIS.87 After stating its adherence to the Supreme Court’s ruling, however, the lower court refused to impose its stated “requirement.”88 Citing the fact that the agency had previously decided to prepare site-specific EISs, the court held that “there would be little sense in requiring an impact statement at the planning stage which would cover the same ground.”89 Thus, despite ruling that a PEIS was required under Kleppe, the court deferred to the agency’s decision not to prepare one.90

In Churchill County v. Norton, the Ninth Circuit Court of Appeals reaffirmed the Adams holding nearly a quarter-century later.91 In holding that there is little courts can do if agencies do not act arbitrarily—even when a court finds a PEIS to be the preferred method of analysis—the Ninth Circuit stated:

The regulations and case law would support a decision by the [defendant agency] to prepare a programmatic EIS, had it decided to prepare one. Indeed, had we been charged with the decision, we may have elected to prepare a programmatic EIS first. The problem, of course, is that it was not our decision to make.92

Finally, although it is often the function of courts to substantively balance and choose between polarized positions, the Supreme Court has interpreted NEPA as a strictly procedural statute since the 1980s.93 Thus, regardless of the conflicting policy arguments often present in environmental litigation,94 courts leave the NEPA-mandated balancing of interests up to the expertise of agencies.95

87 See id. at 406–07 (discussing National Environmental Policy Act of 1969 § 102, 42 U.S.C. § 4332(2)(C) (2000)). Although the court stated that an EIS was necessary here, its reference to subsequent, site-specific EISs indicates that it was conceptually describing a PEIS. See id. at 408.
88 See id. at 407–08.
89 Id. at 408.
90 See id.
91 See 276 F.3d 1060 (9th Cir. 2001).
92 Id. at 1079.
94 See, e.g., Natural Res. Def. Council, Inc. v. Watkins, 954 F.2d 974, 983 (4th Cir. 1992) (“[B]oth parties assert important public policy concerns—environmental preservation by [plaintiffs] and national security by [the agency].”).
95 National Environmental Policy Act of 1969 § 102, 42 U.S.C. § 4331(b) (2000); see Churchill County, 276 F.3d at 1079.
3. New Technologies

One line of cases in the D.C. Circuit Court of Appeals discusses the implications of using PEISs for research into new technologies.96 These cases show that, despite courts’ deference to agencies’ decisions, research into a nominally beneficial but potentially damaging new technology should require a PEIS.

*Scientists’ Institute for Public Information, Inc. v. Atomic Energy Commission (SIPI)* was decided before *Kleppe* in 1973.97 In an opinion by Judge Skelly Wright, a unanimous panel of the D.C. Circuit held that NEPA required a PEIS for concerted federal technology research and development initiatives.98 In a time of “growing demand for economical clean energy,” the Atomic Energy Commission (AEC) had the support of both Congress and President Nixon in carrying out its Liquid Metal Fast Breeder Reactor (LMFBR) Program Plan.99 Despite this support and the public service potential of the research, the court ruled for the plaintiffs and stated that “[the AEC] takes an unnecessarily crabbed approach to NEPA in assuming that the impact statement process was designed only for particular facilities rather than for analysis of the overall effects of broad agency programs. Indeed, quite the contrary is true.”100 Both the testimony of the AEC Chairman at a Senate Joint Hearing101 and a CEQ memorandum102 helped convince the court that it would “tread firm ground in holding that NEPA requires [PEISs] for major federal research programs . . . .”103

One year after *Kleppe*, the D.C. Circuit again addressed the issue of PEISs in the context of technology development programs.104

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96 See generally Mandelker, supra note 22, § 9:7.
97 481 F.2d 1079 (D.C. Cir. 1973). For a catalog of pre-SIPI, pro-PEIS cases, see Recent Case 87 Harv. L. Rev. 1050, 1053 n.19 (1974).
98 See SIPI, 481 F.2d at 1091.
100 See id. at 1086–87.
101 Joint Hearings on Operation of National Environmental Policy Act Before Senate Committee on Public Works and Senate Committee on Interior and Insular Affairs, 92d Cong. 98–99 (1972) (statement of Dr. James R. Schlesinger, Chairman, AEC) (“[T]he public has a right to know . . . what the broader future implications may be of the cumulative impact of a number of such facilities, rather than looking at each facility microscopically.”).
102 See Memorandum from CEQ to Federal Agencies on Procedures for Improving Environmental Impact Statements (May 16, 1972), reprinted in 3 Env’t Rep. (BNA) 82, 87 (1972) (“In many cases, broad program statements will be appropriate, assessing . . . the environmental implications of research activities that have reached a stage of investment or commitment to implementation likely to restrict later alternatives.”).
103 See SIPI, 481 F.2d at 1091.
Concerned About Trident v. Rumsfeld, citizens’ groups brought an action against the Secretary of Defense for his decision to locate a support facility for the new Trident nuclear submarine program in Bangor, Washington. The court distinguished its prior ruling in SIPI and found that no PEIS was necessary because unlike the LMFBR program, the Trident program did not involve “brand new technology with the possibility of unforeseen or unknown consequences.” The court also stated that the Trident program did not come about as the result of any declared change to the national defense strategy. Implicit in these rulings is an idea central to the current Project BioShield disputes: the government’s development of a new technology with unknown environmental consequences—if commenced in response to an asserted change in national defense strategy—would not fall under the SIPI exception carved out by Trident.

Twelve years after authoring the D.C. Circuit’s opinion in SIPI, Judge Wright updated the court’s views on whether a PEIS should be completed for a federal technology research program. In Foundation on Economic Trends v. Heckler, he wrote that the challenge is “to ensure that the bold words and vigorous spirit of NEPA are not . . . lost or misdirected in the brisk frontiers of science.” The current debates over Project BioShield’s proposed BSL-3/4 expansions echo the arguments in Heckler twenty years earlier. There, as in the instant dispute, plaintiffs challenged an NIH decision not to produce a PEIS for an action taken in the name of public health: the planned release of a genetically engineered bacteria into the environment. The court stated that the potential for environmental damage was a “‘low probability, high consequence risk; that is, while there is only a small possibility that damage could occur, the damage that could occur is great.’”

105 See id. at 820–21.
106 See id. at 826. The Trident program was a development of the already-existing Polaris/Poseidon nuclear submarine program. Id. at 820 n.4.
107 Id. at 826.
108 See id.
109 756 F.2d 143 (D.C. Cir. 1985).
110 Id. at 145.
111 See id. at 147.
112 See id. at 150 (citing 48 Fed. Reg. 24,549 (June 1, 1983)).
113 See id. at 147–48 (quoting STAFF OF SUBCOMM. ON INVESTIGATIONS & OVERSIGHT, HOUSE COMM. ON SCI. & TECH., 98TH CONG., REPORT ON THE ENVIRONMENTAL IMPLICATIONS OF GENETIC ENGINEERING 9 (Comm. Print 1984)) (internal quotations omitted).
Although the court ultimately deferred to the agency’s decision, it made a point of imposing a tangible obligation upon NIH.\textsuperscript{114} Citing \textit{SIPI}, the court concluded that a failure to “at least consider” the advisability of a PEIS would likely “violate established principles of reasoned decisionmaking.”\textsuperscript{115}

A concurring opinion by Senior Circuit Judge MacKinnon reiterated the D.C. Circuit’s collective viewpoint that a PEIS was highly recommended prior to implementation of a broad research agenda for a new technology. “not only [to] ease lay concerns, but [to] facilitate review as well.”\textsuperscript{116} Although Judge MacKinnon ultimately agreed with the majority that no PEIS was required in this specific case, the D.C. Circuit Court’s reluctance to stay within the bounds of the Supreme Court’s \textit{Kleppe} ruling is evident.\textsuperscript{117}

4. Do Not Waste Agency Resources

The circuit court’s ruling in \textit{Heckler} is an example of a larger tendency: courts will not require a PEIS if the agency has decided to complete site-specific EISs instead.\textsuperscript{118} \textit{Environmental Defense Fund, Inc. v. Adams} provides an early expression of this sentiment, where a district court stated that, “[s]ince, at the award stage, the Secretary has a specific application before him, . . . there would be little sense in requiring an impact statement at the planning stage which would cover the same ground.”\textsuperscript{119} Both \textit{Heckler} and \textit{Adams} articulate the view, also held by CEQ in its regulations, that agencies should only apply PEIS methods if they can do so while “avoid[ing] duplication and delay.”\textsuperscript{120}

\textsuperscript{114} See id. at 160.
\textsuperscript{115} See \textit{Heckler}, 756 F.2d at 160 (“[A]n agency may not ‘entirely fail[] to consider an important aspect of the problem.’” (quoting \textit{Motor Vehicle Mfrs. Ass’n, Inc. v. State Farm Mut. Auto. Ins. Co.}, 463 U.S. 29, 43 (1983)) (second alteration in original)).
\textsuperscript{116} Id. at 161 (MacKinnon, J., concurring). Judge MacKinnon stated:

I can understand how the . . . scientists who are knowledgeable in this field . . . would approve the experiment by a vote of 19–0 without abstentions. . . . However, the general public and those who have to pass on this action are not knowledgeable in this field and they are easily frightened by new scientific experiments and their possible consequences. It is such lay concerns that must here be satisfied by [EISs]. There is considerable merit, moreover, in having all the environmental considerations set forth and discussed in one document . . .

\textit{Id.}

\textsuperscript{117} See id.
\textsuperscript{118} See 756 F.2d at 159.
\textsuperscript{120} See 40 C.F.R. § 1502.4(d) (2004).
Mooreforce, Inc. v. United States Department of Transportation—a recent district court case refusing to mandate a PEIS—illustrates the court’s reluctance to require a PEIS when it may waste resources.\(^{121}\) In denying the plaintiffs’ motion for a preliminary injunction to stop construction of a highway bypass, the Mooreforce court ruled that the plaintiffs were unlikely to prove that a PEIS was necessary.\(^{122}\) The court noted that the agency “could not accomplish the purpose of a PEIS because [it] had already completed an [EIS].”\(^{123}\) Similarly, in National Wildlife Federation v. Appalachian Regional Commission, a circuit court held that “relevance at the planning stage is the measure of agency reasonableness for preparing EISs.”\(^{124}\) In refusing to require a PEIS for construction of a highway system “well beyond the nascent stage,”\(^{125}\) the court noted a good-faith requirement for an agency’s postponement of its PEIS.\(^{126}\)

III. Litigation Background: “Inadequate EIS” Claim

The second major NEPA claim in environmental groups’ comment letters on Project BioShield is that NIH’s site-specific EIS, as completed, is inadequate.\(^{127}\) Because EISs are complex documents with various mandated components, a claim of this nature can fault a number of distinct aspects of an EIS.\(^{128}\) The two aspects of PEIS inadequacy most relevant to this Note’s discussion are: (1) failure to adequately consider alternative locations; and (2) inadequate risk-assessment methodologies.

A. Failure to Adequately Consider Project Alternatives

In what the CEQ regulations characterize as the “heart” of an EIS,\(^{129}\) NEPA requires all federal agencies to consider possible alternatives to their proposed actions in an EIS.\(^{130}\) These alternatives may

\(^{122}\) Id.
\(^{123}\) Id.
\(^{125}\) Id. at 885.
\(^{126}\) Id. at 889 n.35 (“Of course an agency may not so delay the preparation of a [PEIS] that the document could no longer have any useful decisionmaking function. This would be an unreasonable, hence unlawful, evasion of NEPA.”).
\(^{127}\) See December ACE Letter, supra note 17, at 5–11.
\(^{130}\) See 42 U.S.C. § 4332(2)(C)(iii), (2)(E). Though these NEPA subsections have slightly different approaches—subsection (2)(C)(iii) contains broader language than sub-
take two different forms—referred to as primary and secondary alternatives—between which courts do not discriminate when evaluating the adequacy of an EIS. NEPA requires agencies to consider these project alternatives in order to “insure the integrated use of . . . the environmental design arts in planning and decisionmaking.”

A CEQ regulation codifies the “rule of reason” set forth in a leading circuit court decision, stating that agencies are to “[r]igorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated.” In addition, agencies must “[d]evote substantial treatment to each alternative considered in detail including the proposed action so that reviewers may evaluate their comparative merits.”

Importantly, agencies must state an underlying “purpose and need” to which they are responding when discussing proposed alternatives. The narrowness of these stated rationales can potentially limit the alternatives that an agency is required to take into account. Agencies have been criticized for intentionally propounding narrow project purposes, and two Circuit Courts of Appeals have

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131 See generally Mandelker, supra note 22, §§ 10:31, 10:32. A primary alternative is “a substitute for the agency’s proposed action that accomplishes the action in another manner,” while a secondary alternative is “a means of carrying out a proposed action in a different manner.” Id.

132 42 U.S.C. § 4332(2)(A). These alternatives must be analyzed and considered before agency decisions are made. The Second Circuit recognized as much shortly after NEPA’s inception, stating, “[T]he critical agency decision must, of course, be made after the [EIS] has been . . . considered and discussed in the light of the alternatives, not before. Otherwise the process becomes a useless ritual, defeating the purpose of NEPA, and rather making a mockery of it.” Natural Res. Def. Council, Inc. v. Callaway, 524 F.2d 79, 92 (2d Cir. 1975).


134 40 C.F.R. § 1502.14(a) (2004) (emphasis added). This regulation effectively establishes two categories for proposed alternatives—reasonable and unreasonable—for which the requisite levels of discussion are “detailed” and “brief,” respectively. See id.

135 Id. § 1502.14(b).

136 Id. § 1502.13.

137 See Owen L. Schmidt, Essay, The Statement of Underlying Need Defines the Range of Alternatives in Environmental Documents, 18 ENVTL. L. 371, 374 (1988) (“When the underlying need is for both flood control and power, only a dam will meet that need and the range of alternatives may become very narrow.”).

recently supported this assertion.\textsuperscript{139} However, the arbitrary or capricious standard of review applies to judicial review of an agency’s stated purpose.\textsuperscript{140} Thus, notwithstanding these circuit court decisions, the majority of courts have found agencies’ purpose and need statements to be reasonable.\textsuperscript{141}  

If a reviewing court does not invalidate an EIS for having a purpose and need statement that is too narrow, it must then decide whether the agency’s discussion of alternatives violates the “‘rule of reason’ which governs both ‘which alternatives the agency must discuss’ and ‘the extent to which it must discuss them.’”\textsuperscript{142} The specific number of alternatives considered—whether discussed in detail or only briefly—is not determinative; rather, an agency is charged with evaluating a “reasonable” number of alternatives for the particular situation.\textsuperscript{143} While courts have found to be reasonable agencies’ choices to discuss varying numbers of alternatives,\textsuperscript{144} they have at times found unreasonable agencies’ choices to discuss only a single alternative.\textsuperscript{145}  

Another factor that makes it less likely for courts to rule in favor of plaintiffs is that agencies are not required to select the most environ-

\textsuperscript{139} See, e.g., Davis v. Mineta, 302 F.3d 1104, 1118–20 (10th Cir. 2002); Simmons v. U.S. Army Corps of Eng’rs, 120 F.3d 664, 666 (7th Cir. 1997) (“One obvious way for an agency to slip past the strictures of NEPA is to contrive a purpose so slender as to define competing ‘reasonable alternatives’ out of consideration (and even out of existence).”).

\textsuperscript{140} See Schmidt, supra note 137, at 381; discussion supra Part II.C.2.

\textsuperscript{141} For a comprehensive list of cases either reversing or upholding agencies’ purpose statements at the circuit and district court levels, see Mandelker, supra note 22, § 9:23 n.8. Courts are approximately three times as likely to support agencies than they are to reverse them. See id.

\textsuperscript{142} Tongass Conservation Soc’y v. Cheney, 924 F.2d 1137, 1140 (D.C. Cir. 1991) (quoting Natural Res. Def. Council, Inc. v. Hodel, 865 F.2d 228, 294 (D.C. Cir. 1988)).

\textsuperscript{143} See 40 C.F.R. § 1502.14(a) (2004). It is assumed that the CEQ-mandated no-action alternative will also be discussed in an EIS; failure to do so would be a per se violation of the regulations. See Id. § 1502.14(d).

\textsuperscript{144} See, e.g., Laguna Greenbelt, Inc. v. U.S. Dep’t of Transp., 42 F.3d 517, 524 (9th Cir. 1994) (finding an agency’s decisions to discuss two action alternatives in detail and to briefly discuss why six other alternatives were eliminated to be reasonable); Town of Norfolk v. EPA, 761 F. Supp. 867, 883–84 (D. Mass. 1991), aff’d mem., 960 F.2d 143 (1st Cir. 1992) (unpublished table decision) (holding an agency’s decision to discuss in detail ten action alternatives, briefly discuss the reasons why two other alternatives were eliminated, and summarily dismiss 290 additional alternatives to be reasonable).

\textsuperscript{145} See, e.g., Natural Res. Def. Council, Inc. v. Evans, 232 F. Supp. 2d 1003, 1037–41 (N.D. Cal. 2002) (finding the discussion of alternatives unreasonable where the two action alternatives discussed in detail were essentially equivalent); Massachusetts v. Clark, 594 F. Supp. 1373, 1379–81 (D. Mass. 1984). But see Tongass, 924 F.2d at 1138–39 (finding reasonable an agency’s decision to provide detailed discussion of only a single alternative).
mentally preferable option as their favored alternative.\textsuperscript{146} Thus, once reasonable alternatives receive procedural consideration, an agency is free to select whichever alternative it desires based on criteria of its choosing.\textsuperscript{147} A recent Ninth Circuit Court of Appeals decision gives certain agencies additional leeway by holding that an agency primarily concerned with conserving and protecting the environment is subject to less stringent requirements when choosing a range of alternatives to consider.\textsuperscript{148}

Acting as a judicial counterbalance, however, is the fact that courts will invalidate an EIS if the agency has neglected to fully analyze all of the reasonable alternatives.\textsuperscript{149} This requires a court hearing a challenge to an EIS to review both the reasonableness of an agency’s choice to forego certain alternatives, and the reasonableness of the agency’s level of review for its chosen alternatives. The Seventh Circuit Court of Appeal’s conclusion in a 1997 case emphasizes this point succinctly:

If NEPA mandates anything, it mandates this: a federal agency cannot ram through a project before first weighing the pros and cons of the alternatives. In this case, the officials of [the agency] executed an end-run around NEPA’s core requirement. By focusing on [one range of alternatives], [the agency] never looked at an entire category of reasonable alternatives and thereby ruined its environmental impact statement.\textsuperscript{150}

\textsuperscript{147} Id.
\textsuperscript{148} See Kootenai Tribe of Idaho v. Veneman, 313 F.3d 1094, 1121–22 (9th Cir. 2002) (holding that the Forest Service was not required to conduct in-depth analyses of certain alternatives given its inherent “conservation and preventative goals.”).
\textsuperscript{149} See, e.g., Utahns for Better Transp. v. U.S. Dep’t of Transp., 305 F.3d 1152, 1192 (10th Cir. 2002) (invalidating an EIS for unreasonable elimination of one alternative based on inadequate data and outright failure to consider two additional alternatives); Simmons v. U.S. Army Corps of Eng’rs, 120 F.3d 664, 669–70 (7th Cir. 1997) (“As a matter of logic, however, [the alternative suggested by the plaintiffs] is not absurd—which it must be to justify [the agency]’s failure to examine the idea at all.”).
\textsuperscript{150} Simmons, 120 F.3d at 670.
B. Inadequate Risk-Assessment Methodologies

Prior to 1986, CEQ regulations required agencies to conduct a worst-case analysis when completing an EIS. Then, in a move that had been forecast three years earlier, CEQ revoked the worst-case analysis requirement. The new regulations required only analysis of “reasonably foreseeable” events and a statement of any “incomplete or unavailable” relevant information. In 1989, the U.S. Supreme Court upheld the change, holding that requiring analysis of only “reasonably foreseeable” occurrences would focus public discussion on the issues of greatest relevance.

This change, coupled with a deferential standard of review, established a high bar for plaintiffs challenging agencies’ decisions on whether, and how, to analyze certain environmental impacts. A one-sided battle over scientific methodologies often results, with plaintiffs charging agencies with cherry-picking scientific studies to match their desired outcomes, and courts in turn deferring to those studies.

It may still be possible, however, to invalidate an EIS for failure to consider low-probability, high-risk environmental consequences of an agency action. As defined in the regulations, “reasonably foreseeable” includes impacts which have catastrophic consequences, even if their probability of occurrence is low, provided that the analysis of the


154 See 40 C.F.R. § 1502.22(b).


156 See Fitzgerald, supra note 151, at 60 (noting the “benign nature of judicial review of a federal agency’s compliance” with the new regulation); discussion supra Part II.C.2.

157 See, e.g., Lee v. U.S. Air Force, 354 F.3d 1229, 1242 (10th Cir. 2004) (refusing to invalidate an EIS because the plaintiff “simply presents an expert opinion conflicting with the U.S. Air Force’s conclusion”); Sierra Club v. Marita, 46 F.3d 606, 616–21 (7th Cir. 1995) (stating that the post-1986 requirements are “less stringent,” and deferring to the agency’s choice of scientific methodologies as valid because it was not “irrational”); S. Utah Wilderness Alliance v. Norton, 326 F. Supp. 2d 102, 113 (D.D.C. 2004).

158 See 40 C.F.R. § 1502.22(b).
impacts is supported by credible scientific evidence, is not based on pure conjecture, and is within the rule of reason.”

This language has led some observers to point out that courts may still be required to review the credibility of scientific opinions, if only to check for procedural compliance.

Despite the deferential standard of review and CEQ’s revocation of the worst-case scenario requirement, courts do at times engage in this type of review. In a 1991 district court decision, the Department of Energy was required to fully examine the risks of transporting nuclear material:

The Department’s decision is akin to saying that some things just cannot happen. Yet the Department cannot deny that such accidents are possible . . . . Further, although the Department discounts the possibility of human intervention—either through error or sabotage, the risks remain. It is particularly important that a government agency be completely forthright about the risks of a program involving radioactive materials, which inspire great fear among many members of the public.

The court went on to note—perhaps sarcastically—that since the agency had already come up with a risk assessment methodology likely to show that its actions carried no risk, it had no reason to not apply its chosen method to each potential risk scenario.

IV. Analysis: Courts Are Unlikely to Mandate a PEIS for Project BioShield

Potential environmental plaintiffs can look to both regulatory language and case law to support their assertion that a PEIS is necessary for Project BioShield. However, the commonsense objective of not wasting government resources would counsel against requiring a

159 Id.
160 See, e.g., Manelker, supra note 22, § 10:22; Valerie M. Fogleman, Worst Case Analyses: A Continued Requirement Under the National Environmental Policy Act?, 13 Colum. J. Envtl. L. 53, 94 (1987) (“The requirement for preparation of a worst-case analysis is gone but a similar analysis may be required by the courts in order to ensure that an agency has considered the full range of environmental concerns encompassed by NEPA.”).
162 Id. at 869 (citations omitted).
163 Id.
164 See discussion infra Part IV.A.
PEIS, since site-specific EISs have already been undertaken. When called upon to balance the plaintiffs’ claims with the conservation of government resources, a court will likely find that no PEIS is necessary for Project BioShield.

A. Plaintiffs’ Argument: A PEIS Is Necessary

As evidenced by the fact that NIH has already prepared a Draft EIS (DEIS) for the proposed BUMC BSL-3/4 laboratory, that the nine proposed Project BioShield facilities constitute “major Federal actions significantly affecting the quality of the human environment” is not under debate. Courts will analyze regulatory language and case law to determine whether a PEIS is necessary. Here, both CEQ’s guidelines and cases discussing the development of new technologies stand for the proposition that NIH should indeed conduct a PEIS.

1. Regulatory Language

Because NEPA does not directly mention PEISs reviewing courts will look to CEQ regulations for guidance, and will give “substantial deference” to CEQ’s opinions. Interestingly, whether the CEQ provision most relevant to Project BioShield actually requires a PEIS is debatable. Section 1502.4(c) of the Code of Federal Regulations begins with the statement, “When preparing statements on broad actions . . . agencies may find it useful to evaluate the proposal(s) in one of the following ways . . . .” Although this would seem to make the following subsections optional, subsection (c)(3)—discussing PEISs

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165 See discussion infra Part IV.B.
166 See discussion infra Part IV.C.
167 See generally BUMC DEIS, supra note 4.
168 42 U.S.C. § 4332(2)(C) (2000). If NIH had not prepared a DEIS, courts would almost certainly have seen Project BioShield as a “group of concerted actions to implement a specific policy or plan,” or as “systematic and connected agency decisions allocating agency resources to implement a specific statutory program or executive directive,” thus requiring some form of EIS. See 40 C.F.R. § 1508.18(b)(3) (2004).
169 See Andrus v. Sierra Club, 442 U.S. 347, 358 (1979); Porterfield, supra note 57, at 625. Importantly, the dispute here is not over whether CEQ’s PEIS regulations themselves are arbitrary or capricious—Andrus effectively answered that question in the negative. See Andrus, 442 U.S. at 358. Rather, environmental plaintiffs feel that NIH’s decision not to prepare a PEIS was arbitrary and capricious for neglecting to follow CEQ’s regulations. See December ACE Letter, supra note 17, at 2–3.
170 See 40 C.F.R. § 1502.4(c).
171 Id. (emphasis added).
for new technologies—contains the statement that PEISs “shall be prepared on such programs.”\textsuperscript{172}

Environmental plaintiffs may make the argument that the word “shall” in subsection (c)(3) means that certain PEISs must be conducted for programs involving a certain “stage of technological development including federal or federally assisted research, development or demonstration programs for new technologies.”\textsuperscript{173} Project BioShield fits in this category.

Similarly, the definition of “tiering” in the regulations appears directly applicable to Project BioShield.\textsuperscript{174} This term refers to “the coverage of general matters in broader environmental impact statements (such as national program or policy statements) with subsequent narrower statements . . . (such as . . . site-specific statements) incorporating by reference the general discussions.”\textsuperscript{175} Although agencies may use tiering at their discretion, a reviewing court may read the inclusion of tiering in the regulations as an indication that CEQ intended for agencies to use it.\textsuperscript{176}

2. New Technology Cases

From the U.S. Supreme Court’s \textit{Kleppe v. Sierra Club} decision, it is clear that PEISs of a national scope are required in certain instances.\textsuperscript{177} To determine whether Project BioShield falls within the ambit of the Court’s decision, further examination of the previously discussed line of cases involving new technologies is instructive.\textsuperscript{178} These cases suggest that reviewing courts may see Project BioShield as exactly the kind of “broad action” envisioned by CEQ when drafting its regulations.\textsuperscript{179}

\textit{Scientists’ Institute for Public Information, Inc. v. Atomic Energy Commission (SIPI)}, has several remarkable similarities to the case at hand.\textsuperscript{180} \textit{SIPI} involved the development of nuclear power technology; in that case, as with Project BioShield, a government agency had the support of both Congress and the President to begin a nationwide research initiative into a potentially beneficial, but also potentially

\textsuperscript{172} See id. § 1502.4(c)(3) (emphasis added).

\textsuperscript{173} See id.

\textsuperscript{174} See supra note 67 and accompanying text.

\textsuperscript{175} 40 C.F.R. § 1508.28.

\textsuperscript{176} See id.

\textsuperscript{177} See 427 U.S. 390, 398–415 (1976); see also discussion supra Part II.C.1.

\textsuperscript{178} See discussion supra Part II.C.3.

\textsuperscript{179} See discussion supra Part IV.A.1.

\textsuperscript{180} See 481 F.2d 1079, 1085–93 (D.C. Cir. 1973).
dangerous, new technology. Environmental citizens’ groups litigating the construction of BSL-3/4 laboratories would do well to quote Judge Skelly Wright’s ruling that a court would “tread firm ground in holding that NEPA requires [PEISs] for major federal research programs.”

Although the court did not find a PEIS necessary in Concerned About Trident v. Rumsfeld, the circumstances surrounding that case are distinguishable from those of Project BioShield. The court in Trident stated that the submarine modernization at issue did not involve any new technology with “the possibility of unforeseen or unknown consequences.” In contrast, however, it could be argued that there are many unknowable aspects of Project BioShield’s proposed widespread research into BSL-3/4 pathogens. Similarly, the Trident court declined to require a PEIS because there was “no shift in our defense policy.” Rather, since the new Trident submarines were simply updated replacements for the outdated Polaris/Poseidon submarines, a PEIS was not required. Project BioShield, on the other hand, is clearly a major shift in the way the Bush administration intends to defend the country in the newly emerging “Time of Terror.”

If a plaintiff were to use these cases addressing new technology to bolster the argument that a PEIS should be ordered for Project BioShield, however, Foundation on Economic Trends v. Heckler would have to be rationalized. In a case remarkably similar to the Project BioShield debate, the court noted that the agency had “passed the point at which a [PEIS] is required by NEPA and the [CEQ]’s regulations,” and ruled that a PEIS, though “helpful,” was not required.

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181 See id.
182 See id. at 1091.
183 See 555 F.2d 817, 826 (D.C. Cir. 1977).
184 Id.
185 Opponents of Project BioShield have discussed several variations on this theme. One virologist has argued that stockpiling viruses could be a threat to public health. See Brown, supra note 14 (quoting Robert Webster, St. Jude’s Children’s Research Hospital, Memphis, Tenn.). Others have noted that the innocent quest for biodefense knowledge may lead researchers to create new, deadlier viruses. See Daniel Schulman & Adam Smith, When Bioterror Moves Next Door, BOSTON GLOBE MAG., Aug. 8, 2004, at 24, 30.
186 Trident, 555 F.2d at 826.
187 See id.
188 For use of the phrase “Time of Terror” in reference to the world as it exists after September 11, 2001, see generally Giovanna Borradori, PHILOSOPHY IN A TIME OF TERROR (2003).
189 See 756 F.2d 143 (D.C. Cir. 1985).
With this language in mind, plaintiffs must argue that Project BioShield has not passed this point. Additionally, a plaintiff would want to argue that NIH never even considered completing a PEIS, as the court required in *Heckler*.191 Lastly, a plaintiff would want to quote the language of Senior Circuit Judge MacKinnon’s concurrence, and assure the court that the lawsuit was not brought with “delaying tactics” in mind.192

**B. Agency’s Argument: A PEIS Is Not Necessary**

The deference that reviewing courts must give to agencies’ decisions creates a significant hurdle for plaintiffs to clear before their claim will be heard.193 Adding to the plaintiffs’ challenge is the fact that agencies have an entrenched policy argument they can use to counter plaintiffs’ claims that a PEIS is necessary for Project BioShield: government agencies should not waste resources by reevaluating information that has already been analyzed.194

Presumably in good faith, NIH made the decision to not prepare a PEIS for Project BioShield.195 Because of courts’ deferential standard of review toward agencies’ choices, NIH’s decision alone might be enough for a court to refuse mandating a PEIS.196 Tipping the scales even further in favor of the agency is the fact that work has already begun on the EISs in question. NIH’s current position is similar to that of the Department of Transportation in *Mooreforce, Inc. v. U.S. Department of Transportation*, where site-specific EISs were complete at the time of litigation.197 Similarly, two separate circuit court decisions have stated that a PEIS should only be prepared if it can be “forward-looking”—a quality that cannot exist when individual, site-specific EISs have already

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191 See *Heckler*, 756 F.2d at 160. Although there does not seem to be any evidence that a PEIS was considered for Project BioShield, this is a difficult argument to prove due to the inherent difficulties in proving a negative. Cf. *Churchill County v. Norton*, 276 F.3d 1060, 1078–79 (9th Cir. 2001) (noting that an agency that originally decided to prepare a PEIS but subsequently decided to only prepare an EIS was not arbitrary in making its “close call”).

192 See *Heckler*, 756 F.2d at 161 (MacKinnon, J., concurring); *supra* notes 116–17 and accompanying text.

193 See discussion *supra* Part II.C.2.

194 See discussion *supra* Part II.C.4.

195 See generally BUMC DEIS, *supra* note 4. For a discussion of the “good faith” requirements of EISs, see *Aersten v. Landrieu*, 637 F.2d 12, 19 (1st Cir. 1980).


197 See 243 F. Supp. 2d 425, 442–43 (M.D.N.C. 2003); see also *supra* note 123 and accompanying text.
been prepared. Consequently, NIH can effectively argue that it should not have to prepare a PEIS, since imposing that requirement would “not accomplish the purpose of a PEIS,” and would likely violate CEQ’s directive to “avoid duplication and delay.”

C. Prediction

Because of the deference NIH will receive from the court, plaintiffs must fully meet their burden in order to persuade a judge to mandate a PEIS. Although the CEQ regulations contain language that plaintiffs can cite with respect to new technologies and tiering, the regulations also support NIH’s assertion that a PEIS should not be completed because it would cause “duplication and delay.”

Although the Circuit Court of Appeals for the District of Columbia has made a point of adhering to the exact regulatory language when interpreting new technology cases, it stands alone. Meanwhile, Supreme Court decisions interpreting NEPA have been conspicuously sparse, and those that exist have overwhelmingly upheld agency actions. Consequently, environmental plaintiffs are unlikely to convince a reviewing court to require NIH to prepare a PEIS for Project BioShield.

V. Case Study Analysis: Courts May Invalidate the BUMC EIS

In analyzing the likelihood of plaintiffs’ claim that the site-specific EIS is inadequate as filed, each of the two issues detailed in Part III must be examined. Because NIH declined to prepare a PEIS, however, it is not possible to herein address the specifics of each individual EIS. As such, this Note analyzes these charges as they specifically apply to

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198 See Churchill County v. Norton, 276 F.3d 1060, 1076 (9th Cir. 2001); Found. on Econ. Trends v. Heckler, 756 F.2d 143, 159 (D.C. Cir. 1985); see also discussion supra Part II.C.4.
200 Furthermore, the regulatory landscape in the wake of the 2001 terrorist attacks is such that national security concerns are likely to trump public health concerns for the foreseeable future. See Barry Kellman, Regulation of Biological Research in the Terrorism Era, 13 Health Matrix 159, 160 (2003).
201 See Cooper, supra note 24, at 100 (“Over a number of years the Supreme Court had become increasingly impatient with what was perceived by some justices as excessive free-wheeling decision-making by the D.C. Circuit.”); discussion supra Part II.C.3.
202 See Mandelker, supra note 22, § 1:6; Shilton, supra note 70, at 553 (noting that the Supreme Court did not decide a single issue in favor of NEPA plaintiffs in the statute’s first 21 years).
the EIS submitted by NIH for the BUMC site. The conclusions drawn may apply to other Project BioShield lawsuits, depending on the adequacy of the respective EISs. More important for the purposes of this Note, the potential inadequacy of the BUMC EIS raises significant questions about the future role of PEISs in general.

A. Consideration of Project Alternatives May Be Inadequate

A reviewing court could potentially invalidate the BUMC DEIS for any one of the following reasons: (1) an impermissibly narrow purpose and need statement; (2) failure to discuss in detail a reasonable number of alternatives; (3) failure to discuss in detail a reasonable alternative; and (4) disingenuous timing.

The BUMC DEIS’s purpose and need statement reads in pertinent part: “The purpose of the Proposed Action is to fund the construction of the Boston-NBL at the BioSquare Research Park . . . . [The facility] would be located on the BUMC campus in Boston, MA . . . .” Admittedly a “slippery concept,” NIH’s definition of “purpose” in this instance appears to be “so slender as to define competing reasonable alternatives out of consideration (and even out of existence).” It is difficult to imagine a single alternative which would fit this purpose besides NIH’s own predetermined choice. As the Tenth Circuit Court of Appeals recently noted, a reviewing court may conclude that “such a narrow definition of Project needs would violate NEPA.”

Secondly, the BUMC DEIS provides a detailed discussion of only a single action alternative in addition to the requisite no action alterna-

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As noted by EPA, however, the SDEIS did not fully accomplish this ameliorative task. See Letter from Robert W. Varney, Region 1 Administrator, EPA, to Valerie Nottingham, Nat’l Insts. of Health 1–5 (May 17, 2005), available at http://www.ace-ej.org/BiolabWeb/Biolabdocs/EPASDEIScomments.tif (stating that “the analysis of alternative locations should be expanded,” and that “the worst case quantitative risk assessment used many assumptions that were not appropriate”).

204 See discussion infra Parts VI–VII.

205 BUMC DEIS, supra note 4, at 1-8.

206 See Simmons v. U.S. Army Corps. of Eng’rs, 120 F.3d 664, 666 (7th Cir. 1997) (internal quotations omitted); see also supra note 139 and accompanying text.

207 See Davis v. Mineta, 302 F.3d 1104, 1118–20 (10th Cir. 2002).
tive,\textsuperscript{208} and briefly discusses three additional alternatives that NIH deemed unreasonable.\textsuperscript{209} While there is no mandated number of alternatives that must be discussed in detail, the “rule of reason” suggests that this number should be more than one.\textsuperscript{210} Similarly, an agency’s decision to only analyze a single option in detail appears disingenuous in light of NEPA’s mandate to foster informed decisionmaking.\textsuperscript{211}

Thirdly, the BUMC DEIS “considered and subsequently eliminated from further review” three alternatives which NIH determined “provided no environmental advantage over the Proposed Action or No Action or [did] not meet the purpose and need of the Project.”\textsuperscript{212} Two of these alternatives—locating the NBL in lower-density areas outside Boston and locating the NBL at other Boston University-owned sites—represent essentially the same view: a BSL-3/4 laboratory should not be built in a densely populated area. In declining to give these alternatives detailed analysis, NIH tautologously refers to benefits already present at the BUMC campus.\textsuperscript{213} The DEIS then summarily concludes the discussion by stating, “[f]inally, the alternative of a location outside Massachusetts or in a lower density area outside of Boston are not a feasible alternatives [sic] as they do not meet the purpose and need for the Project.”\textsuperscript{214} A reviewing court could find this circular argument unreasonable and, following the lead of a recent holding by the Seventh Circuit Court of Appeals, invalidate the BUMC DEIS for failure to address reasonable alternatives.\textsuperscript{215}

Finally, and perhaps most poignantly, the DEIS states that “NIAID selected the BUMC . . . based on multiple factors including review of environmental issues, but focused primarily on the scientific and technical merit of the application . . . and on BUMC’s ability to contribute to the overall NIAID biodefense research agenda.”\textsuperscript{216} In another feat of circular logic, the “review of environmental issues” that NIH speciously claims to have conducted prior to its site selection can only be seen as disingenuous, since the NEPA-mandated alternatives review was initiated after the selection was made. As such, a reviewing court could in-

\textsuperscript{208} See 40 C.F.R. § 1502.14(d) (2004).
\textsuperscript{209} See BUMC DEIS, supra note 4, at 2-1.
\textsuperscript{210} See supra note 145 and accompanying text.
\textsuperscript{212} See BUMC DEIS, supra note 4, at 2-31.
\textsuperscript{213} See id. at 2-33.
\textsuperscript{214} Id. at 2-35.
\textsuperscript{215} See Simmons v. U.S. Army Corps of Eng’rs, 120 F.3d 664, 669–70 (7th Cir. 1997); see also supra note 149–50 and accompanying text.
\textsuperscript{216} BUMC DEIS, supra note 4, at 2-32.
deed find that NIH did not fulfill its statutory obligation to consider project alternatives in its decisionmaking process. As the Second Circuit Court of Appeals observed three decades ago, “the critical agency decision must, of course, be made . . . in light of the alternatives, not before. Otherwise the process becomes a useless ritual, defeating the purpose of NEPA, and rather making a mockery of it.”

Alternatively, a reviewing court may validate NIH’s choices of alternatives if NIH effectively argues that the overall goal of Project BioShield is to conserve and protect the environment by creating vaccines for deadly diseases before terrorists have an opportunity to unleash them. Following the Ninth Circuit Court of Appeal’s lead, a court could therefore decide that, given the “conservation and preventative goals” of the agency, NIH was not required to conduct in-depth analysis of certain alternatives. It is also to NIH’s advantage that courts find agencies’ purpose and need statements valid three times as often as they invalidate them. Additionally, some lower courts have previously validated EISs discussing in detail only a single alternative.

**B. Risk-Assessment Methodologies May Be Inadequate**

If a reviewing court does not invalidate the BUMC DEIS on the basis of inadequate consideration of project alternatives, it may still decide to invalidate it for using inadequate risk-assessment methodologies. First, NIH cites a study concluding that the proposed NBL presented a “negligible” risk to the public as a factor in determining that “locating the facility in a lower density area would not in any way reduce the risk to the public.” Additionally, although CEQ regulations no longer require it, the BUMC DEIS discusses in detail what it claims to be a realistic worst-case scenario. Finally, the DEIS briefly

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219 See Kootenai Tribe of Idaho v. Veneman, 313 F.3d 1094, 1121–22 (9th Cir. 2002).
220 See supra note 141 and accompanying text.
222 See BUMC DEIS, supra note 4, at 4-9, 2-33.
223 See id. at 4-6 to 4-10, app. 6 (using a private consulting firm’s analysis of an anthrax release in a laboratory with failed air filters as a worst-case scenario); supra notes 151–55 and accompanying text. Interestingly, this type of analysis was required to achieve state environmental certification, which may explain its inclusion here. See Ellen Roy Herzfelder, Executive Office of Envtl. Affairs, Certificate of the Secretary of Environmental Affairs on the Draft Environmental Impact Report 3 (Dec. 1, 2003), available at http://www.ace-ej.org/Biolab-Web/Biolabdocs/EOEADEIRCertiﬁcate.pdf.
discusses—and then dismisses—five other potential risk scenarios as presenting “negligible” community risk.\footnote{224}{BUMC DEIS, supra note 4, at 4-11 to 4-15. The five scenarios are as follows: (1) a laboratory-acquired infection; (2) escape of an infected animal; (3) release of infectious materials during transportation; (4) unauthorized removal of biological material; and (5) a terrorist-related bombing.}

Not surprisingly, there has been a backlash from environmental groups over NIH’s choice of scientific methodologies.\footnote{225}{See December ACE Letter, supra note 17, at 5. This letter sets out several perceived deficiencies in NIH’s analysis, including the use of a BSL-3 pathogen—anthrax—instead of a BSL-4 pathogen—such as Ebola—in its models; use of the wrong number of anthrax spores per gram; failure to consider the increased susceptibility of some people; failure to consider spore dispersal in an urban environment; failure to consider a release of numerous biological pathogens; failure to address soil contamination; failure to consider the escape of an infected insect or animal; failure to analyze a release during transit; and failure to include a threat and vulnerability analysis for a terrorist attack on the laboratory. Id. at 5-8.} While plaintiffs have an uphill battle in proving that the agency did not properly analyze all “reasonably foreseeable” occurrences, the regulations do leave room for courts to find NIH’s risk-assessment methodologies inadequate.\footnote{226}{See 40 C.F.R. § 1502.22(b) (2004); supra notes 158–60 and accompanying text.} It is possible that a reviewing court will see the BSL-3/4 laboratory materials as analogous to the spent nuclear fuel rods in \textit{Sierra Club v. Watkins}—potentially dangerous offshoots of a nominally beneficial public enterprise.\footnote{227}{See 808 F. Supp. 852, 869 (D.D.C. 1991); see also supra notes 161–63 and accompanying text.} In such an instance, the \textit{Watkins} court’s admonition that “[i]t is particularly important that a government agency be completely forthright about the risks of a program involving radioactive materials, which inspire great fear among many members of the public,” would seem equally pertinent to the infectious disease materials in the present case.\footnote{228}{See Watkins, 808 F. Supp. at 869.} Thus, a reviewing court may indeed invalidate the BUMC DEIS for inadequate risk-assessment methodologies.

\section*{VI. The Project BioShield Prisoner’s Dilemma}

The set of circumstances predicted in Parts IV and V lead to a finite number of potential endgames for Project BioShield litigation, none of which is beneficial to both the government and environmentalists.\footnote{229}{Because the current outlook is less than ideal, consideration of the different historical paths that could have been taken leads to hy-}
potheses regarding the possibility of better outcomes in the future. To that end, a classic game theory model demonstrates that the current negative effects of NIH’s historical decision to not complete a thorough PEIS necessitate the modernization of PEISs going forward.

A. The Present: An Unacceptable Status Quo

Assuming the above analyses hold true, a PEIS will not be mandated and the site-specific EIS may or may not be invalidated. Thus, there appears to be three viable endgames to Project BioShield litigation: (1) the EIS is validated and the NBL is built; (2) the EIS is invalidated and NIH chooses to build elsewhere; and (3) the EIS is invalidated but NIH chooses to pursue building at the BUMC site by filing a supplemental EIS that is later accepted.

Each of these outcomes is unattractive to at least one of the participants. In the first option, environmentalists lose because the NBL is built in a densely populated area. In the second option, the government loses because it has wasted time and money on an unsuccessful project. In the third option, environmentalists lose because the lab is built in a densely populated area and the government loses because it wasted time and money in having to prepare a supplemental EIS.

In the absence of a mutually beneficial option, both government agencies and environmental groups willingly roll the dice—however weighted they may be—with courts that have been historically hostile to NEPA. In light of the unavoidable loss of time and money involved, this present situation is less than ideal.

B. The Past: The Optimal Prisoner’s Dilemma Outcome Was Realistically Unattainable

Although the current endgames mentioned above are immutable owing to previous decisions made or foregone, examining where alternate paths could have led engenders consideration of disparate viewpoints and lends a sense of urgency to proposals for the future.

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230 See discussion infra Part VI.B–C.


232 See discussion supra Parts IV, V.

233 Though theoretically conceivable, two additional outcomes—the EIS is invalidated but NIH builds anyway, and the EIS is validated but NIH does not build—are realistically unattainable.

234 See supra note 202 and accompanying text.
1. Applying the Prisoner’s Dilemma to Project BioShield

The predicament faced by the government and environmentalists at Project BioShield’s inception can be likened to a well-known non-zero-sum game theory concept: the prisoner’s dilemma. This models decisions made by two opposing parties, where each party, acting in self-interest, will attempt to maximize its own payout despite the fact that both parties would be better off if they cooperated.

Specifically, the post-9/11 government perceived an imminent terrorist threat, and may have thought it reasonable to try to force through environmental review its first choice for a BSL-3/4 laboratory. On the other hand, the prospect of a potential legal victory encouraged environmental plaintiffs to file lawsuits and stall proceedings at every juncture, regardless of the relative reasonableness of the government’s proposed actions. Given the circumstances as they existed at the time, the government’s and the potential plaintiffs’ decisions alike were both rational.

As in the classic prisoner’s dilemma problem, there are four potential outcomes: (1) NIH does not complete a PEIS and environmental groups sue; (2) NIH does not complete a PEIS but environmental groups decide not to sue; (3) NIH completes a PEIS but

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\(^{235}\) Zero-Sum, in WIKIPEDIA, http://en.wikipedia.org/wiki/zero-sum (last visited May 7, 2006). Zero-sum games, such as tic-tac-toe or poker, are games where it is impossible for both players to win; what one player loses, the other gains. \(\text{Id.}\) In nonzero-sum games, on the other hand, there may be an optimal solution that benefits both players. \(\text{Id.}\)

\(^{236}\) For a thorough discussion of this classic problem, see Steven Kuhn, Prisoner’s Dilemma, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2003), http://plato.stanford.edu/archives/fall2003/entries/prisoner-dilemma/. As the author details, the standard problem involves two bank robbery suspects placed in separate jail cells, where a prosecutor tells them each in turn:

You may choose to confess or remain silent. If you confess and your accomplice remains silent I will drop all charges against you and use your testimony to ensure that your accomplice does serious time. Likewise, if your accomplice confesses while you remain silent, they will go free while you do the time. If you both confess I get two convictions, but I’ll see to it that you both get early parole. If you both remain silent, I’ll have to settle for token sentences on firearms possession charges.

\(\text{Id.}\)

\(^{237}\) See \(\text{id.}\). Couched in terms of the classic prisoner scenario, it is seen that “whatever the other [prisoner] does, each is better off confessing than remaining silent. But the outcome obtained when both confess is worse for each than the outcome they would have obtained had both remained silent.” \(\text{Id.}\)

\(^{238}\) See Simmons v. U.S. Army Corps of Eng’rs, 120 F.3d 664, 670 (7th Cir. 1997).

\(^{239}\) Importantly, the prisoner’s dilemma model does not rely on one side being morally “right.” See Ross, supra note 231.
environmental groups sue regardless; and (4) NIH completes a PEIS and environmental groups do not sue.  

2. The Optimal Outcome

Although this last outcome—NIH completes a PEIS and environmental groups do not sue—appears to be a mutually advantageous solution, does prisoner’s dilemma analysis confirm it as the optimal outcome? A situation where both the government and environmentalists receive what they want with relatively low costs and few delays would benefit both sides. For NIH, this entails the permitting and construction of an NBL with minimal legal delays, while the environment is better off if NIH initially proposes an NBL sited in a less densely populated area. Had NIH chosen to prepare a thorough PEIS—one that was tiered and included candid risk assessment and alternatives analyses—the optimal outcome may have been reached.

The first tier of a thorough PEIS would include a genuine analysis of the inherent risks posed when working closely with organisms such as Ebola and diseases such as SARS. With the statutory goal of informed environmental decisionmaking in mind, such an analysis would realistically analyze the probabilities of a wide variety of accident scenarios, rather than summarily concluding that a few relatively benign scenarios would have “negligible” impacts.

Had it conducted this sincere risk assessment, NIH would have approached the second phase of the tiering process—alternatives analysis and site selection—fully informed of the unlikely, but devastating, effects of an accidental release. Armed with this knowledge,

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240 Looking at the situation as it currently presents itself, it is almost certain that the first potential outcome will come to pass because NIH has already chosen not to complete a PEIS and environmental groups have given every indication that they will attempt to block proposed BSL-3/4 laboratories with litigation. See discussion supra Part IV.

241 Rating certain outcomes as better than others—thus recognizing the existence of an optimal outcome—is essential for non-zero-sum game theory analysis. See generally Zero-Sum, supra note 235.

242 Not all environmentalists would necessarily be pleased, however. Some critics claim that researching these dangerous diseases is never a good idea, regardless of where the research is conducted. See Anna Badkhen, Fear Follows Plan to Build More Deadly-Disease Labs, S.F. Chron., Aug. 22, 2004, at A1. This Note adopts the less-extreme view that the environment as a whole is better off with NBLs and the vaccines that may result, if the laboratories can be sited in areas with low population densities.

243 See supra note 67 and accompanying text; see also discussion supra Part III.

244 See supra notes 58, 224 and accompanying text.
the agency’s purpose and need statement would not be site specific. Instead, it would reflect NIH’s desire to find the best possible location for the NBL by balancing the “physical and intellectual capital” present in the Boston area with the recognized environmental and public health risk of siting an NBL in a densely populated area. This scenario would likely result in the selection of a less densely populated area outside of Boston as NIH’s preferred alternative.

This set of events perfectly mirrors the optimal outcome of the classic prisoner’s dilemma—if one additional assumption is made. In this optimal scenario, the government makes a cooperative concession to environmentalists by taking the time and money to effectively analyze the situation. One must then assume that this compromise results in a cooperative concession from environmentalists—recognition of NIH’s comprehensive analyses, and their subsequent decision not to litigate the agency’s informed selection of the less densely populated location as its preferred alternative. Thus, the Project BioShield prisoner’s dilemma demonstrates that the true optimal outcome would only have been attainable if both sides had cooperated effectively and conceded accordingly.

3. The Optimal Outcome Was—and Is—Realistically Unattainable

Faced with the practical certainty of legal action regardless of the perceived diligence of their selection processes, agencies have every incentive to spend less time and money on their environmental analyses and attempt to force through their first choice without a PEIS. Environmentalists have reacted in turn by further marginalizing their role with ever-more-radical attempts to be heard. With no incentive to arrive at a mutually beneficial outcome, neither the government nor environmentalists have reason to stray from their self-serving paths; thus, the sub-optimal status quo persists.

245 See supra note 205 and accompanying text.
246 BUMC DEIS, supra note 4, at 2-33.
247 See supra notes 236–37 and accompanying text.
248 See Nicholas D. Kristof, ‘I Have a Nightmare’, N.Y. TIMES, Mar. 12, 2005, at A15 (“[E]nvironmental groups are too often alarmists. They have an awful track record, so they’ve lost credibility with the public. Some do great work, but others can be the left’s equivalents of the neocons: brimming with moral clarity and ideological zeal, but empty of nuance.”).
C. The Future: Congress, CEQ, and the Courts Should Strive for the Best Possible Outcome

Recognizing that the optimal outcome exists but is realistically unattainable, a mechanism should be adopted that pushes both agencies and environmental plaintiffs towards the best possible outcome. Currently, neither NEPA nor the CEQ regulations clearly mandate the use of PEISs, and courts are loathe to impose such a requirement. In this instance, however, the situation resulting from NIH’s initial preparation of a thorough PEIS, coupled with the concomitant decrease in both the number and viability of impending environmental lawsuits, a thorough PEIS would have been as close to the optimal outcome as possible. Going forward, the current sub-optimal status quo need not be tacitly condoned by the absence of statutory, regulatory, and judicial guidance forcing the completion of thorough PEISs.

VII. Recommendations for Modernizing PEISs

In Kleppe v. Sierra Club, the U.S. Supreme Court did not stop at merely legitimizing PEISs of national scope; it went further in recognizing that PEISs were actually required in some instances. However, a problem arises where, as in the current situation, despite the fact that prior completion of a PEIS would have been advantageous, an agency is able to forego such an action by pressing ahead with site-specific EISs. Continued acceptance of this frequent practice realistically means that PEISs can always be avoided. For PEISs to reach their potential as planning tools, Congress, CEQ, and the courts must modernize them by clarifying the vague aspects of the PEIS process.

A. Congress Should Amend NEPA

Congress should amend NEPA to legislatively recognize PEISs, state exactly when they should be implemented, and establish the exact levels of analysis necessary for their validation. Unfortunately, Congress has shown little desire to amend NEPA since its inception, and recent amendments have only diminished the statute’s environ-

\[249\] See discussion supra Part II.A–B.
\[250\] See supra note 71 and accompanying text.
\[251\] See 427 U.S. 390, 398–415 (1976); see also discussion supra Part II.C.1.
\[252\] See discussion supra Part VI.B.
\[253\] For a detailed discussion of recommended changes to project alternatives and risk-assessment methodologies, see discussion infra Part VII.B.
mental purview.\textsuperscript{254} Despite its aversion to environmental action, Congress should see a potential NEPA PEIS amendment for what it would be: a worthwhile step toward achieving the best possible outcome in future environmental reviews.\textsuperscript{255}

B. CEQ Should Promulgate Clarifying Regulations

CEQ should promulgate new regulations in order to clarify certain aspects of the PEIS process. The need for revised PEIS regulations was conveyed to CEQ in a September 2003 report issued by the NEPA Task Force.\textsuperscript{256} Chapter 3 of this report focuses specifically on tiering and PEISs, stating that they are “valuable decisionmaking tools” that agencies do not take advantage of often enough.\textsuperscript{257}

Indeed, James L. Connaughton, the chairman and sole member of CEQ, recognized the importance of PEIS modernization in an address he gave a few months before the report was published.\textsuperscript{258} In an article adapted from his address, Connaughton stated that “we are on the cusp of a new future for this whole idea of environmental review,” and posed an important question about the future of PEISs specifically: “The question we must find an answer to now is how to pull environmental and risk assessments together in such a way to create a more programmatic view of planning and development . . . .”\textsuperscript{259}

Perhaps in a nod to CEQ’s poor reputation among environmental groups,\textsuperscript{260} the NEPA Task Force report proposed that the onus


\textsuperscript{255} See discussion supra Part VI.B.4.


\textsuperscript{257} Id. at 35.


\textsuperscript{259} Id. at 3, 9.

\textsuperscript{260} Prior to his appointment as CEQ Chairman, Mr. Connaughton was an environmental lawyer who “represented General Electric Co. and the mining company Asarco Inc. in battles with the EPA over Superfund cleanup requirements. He also lobbied on behalf of Alcoa Inc., the Chemical Manufacturers Association and other prominent corporate interests with pollution problems.” Eric Pianin, \textit{In Pollution Debates, Bush’s Man Seeks Harmony Amid the Storm}, \textit{Wash. Post}, Aug. 5, 2003, at A13.
of answering the chairman’s question be delegated to a diverse Federal Advisory Committee in order to “foster a nonfederal perspective and encourage public trust.” 261 This committee would be charged with proposing regulations to “clearly define” both the range of alternatives and the depth of analysis required in NEPA documents. 262 Importantly, the report also recognizes that early involvement of all concerned parties is essential to a properly prepared PEIS. 263

These recommendations are clearly relevant and should be adopted by CEQ. What the report fails to mention, however, is the need for regulations that state exactly when a PEIS must be pursued for each specific type of project. This would clarify the Kleppe Court’s holding that PEISs are sometimes mandatory. 264 Additionally, it would usher the two relevant parties toward the best possible prisoner’s dilemma outcome: agencies would complete a PEIS only when required, and environmentalists would not sue every time an agency declined to complete a PEIS. 265 Agencies must know exactly when to begin the PEIS analysis; without this impetus, the NEPA Task Force’s compelling recommendations on how to thoroughly complete a PEIS may never be implemented.

Any meaningful CEQ overhaul of the PEIS regulations would therefore require all three of these innovations. Chronologically, an agency must first know whether completion of a PEIS is required for the specific action in question. If so, then the agency involved must be required to begin the PEIS process right away by requesting input from a wide range of affected parties at the outset. Finally, once those discussions have begun, the agency must know exactly what levels of analysis the PEIS must contain—both in terms of ranges of alternatives and risk-assessment methodologies.

C. The Courts Should Encourage Agencies to Consider PEISs

Early on in the environmental review process, courts should be vigilant in demanding that agencies have valid reasons for deciding to forego PEISs. Although the deferential standard of review will continue to constrain courts from mandating PEISs in many circum-

262 Id. at 42–43.
263 See id. at 43.
264 See supra note 80 and accompanying text.
265 An initial lawsuit under such a scheme would be a one-time hurdle, easily cleared due to the Supreme Court’s stated desire to give CEQ regulations substantial deference. See Andrus v. Sierra Club, 442 U.S. 347, 358 (1979).
stances, the subjective nature of this test allows courts to censure those agencies that refuse outright to consider PEISs, as well as those that arbitrarily decline their use. Timely enforcement of these requirements will assure that an agency cannot preempt the informed use of a PEIS by beginning site-specific EISs before a court has had the chance to appraise the situation.

As with Project BioShield, however, judicial review is not always initiated before work on site-specific EISs has commenced. Nonetheless, well-reasoned court rulings on the validity of EISs may prospectively influence agencies’ consideration of PEISs as planning tools. If hastily conceived EISs were routinely invalidated—either for failure to adequately consider project alternatives or for inadequate risk-assessment methodologies—then initial, project-level environmental evaluations are more likely to be implemented. Because this “informed” decisionmaking would result in more thorough site-selection procedures, less time and money would be spent by agencies on court proceedings. In sum, effective judicial enforcement of EIS requirements would eventually cause agencies to recognize PEISs as valuable planning tools.

D. A Necessary First Step

All things considered, the executive branch is in the best position to make effective changes to the ways its agencies approach PEISs, for agencies are less likely to question instructions if they come from CEQ. Additionally, while there currently exists a vast body of NEPA common law, the U.S. Supreme Court has attempted to reduce the burdens of environmental litigation by broadcasting its preference that CEQ’s regulations be given substantial deference.

It is possible, of course, that CEQ is content with the status quo. In that case, the courts should use Project BioShield litigation as a starting point for taking a stand on agencies’ PEIS reluctance. By invalidating the BUMC EIS for either inadequate consideration of alternatives or inadequate risk-assessment methodologies, the courts can take a necessary first step toward change.

266 See Churchill County v. Norton, 276 F.3d 1060, 1079 (9th Cir. 2001); see also discussion supra Part II.C.2.

267 See supra note 260 and accompanying text.
In light of public apprehension regarding the inherent dangers posed by BSL-3/4 pathogens, litigation is likely to result from siting controversies over proposed Project BioShield laboratories. Given professed executive and legislative approval for the swift proliferation of vaccine-producing laboratory space, environmental opposition should focus on the need for these laboratories to be sited in areas with comparatively low population densities, rather than on the desire to halt all construction indefinitely.

Though regulatory language and a line of appellate court cases support their assertions, environmental plaintiffs nationwide are unlikely to prevail in their claims that NIH failed to complete a PEIS, because courts will probably defer to NIH’s desire not to waste agency resources. On the other hand, a reviewing court may invalidate NIH’s site-specific BUMC EIS—and any significantly comparable EISs—for either failure to adequately consider project alternatives or use of inadequate risk-assessment methodologies.

Unfortunately, the current range of potential litigation endgames does not include an option that is mutually beneficial to agency and environmentalist alike. In an effort to effectuate such an outcome going forward, future actors must first scrutinize the historical underpinnings supporting the present stalemate. Applying the prisoner’s dilemma game theory model to the circumstances present at the inception of Project BioShield shows that, although an optimal outcome existed, it was realistically unattainable.

Looking ahead, Congress, CEQ, and the courts should strive to make the best possible outcome—initial agency completion of a thorough PEIS, coupled with the attendant decrease in both the number and efficacy of potential environmental lawsuits—a reality for similarly situated agencies. Unfortunately, legislation clarifying NEPA processes is unlikely to materialize any time soon. As a result, CEQ is in the best position to make effective changes to the PEIS process through the promulgation of clarifying regulations. Such regulations should: (1) detail the types and amounts of analysis necessary for a given category of PEISs; (2) require early communication between all affected parties in PEIS proceedings; and (3) state exactly when a PEIS must be pursued in the first place. Although cataloging the necessary changes to agencies’ PEIS practices will no doubt be a Herculean task for CEQ, its one-time occurrence is certainly preferable to the Sisyphean process undertaken by agencies attempting to navigate the current regulatory morass.
Should CEQ remain reticent, impending lawsuits would allow courts to take the first step toward PEIS rehabilitation by invalidating site-specific BSL-3/4 EISs for either inadequate consideration of alternatives or inadequate risk-assessment methodologies. As prisoner’s dilemma analysis demonstrates, Project BioShield litigation offers the judiciary the opportunity to censure the executive branch’s PEIS neglect in an effort to stimulate regulatory clarification.