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“LOVE DON’T LIVE HERE ANYMORE”: ECONOMIC INCENTIVES FOR A MORE EQUITABLE MODEL OF URBAN REDEVELOPMENT

Michèle Alexandre

[pages 1–44]

Abstract: The exclusion of poor, underprivileged people in urban renewal projects has been discussed in depth by a number of scholars. While this issue is far from resolved, the post-Katrina redevelopment plans provide an opportunity to re-evaluate notions of how to best redevelop urban spaces. In this Article, the author attempts to show that the interests of poor individuals can converge with those of city officials and developers in order to prevent the exclusion of the poor in post-Katrina New Orleans as well as future cities. To do so, the author relies on Law and Economics’ notion of the maximization of incentives and Critical Race Theory’s Interest Convergence Theory.

PUBLIC USES AND NON-USES: SINISTER SCHEMES, IMPROPER MOTIVES, AND BAD FAITH IN EMINENT DOMAIN LAW

Lynda J. Oswald

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Abstract: This Article addresses the largely unexplored issue of whether a sovereign may use its power of eminent domain not to pursue an affirmative public use, but rather to prevent an undesired private use (such as a landfill, rehabilitation facility, or other NIMBY-triggering use) from going forward. The author argues that although sovereigns tend to dissemble in these non-use cases based upon an underlying assumption by condemners and courts alike that non-use takings are not constitutionally permitted, their analysis is in fact, incorrect. It is not the non-use condemnations themselves that are problematic, but the subterfuge that condemners
typically use in pursuing such takings. The resulting lack of transparency in governmental action subverts the political process and weakens private property rights protection.

NOTES

WILD RIVERS AND THE BOUNDARIES OF COOPERATIVE FEDERALISM: THE WILD AND SCENIC RIVERS ACT AND THE ALLAGASH WILDERNESS WATERWAY

Simon B. Burce

[pages 77–110]

Abstract: The Wild and Scenic Rivers Act (WSRA) is a collaboration between the federal and state governments designed to preserve nationally significant rivers. Section 2(a)(ii) is an innovative provision of the WSRA, which allows states to designate rivers for review by the Secretary of the Interior for inclusion in the National Wild and Scenic Rivers System. When federal and state interests align, section 2(a)(ii) designation is an effective tool for encouraging state participation in river management. When state interests in a river diverge from federal interests, however, the contours of this collaboration raise difficult federalism questions because the federal government has traditionally regulated the management of natural resources, while states have traditionally regulated land use. Maine recently provoked these difficult federalism questions by unilaterally downgrading the status of the Allagash Wilderness Waterway. This Note examines the WSRA and argues that it preempts state laws that violate its federal purpose of preservation.

ZONING OUT: STATE ENTERPRISE ZONES’ IMPACT ON SPRAWL, JOB CREATION, AND ENVIRONMENT

Sarah Kogel-Smucker

[pages 111–140]

Abstract: State enterprise zone programs are a common type of economic development incentive. These programs designate certain geographical areas as enterprise zones and provide tax breaks to qualified businesses located within those zones. Depending on the location of the geographical area chosen, enterprise zone programs may contribute to sprawl development. This Note first provides an overview of state enterprise zone programs. Second, this Note examines the programs’ envi-
ronmental impact by exploring their link to sprawl development. This Note ultimately argues that states should bring enterprise zone programs in line with smart growth principles. This Note also argues that advocates for such reform will be more successful if they are mindful of communities’ need for job creation and economic development. Consequently, this Note provides an overview of the economic literature evaluating state enterprise zone programs, and an overview of the evolving dynamic between job proponents and environmental advocates.

LIABILITY UNDER CERCLA § 9601(35)(C) FOR INTERMEDIATE LANDOWNERS WHO DISCOVER CONTAMINATION, DO NOT DISCLOSE, AND SELL TO INNOCENT BUYERS

Christine A. Yost

[pages 141–174]

Abstract: Section 9601(35)(C) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) may amend the traditional classes of liable parties, holding responsible intermediate landowners who convey properties without disclosing their knowledge of contamination. To date, however, courts have failed to settle on whether § 9601(35)(C) constitutes a new and independent basis for liability. This Note provides a discussion of the current status of the law on intermediate landowner liability, presents four scenarios in which the lack of consistency in judicial interpretation of § 9601(35)(C) results in mischievous land transfers, and finally, suggests that courts should use the section as an independent basis for intermediate owner liability to achieve the policy goals of CERCLA.
“LOVE DON’T LIVE HERE ANYMORE”:
ECONOMIC INCENTIVES FOR A MORE
EQUITABLE MODEL OF URBAN
REDEVELOPMENT

MICHÈLE ALEXANDRE*

Abstract: The exclusion of poor, underprivileged people in urban re-
newal projects has been discussed in depth by a number of scholars. While this issue is far from resolved, the post-Katrina redevelopment plans provide an opportunity to re-evaluate notions of how to best re-de-
velop urban spaces. In this Article, the author attempts to show that the interests of poor individuals can converge with those of city officials and developers in order to prevent the exclusion of the poor in post-Katrina New Orleans as well as future cities. To do so, the author relies on Law and Economics’ notion of the maximization of incentives and Critical Race Theory’s Interest Convergence Theory.

INTRODUCTION

Her story is all too common in contemporary urban life. For fif-
teen years, Sue Ann, a working-class mother, lived with her two chil-
dren in a small two-bedroom apartment located in a mixed-use neigh-
borhood in a large urban center. In the past five years, her neighbor-
hood underwent dramatic change as eager developers and trendy young professionals flooded into the neighborhood. Their arrival was accompanied by internet cafes, coffee shops, and bookstores. To ac-
commodate their upper-class demands, residential apartment buildings were gutted and transformed into new condos and lofts.

After watching these transformations take place around her, Sue Ann was notified one day that the developers set their sights on her

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tants Tannera George and Melissa Raszewski.

1 Sue Ann is a fictional character used here to illustrate the plight and experiences of millions of individuals.
apartment building. Sue Ann’s landlord informed the building’s residents of her decision to sell the complex. Sue Ann must now find a new home for herself and her children. However, she has been priced out of her neighborhood, given the reality that the lowest rent in this “revitalized” community is seventy-five percent greater than her current rent. The closest affordable housing is in a remote area of town, which will increase her commute to work by forty-five minutes. Furthermore, the school system in the remote area leaves a lot to be desired.3

This story of displacement is so recurring that it is fast becoming one of the formative experiences of America’s low-income, urban populations.4 There are increasing numbers of families5 in urban centers who are finding themselves physically excluded6 and economically marginalized7 from their long-time residences and communities as a result of urban renewal.8 Urban renewal refers to the process by which municipalities, in conjunction with developers, target sections of a city regarded as low-income, barren, and/or blighted and redevelop those areas in order to—among many reasons—increase property values and

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4 See James Geoffrey Durham & Dean E. Sheldon III, Mitigating the Effects of Private Revitalization on Housing for the Poor, 70 Marq. L. Rev. 1, 13–14 (1986). The authors note that, “The incidence of displacement on a national level is significant . . . .” Id. at 13. There are 1.7 million people displaced every year. Id. at 14.


7 See Kelo v. City of New London, 545 U.S. 469, 522 (2005) (Thomas, J., dissenting) (noting that mid-century development plans employed the Court’s expansive understanding of public use to displace significant numbers of non-white or low-income families).

attract higher-income individuals to the city. Among the problems caused by the displacement of low-income individuals is psychological strain on those residents who are emotionally attached and economically dependent on their homes and communities.

While the definition of urban renewal changed during the late twentieth and early twenty-first centuries, the effects of urban renewal have been the same for poor people living in the targeted neighborhoods because their interests and voices continue to be excluded from urban planning programs and development initiatives. In this

9 The City of New London represents a perfect example of the type of conditions that usually give rise to the implementation of urban renewal projects. According to the Court in *Kelo*:

Decades of economic decline led a state agency in 1990 to designate the City [of New London] a “distressed municipality.” . . . In 1998, the City’s unemployment rate was nearly double that of the State, and its population of just under 24,000 residents was at its lowest since 1920.

These conditions prompted state and local officials to target New London, and particularly its Fort Trumbull area, for economic revitalization.

*Kelo*, 545 U.S. at 473.

10 See *Fullilove*, *supra* note 5, at 3–4.

11 See Silkwood, *supra* note 6, at 521–22 (“Indeed, urban renewal, which over its sketchy past has displaced scores of African-Americans [sic], came to be called ‘Negro removal’ instead of urban renewal. Further, scholars have noted how governments have ‘implemented policies to segregate and maintain the isolation of the poor, minority, and otherwise outcast populations’ . . . .” (footnote omitted)).


In theory, land use decisions take place within a planning framework, done in accordance with a comprehensive plan. In practice, however, private market forces are more apt to directly influence land use decisions than any comprehensive public deliberative process that considers the larger social, economic, or environmental considerations that underlie land use within an urban area. Although there is some move toward stronger local planning requirements, the prevailing law and practice remains a highly atomized approach.

The atomization of urban space has fragmented urban communities in ways that make “bridging” social capital difficult, undermining the formation of socially and economically integrated urban communities. This has had the consequence of isolating certain populations in ways that render them vulnerable to larger structural forces that are difficult for them to overcome without either stronger social and economic resources or collective action on the part of interests who have very little incentive to assist socially isolated communities.

*Id.* at 546; see also *Fullilove*, *supra* note 5, at 20, 242 n.14. Fullilove describes urban renewal projects in the 1960s and 1970s as:
Article, I consider these persistent effects as they have impacted both property owners and lessees. Primarily, this Article concentrates on how the scope of public purpose, as it is used in eminent domain standards, may be expanded in order to implement more equitable renewal plans. I argue that equity-based redevelopment plans can help prevent the displacement and future exclusion of traditionally disadvantaged residents of the low-income communities that are normally targeted by redevelopment plans. I suggest that a system of incentives that merges the interests of development planners with the interests of the urban poor be incorporated into all urban renewal plans so as to achieve more equitable results. In this way, I attempt to show that the interests of poor individuals can converge with those of city officials and developers. Derrick Bell’s Interest Convergence Theory inspires this incentive-based urban renewal plan. More specifically, this Article will show that the interests of poor individuals can converge with those of city officials and developers. It will explore the intersection of Interest Maximization and Interest Convergence Theory, and offer a modified defini-

By my estimate, 1,600 black neighborhoods were demolished by urban renewal. This massive destruction caused root shock... First, residents of each neighborhood experienced... the loss of their life world... Root shock, post urban renewal, disabled powerful mechanisms of community functioning, leaving the black world at an enormous disadvantage for meeting the challenges of globalization.

Id. at 220. Fullilove goes on to explain the reasons underlying her mathematical estimate:

This estimate is based on the following pieces of information. According to the final report on urban renewal, there were 2,532 urban renewal projects in 992 cities. A number of authors have reported that 75 percent of the people displaced were people of color and about 63 percent were African American.

Id. at 242 n.14 (citation omitted).


14 See id. at 22; James Boyd White, Economics and Law: Two Cultures in Tension, in ECONOMIC JUSTICE: RACE, GENDER, IDENTITY AND ECONOMICS 33, 33–34 (2005) [hereinafter ECONOMIC JUSTICE]. White explains some of the assumptions of microeconomics are that:

The universe is populated by... human actors, each of whom is competent, rational, and motivated solely by self-interest. External to the human actors is a natural universe that affords what are called “resources,” which are acted upon by human actors to create something called “wealth.”... Each actor is assumed to be motivated by an unlimited desire to acquire or consume. Since each is interested only in its own welfare, each is in structural competition
tion of public purpose that precludes the exclusion of economically disadvantaged individuals.

The definition of public purpose that I propose for courts reviewing urban renewal projects is one that makes paramount the nondisplacement of poor residents. In addition, I argue that intangible contributions made by pre-redevelopment community residents to the redeveloped communities must be preserved and computed in the type of “just compensation” awarded to homeowners, as well in the types of amenities provided for low-income renters in the post-renewal community. The computation of intangible contributions of poor community members to the redeveloped communities would adequately acknowledge the role that the pre-redevelopment residents’ social capital plays in increasing the value of the community. That role is discussed in this Article when analyzing the proposed redefinition of public purpose. Furthermore, I borrow from international law’s recognition of indigenous populations’ right to return to their homeland, as well as the now established standards of environmental justice, to further support the basis for expanding the definition of public purpose to prevent the displacement of poor residents.

Part I of the Article discusses conventional notions of public purpose and explores incentives that local governments have traditionally offered to attract private developers. In Part I, I also propose a redefinition of public purpose that takes into account the intangible contributions and value of the residents/indigenous people of pre-redeveloped communities. Part II investigates the possibilities of a more egalitarian model of urban redevelopment by applying the Interest Convergence Theory to urban renewal plans. Part III proposes such an egalitarian redevelopment model using redevelopment plans in post-

\textit{Id.}


\textsuperscript{16} See Foster, \textit{supra} note 12, at 529.


\textsuperscript{19} See infra Part I.

\textsuperscript{20} See infra Part II.
Hurricane Katrina New Orleans as a promising example. Ultimately, the Article will explore the ways in which the interests of developers and politicians may converge with those of homeowners and renters in urban renewal cases.

I. Public Purpose and the Traditional Use of Incentives in Urban Renewal Projects

Eminent domain is the power of the government to expropriate private properties. The Constitution does not explicitly grant this power. Instead, the Constitution tacitly recognizes that the power to expropriate inheres in governments and requires, in the Takings Clause, that the government pay “just compensation” in exchange for an expropriation. “Just compensation” is interpreted as an attempt to balance a valued interest in property rights with the government’s need to sometimes appropriate private property for public benefit. Eminent domain continuously positions individuals’ sacrosanct rights to their property against the need of government to make decisions consistent with the welfare of the general public. The evidence of the sanctified nature of individual property rights lies in the very admonishment of the Framers of the Constitution that property shall

21 See infra Part III.
23 See U.S. Const. amend. V.
25 U.S. Const. amend. V (“[N]or shall private property be taken for public use, without just compensation.”).
not be taken without “just compensation.” Armed with such protection, it is no surprise that private property owners become incensed when those property rights become endangered by takings decisions that seem to fall beyond the scope of public welfare and seem to fit closer to that of private interests. In the early years of the United States, subsequent to the passage of the Bill of Rights, the Takings Clause served as a tool to achieve a proper structuring of cities and communities. At that time, the public use mandate of the Takings Clause was carried to its literal meaning in that it granted local government the right to use private property for the creation of items open to the general public.

A. Kelo v. City of New London and the Evolution of Public Purpose

The tension between the sanctity of property rights and the government’s need to sometimes limit property rights—either through regulatory taking or expropriation—has given rise to substantial litigation. Over time, the U.S. Supreme Court has developed a robust interpretation of the Takings Clause and the meaning of “just compensa-

28 See U.S. Const. amend. V.
29 See Ashley J. Fuhrmeister, In the Name of Economic Development: Reviving “Public Use” as a Limitation on the Eminent Domain Power in the Wake of Kelo v. City Of New London, 54 Drake L. Rev. 171, 220–21 (2005) (discussing the impact of takings that do not have a direct effect on public welfare). Fuhrmeister states:

Although municipalities and developers often have nothing to lose under these economic development schemes, the private property owners located in the midst of an economic development area have everything to lose . . . .

. . . . Such is the case of economic development takings in which the anticipated benefits are only indirectly related to the taking itself and are dependent upon the financial health of an independent, private entity that cannot guarantee a certain amount of jobs or tax dollars.

30 See Donald L. Beschle, The Supreme Court’s IOLTA Decision: Of Dogs, Mangers, and the Ghost of Mrs. Frothingham, 30 Seton Hall L. Rev. 846, 890–91 (2000) (discussing the weight of individual interests against the goal of a city in that “[t]he Takings Clause . . . limits both the owner’s power to frustrate the community and the community’s power through the requirement of just compensation”).

31 See Silkwood, supra note 6, at 502–22. “The interpretation of public use as public purpose endured as the method of determining proper and improper takings into the mid 1900’s.” Id. at 502 (citing Thompson v. Consol. Gas Utils. Corp., 300 U.S. 55, 80 (1937)).

tion” under the Constitution. I will examine three important Supreme Court cases, Berman v. Parker, Hawaii Housing Authority v. Midkiff, and Kelo, to analyze the evolution of public purpose.

Eminent domain triggers controversies because many perceive it as an extreme form of governmental intrusion. The government, in turn, usually argues that eminent domain is necessary to solve holdout problems that market inefficiencies create. Further, the government often argues that most public use or redevelopment projects acquire private properties through ordinary means. The use of eminent domain is designed to be a tool of last resort, to be used only in the case of holdout by one or more property owners. In this context, eminent domain is believed to be useful in preventing a few property owners

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34 See Kelo, 545 U.S. 469; Midkiff, 467 U.S. 229; Berman, 348 U.S. 26.

[I]t is now the widespread and not unjustified popular perception that the Court de facto declared economic war on people’s most cherished possessions—their homes that are not merely their “property,” but also are traditionally thought of as places of security and repose, as well as places of family refuge that is [sic] secure from government intrusion.

Id.; see also Dennis J. Coyle, Takings Jurisprudence and the Political Cultures of American Politics, 42 CATH. U. L. REV. 817, 848 (1993). Coyle writes:

The courts’ confusion of takings doctrine with substantive due process has lessened the effectiveness of federal and state takings clauses as shields against government intrusion. When these two concepts are treated as one, with a single, rational basis standard so watered down as to permit virtually anything to pass, these protections of rights become empty shells.

Id.

37 See id. at 61–62, 64.
from thwarting the intended public benefit that the government anticipates will flow from the taking.\textsuperscript{39}

In the early period of takings jurisprudence, traditional eminent domain cases, mostly state cases, involved disputes over the taking of private properties to build highways and public roads.\textsuperscript{40} In 1875, the Supreme Court confirmed the state courts’ interpretations by limiting the use of eminent domain to “forts, armories, and arsenals, for navy-yards and light-houses, for custom-houses, post-offices, and court-houses.”\textsuperscript{41} The Supreme Court did not deviate from this limitation until the middle of the twentieth century.\textsuperscript{42}

In recent years, the Supreme Court has embraced the more expansive notion of takings for public use purposes, culminating in a broader notion of public purpose announced in \textit{Kelo}.\textsuperscript{43} The Supreme Court decided \textit{Berman} in 1954, finding the type of taking under review to be within the public use language of the Fifth Amendment.\textsuperscript{44} \textit{Berman} involved private owners challenging the condemnation of their property under the District of Columbia Redevelopment Act of 1945.\textsuperscript{45} The Act allowed the use of eminent domain to redevelop slums and blighted areas and the sale or lease of condemned lands to private buyers.\textsuperscript{46} The private owners argued that their properties could not be taken because they were commercial properties, because the properties were not in a slum, and because the government would transfer their properties to private interests.\textsuperscript{47} The \textit{Berman} Court rejected the private owners’ argument, holding that:

\begin{itemize}
\item \textsuperscript{39} See Posner, \textit{Economic Analysis}, supra note 36, at 64–68 (making efficiency and public benefit arguments for takings).
\item \textsuperscript{40} See Dickey v. Maysville, W.P. & L. Tpk. Rd. Co., 37 Ky. (7 Dana) 113, 113 (1838); Katherine M. McFarland, Note, \textit{Privacy and Property: Two Sides of the Same Coin: The Mandate for Stricter Scrutiny for Government Uses of Eminent Domain}, 14 B.U. PUB. INT. L.J. 142, 142–43 (2004) (“The practice of eminent domain—the government’s power to take private property for public use—was recognized by common law and originally used to facilitate the buildings of public roads, schools, and post offices.” (citing United States v. Chicago, 48 U.S. 185, 194 (1849))).
\item \textsuperscript{41} Kohl v. United States, 91 U.S. 367, 371 (1875); see McFarland, supra note 40, at 147.
\item \textsuperscript{42} See Scott P. Ledet, Comment, \textit{The Kelo Effect: Eminent Domain and Property Rights in Louisiana}, 67 LA. L. REV. 171, 181 (2006) (“A narrow construction of the public use provision of the takings clause was all but destroyed in the United States Supreme Court case of \textit{Berman v. Parker}.”).
\item \textsuperscript{43} See generally Kelo v. City of New London, 545 U.S. 469 (2005) (announcing an increasingly broad definition of public purpose).
\item \textsuperscript{44} 348 U.S. 26, 33–34 (1954).
\item \textit{Id.} at 28.
\item \textit{Id.} at 29–31.
\item \textit{Id.} at 31.
\end{itemize}
The concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.\footnote{48} The Court denied the private owners’ challenge and found the taking to be lawful.\footnote{49}

The \textit{Berman} Court rejected the invitation to second-guess the legislature’s determination that the use of eminent domain would benefit the public.\footnote{50} The Court embraced the notion of public purpose as the constitutional prerequisite for the exercise of eminent domain power.\footnote{51} This expanded view of public use—public purpose, in particular—is far removed from the Court’s early views that eminent domain should only be exercised when the use is one that is specifically open to the public.\footnote{52}

The Court revisited eminent domain thirty years later in \textit{Midkiff}, where it held that the government may condemn private land to break up a land ownership oligopoly in order to reestablish a free market.\footnote{53} The Court again followed \textit{Berman’s} flexible interpretation of the public use/public purpose doctrine.\footnote{54} Adopting the deference-to-legislature approach in \textit{Berman}, Justice O’Connor argued in \textit{Midkiff} that the role of the Court in determining public purpose is very narrow and should be invoked only when absolutely necessary.\footnote{55} Justice O’Connor stated that, “The ‘public use’ requirement is thus coterminous with the scope of a sovereign’s police powers.”\footnote{56} The Court continued:

\footnote{48} \textit{Id.} at 33 (citation omitted).
\footnote{49} \textit{Id.} at 36.
\footnote{50} \textit{Berman}, 348 U.S. at 33.
\footnote{51} \textit{See id.}
\footnote{52} \textit{See} Kelo v. City of New London, 545 U.S. 469, 479–80 (2005); \textit{Berman}, 348 U.S. at 33. Prior to 1875, the federal government did not make any definitive statements on the scope of the public use admonishment of the Takings Clause. The state courts tackled taking for public purpose, approving uses such as the building of a university, a road, and a bridge. \textit{See generally} Proprietors of Charles River Bridge v. Proprietors of Warren Bridge, 24 Mass. (7 Pick.) 344 (1829) (bridge); Bonaparte v. Camden & A.R. Co., 3 F. Cas. 821 (Cir. Ct. D.N.J. 1830) (road); Trs. of the Univ. of N.C. v. Foy, 5 N.C. (1 Mur.) 58 (1805) (university).
\footnote{54} \textit{Id.} at 239–41; \textit{Berman}, 348 U.S. at 33.
\footnote{55} \textit{Midkiff}, 467 U.S. at 240–41; \textit{see} \textit{Berman}, 348 U.S. at 32–33.
\footnote{56} \textit{Midkiff}, 467 U.S. at 240.
There is, of course, a role for courts to play in reviewing a legislature’s judgment of what constitutes a public use, even when the eminent domain power is equated with the police power. But the Court in *Berman* made clear that it is “an extremely narrow” one. The Court in *Berman* cited with approval the Court’s decision in *Old Dominion (Land) Co. v. United States*, which held that deference to the legislature’s “public use” determination is required “until it is shown to involve an impossibility.”  

The debate surrounding the definition of public purpose reached its peak in the *Kelo* decision in 2005. In further broadening the public purpose doctrine, the Court argued that public purpose extended beyond public use. In 1990, the City of New London was classified by a

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57 *Id.* (citations omitted) (quoting Old Dominion Land Co. v. United States, 269 U.S. 55, 66 (1925)).


Several recent law journal articles have critiqued the current interpretations of the doctrine. These scholars argue that eminent domain is used by “rent seeking” groups that want to avoid private market negotiations. They also claim that eminent domain is abused by public authorities that are controlled by private developers, and they argue for a stricter application of the [Public Use] Clause.

*Id.* at 50; see also Rindge Co. v. County of L.A., 262 U.S. 700, 705–06 (1923). The Court stated:

The nature of a use, whether public or private, is ultimately a judicial question. However, the determination of this question is influenced by local conditions; and this Court, while enforcing the Fourteenth Amendment, should keep in view the diversity of such conditions and regard with great respect the judgments of state courts upon what should be deemed public uses in any State.

*Id.* at 705–06 (stating that the use of eminent domain for a public highway qualifies as public use); see Bruce A. Ackerman, *Private Property and the Constitution* 190 n.5 (1977); Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* 161–62 (1985); Margaret Jane Radin, *Reinterpreting Property* 136–37 (1993).

59 *Kelo*, 545 U.S. at 479 (“[T]his ‘Court long ago rejected any literal requirement that condemned property be put into use for the general public.’” (quoting *Midkiff*, 467 U.S. at 244)). Rather, the Court “embraced the broader and more natural interpretation of public use as ‘public purpose.’” *Id.* at 480 (citing Fallbrook Irrigation Dist. v. Bradley, 164 U.S. 112, 158–64 (1896)).
state agency as a distressed city. In 2000, the city approved a development plan that would create 1000 jobs, raise revenue, and renew the city. Having acquired most of the land needed for the renewal, the city developers instituted condemnation proceedings to acquire remaining land through eminent domain. The Supreme Court was asked to determine whether the city’s economic rejuvenation scheme served a public purpose within the meaning of the Takings Clause.

Among other arguments, petitioners contended that economic development should not serve as the basis for a taking, nor should the city be able to use eminent domain to take nonblighted areas. Petitioners asked the Court “to adopt a new bright-line rule that economic development does not qualify as a public use.” The Court rejected the invitation, arguing that “[p]romoting economic development is a traditional and long accepted function of government. There is, moreover, no principled way of distinguishing economic development from the other public purposes [the Court has] recognized.” Kelo completed the public purpose expansion, permitting the taking of private properties for economic rejuvenation absent any blight. The Court admitted that “[t]hose who govern the City were not confronted with the need to remove blight in the Fort Trumbull area, but their determination that the area was sufficiently distressed to justify a program of economic rejuvenation is entitled to our deference.” The Court sanctioned the power of government to allow private developers to take private properties for redevelopment under the eminent domain power.

The Court’s expansion of public use is helpful to support the arguments for extending the meaning of public purpose that I pro-

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60 See id. at 473.
61 Id. at 472 ("In 2000, the city of New London approved a development plan that, in the words of the Supreme Court of Connecticut, was 'projected to create in excess of 1,000 jobs, to increase tax and other revenues, and to revitalize an economically distressed city, including its downtown and waterfront areas.'" (quoting Kelo v. City of New London, 843 A.2d 500, 507 (Conn. 2004))).
62 Id.
63 Id.
64 Kelo, 545 U.S. at 484–85.
65 Id. at 484.
66 Id.
67 Id. at 483.
68 Id.
69 See id. at 483–86.
70 See Silkwood, supra note 6, at 503. Silkwood states:

The United States Supreme Court’s decisions in Berman v. Parker and Hawaii Housing Authority v. Midkiff, two seminal cases in the development of eminent
pose in this Article. If, as stated in Berman, public purpose can represent values that are “spiritual as well as physical,” intangibles such as social capital should be considered in the implementation of urban renewal plans.

II. INTEREST CONVERGENCE AND PUBLIC PURPOSE REDEFINED: A UTILITARIAN JUSTIFICATION FOR REFORMS IN URBAN REDEVELOPMENT CASES

A. Interest Convergence Defined and a Consideration of Ways of Converging Economic Interests for the Public Good

In his seminal article, Brown v. Board of Education and the Interest Convergence Dilemma, Derrick Bell discussed the import of interest convergence in civil rights cases:

The interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites. However, the Fourteenth Amendment, standing alone, will not authorize a judicial remedy providing effective racial equality for blacks where the remedy sought threatens the superior societal status of middle- and upper-class whites.

Bell specifically referred to the events that culminated in Brown and demonstrated that the Supreme Court’s decision in Brown correlated with the interest of the United States at the time. As demonstrated

domain law in the United States, are illustrative of the Court’s new, less restrictive approach to the use of eminent domain power. These decisions introduced a broader interpretation of ‘public use’ by giving a great amount of deference to legislative definitions regarding what constituted a valid public use.

Id.


72 See Foster, supra note 12, at 529. Social capital refers to the value that the intangible contributions of individuals, such as cooperation, camaraderie, and a sense of unity, add to a particular community. This idea is explored in further detail at the end of Part II of this Article. See infra Part II.

73 Bell, supra note 13, at 22; see also Derrick Bell, Remembrances of Racism Past: Getting Beyond the Civil Rights Decline, in RACE IN AMERICA: THE STRUGGLE FOR EQUALITY 73–82 (Herbert Hill & James E. Jones eds., 1993).

74 Bell, supra note 13, at 22–23. According to Bell:

First, the decision helped to provide immediate credibility to America’s struggle with communist countries to win the hearts and minds of emerging third world people. At least this argument was advanced by lawyers for both the NAACP and the federal government. . . .
in the case of desegregation, a coalescence of interests across sectors can aid in the protection of marginalized individuals.\textsuperscript{75}

In the urban renewal context, the interests converging are typically those of city officials and developers in order to accomplish the designated projects.\textsuperscript{76} Unfortunately, the city officials and developers’ perception of public good often fails to consider the interest of economically marginalized residents.\textsuperscript{77} Urban renewal projects not only attract new businesses to poor neighborhoods, but also often result in

Second \textit{Brown} offered much needed reassurance to American blacks that the precepts of equality and freedom so heralded during World War II might yet be given meaning at home. Returning black veterans faced not only continuing discrimination but also violent attacks in the South which rivaled those that took place at the conclusion of World War I.\ldots

Finally, there were whites who realized that the South could make the transition from a rural plantation society to the sunbelt with all its potential and profit only when it ended its struggle to remain divided by state-sponsored segregation. Thus, segregation was viewed as a barrier to further industrialization\ldots

Here, as in the abolition of slavery, there were whites for whom recognition of the racial equality principle was sufficient motivation. As with abolition, though, the number who would act on morality alone was insufficient to bring about the desired racial reform.

\textit{Id.} at 23. Another scholar has also supported the Interest Convergence Theory in her historical analysis of the events that culminated to desegregation. See generally Mary L. Dudziak, \textit{Brown as a Cold War Case}, 91 J. Am. Hist. 32 (2004) (describing the impact historical events surrounding the \textit{Brown} decision, such as the Cold War). According to Dudziak, the United States was under such international scrutiny at the time, that the \textit{Brown} decision was an opportune and important moment to clean up the United States’s image and show the world that America’s propaganda about democracy was a reality on America’s soil. See \textit{id.} at 32, 38.

\textsuperscript{75} See Daniel H. Cole, \textit{Political Institutions, Judicial Review, and Private Property: A Comparative Institutional Analysis}, 15 \textit{Sup. Ct. Econ. Rev.} 141, 153–54 (2007) (discussing the power of citizens with respect to the protection of property rights and noting that “[t]o the extent that the ‘interests of the common citizen’ include private property, it follows that sensitivity to the property rights of the common citizen is crucial to a government’s political survival and prosperity”).

\textsuperscript{76} See, e.g., Silkwood, \textit{supra} note 6, at 523 (showing the interplay of the city’s interest and private investors in Mississippi). Silkwood relates:

The executive director of the Mississippi Development Authority explained, in an attempt to justify the takings, “It’s not that Nissan is going to leave if we don’t get the land. What’s important is the message it would send to other companies if we are unable to do what we said we would do. If you make a promise to a company like Nissan, you have to be able to follow through.” Clearly, the corporate dollars meant more to the Mississippi Development Authority than the Constitutional rights of the minority homeowners whom they sought to uproot and displace.

\textit{Id.} (footnotes omitted).

\textsuperscript{77} See \textit{id.} at 521–23.
substituting the low-income residents and buildings formerly in that neighborhood with professional, middle class commercial and residential edifices. These projects are popular and can be very successful as formerly poor and isolated neighborhoods, over a period of five to ten years, become coveted by affluent developers. These changes can also contribute to more stable economies and provide opportunities for city officials to receive accolades.

Judge Richard Posner proposed “that people are rational maximizers of their satisfactions” and “nothing they do is motivated by the public interest.” He further asserted that market inequities should be resolved by market participants’ own motivations and not by external regulations. In redevelopment cases, the maximization of satisfactions, in the form of incentives, is not a new phenomenon. In fact, local governments and private developers regularly develop incentives to attract the services and attention of one another.


The current market for inner city space coincides quite evenly with a decades-old policy of cities trying to attract the upper-middle class to the city. Arguably, the discovery has been partially fostered and guided by the deliberate intervention of state and local governments through an explicit and pointed policy to attract affluent residents. This intervention by state and local governments has taken many forms: incentives to urban professionals to locate in certain neighborhoods such as first-time homebuyers programs, settlement cost forgiveness programs, other incentive grants and loans for purchasing residential real estate within the city, and favorable re-zonings of industrial property to facilitate residential occupancy.

Id.

79 See James A. Kushner, Smart Growth, New Urbanism and Diversity: Progressive Planning Movements in America and Their Impact on Poor and Minority Ethnic Populations, 21 UCLA J. Envtl. L. & Pol’y 45, 61 (2002–03) (discussing developer-created movements toward urban revitalization: “The young and old are attracted to New Urbanist communities, and developers are attracted to what could result in better communities, urban revitalization, and higher profits from increased density”).


82 See generally id. at 351–92 (chapter discussing an economic approach to law).

83 See Pritchett, supra note 58, at 29–30 (discussing the government’s use of eminent domain coupled with redevelopment incentives to encourage private investment).

quid pro quo relationship between private developers and city officials is illustrated in the following:

Cities aid in redevelopment by entering into public-private partnerships to write down land acquisition and development costs by using regulatory freezes and eminent domain power, and by providing a number of business incentives to companies willing to relocate and participate in residential and commercial (entertainment and retail) development projects. This is done with geographically targeted commercial tax incentives such as enterprise zones, creative financing techniques such as tax increment financing, favorable taxing policies such as under-assessment of commercial property values, or even the waiver of taxes through nominal payments-in-lieu-of-taxes (PILOTS).

In these examples, developers and city officials maximize their satisfaction by finding common points of interest. In the last example, the converging interest between the city officials and the private developers was the desire to attract lucrative business to the particular neighborhood. In light of that common interest, private developers and city officials had great incentives to collaborate. Each party

85 McFarlane, New Inner City, supra note 78, at 7. See generally Audrey G. McFarlane, Preserving Community in the City: Special Improvement Districts and the Privatization of Urban Racialized Space, Stanford Agora: Online J. Legal Persp. 2003, http://agora.stanford.edu/agora/volume4/articles/mcfarlane/mcfarlane.pdf (discussing Business Improvement Districts as used by developers to further segregate affluent neighborhoods from poor, minority ones).

86 See McFarlane, New Inner City, supra note 78, at 6–7, 15–17.

87 See Barbara L. Bezdek, To Attain “The Just Rewards of So Much Struggle”: Local-Resident Equity Participation in Urban Revitalization, 35 Hofstra L. Rev. 37, 39 (2006) (“Around the United States, cities are being remade through increasingly intricate and opaque ‘public/private partnerships’ (‘PPPs’), by which local government agencies trade essential infrastructure at low or no cost in exchange for a profit-sharing stake or other return on the city’s investment.”); McFarlane, New Inner City, supra note 78, at 15–17.

88 See Bezdek, supra note 87, at 40. Bezdek states:

Today’s public/private cooperation has its origins in the first federal revitalization programs. Congress designed its redevelopment programs to be federally funded and driven, but implemented at the local level. Passage of the Housing Act of 1949 was secured by an amalgamation of disparate interests who saw what they wanted to see in the program. More specifically, “[h]ousing advocates thought it would result in additional affordable housing, while developers saw it as an economic opportunity.” Local jurisdictions realized it would give them the
could use their status to place the other in a better position.\textsuperscript{89} City officials use eminent domain to acquire needed property and private developers acquire funding to implement development plans.\textsuperscript{90} In the context of urban renewal, it is clear that the perennial “invisible hand” described by Judge Posner, traditionally believed to be at play in all market transactions, cannot be relied on to redress all inequities.\textsuperscript{91}

In a society where supply and demand provide a major motivation, economically marginalized individuals lack bargaining power.\textsuperscript{92} They are consequently unable to participate in the market and become unfortunate casualties.\textsuperscript{93} As a result, economically marginalized individuals have fewer ways to maximize their interests.\textsuperscript{94} Taking these limitations into consideration, how then do we proceed to include the interests of the nonmarket participants—those economically incapable of participating—in order to prevent their marginalization? Judge Posner concedes that nonmonetary and intangible incentives can be a considerable force in the market and that they can create palpable shifts in the conduct of business.\textsuperscript{95} The concerns generated by the post-Hurricane Katrina redevelopment efforts encapsulate the potential effects of nonmonetary incentives in redevelopment cases.\textsuperscript{96} The displacement faced by many of the hurricane victims is an example of what can happen when the interests of nonmarket participants are tools to clear away blighted eyesores and to build preferred developments in their place with the Federal Treasury footing the bill.


\textsuperscript{89} See \textit{id.} at 40–41.

\textsuperscript{90} See \textit{id.}


\textsuperscript{94} See \textit{Fullilove}, supra note 5, at 11–17.

\textsuperscript{95} \textit{Id.}; see Posner, \textit{Problems of Jurisprudence}, supra note 81, at 354. Posner asserts that “nonmonetary as well as monetary satisfactions enter into the individual’s calculus of maximizing.” \textit{Id.}

\textsuperscript{96} See Bezdek, supra note 87, at 38–39 (“The victims least able to escape [Hurricane Katrina] and last to be remembered in emergency planning and evacuation were predominantly poor, black, elderly, and disabled.”).
The redevelopment issues facing post-Hurricane Katrina New Orleans should not be viewed as exceptions to the issues usually present in urban renewal projects. The underlying threat of excluding disenfranchised individuals is integral to urban renewal, and palpable in post-Hurricane Katrina redevelopment efforts. It is commonly the case, however, that marginalized individuals are overlooked when points of interest convergence are not identified.

Rather than exhaust efforts to change individuals’ motivations, it is useful to investigate how to capitalize on merged interests. While self-motivated actions are arguably the ideal form of altruism, it is probably more realistic and, perhaps more productive, for advocates of economically marginalized individuals to concentrate post-Brown strategic energy on providing utilitarian incentives for change.

Id. See generally Lolita Buckner Inniss, A Domestic Right of Return?: Race, Rights, and Residency in New Orleans in the Aftermath of Hurricane Katrina, 27 B.C. THIRD WORLD L.J. 325 (2007) (discussing the overall effects of revitalization generally and in post-Katrina New Orleans).

See Bezdek, supra note 87, at 40–41. Bezdek states:

Over the years, much redevelopment has been sharply criticized for its displacement of the poor people who lived where local officials yearned to rebuild. The irony is that the plain purpose of the first national Housing Act was displacement of the poor. The Act required that redevelopment occur in a “slum area or a deteriorated or deteriorating area which is predominantly residential in character,” but did not require that any demolished housing be replaced.

Id. (footnote omitted) (quoting Quinones, supra note 88, at 700 (quoting the Act)).

See Inniss, supra note 98, at 357–58, (discussing the effect on marginalized individuals when the greater community is distanced by the differences in their identities, and fails to find a common interest in protecting those disenfranchised citizens). Inniss states:

These identities may be based on a variety of factors such as race, ethnicity, or religion, any one of which may effectively serve as “identity cleavages.” Identity cleavages sever members of the differentiated group from the dominant group in a society. When these persons also happen to be members of a marginalized or disfavored group already in conflict with the dominant group, the rights of citizenship are rarely fully available to them during a crisis of displacement. In such a case, displaced persons are not “protected and assisted” as mainstream citizens during a crisis, but instead are “identified as part of the enemy, neglected and even persecuted.”


remain true to the legal realism that forms the basis of the Interest Convergence Theory, it is unlikely that social change will result solely from the sheer good will of people. Consequently, it might be more effective to focus on strategies that maximize incentives for these changes to occur.

Economic strategizing has been used in other spheres to explain or to affect market forces. Recently, for example, many companies changed their hiring practices through interest convergence. For (i.e., completely selfless) because giving occurs only if some positive or negative incentive impels the donor to give.” Id.

102 See R. H. Coase, Adam Smith’s View of Man, 19 J.L. & Econ. 529 (1976), reprinted in EMMA COLEMAN JORDAN & ANGELA P. HARRIS, ECONOMIC JUSTICE: RACE, GENDER, IDENTITY AND ECONOMICS 144–45 (2005) (discussing Adam Smith’s view on the dangers of relying on benevolence alone as a source of change). Coase states: “The great advantage of the market is that it is able to use the strength of self-interest to offset the weakness and partiality of benevolence, so that those who are unknown, unattractive, or unimportant, will have their wants served.” Id.


[E]conomic theory can nevertheless help explain the strategic behavior of CEOs in this context. Game theory suggests that much behavior can be explained by substituting strategic behavior (where actors have knowledge of and are influenced by the expected behavior of others) for mere rational maximization in the context of impersonal markets. This strategic behavior is a function of each actor’s expected payoffs, determined in light of the expected behavior of other actors. A fundamental heuristic of game theory is the Prisoner’s Dilemma. The Prisoner’s Dilemma illustrates how two parties striving to maximize their payoffs will conduct themselves in a way that may not maximize their joint welfare, once they take into account the behavior of others. Assume two individuals are in custody for suspicion of a crime. If they cooperate and agree not to testify against each other, they would serve two-year sentences as the result of a plea bargain. If one confesses and testifies against the other at trial, the confessor will receive a one-year sentence, and the other will receive a ten-year sentence. If both confess, they will receive sentences of five years. Obviously, the best option is for neither to confess, for they would then only serve a combined four years. Nevertheless, if they do not know what the other will do, they are each best served by confessing, which eliminates the worst outcome and creates an opportunity for the confessor to serve only one year. If both do this, which they rationally may, they jointly serve ten years instead of four. Simply stated, their strategic behavior will prevent both from rationally maximizing their utility.

Id. (footnotes omitted)

104 See Angela Brouse, Comment, The Latest Call for Diversity in Law Firms: Is It Legal?, 75 UMKC L. Rev. 847, 850–52 (2007) (discussing the converging interests that are prompting law firms to create a diverse work environment). Brouse states:

It is generally accepted that diversity promotes equal opportunity and social justice in the world of employment. “Many corporate executives and hu-
these companies, diversity became a business decision because several of their consumers and clients were people of color. Continued growth meant hiring and promoting traditionally underrepresented persons. From the consumers and clients’ perspectives, they would only support businesses with a diverse workforce. Many of the consumers and clients had a vested interest in diverse workforces because they were people of color themselves. Others had a social interest—perhaps a business interest—in doing business with companies concerned with diversity. Therefore, a common interest in diversity is forged between companies and their consumers and clients.

Tax deductible donation is another form of interest convergence. Institutions often seek large donations from individuals or companies

man relations managers are motivated by a desire to do right (and perhaps by a desire to be seen as doing right) in giving an edge to individuals from groups long marginalized and excluded from positions of authority and privilege in society.”

Id. at 850–51 (footnote omitted) (quoting Cynthia Estlund, Putting Grutter to Work: Diversity, Integration, and Affirmative Action in the Workplace, 26 Berkeley J. Emp. & Lab. L. 1, 7 (2005)).

105 See id. at 848–50 (discussing how clients pressure law firms to staff minority attorneys on the clients’ matters).


“[A]ffects a business’ performance of virtually all of its major tasks: (a) identifying and satisfying the needs of diverse customers; (b) recruiting and retaining a diverse work force, and inspiring that work force to work together to develop and implement innovative ideas; and (c) forming and fostering productive working relationships with business partners and subsidiaries around the globe.”


107 See id.

108 See generally Kelly McMurry, Balancing the Scales: Small Firms Seek Diversity, TRIAL, Jan. 1998, at 12, available at 34-JAN Trial 12 (Westlaw) (discussing moves toward diversity in a legal context where one firm partner is a black male and the other a white female, and both the positive and negative effects that their diverse workplace has had with diverse clients).

109 See id. at 12 (McMurry quotes Margaret Lack, a Vice President and diversity facilitator with Career Partners, International/The Chesapeake Group, in McLean, Virginia, stating: “[D]iverse clients want diverse lawyers representing them”).

110 See Brouse, supra note 104, at 850–52; Wilkins, supra note 106, at 1576; McMurry, supra note 108, at 12.
in exchange for both tax deductions and social or public recognition for the donor.\textsuperscript{111} For example, universities regularly name buildings after their benefactors who also get to deduct the donation from their taxes, in addition to having their names on an edifice.\textsuperscript{112} Such exchanges are mutually beneficial to both parties because they have found ways to bring together disparate or previously unknown interests. The institutions amass the donations they need to complete a beneficial project while the benefactors receive social or public recognition for their altruism.\textsuperscript{113}

The foregoing examples are analytically useful for post-Hurricane Katrina redevelopment projects in New Orleans. Through interest convergence, these examples are paradigmatically useful in bringing together traditionally conflicting interests and protecting disadvantaged persons.\textsuperscript{114}

The redemptive power of interest convergence already manifested itself after \textit{Kelo v. City of New London}. Following public uproar against the \textit{Kelo} decision, local legislators have enacted legislation attempting to counter and limit its impact.\textsuperscript{115} Some states have reacted to \textit{Kelo} by

\begin{itemize}
\begin{quote}
Professor Bittker notes that according to statistical studies “rich taxpayers contribute heavily to private colleges and universities [whose students] are likely to be drawn . . . from families with less income than their benefactors. [Also] gifts to community chests, the Red Cross, hospitals and similar social welfare agencies probably generate an even greater degree of redistribution.”
\end{quote}
\item \textsuperscript{113} See id. at 947–49 (discussing the ease with which an institution will give a benefactor public recognition when his or her donations are sizeable). Bartow states an example: “Senator Mitch McConnell steered $14.2 million in federal funding toward the University of Louisville to build a new library wing, the university magnanimously named the new auditorium after U.S. Labor Secretary Elaine Chao, McConnell’s wife.” Id. at 947.
\item \textsuperscript{114} See Sheryll D. Cashin, \textit{Shall We Overcome? Transcending Race, Class, and Ideology Through Interest Convergence}, 79 St. John’s L. Rev. 253, 278–79 (2005) (discussing the power that minorities wield against the conflicting interests of the greater community when their collective interests are either represented by organized coalitions or they have political power). The ongoing debate triggered by \textit{Kelo} renders this a ripe time to re-evaluate implementation of renewal projects. See Andrew Schouten, Recent Development, \textit{Clear as Mud: Chapter 98 and California’s Community Redevelopment Law}, 38 McGeorge L. Rev. 216, 226 (2007) (noting that five policy committees in the California Legislature held joint hearings on redevelopment reform proposals in 2005, in response to concerns over \textit{Kelo}).
\item \textsuperscript{115} See Will Lovell, Note, \textit{The Kelo Blowback: How the Newly-Enacted Eminent Domain Statutes and Past Blight Statutes Are a Maginot Line-Defense Mechanism for All Non-Affluent and Mi-
prohibiting the use of eminent domain when the property is to be
transferred to private parties.\textsuperscript{116} Others have specified that eminent
domain should be restricted to blighted communities.\textsuperscript{117} Nationwide,
activists across the political spectrum have joined together to share
concerns about the impact of \textit{Kelo}.\textsuperscript{118} The collaboration has provided a
space for the activists to find a common ground for the protection of
property rights and fear of abuse of power by the state.\textsuperscript{119}

\textit{Minority Property Owners}, 68 \textit{Ohio St. L.J.} 609, 610–11 (2007). Referring to public reaction to
\textit{Kelo}, Lovell notes:

To . . . property owners, their government had betrayed them by authorizing
governments to take their own homes and businesses and transfer that very
same property to private developers under the guise of “economic develop-
ment.” Following a strong public reaction after \textit{Kelo}, state legislatures began
to enact new laws to tighten the restrictions against such abuses.

\textit{Id.} at 610.

\textsuperscript{116} See \textit{id.} at 616–17 (detailing the reaction to \textit{Kelo} as one that successfully pushed for
legislation that would restrict the government’s ability to take private property for private
development).

\textsuperscript{117} See \textit{id.} at 619–22 (discussing the restrictions adopted by many states that allowed the
taking of private property for private development, only if the property taken was
blighted).

\textsuperscript{118} See Bezdek, supra note 87, at 38 (comparing the perceived pre-\textit{Kelo} apathy towards
individuals displaced by urban renewal to “the outrage that followed the Supreme Court’s
\textit{Kelo} v. City of New London decision” (footnote omitted)).

\textsuperscript{119} See Bernard W. Bell, \textit{Legislatively Revising Kelo v. City Of New London: Eminent Do-
main, Federalism, and Congressional Powers}, 32 \textit{J. Legis.} 165, 166–67 (2006) (noting that the-
desire to find a means to protect property interests has been a common thread among
Americans). Bell states:

Reaction to the Court’s decision has been swift and sharp. Opinion polls
have shown a public sharply critical of the decision. Many states have enacted
or are considering legislation restricting the use of eminent domain for eco-
nomic revitalization. Several states have created commissions to study the use
of eminent domain for economic redevelopment. Indeed, legislation restrict-
ing the use of eminent domain for economic development has even been
considered in Connecticut, the state from which \textit{Kelo} arose. On the federal
level, the United States House of Representatives almost immediately passed
both a resolution of disapproval and an appropriations rider prohibiting the
use of funds to enforce the decision. Both the House and the Senate have in-
troduced legislation to reverse \textit{Kelo}. Indeed, the decision seems to have
united members of Congress from across the political spectrum, including,
for example, conservative former Republican House Majority Leader Tom
DeLay and liberal Democrat Representatives John Conyers and Barney Frank.

\textit{Id.} (footnotes omitted).
B. Redefining Public Purpose

A mere interest in protecting traditionally recognized property rights is insufficient to address the needs of people marginalized by inequitable urban renewal plans.\textsuperscript{120} In addition, such a narrow view consistently undervalues the nonpecuniary investments that all individuals make in a community.\textsuperscript{121} The displacement of the poor members of redeveloped communities still remains a problem.\textsuperscript{122} Those displaced range from individuals whose houses are destroyed in anticipation of the redevelopment—if public housing—to those who have unequal bargaining power with the city and developers and are subsequently forced to sell their property below fair-market value.\textsuperscript{123} Others, unable to afford the rent in the newly developed neighborhoods, are forced to find lodging in more remote neighborhoods or even in other cities or states.\textsuperscript{124}

We can equitably implement urban renewal plans by redefining public purpose.\textsuperscript{125} As discussed above, an adequate definition of public purpose should include protecting poor residents and preventing their displacement.\textsuperscript{126}

While the majority in \textit{Kelo} contends that “the achievement of a public good often coincides with the immediate benefiting of private


\textsuperscript{121} See id. at 104–06 (discussing the psychological effects of “revitalization” on displaced residents).

\textsuperscript{122} See id.

\textsuperscript{123} See Lance Freeman & Frank Braconi, \textit{Gentrification and Displacement: New York City in the 1990s}, \textit{70 J. Am. Plan. Ass’n} 39, 50 (2004). The authors note:

[D]isadvantaged households who wish to move into these neighborhoods may not be able to find an affordable unit, as may disadvantaged households in gentrifying neighborhoods who wish to move within their neighborhood. Moreover, if gentrification occurs on a sufficiently wide scale, it could result in a gradual shrinking of the pool of low-cost housing available in a metropolitan area.

\textit{Id.}

\textsuperscript{124} See id.


\textsuperscript{126} See Gideon Kanner, \textit{The Public Use Clause: Constitutional Mandate or “Hortatory Fluff”?}, \textit{33 Pepp. L. Rev.} 335, 365–67 (2006) (arguing that the present definition of public use is so broad that it may apply to any private “profit-making” use, but nonetheless does not encompass the needs of those that may fall victim to urban revitalization due to the fact that the process of “urban redevelopment has been one of discrimination against, and oppression of, politically powerless urban ethnic and economic minorities”).
the reality still remains that the interests of the public often conflict with the interests of private developers. As it stands, the current application of the public purpose standard is so broad that it is subject to manipulation. A redefinition of public purpose should include a protection against displacement of economically marginalized individuals.

In order to test whether a redefined public purpose has been applied, the following factors should be considered. First, whether developers and decisionmakers maximized the intangible value and contribution created by the social capital present in the preblighted community and took specific steps to preserve the human capital-based value. Social capital has been defined as "the ways in which individuals and communities create trust, maintain social networks, and establish norms that enable participants to act cooperatively toward the pursuit of shared goals." The capacity for social capital to provide, then add, an invaluable quality to a neighborhood is described

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127 Kelo, 545 U.S. at 485 n.14.
128 See Carol Necole Brown & Serena M. Williams, The Houses that Eminent Domain and Housing Tax Credits Built: Imagining a Better New Orleans, 34 FORDHAM URB. L.J. 689, 699 (2007). The authors note the often opposing views of private developers and the public:

"[T]here are two seemingly opposing points of view about how to rebuild destroyed communities. On one hand, urban planners, real estate developers and architects tend to see solutions mainly in terms of demolition and large-scale redevelopment projects. On the other hand, property owners look at the wreckage . . . and ask, ‘How can I fix this?’"


*Kelo* has inspired a widespread and vigorous reaction by the public and press primarily because it is a case of *reductio ad absurdum*, meaning that its premise is flawed in that it deems almost *everything* to be a "public use." So long as developers and municipal functionaries predict that more money will be made from the subject property in the redevelopers’ hands than its present owner’s then the "public use" requirement is said to be met. This amounts to a sort of municipal do-it-yourself constitutional imprimatur because all the condemning municipality needs to do now is proffer self-manufactured plans for the proposed taking, even though . . . condemners are not obliged to carry out their plans and are free to engage in intrinsic fraud to take private property but then not use it as planned.

Id. (footnote omitted).
130 Foster, *supra* note 12, at 529.
as a community’s purchasing power.\footnote{Id. at 543.} Second, whether the community’s input was solicited and considered during the planning of the renewed neighborhood.\footnote{The Environmental Justice Small Grants Program provides financial assistance to eligible organizations to build collaborative partnerships, to identify the local environmental and/or public health issues, and to envision solutions and empower the community through education, training, and outreach. City officials and urban developers could also work in conjunction with grassroots community organizations to avail themselves of the support and organizational framework that this program provides.} Forms of community participation should include the election of community-based unions\footnote{See Maia Sophia Campbell, Note, \textit{The Right of Indigenous Peoples to Political Participation and the Case of YATAMA v. Nicaragua}, 24 \textit{Ariz. J. Int’l \\& Comp. L.} 499, 513–22 (2007).} to the renewal planning team with full voting powers and a mandate that all decisions be made only after full transparent disclosure to the community residents. Third, whether the prevention of displacement was one of the stated goals of the renewal plans and whether specific and concrete steps were taken to prevent the displacement of low-income residents. If, as stated in \textit{Berman v. Parker}, public purpose can represent values that are “spiritual as well as physical,”\footnote{348 U.S. 26, 33 (1954).} intangibles such as social capital,\footnote{Social capital refers to the value that the intangible contributions of individuals such as cooperation, camaraderie, and a sense of unity, add to a particular community. See Foster, supra note 12, at 529–31. This idea is explored in further detail at the end of this Part.} the prevention of displacement, and mandatory community involvement are all values that should be reflected in any definition of what constitutes appropriate use of property for public purpose under the Fifth Amendment.

Nondisplacement can be achieved by offering incentives for developers and city officials to work together to craft protections for vulnerable members of society in addition to their other goals.\footnote{See Steven J. Eagle, \textit{Private Property, Development and Freedom: On Taking Our Own Advice}, 59 SMU L. Rev. 345, 380–81 (2006) (describing similar incentives to motivate developers to participate in “‘combating urban sprawl’” (quoting James E. Holloway & Donald C. Guy, \textit{Smart Growth and Limits on Government Powers: Effecting Nature, Markets, and the Quality of Life Under the Takings and Other Provisions}, 9 \textit{Dick. J. Envtl. \\& Pol’y} 421, 455–56 (2001))).} One manner in which incentives can be created is to organize a bottom-up movement where citizens put pressure on local officials through grassroots organizations.\footnote{See \textit{id.} at 381 (describing the smart growth movement that has been endorsed by the American Planning Association). Though Eagle notes that the success of the smart growth movement will not be apparent for some time, a similar movement may prove
city officials who, in turn, will have to include the community’s interests in their negotiations with developers.\textsuperscript{138} The private developers, needing support from city officials for licenses and land acquisition, will have an incentive to cooperate with the city and the public’s wishes.\textsuperscript{139} As a result, the interests of city officials, private developers, and the public can all converge.\textsuperscript{140}

This convergence of interests is being played out in the redevelopment of New Orleans after Hurricane Katrina.\textsuperscript{141} The redevelopment plan exposed the inadequacy of the present public purpose doctrine and a need for redefinition.\textsuperscript{142} The local government issued its initial plan for redevelopment and received nationwide criticisms.\textsuperscript{143} In the past year, it has become clear that solutions that exclude the masses of displaced individuals will not be tolerated locally or nationally.\textsuperscript{144}

New Orleans provides a perfect example of how a traditional application of public purpose can disenfranchise large numbers of indivi-

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\textsuperscript{138} See id. (describing smart growth, a similar program concerning urban sprawl).

\textsuperscript{139} See Mark W. Zimmerman, Note, \textit{Opening the Door to Race-Based Real Estate Marketing: South-Suburban Housing Center v. Greater South Suburban Board of Realtors}, 41 \textit{DePaul L. Rev.} 1271, 1301–02 (1992) (noting a U.S. Court of Appeals for the Second Circuit decision in \textit{Huntington Branch, NAACP v. Town of Huntington}, 844 F.2d 926 (2d Cir. 1988), where the City would deny building permits in certain areas in order to force developers to build in urban renewal areas, the Court held that the City could accomplish its goals by adopting incentives for developers).


\textsuperscript{141} See Brown & Williams, \textit{supra} note 128, at 701–02 (“Presently, most of the housing policy efforts by federal, state, and local actors have focused on owner-occupied housing needs, leaving many concerned that rental housing and renters will not receive adequate consideration in the rebuilding process.”).

\textsuperscript{142} See Parlow, \textit{supra} note 140, at 860–64 (noting the marginalization caused by the current definition of public use of those who are at the mercy of the government for affordable housing).

\textsuperscript{143} See Joel Horwich et al., CTR. FOR AM. PROGRESS, REBUILDING HOMES AND LIVES: PROGRESSIVE OPTIONS FOR HOUSING POLICY POST-KATRINA 4 (2005), available at http://www.americanprogress.org/att/ct/%7BE9245FE4–9A2B-43C7-A521–5D6FF2E06E03%7D/ housing_brief.pdf (“The Bush administration initially proposed concentrating displaced families in large trailer parks, an approach that met considerable criticism from commentators across the political spectrum.”).

Justice Thomas addressed the potential negative effects of *Kelo*’s definition of public purpose in his dissenting opinion. He argued:

The consequences of today’s decision are not difficult to predict, and promise to be harmful. So-called “urban renewal” programs provide some compensation for the properties they take, but no compensation is possible for the subjective value of these lands to the individuals displaced and the indignity inflicted by uprooting them from their homes. Allowing the government to take property solely for public purposes is bad enough, but extending the concept of public purpose to encompass any economically beneficial goal guarantees that these losses will fall disproportionately on poor communities. . . . If ever there were justification for intrusive judicial review of constitutional provisions that protect “discrete and insular minorities,” . . . surely that principle would apply with great force to the powerless groups and individuals the Public Use Clause protects. The deferential standard this Court has adopted for the Public Use Clause is therefore deeply perverse. It encourages “those citizens with disproportionate influence and power in the political process, including large corporations and development firms,” to victimize the weak.

The rebuilding of New Orleans should force governmental entities to determine how to balance their economic interests and the needs of the poor populations in the areas subject to redevelopment. *Kelo* ex-

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145 See Brown & Williams, *supra* note 128, at 701–02. Providing an example of the inequity that may result from the use of an overly broad definition of public use, Brown and Williams state:

The Urban Land Institute has recommended that New Orleans delay redeveloping many of the most severely impacted areas of the City. Some African-American leaders object to the Institute’s recommendation and are concerned that the minority neighborhoods could be negatively impacted in a disproportionate manner by condemnation and, relatedly, eminent domain. If residents are discouraged by these prospects of long-term displacement, they may be more inclined to sell land to speculators at suppressed prices and, in so doing, miss out on the actual condemnation of their property.

*Id.* (footnotes omitted).


147 *Id.* (citations omitted).
tends public purpose beyond the broad scope contemplated by the Berman Court. While Berman conceded that public purpose was not limited to a strict public use only, Berman did not stretch public purpose to allow transfer to another private interest. Kelo’s extension of public purpose has some redeeming potentials. It gives cities the flexibility to decide how to carry out the interests of all members of the community. City decisions that impose substantial burdens on some members of the community should fall outside of what should be considered public good.

A consideration of what constitutes public purpose is incomplete without computing the intangible investments that people make in their communities.

For some, the newly restructured city is the fulfillment of the post-modern American dream: a post-industrial, culturally hybrid aesthetic that covets urban life while implicitly rejecting some of its “grittier” aspects (read: diversity and certain inconveniences). For others, the restructuring signals a welcome change in community character from declining and impoverished to popular and affluent. All recognize that affluent people bring business and government attention and improved services to their neighborhoods. On the other hand, the changes are also viewed with a sense of foreboding as residents who have experienced displacement or understand that rising rents will force them out and change the complexion of the neighborhood hold their breath or worry. Worse, the changes signal ominously that the residents’ departure from the community is imminent.

148 See id. at 484–85 (majority opinion).
151 See id. (discussing at length the necessity of a city’s ability to exercise eminent domain without great difficulty, in order to effect changes that benefit both the wealthy and the poor).
152 See Broussard, supra note 120, at 104–11 (discussing the failure of cities and developers to consider the emotional ties that displaced residents have with their homes and the nonmonetary investments that many residents have made in their homes and communities).
153 McFarlane, New Inner City, supra note 78, at 5. McFarlane states:

Although many old central cities continue to experience overall population loss from the now decades-old middle and upper-middle class exodus to the suburbs, the loss masks a dramatic, yet paradoxical, counter-trend. Since the
The displacement of former residents triggers a loss for those displaced as well as for the neighborhood at large. Individuals invest their time and energy into shaping the identity of their particular geographic areas. These investments create an intangible value that renders the area more attractive to residents and nonresidents alike. This intangible quality is, as previously stated, referred to as social capital. Pur-
chasing power is the capacity for social capital to provide an invaluable quality to a neighborhood.\textsuperscript{158} Social capital can:

\begin{quote}
[B]e a critical resource in urban communities, especially in large cities where people can lead fairly atomized lives and in vulnerable neighborhoods where residents can only meet their economic and social needs through cooperation with others. Thus, where a community has sufficient amounts of social capital it can also “purchase” many other social (and economic) resources that create and sustain healthy neighborhoods and, ultimately, healthy cities.\textsuperscript{159}
\end{quote}

Characteristics like collective cooperation, shared goals, and shared values make up many poor communities’ social capital.\textsuperscript{160} When renewal plans are implemented, community members are dispersed, and

\begin{quote}
lished networks of “small-scale, everyday public life and thus of trust and social control” necessary to the “self-governance” of urban neighborhoods.

Cities are thus constituted of neighborhoods and communities which come to manage themselves via networks of interested individuals who build and strengthen working relationships over time through trust and voluntary cooperation. This social capital is the “civic fauna” of urbanism, making the successful governance of cities possible. Once this social capital is lost, Jacobs argued, “the income from it disappears, never to return until and unless new capital is slowly and chancily accumulated.”
\end{quote}

\textit{Id.} at 530–31 (footnotes omitted).

\textsuperscript{158} See \textit{id.} at 543.

\textsuperscript{159} \textit{Id.} at 543. Foster uses studies conducted by sociologist Eric Klinenberg comparing:

\begin{quote}
[H]ow two very similar adjacent Chicago neighborhoods, one African-American and one Latino, of roughly equal size fared in one week of extremely hot weather in Chicago in July 1995 that left over 700 dead. The two neighborhoods, North Lawndale and Little Village, had similar numbers and proportions of senior citizens living alone and in poverty. Yet the two communities experienced very different outcomes during the heat wave: while North Lawndale endured nineteen fatalities, Little Village suffered only three deaths. Klinenberg illustrates how the vibrant street life and plentiful commercial activity of Little Village contributed to the safety of the elderly residents who matched the general profile of heat wave victims. Not only were low-income senior citizens in Little Village more likely to receive visits from concerned friends and neighbors than their counterparts in North Lawndale, even those seniors without social networks were more likely to venture out to air-conditioned stores or other public places, thanks to the busy streets and a greater sense of safety. In North Lawndale, by contrast, the rampant crime, proliferation of vacant lots and abandoned buildings—and general absence of any activities indicating a functional, safe community—imposed upon area seniors the brutal choice between staying inside to face the heat alone or going out to risk intimidation, robbery, or worse.
\end{quote}

\textit{Id.} at 543–44 (footnotes omitted).

\textsuperscript{160} Foster, \textit{supra} note 12, at 542–43, 569–70.
these intangible valuables completely disappear.\textsuperscript{161} Currently, the preservation of a neighborhood’s social capital is not computed into developers’ equations when making renewal decisions.\textsuperscript{162} The displacement from renewed neighborhoods, consequently, causes a reduction in the original value of the neighborhood and emotional trauma to its economically displaced former residents.\textsuperscript{163}

III. Proposal for a More Egalitarian Redevelopment Model

While some jurisdictions have attempted to curb the exclusionary effects of using eminent domain for private development,\textsuperscript{164} there still remain a number of factors that have inhibited creation of egalitarian redevelopment plans.\textsuperscript{165} Maryland provides a good demonstration of the challenges in public land use reform.\textsuperscript{166} The Maryland Legislature created a task force to study the effects of eminent domain on small businesses and develop policies to protect small businesses from the

\textsuperscript{161} See Fullilove, supra note 5, at 14.

\textsuperscript{162} See Foster, supra note 12, at 545–46 (describing the fact that social scientists are now realizing that social capital is undervalued). Foster states:

\begin{quote}
Even though many sociologists have traditionally assumed, based in part on William Julius Wilson’s work, that poor communities lack adequate social capital and related resources, contemporary social scientists are beginning to question that assumption. Recent scholarship and empirical evidence is beginning to illustrate the “ecological fallacy” that equates high levels of poverty with social dysfunction and frayed community ties. For instance, a recent study by geographers at the University of Southern California provides evidence that the landscape of concentrated poverty can differ dramatically depending upon place-specific local and regional forces, as well as broader economic forces. As we see increasing levels of differentiation among impoverished communities, we need to rethink the equation of low levels of social functionality and capital with poverty.
\end{quote}

\textit{Id.} at 542–43 (footnotes omitted); see also Eric Klinenberg, Heat Wave: A Social Autopsy of Disaster in Chicago 104–05, 116–17 (2002) (demonstrating that a community’s reputation as poor and blighted does not mean that it lacks value; such value should be maintained when making renewal decisions).

\textsuperscript{163} See Fullilove, supra note 5, at 11–12, 14.

\textsuperscript{164} See Mayor & City Council of Balt. v. Valsamaki, 916 A.2d 324, 346–47 (Md. 2007) (holding that the City of Baltimore must prove necessity related to a specified redevelopment plan before taking immediate possession of property via a “quick take” condemnation procedure); see also American Planning Association, Eminent Domain 2006 State Legislation, http://www.planning.org/legislation/eminentdomain/edlegislation.htm (last visited Dec. 10, 2007) (providing a survey of state actions regarding eminent domain).

\textsuperscript{165} See Audrey G. McFarlane, Redevelopment and the Four Dimensions of Class in Land Use, 22 J.L. & Pol. 33, 45–46 (2006) [hereinafter McFarlane, Redevelopment] (discussing a variety of factors that perpetuate the class-based nature of land use).

\textsuperscript{166} See Kurt J. Fischer & Melissa L. Mackiewicz, Eminent Domain Reform’s Failure in Maryland, Md. Bar J., Sept. 2006, at 14, 16.
This initiative was prompted by a concern that the broad public purpose notion reiterated in *Kelo v. City of New London* does not truly consider the needs of all segments of the public. At the time the task force was created, Maryland law did not provide property owners with compensation for the value of closed businesses or lost revenue during transition periods as a result of eminent domain. The task force was directed to study:

1. the concept of business goodwill and whether a business owner should be entitled to compensation for loss of goodwill,
2. the feasibility of requiring a condemning authority to study the impact of condemnation on businesses in the proposed area where condemnation will occur, and
3. the feasibility of a shorter condemnation process to lessen the uncertainty that the process creates for businesses.

The task force was also to outline more generally the conditions that must be present before a public entity can attempt eminent domain proceedings in Maryland. While the task force did not recommend a ban on the use of eminent domain to further private development plans, it did make some suggestions geared towards protecting small businesses. Some of the protections suggested included: requiring a condemning authority to demonstrate that it considered whether alternative plans might avoid the acquisition of businesses or incorporate them in the redevelopment project; compensating business owners for lost assets of closed businesses or lost income during periods of business interruption as a result of condemnation; and providing relocation assistance to businesses affected by eminent domain rulings.

Furthermore, recent Maryland cases have limited the government’s power to use eminent domain on an emergency basis. Despite this progress, however, Maryland has not yet amended its rules to prevent use of eminent domain for private development or to mandate the nondisplacement of low-income residents. A redefinition of public

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167 Id. at 16.
168 Id.
169 See id.
170 Id.
171 Id.
172 Fischer & Mackiewicz, *supra* note 166, at 14, 16.
173 Id. at 16, 22–23.
174 Mayor & City Council of Balt. v. Valsamaki, 916 A.2d 324, 327 (Md. 2007).
175 See American Planning Association, *supra* note 164 (providing a survey of state actions regarding eminent domain).
purpose is especially needed in such a state, in which cities like Baltimore are undergoing constant renewal.\textsuperscript{176}

Other commentators have expressed concern with the broad reach of \textit{Kelo} and have encouraged limiting statutes similar to the efforts made by Maryland.\textsuperscript{177} However, a number of issues remain to be resolved to ensure egalitarian redevelopments.\textsuperscript{178} As in Maryland, very few redevelopment laws address the difficulties that urban renewal causes to poor individuals, especially lessees.\textsuperscript{179} If the need to protect small businesses has proved compelling enough to induce legislative action, the need to protect low-income communities against the inequitable use of eminent domain should be even clearer. The plight of the poor was revealed in graphic and disturbing detail in the wake of Hurricane Katrina.\textsuperscript{180} As a consequence, the post-Katrina era is ripe for ad-

\textsuperscript{176} See Amanda J. Crawford, \textit{Residents Call for Fair Play as Renovation Plan Proceeds; Neighbors Voice Concerns About Loss of Homes}, \textit{Balt. Sun}, Aug. 20, 2002, at 3B (public protest in regards to Johns Hopkins’s appropriation of property to redevelop the Middle East neighborhood of Baltimore).

\textsuperscript{177} See Kanner, \textit{supra} note 129, at 201. Kanner states:

\textit{[Kelo] has precipitated a great deal of controversy. Large numbers of Americans were dismayed and angered to find that anyone’s unoffending home may be seized and razed to convey the site to a municipally favored redeveloper, on the theory that redevelopment will increase revenues and wages, thus tending to revitalize the community. Public opinion polls indicate that Kelo’s broad reading of the Public Use Clause has left the great majority of Americans gasping with disbelief. Kelo has precipitated a flood of proposed (and in some cases enacted) legislation to curb this breathtaking expansion of unreviewable and unaccountable government power. A strong public reaction to a Supreme Court ruling is hardly a new phenomenon, but in this case its intensity and its ability to stir legislatures into immediate corrective action are, at least in my experience, unprecedented.}

\textit{Id.} (footnotes omitted).

\textsuperscript{178} See McFarlane, \textit{Redevelopment}, \textit{supra} note 165, at 45–46 (discussing unresolved class issues in land use).

\textsuperscript{179} See Bezdek, \textit{supra} note 87, at 67–68 (“When the neighborhood converts to ownership property from rental property, or the neighborhood undergoes gentrification, from low to moderate income residents to professional and other social elites, the former tenants must find somewhere else to live.”).

\textsuperscript{180} See Michèle Alexandre, \textit{At the Intersection of Post-911 Immigration Practices and Domestic Policies: Can Katrina Serve as a Catalyst for Change?}, 26 \textit{CHICANO-LATINO L. REV.} 155, 157–59 (2006). The article states:

The events surrounding the Katrina disaster in September 2005 . . . highlighted the race/class based hierarchy existing in the United States . . .

. . . . Overnight, New Orleans metamorphosed from one of the most cherished cities of the United States to being described as “third world-like,” a term which is usually charged with contempt and condescension. Time and
vocating for changes that will protect the rights of the poor in redevelopment cases. One way to create such change is by showcasing the incentives that would convince developers and cities to adopt such changes. One such incentive is that the nondisplacement of the poor in redevelopment cases can help alleviate the existing racial/economic tension in the United States. Since displaced individuals are disproportionately poor non-Whites, carving out protections for these groups sends a message that poor non-Whites and poor individuals are valued members of our citizenry. Promoting such value would, in turn, benefit the elected officials who sponsor these initiatives. When successful, elected officials can benefit from such efforts by garnering the votes of members of the poor communities, as well as the votes of others who share the same values.

While most individuals would probably not have denied the existence of poverty in America before Hurricane Katrina, few were probably ready to face the reality of its ugly, nefarious consequences on the lives of America’s poor. This reality reinvigorated discourse concerning the role of government policy in the creation and alleviation of poverty in America. Decisions such as budget cuts for education and Medicaid programs have historically adversely impacted the lives of poor Americans, without the rest of the country experiencing their disastrous effects or the complete vulnerability in which poor Americans find themselves.181

Because of the dynamics produced by Hurricane Katrina, post-Katrina New Orleans has become the focal point for many advocates of equitable urban planning.182 While Hurricane Katrina placed redevelopment issues in New Orleans in a unique setting, the underlying issues of displacement remain the same.183

Id. (footnote omitted).

181 See Peter Dreier, America’s Urban Crisis: Symptoms, Causes, Solutions, 71 N.C. L. REV. 1351, 1383–86 (1993) (discussing the disparate impact of federal budget cuts on programs designed to assist poor individuals).


183 See McFarlane, New Inner City, supra note 78, at 18–19. As McFarlane points out:

Typically this devalued land is in Black and Latino inner city neighborhoods, and to a certain extent, in working class White neighborhoods. The difference between the two is that there may be a higher percentage of
Though, in many cities, the areas targeted for renewal are often disenfranchised neighborhoods, as indicated earlier, low-income dwellers are not included when designing new spaces and communities.\textsuperscript{184} In the case of New Orleans, the threshold requirement that the targeted area has experienced a blighted economy can easily be met in many areas of the region.\textsuperscript{185} Since most of the city’s neighborhoods are still in poor shape, there exists a dangerous propensity to replace current communities with more upscale neighborhoods.\textsuperscript{186} This trend is commonly seen in the renewal process.\textsuperscript{187} As space will be needed to construct renovated homes and businesses, some residents’ neighborhoods may be sacrificed or life in the new neighborhoods will simply become too costly.

This danger still lurks beneath proposed plans for rebuilding New Orleans. Among the plans for rebuilding, the Bring New Orleans Back Commission proposed: (1) “Parks in every neighborhood”; (2) “Multi-functional parks and open spaces connect neighborhoods and employment”; (3) “Identify properties that can become part of the system [of redevelopment]”; (4) “Secure funding for park restoration”; (5) “Complete acquisition of necessary properties”; (6) “Consolidate public and private ownership”; (7) “Issue developer requests for proposals and select developers”; (8) “Buy and sell property for redevelopment, including use of eminent domain as a last resort”; and (9) “Aggressively

owner-occupied housing in the White working class neighborhoods and more rental properties in Black and Latino neighborhoods.

\ldots As a result, the private real estate market was depressed, and the visible signifier of this depression and disinvestment was race.

\textit{Id.} (footnote omitted).

\textsuperscript{184} \textbf{Fullilove, supra} note 5, at 59–60; Bezdek, \textit{supra} note 87, at 64. Bezdek states:

In today’s urban boom cycle, however, much of the change in neighborhoods is created not by homesteaders but by private developers anointed by local government, which assembles land not to build roads or stadia, but to offer to private developers in a frank bid to remake space in its preferred, high-end vision.

\textit{Id.}


\textsuperscript{186} \textit{See} James J. Kelly, Jr., \textit{“We Shall Not Be Moved”: Urban Communities, Eminent Domain and the Socioeconomics of Just Compensation}, 80 \textit{St. John’s L. Rev.} 923, 961–62 (2006) (“Re-development experts offer little more comfort to residents of poor neighborhoods when they tell them that they are being displaced to make way for new and beautiful homes for others . . .”)

support a modified Baker bill to accommodate buy-out of homeowners in heavily flooded and damaged areas for 100% of pre-Katrina market value, less insurance recovery proceeds and mortgage.”  

For those skeptical of traditional urban renewal plans, the New Orleans rebuilding plans raise a number of red flags. Among those are: (1) the proposed use of eminent domain; (2) the designation that a park be placed in every neighborhood (which implies that some prior property will be used); and (3) the proposal that property owners be awarded compensation based on pre-Katrina property value. These items are red flags because they presuppose alterations of neighborhoods to formulations much different than those in existence before Hurricane Katrina. Displaced New Orleanians considering returning home will be offered accommodations in neighborhoods that no longer reflect their previous lives, thereby continuing their feelings of displacement. Furthermore, individuals often witnessed, after selling their property, that in newly redeveloped areas property value increased upwards of five to ten times the purchase amount. Thus, having been reimbursed only the pre-Hurricane Katrina market value for their property, many homeowners might not be able to afford any property in their converted, post-renewal neighborhood. Some equity-based percentage must be computed in the compensation package.

Finally, the proposal for redevelopment does not provide any compensation or housing allocation for residents who were renters and not property owners. Their displacement and inability to afford lodging...
ing in the new neighborhood will be just as real as for property owners. Consequently, renters must be compensated in some form for the value of intended use or for the projected difference between new rents and old rents. Advocates for New Orleans residents should insist that city officials make their approval of development plans contingent on developers reserving units for poorer renters at affordable rates.

While there does not yet exist an exact numerical figure for returning New Orleanians, such uncertainty should not be deemed an impediment to an equitable implementation of renewal plans. Whether or not New Orleans residents choose to come back, they have an equitable interest in their neighborhoods that deserves protection from economic displacement and undercompensation. These individuals have made an emotional and social contribution to the city and thereby should be considered as having property rights in the community. Their social contributions—i.e., community developments, collective work, coalition building, protection of families and their neighborhoods—facilitated the reputation of New Orleans before the Hurricane, which many were eager to visit multiple times a year.

The concerns faced by communities in New Orleans are consistent with those faced by other communities experiencing the results of renewal plans. Urban centers subject to renewal commonly struggle to balance the interests of builders with concerns that homeowners are undercompensated for taken property. The award of market value buy-outs to low-income homeowners is insufficient both to cover the predicted costs these homeowners will face, discussed above, and to compensate for the intangible value of the property to the individual homeowner. Considering the lack of bargaining power between low-

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193 Id.
194 See Joe Gyan Jr., Much Has Changed Since Katrina—and Much Hasn’t *** Two Years Later *** Some Areas Seem Stuck in Time, ADVOC. (Baton Rouge, LA), Aug. 26, 2007, at A1 (“[M]ore than 27,000 FEMA trailers still dot the landscape in the southeastern tip of Louisiana.”); Rick Jervis, 66% Are Back in New Orleans, but Basic Services Still Lag, USA TODAY, Aug. 12, 2007, at A3 (noting that the current number is in line with the mayor’s forecast, but the number is neither final nor definite being that it is based on postal service records of people actively receiving mail in the area).
195 See McFarlane, New Inner City, supra note 78, at 57.
196 See Bezdek, supra note 87, at 94.
197 See id. at 94, 98.
198 See Marc B. Mihaly, Living in the Past: The Kelo Court and Public-Private Economic Redevelopment, 34 ECOLOGY L.Q. 1, 15 (2007) (“Recent studies have concluded that relocation compensation is higher than actual relocation cost, and that in many cases governments utilize the relocation assistance as a de facto surrogate for addressing intangible costs.” (footnote omitted)).
income homeowners and commercial developers, low-income homeowners are often not in a position to negotiate the best price possible. In the valuation of property, developers often overlook “the pesky question of the subjective understandings of the value and nature of property harbored by the owners of property... In short, sterile formulations of fair-market value often do not satisfy landowners who are losing their land to the forces of condemnation.”

Instead of merely awarding the market value to low-income owners, city redevelopment plans should require that developers provide one of two alternatives: (1) the approximation of the value of property post-redevelopment, or (2) the value of the property predevelopment plus a percentage of any future profits. City officials can be forced to include these terms as part of the negotiation package if adequate public pressure is used. In turn, private developers desirous to attract more contracts will eventually come to view such concessions as the least costly alternative. This standard would be consistent with principles of fairness and justice and in accord with the spirit of the Takings Clause of the Fifth Amendment.

Moreover, a more equitable solution for renters would be to condition building permits with requirements to designate specific affordable housing units to low-income individuals who stand to be displaced. As the level of accountability placed on New Orleans city officials illustrates, local governments have great incentives to encourage a fairer

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199 See Brown & Williams, supra note 128, at 701–02.
201 See Bezdek, supra note 87, at 97–99.
202 See Anastasia C. Sheffler-Wood, Comment, Where Do We Go from Here? States Revise Eminent Domain Legislation in Response to Kelo, 79 TEMP. L. REV. 617, 637–38, 642–43 (2006). “The public outcry has turned into action as homeowners form grassroots campaigns to express their views to state legislators.” Id. at 637–38. For example, “Nevada enacted statutory amendments that provide that government cannot exercise eminent domain for redevelopment purposes unless it has negotiated in good faith with the property owner, provided a written compensation offer, and supplied an appraisal report corresponding to the compensation offer.” Id. at 643.
203 This cost-benefit analysis is a calculation that corporate entities often have to make in the face of public outrage. The recent Imus controversy, is one of the many examples of corporate entities deciding to minimize future loss by making decisions that might appear costly in the present. This balancing act is yet another example of the Interest Convergence Theory at play. See Bell, supra note 13, at 22.
204 See Sheffler-Wood, supra note 202, at 618.
fractioning of property.\footnote{205} In New Orleans, the pressure from grassroots activists and private individuals has forced the local government to be of the utmost transparency in redeveloping New Orleans.\footnote{206} This type of accountability requires ongoing activism by invested parties to ensure that residents of low-income communities remain involved in developing and implementing the plans to rebuild their neighborhoods.\footnote{207}

One positive outgrowth of the efforts to rebuild New Orleans is the demonstration that political incentives are not yet obsolete tools of change. For example, when New Orleans officials announced plans for rebuilding in January 2006, overwhelming outcry from local and national advocates forced the city to delay proposals that called for unilateral decisions on which areas would be rebuilt.\footnote{208} “The 17-member Bring New Orleans Back commission largely side-stepped that issue . . . [by creating] 13 districts where residents will work with planners to explore opportunities for rebuilding and work to determine how many people ultimately [will return to the region].”\footnote{209} New Orleans officials, aware of the pressures of accountability to the public, were deliberate in their plan to include New Orleans residents in the decisionmaking process.\footnote{210} This situation highlights Derrick Bell’s Interest Convergence Theory.\footnote{211} The New Orleans officials, after having received such bad press for their collective failure to provide for the needs of their disadvantaged citizens during the hurricane, needed to show the world that redevelopment will take place in conjunction with New Orleanians.\footnote{212} Without constant supervision, the egalitarian solution proposed in this Article will not be successful.

\footnote{205} See Scott L. Cummings, The Trickle After the Flood, 15 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 12, 12–13 (2005), available at 15-FALL JAHCDL 12 (Westlaw) (noting the importance of the community’s voice in assuring accountability with “what will amount to $200 billion in disaster relief”).


\footnote{207} See Cummings, supra note 205, at 13 (“[M]arket-driven efforts without adequate opportunities for community participation typically result in the massive displacement of poor residents of color.”).

\footnote{208} Id.; Joyce, supra note 144; see also WDSU New Orleans, supra note 144.


\footnote{210} See id.

\footnote{211} See Bell, supra note 13, at 22.

\footnote{212} See William L. Waugh Jr., The Political Costs of Failure in the Katrina and Rita Disasters, 604 ANNALS AM. ACAD. POL. & SOC. SCI. 10, 19–21 (2006), available at http://ann.sagepub.com/cgi/content/abstract/604/1/10 (discussing the failures of the government to act in
The pressure for accountability can also motivate local governments to require that local developers designate units for low-income renters and potential homeowners. Since developers potentially will reap the most profits from redevelopment, and thus the displacement, city leaders have good reason to require developers to shoulder more of the costs related to displacement. The post-Katrina Gulf Coast is pregnant with possibilities for producing a model of more fruitful and nonexclusionary redevelopment. Katrina revealed that many white Americans have vested interests in making sure that economic measures benefit a larger group of Americans rather than a smaller number. There might be a vested interest for groups to ally themselves, not only along racial lines, but also economic lines and commonalities. Applying Bell’s Interest Convergence Theory, many affluent Americans might now find that their interest in governmental transparency and efficiency converge with poor individuals’ interest in being protected. The new awareness and visibility that media coverage brought to New Orleans caused everyone to feel invested in the success of New Orleans. The slow response to help New Orleanians during the hurricane generated national sympathy for the region. Much like the international coverage of the brutality of seg-

the wake of Hurricane Katrina, and the damage control that governmental officials have attempted to affect with regard to housing, education and the like).

A number of local organizations, such as the People’s Organizing Committee, an organization dedicated to helping New Orleans residents with housing issues and with educating them about their legal rights and remedies, organize at a grassroots level to compensate for shortcomings in government services and bring these shortcomings to the public’s attention. See People’s Organizing Committee, http://www.peoplesorganizing.org (last visited Dec. 10, 2007).

New Orleans demonstrated that a huge number of the American population lives well below the poverty level and that, more than ever, race and class are tightly linked. In the surge of generosity that followed the disaster, one hopes that the old tendency to view the victims of poverty as irresponsible, lazy, and deserving of their fate will now be seen as flawed. Post-Katrina discussions of poverty should center on the elements that contribute to the disenfranchisement of the poor and on how those elements can be defeated. See Alexandre, supra note 180, at 165–66.


See Bell, supra note 13, at 22.


See id.
regation provided an opportunity for disparate interests to converge in the 1950s, a window now exists for socially diverse contingencies with interrelated interests to ally themselves with each other.

Due to public demand for accountability by New Orleans officials, the city’s government has been compelled to consider inclusive redevelopment plans. In the face of marches and protests by residents, covered by the national media, the city officials have had to reassure residents that their concerns will be considered. The redevelopment plans are still tentative, but if the public pressure remains, city officials will have to alter noninclusive proposals. Hurricane Katrina not only accelerated the need for development, which was long overdue in many New Orleans neighborhoods, but also placed considerations of equity at the forefront of the redevelopment debate.

**Conclusion**

When the effects of redevelopment decisions on the lives of the poor are examined, it becomes clear that “just compensation” and public purpose must be reassessed to prevent exclusion of the poor from their life-long residences and communities or, at least, to provide sufficient compensation for their displacement. Although courts have allowed eminent domain to be used for the benefit of private developers if the land is used for public use, “beyond [this] general rule there is little or no agreement as to what constitutes public use.” Many have expressed that the term “is ‘elastic.’”

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219 See Allen, supra note 209.


221 See Marcia Johnson, Addressing Housing Needs in the Post Katrina Gulf Coast, 31 T. Marshall L. Rev. 327, 329–30 (2006). Johnson provides statistics demonstrating that, in the years before Hurricane Katrina, “a third of New Orleans’s population paid 35% or more of their annual incomes for housing,” and “almost 15% of the people in New Orleans lived in poverty before Katrina. Moreover, 37.3% of New Orleans’s poor lived in concentrated poverty neighborhoods.” Id. (footnote omitted). Thus, many lived beyond the Department of Housing and Urban Development’s recommended affordability index. See id. at 329.


223 Id. at 201.

I maintain that public purpose should be defined based on equitable considerations that incorporate the interests of economically vulnerable members of the community. The new definition not only benefits low-income residents by incorporating their predominant interests into the actual development plans, but would also provide long-term benefits to local officials by maintaining their political integrity and public accountability. These new urban redevelopment models will help provide a modicum of confidence and satisfaction in local officials’ commitment to poor communities and communities of color and might help create pecuniary resources that help curtail resort to violent crimes—this reduction would directly benefit wealthier members of a community.

Additional broad scale benefits of interest convergence that developing communities would likely manifest would include lowered crime rates, as a greater population experiences the various gains that come with rising property values. This interest is not only a local interest, but a national interest, as well. Expanding the definition of public purpose to include the interests of low-income community members promotes the establishment of stable communities among mixed-income constituents, accomplishing a fundamental incentive to redevelopment.

The proposed redefinition of public purpose would not only honor the contributions made by residents via social capital and help prevent displacement, but would also ensure that city officials and private developers become more mindful of the need to make sure that all development decisions are in compliance with established standards of environmental justice. The patterns of displacement that have constantly resulted from the implementation of urban renewal plans, as well as the psychological trauma and the loss of income that often result from the displacement, cause a grave disproportionate injustice to disempowered members of these communities. This injustice violates the tenets of the goals of federal environmental statutes geared toward preventing environmental injustice against minority and poor populations. The creation of the aforementioned incentives, as well as the

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broadening of the definition of public purpose to prevent displacement of poor populations, consequently, not only allows city officials and developers to achieve their political and economic goals, but also ensures that economic and environmental justice remain a paramount focus in all urban renewal decisions. In adopting the above proposals, developers and city officials would serve their respective interests and those of economically marginalized individuals, as well as ensure that they remain compliant with the mandates of federal environmental laws.

PUBLIC USES AND NON-USES: SINISTER SCHEMES, IMPROPER MOTIVES, AND BAD FAITH IN EMINENT DOMAIN LAW

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Abstract: This Article addresses the largely unexplored issue of whether a sovereign may use its power of eminent domain not to pursue an affirmative public use, but rather to prevent an undesired private use (such as a landfill, rehabilitation facility, or other NIMBY-triggering use) from going forward. The author argues that although sovereigns tend to dissemble in these non-use cases based upon an underlying assumption by condemnors and courts alike that non-use takings are not constitutionally permitted, their analysis is in fact, incorrect. It is not the non-use condemnations themselves that are problematic, but the subterfuge that condemnors typically use in pursuing such takings. The resulting lack of transparency in governmental action subverts the political process and weakens private property rights protection.

Introduction

Imagine that you are a retired farmer, with several hundred acres of agricultural land, and that neither you nor your family has any continued interest in farming it. You have been approached by a national real estate development firm that wishes to build a large “New Urbanism” mixed-use community on your property, consisting of thousands of homes intermixed with retail and office uses. Although the project would require a rezoning, the proposed uses are not inconsistent with your municipality’s master plan and the development firm anticipates that the project would be approved by the local planning commission, subject only to typical land use controls.

Your neighbors are horrified at the proposal and quickly organize to oppose the project. Soon thereafter, your municipal government announces that it intends to condemn your property for use in part as a public park, but primarily for an open space/wildlife preserve. The

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municipal officials propose a special tax to pay for the condemnation, which the residents approve in a special election.

You find the condemnation highly suspect, as the municipality has never before expressed a desire or need for a public park or open space in this location or of this size. Although the municipality has offered you just compensation for your property, you and the development firm you were negotiating with wish to challenge the condemnation of the property in court as not meeting the public use requirement of the state and federal constitutions. Your argument is that the municipality is not really pursuing a public use—a park and provision of open space—through condemnation of your property, but rather is condemning to prevent a private, lawful use that it opposes from going forward. Will your legal challenge succeed?

Various permutations of this scenario have played out in recent years in published court cases. We can only speculate as to how often the situation has occurred, but has not resulted in a court challenge and subsequent published opinion. Moreover, the number of times that this condemnation strategy has been proposed and seriously considered but not pursued because of budgetary or other concerns is, undoubtedly, much higher still.\(^1\) The scenario raises a fascinating, though largely unexplored, question regarding the scope of the public use requirement of the Takings Clause: may a sovereign use its power of eminent domain not to pursue an affirmative public use, but rather to prevent an undesired private use from going forward? In short, may a sovereign exercise its eminent domain power to pursue a non-use?

The Fifth Amendment to the U.S. Constitution provides: “nor shall private property be taken for public use, without just compensation.”\(^2\) Most recent legal scholarship on the scope of the public use

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1 Anecdotal evidence derived from my own experience of serving on a local planning commission for fifteen years suggests that it is a strategy often urged by disaffected neighbors, who may well not comprehend either the fiscal or legal issues posed by such a tactic, but who view it as an efficient and quick solution to often hostile and emotion-laden conflicts between neighboring land uses.

2 U.S. CONST, amend. V. The U.S. Supreme Court extended this amendment to the states under the Due Process Clause of the Fourteenth Amendment in 1896. See Chi., Burlington & Quincy R.R. Co. v. City of Chi., 166 U.S. 226, 241 (1897). In addition, virtually all state constitutions contain similar clauses. See 2A JULIUS L. SACKMAN, NICHOLS ON EMINENT DOMAIN § 7.01[1] & n.10 (3d ed. 2006) [hereinafter NICHOLS] (listing state statutory and constitutional provisions).

As noted by the Supreme Court in Kelo v. City of New London, state takings clauses may be significantly more restrictive than the federal clause: “[M]any States already impose ‘public use’ requirements that are stricter than the federal baseline. Some of these re-
requirement has tended to focus on the thorny question of whether a sovereign can condemn private property for redevelopment by another private party, a question that the U.S. Supreme Court addressed recently in *Kelo v. City of New London*.

I address the flip side of the eminent domain coin. In the non-use context, the condemning authority condemns to prevent an undesirable use—or, at least, one undesired by the condemnor or its most vocal constituents—be it a landfill, low-income housing, a rehabilitation facility, or any other NIMBY-triggering use. Rather than attempting to prevent the undesired use through a noncompensable exercise of its police power—an attempt that might prove illegal, resulting in a regulatory taking—the sovereign elects instead to condemn the property and pay the constitutionally mandated just compensation for the property taken. But is such an action constitutional? Does it satisfy the public use requirement of the Fifth Amendment?

Although public use itself is a difficult concept for courts to wrest with, the non-use cases seem to pose even tougher analytical hurdles for the courts. As a result, the line of published cases on this topic are either limited in their analysis, or simply wrongly decided.
I believe that the major cause of the analytical muddle surrounding this area is the fact that condemnors and courts alike misunderstand the scope and extent of the condemnors’ power to condemn. Both condemnors and courts seem to assume that condemnations for non-uses are not constitutionally permitted, so the condemnors attempt to conceal their motivations in order to proceed with the condemnation they desire. Instead of forthrightly declaring their intentions—“we don’t want a large-scale mixed-use development at this location in our community, so we are condemning the property to prevent the use”—they make a flimsy excuse for their actions—“we have always needed a park and open space, right here where this development is proposed, we just hadn’t realized it until now.” Their dissembling is often obvious to property owners, citizens, and the courts alike and leads to suspicion that something not only dishonest, but quite likely illegal, is really going on.

Sometimes, of course, the municipal officials are right in thinking that the condemnation they desire is illegal. For example, the municipality may lack statutory authority to condemn for other than very specific purposes,11 or its actions may be unconstitutional as a violation of equal protection.12 In such instances, the municipality does indeed lack the power to do directly what it is indirectly attempting to do through its eminent domain power, and the courts are correct to call the municipality on its illegitimate action.

In many instances, however, the municipality’s authority is not constrained in this manner. It is those instances that interest me here. We must step back and ask why municipal officials feel a need to dissemble in these non-use cases, rather than being forthright about their intentions and motivations. Why do they think that condemning for non-uses is not permitted, and are they correct in their belief?

11 If the purpose of the taking is outside the constraints of the enabling legislation authorizing the exercise of the eminent domain power by the municipality, the condemnation is ultra vires and will be struck down. In Wilmington Parking Authority v. 227 West 8th Street, for example, the Delaware Supreme Court found that a parking authority lacked the power to condemn certain land pursuant to its statutory authority to exercise eminent domain because the primary purpose of the condemnation was to retain a business within the city limits, not to provide public parking, and such a purpose was outside the parking authority’s delegated powers. 521 A.2d 227, 230–31 (Del. 1986); see also infra note 21 (discussing City of Tempe v. Fleming, 815 P.2d 1, 4–5 (Ariz. Ct. App. 1991)).

12 See Gazzola v. Clements, 411 A.2d 147, 152 (N.H. 1980) (finding a lack of equal protection under the state constitution when a citizen was denied a hearing where the state sought condemnation to build a park, but others were given a hearing where the state sought to condemn for highway construction).
I argue that—particularly in light of the recent decision in *Kelo,* in which the Supreme Court essentially stated that public uses equal public purposes, which equal practically anything the legislature defines as such\(^\text{13}\)—municipalities actually do have the constitutional power to engage in condemnations for non-uses. Prevention of an undesired use is, in effect, a form of public use, and the sovereign should be able to use eminent domain as yet one more tool in its regulatory toolbox, provided that: (1) it is willing to pay the just compensation price tag; and (2) it is prepared to show that the condemnation is motivated by an actual public use (which would include prevention of a private use deemed detrimental to the public as a whole), as opposed to an intent to benefit private parties (such as protection of one or a few vocal neighbors).

The real problem is not that municipalities engage in condemnations for non-uses, but that they employ subterfuge to do so. It is the lack of transparency in governmental action, not the action itself, that renders the taking suspect and perhaps even void. If a municipality were simply honest about what it was doing—“we are condemning to prevent this large development from being built”—the rights of all concerned would be better protected. The property owner would obtain just compensation for its property. (It may still resent the condemnation and prefer the ownership of the land to the monetary compensation, but that can be true of any condemnation, not just those involving non-uses.) More importantly, the public would be fully informed as to the nature of the municipality’s action and, to the extent that the public opposed the municipality’s condemnation, the political process could address those decisions contrary to public will through referenda, recalls, or other ballot-box measures. The Constitution is not the only protector of private property rights. The political process also has a critical role to play; unfortunately, the current jurisprudence on non-use takings encourages a subversion of that process.

I. DISTINGUISHING THE EMINENT DOMAIN POWER FROM THE POLICE POWER

The answer to whether a non-use can be a public use for purposes of the Takings Clause turns in part upon the potent distinction between the eminent domain power and the police power. The former permits the taking of private property for public use upon payment of

\(^{13}\) See infra note 35 and accompanying text.
just compensation; the latter permits the regulation, even value-impairing regulation, of private property without the payment of such compensation.14

Professor Freund provided the classic definition of the distinction between these two sovereign powers over a century ago:

Under the police power, rights of property are impaired not because they become useful or necessary to the public, or because some public advantage can be gained by disregarding them, but because their free exercise is believed to be detrimental to public interests; it may be said that the state takes property by eminent domain because it is useful to the public, and under the police power because it is harmful . . . . 15

Thus, a sovereign’s police power enables it to enact regulations to promote the public health, safety, and welfare, or to prevent a public harm.16 Legitimate uses of the police power require no payment of compensation by the condemning authority; it is only when the exercise of the police power goes “too far,” resulting in a regulatory taking, that compensation is required.17

One might think that an exercise of the eminent domain power is, at least in some ways, less burdensome and costly to the affected landowner than the exercise of the police power—after all, with the former the property owner receives monetary compensation equivalent to the property value it has lost, but with the latter it does not. This less-burdensome result would suggest then that a municipality should always be able to choose to exercise the eminent domain power instead of the police power.

The property owner may well disagree with this trade-off, however. First, the exercises of the two powers have very different effects. An eminent domain action strips the property owner of its ownership

15 Id.
16 See Bacon v. Walker, 204 U.S. 311, 316–18 (1907) (“[The police power] is not confined . . . to the suppression of what is offensive, disorderly or unsanitary. It extends to so dealing with the conditions which exist in the State as to bring out of them the greatest welfare of its people.”).
17 The Supreme Court held in Pennsylvania Coal Co. v. Mahon that “[t]he general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.” 260 U.S. 393, 415 (1922). Since then, of course, the courts have struggled to decide how far is “too far.” See generally Lynda J. Oswald, Cornering the Quark: Investment-Backed Expectations and Economically Viable Uses in Takings Analysis, 70 Wash. L. Rev. 91 (1995) (discussing the Court’s tests for regulatory takings).
interests, while a police power action merely constrains the property owner’s ability to use the property for certain purposes or in certain manners; the underlying property interest, and all the rights attendant upon that property ownership, are left with the property owner.

Second, and more importantly, the exercises of the two powers have very different predicates. An exercise of the police power must be justified either by reference to the harmful nature of the proposed use at issue or by the promotion of the public welfare to be achieved. The eminent domain power, on the other hand, must be supported by a public use (though just how real this constraint is under modern jurisprudence is a matter of some debate, as discussed in the next Part). If the public use requirement of the Eminent Domain Clause can be satisfied by the mere desire of municipal officials to avoid an unwanted, but otherwise legitimate use, then the property owner may correctly view his rights to be at greater risk. The police power requirement that the municipality justify its restrictions, define their extent, and otherwise leave the property owner in possession of, and free to use, his property may be preferable to the cold comfort of knowing that the owner will be fully compensated for the property he has lost under the eminent domain power.

If the mixed-use development proposed in the hypothetical above were to actually pose harm to the public, the municipality would not have to resort to eminent domain, and the concomitant requirement of just compensation, in order to regulate and prevent the harm. Instead, it could do so directly through its police power, and without payment of compensation, by passing land use regulations governing the use. The difficulty lies, of course, in characterizing a particular use as either a prevention of public harm or promotion of public welfare such that compensation is not required for the regulation. With regard to the hypothetical, for example, the municipality could clearly exercise its police power to regulate the location of the development and its infrastructure so as to prevent conflicts with neighboring uses or threats to resources such as public water supplies or to regulate the placement of roads, type of signage and lighting, and other aspects of the development that might create a public or private nuisance. It is conceivable that the municipality

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19 See infra Part II.
20 See Oswald, supra note 18, at 1478–81, 1485–89.
could even ban the land use altogether (if, for example, the public need for these uses was already being met in nearby communities or if the municipality lacked adequate water or sewer infrastructure to support such an activity). Outright bans on such uses are likely to be viewed with a close and skeptical judicial eye, however, and such exercises of the police power may not survive a legal challenge. The police power therefore might well support the imposition of restrictions upon the proposed use, but perhaps not its ban altogether.

It is in this context that the question posed by the non-use cases arises: when the use proposed by the property owner is perfectly legal and is likely insulated from police power regulation banning such use, can a municipality turn to eminent domain as an alternative? Is the payment of just compensation the only key needed to open the eminent domain door? Or does the public use requirement impose real constraints on the use of eminent domain as a regulatory tool to prevent non-desired uses? In short, can a non-use be a public use?

II. The Public Use Requirement of the Takings Clause

The power of eminent domain is considered to be an inherent and essential attribute of sovereignty. In the words of the Supreme Court, “The taking of private property for public use upon just compensation is so often necessary for the proper performance of governmental functions that the power is deemed to be essential to the life of the State.” Thus, the Court has noted, the Takings Clause “is

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21 Although the public use requirement focuses on constitutional bars to exercise of the eminent domain power, statutory bars may exist as well. The municipality may lack authority to condemn, depending upon the underlying enabling legislation. In such an instance, the municipality’s only option is to exercise its police power, assuming, of course, that the situation lends itself to a legitimate exercise of the police power. In City of Tempe v. Fleming, for example, the city convicted a property owner of maintaining a public nuisance because his property contained extensive trash. 815 P.2d 1, 2 (Ariz. Ct. App. 1991). The city then sought to obtain title to the property through eminent domain so that it could abate the nuisance. Id. The court noted that the state statute authorized a municipality to exercise the eminent domain power for only limited purposes, and that none of these purposes included abatement of a nuisance, but that the state did allow the city to abate a nuisance by use of its police power. Id. at 4–5. The city had argued that it should be able to avoid the “harsh result” of using its police power to abate the nuisance by taking the property through eminent domain and offering just compensation. Id. The court rejected the argument, stating that “[t]he regulation and abatement of a nuisance is one of the ordinary functions of the police power.” Id. at 5. But, the court went on to state, “The exercise of the police power does not include the power of eminent domain.” Id. “Eminent domain proceedings are not a substitute for judicial foreclosure of a lien created pursuant to [a state statute].” Id.

designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking.”

The “otherwise proper interference” language is critical here. The eminent domain power is not without limits. If the government action fails to satisfy the public use requirement, or is so arbitrary as to be a violation of due process, then the taking is invalid and “[n]o amount of compensation can authorize such action.”

Historically, public use has been an amorphous concept, resistant to precise definition. The state courts, in particular, have diverged on how they treat the term. In the narrow (and more literal) view of the concept, public use is considered to be synonymous with employment, meaning that the condemned property must be employed only for projects where the public can use the property acquired—a definition that constrains the state’s exercise of the condemnation power.

In the broader view, public use is treated as coterminous with public advantage or public purpose, which allows the acquisition of private property to further the public good or general welfare, or to secure a public benefit. Under this view, public use is broadly defined as “conducive to community prosperity,” which would include “any exercise of eminent domain which tends to enlarge resources, increase industrial energies, or promote the productive power of any considerable number of inhabitants of a state or community . . . .”

At the same time, the public use to which the private property taken is put need not be active; rather, negative uses are permitted in the sense that “the prevention of an evil may constitute a public use.” Normally, the courts discuss the negative public uses that prevent evil as being those combating “slum, blight, and economic loss.” I could find no reported case characterizing prevention of a legal but undesired land use as a negative public use that combats evil.

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26 See *Nichols*, supra note 2, § 7.02[2] (discussing the narrow view of public use).
27 See *id.* § 7.01[3].
28 *Id.* § 7.02[4].
29 *Id.* § 7.02[3].
30 *Id.* § 7.02[4]; see also Crommett v. City of Portland, 107 A.2d 841, 850 (Me. 1954) (noting that “[t]he prevention of evil may constitute a [public] use”).
31 *Nichols*, supra note 2, § 7.02[4].
The Supreme Court historically has adopted the broad view of the public use power. Its recent decision in *Kelo v. City of New London* reaffirmed this stance, although hardly unreservedly, as it was a divisive 5-4 decision. The majority, in an opinion authored by Justice Stevens, stated that “this ‘Court long ago rejected any literal requirement that condemned property be put into use for the general public.’” Instead, the *Kelo* majority turned to what it deemed the “broader and more natural interpretation of public use as ‘public purpose.’” The Court also emphasized the “great respect” that the federal courts should pay the state courts and legislatures in identifying local public needs, stating that: “When the legislature’s purpose is legitimate and its means are not irrational, our cases make clear that empirical debates over the wisdom of takings—no less than the debates over the wisdom of other kinds of socioeconomic legislation—are not to be carried out in the federal courts.”

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33 545 U.S. 469 (2005).

34 *Id.* at 479 (quoting *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 244 (1984)).

35 *Id.* at 480. The *Kelo* majority had a long line of precedent to look to, in which the Court had repeatedly held that the judicial role in the public use inquiry was extremely limited. See, e.g., *Berman v. Parker*, 348 U.S. 26, 32 (1954) (“The role of the judiciary in determining whether [the eminent domain] power is being exercised for a public purpose is an extremely narrow one.”). The *Kelo* court in particular turned to *Berman*, where the Court had found that “[t]he concept of the public welfare is broad and inclusive” enough to allow the use of eminent domain to achieve any legislatively permissible end. *Id.* at 33 (quoted in *Kelo*, 545 U.S. at 481). It also relied on its 1984 decision in *Midkiff*, where the Court stated that the eminent domain power is “coterminous with the scope of a sovereign’s police powers” and that an exercise of eminent domain must be upheld if it “is rationally related to a conceivable public purpose.” 467 U.S. at 240–41.

36 *Kelo*, 545 U.S. at 482 (quoting *Hairston v. Danville & W. Ry. Co.*., 208 U.S. 598, 606–07 (1908)).

37 *Id.* at 488 (quoting *Midkiff*, 467 U.S. at 242–43). As explained in *Nichols on Eminent Domain*, the leading treatise in the eminent domain law area:

When the legislature has authorized the exercise of eminent domain in a particular case, it has necessarily adjudicated that the land to be taken is needed for the public use, and no other or further adjudication is necessary. When the legislature has made its decision and has authorized the taking of land by eminent domain, the owner has no constitutional right to have this decision reviewed in judicial proceedings or to be heard by a court on the question whether the public improvement for which it is taken is required by public necessity and convenience, or whether it is necessary or expedient that his land be taken for such improvement, unless the public use alleged for the taking is a mere pretense.
In the end, *Kelo* provides little direct guidance for the resolution of the non-use situation. At issue in *Kelo* was whether the condemnation of non-blighted private property to foster economic redevelopment was a public use. The debate amongst the Justices was the extent to which the direct benefit derived from such a taking must flow through to the public as opposed to private interests.

The Court’s reaffirmation of its earlier adoptions of the broad view of public use is illuminating, even if it does not completely resolve the issue of takings for non-use. Of particular relevance is the syllogism that the *Kelo* court invoked. In effect, the *Kelo* majority stated:

\[
\text{Public Use} = \text{Public Purpose} = \text{Pretty Much Anything the Legislature Rationally Defines as Such}
\]

The interesting and critical debate over whether the Court is correct in the deferential stance that it has taken to local legislative determinations of public use, particularly in the context of economic redevelopment projects, has been left to another day and another forum. Rather, taking *Kelo* at face value—as the Supreme Court’s most current word on the extent of judicial deference to legislative determinations of takings and as binding law on the scope of constitutional limitations on the eminent domain power—it becomes clear that non-use takings are not constitutionally prohibited on their face. *Kelo*’s hands-off approach to public use leaves the door clearly open for takings to prevent undesired uses, as well as takings to achieve affirmative goals,

1A Nichols, *supra* note 2, § 4.11[1].

38 *Kelo*, 545 U.S. at 472, 475.

39 *Id.* at 500. Justice Stevens, writing for the majority, found that any public purpose espoused by the legislature was a sufficient public use. *Id.* at 483 (stating that for over a century, the Court’s “public use jurisprudence has wisely eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power”). Justice Thomas, in his dissent, argued that a public use existed only when the public had the legal right to use the property after the taking—in effect, adopting the narrow definition of public use. See *id.* at 521 (Thomas, J., dissenting) (“[T]he government may take property only if it actually uses or gives the public a legal right to use the property.”). In her dissent, Justice O’Connor took a middle ground, arguing for a rule that would permit a taking of property for the benefit of a private party only when the taking would “directly achieve[] a public benefit.” *Id.* at 500 (O’Connor, J., dissenting). Justice O’Connor was joined by Chief Justice Rehnquist and Justices Scalia and Thomas. *Id.* at 494.
provided that the legislature in good faith determines that preventing an undesired use would serve the public purpose and provide a public use.

That is not to say, however, that the legislature has a blank check with respect to takings, including non-use takings. One important lesson of Kelo and the firestorm of public outrage that it sparked is that constitutional protection is by no means the only protection that private property owners have against unbridled and/or overreaching legislative takings. The political process has a large and important role to play in determining whether takings go forward. For instance, in the aftermath of Kelo, where the public outcry was immediate and vocal, the response of the state legislatures in introducing (and even enacting) legislation that would limit the impact of Kelo in state condemnation actions was swift and severe.

The significance of Kelo for non-use takings lies in its two-fold message that: (1) legislative determinations of public use and need are entitled to substantial judicial deference; and (2) the political process, as well as the judiciary and the Constitution, has an important role to play in reining in takings that are inappropriate or unwarranted. However, for the proper balance of power between the judiciary and the political process to emerge in the takings arena, the takings process itself must be open and transparent—and it is here that the non-use takings cases fall short.

The current jurisprudence on non-use takings discourages candid discussions of motivations and purposes by condemnors, and encourages instead evasive and disingenuous actions that, even if they do not run afoul of constitutional limitations as set forth in Kelo, clearly subvert the political process and dilute the power of the public in setting condemnation policy. To a large extent, this problem has been generated by the complex, confusing, and often imprecise terms that courts use to evaluate condemnors’ actions in takings cases. As


41 See Kelo, 545 U.S. at 489 ( “[N]othing in [this] opinion precludes any State from placing further restrictions on its exercise of the takings power.”).

42 See National Conference of State Legislatures, Post Kelo v. New London State Eminent Domain Legislation (May 2007), http://www.ncsl.org/programs/natres/post-keloleg.htm. Thirteen states have considered restrictive legislation in response to Kelo. Four states have enacted such legislation, and one state (Michigan) has passed a constitutional amendment on this issue. Id.

43 See Kelo, 545 U.S. at 482–83, 489.
discussed in the next Part, vague notions of motive, purpose, and bad faith have led condemnors to dissemble, rather than to be direct and honest about their actions.\footnote{44 See infra Part III.}

III. Motive, Purpose, and the Role of Bad Faith in Non-Use Cases

It is difficult to characterize the public use limitations of eminent domain actions because the rules are packed with complex and often conflicting notions. Even prior to \textit{Kelo v. City of New London}, substantial judicial deference to the sovereign was the norm in condemnation actions.\footnote{45 See, \textit{e.g.}, Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 244 (1984) (“[L]egislatures are better able to assess what public purposes should be advanced by an exercise of the taking power.”).} The courts historically have applied a presumption of legitimacy to legislative declarations of public use, which can only be overcome where, as one treatise summarized it, “the use is clearly, plainly, and manifestly of a private character, or the declaration by the legislature is manifestly arbitrary or unreasonable, involves an impossibility, or is palpably without reasonable foundation, or was induced by fraud, collusion, or bad faith.”\footnote{46 29A C.J.S. \textit{Eminent Domain} § 29 (1992).} In short, when the alleged “purpose is to cloak to some sinister scheme,”\footnote{47 Timmons v. S.C. Tricentennial Comm’n, 175 S.E.2d 805, 814 (S.C. 1970).} the courts can intervene to redress bad faith actions by the legislature.\footnote{48 29A C.J.S. \textit{Eminent Domain} § 29 (1992). And yet, while the courts frequently aver their power to set aside eminent domain actions of the legislature grounded in bad faith, they have actually done so in only a few cases. \textit{See id.} § 28. Bad faith is discussed further below. \textit{See infra} Part III.B.} Short of these types of clearly untenable actions, however, it would appear that almost anything goes in terms of legislative determinations of public uses. Moreover, while articulating these general prohibitions regarding legislative overreaching in the public use arena is relatively easy, applying them in specific cases is much more difficult.

In general, in evaluating the legitimacy of a condemnation action, the courts use a confusing, and often overlapping, array of terms. The courts talk of analyzing the condemnor’s actions in terms of purpose versus motive (the former being a legitimate focus of judicial inquiry, the latter not), in terms of true versus stated purpose, and in terms of bad faith. None of these terms is well defined within the eminent domain field, however, and they are often used inter-
changeably. The net result is that it is difficult to ascertain the true rules that apply to judicial evaluations of legislative decisions to condemn property, particularly in the non-use context.

A. Motive Versus Purpose

In defining the scope of appropriate judicial scrutiny of condemnation actions, the courts rely heavily on the hazy distinction between motive and purpose\(^\text{49}\)—while legislative motives are considered outside the realm of appropriate judicial inquiry, legislative purpose (which is viewed as a more concrete, verifiable concept) is considered fair game for judicial scrutiny.\(^\text{50}\) Judicial reluctance to inquire into the motives underlying legislative actions (of any type, not just condemnations) is driven by the difficulty of assessing such motives. As the Supreme Court explained in an 1885 case involving allegations that San Francisco regulations controlling the operation of public laundries

\(^\text{49}\) See, e.g., City of Wentzville v. Dodson, 133 S.W.3d 543, 548 (Mo. Ct. App. 2004). The Missouri Supreme Court recently described the difference between motive and purpose as follows:

While purpose and motive are sometimes used synonymously, . . . they are distinguishable in that motive refers to “that which prompts the choice or moves the will thereby inciting or inducing action,” and purpose refers to “that which one sets before himself as the end, aim, effect, or result to be kept in view or object to be attained.” The purpose of a condemnation action is subject to judicial scrutiny because it is the basis on which the authority to condemn rests.

\(^\text{id.}\) (citation omitted) (quoting City of Kirkwood v. Venable, 173 S.W.2d 8, 12 (1943)).

\(^\text{50}\) See, e.g., id. (“Generally, however, the purpose of a condemnation action is open to judicial investigation, although we cannot question the motive of such an action.”); In re Real Property in Inc. Vill. of Hewlett Bay Park, 265 N.Y.S.2d 1006, 1010 (N.Y. Sup. Ct. 1966) (“[W]hen dealing with a legislative determination to condemn, it becomes especially important to scrutinize the purpose, for a proper purpose is the very essence of the right to condemn.”), rev’d sub nom., Inc. Vill. of Hewlett Bay Park v. Klein, 276 N.Y.S.2d 312 (N.Y. App. Div. 1966).

The purpose/motive distinction is blurred by the tendency of at least some courts to analyze purpose in terms of motivation. See, e.g., Wilmington Parking Auth. v. Ranken, 105 A.2d 614, 626 (Del. 1954) (“[T]he reviewing court must be satisfied that the underlying purpose—the motivating desire—of the public authority is the benefit to the general public.”). According to the Delaware Supreme Court: “This test instructs the trier of fact to examine the motivations of the parking authority and the objective benefits that accrue to the general public versus private interests.” Wilmington Parking Auth. v. 227 W. 8th St., 521 A.2d 227, 235 (Del. 1987) (affirming trial court’s finding that the primary motivation behind the condemnation was to benefit the city by retaining a business, not to provide public parking, and that the proposed condemnation was, therefore, beyond the parking authority’s statutory condemnation power).
were improperly motivated by a discriminatory animus against Chinese persons:

[T]he rule is general with reference to the enactments of all legislative bodies that the courts cannot inquire into the motives of the legislators in passing them, except as they may be disclosed on the face of the acts, or inferrible [sic] from their operation, considered with reference to the condition of the country and existing legislation. The motives of the legislators, considered as the purposes they had in view, will always be presumed to be to accomplish that which follows as the natural and reasonable effect of their enactments. Their motives, considered as the moral inducements for their votes, will vary with the different members of the legislative body. The diverse character of such motives, and the impossibility of penetrating into the hearts of men and ascertaining the truth, precludes all such inquiries as impracticable and futile.  

Thus, courts generally view inquiries into the motives behind eminent domain actions as off-limits, absent “a clear abuse” of the taking power.  

In Deerfield Park District v. Progress Development Corp., for example, the property owner argued that the Park District Board had condemned its property for use as a park to prevent it from building integrated housing on the site.  

The Illinois Supreme Court’s application

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51 Soon Hing v. Crowley, 113 U.S. 703, 710–11 (1885).  
52 City of Chi. v. R. Zwick Co., 188 N.E.2d 489, 491 (Ill. 1963) (“[T]he purpose for which the power of eminent domain is exercised may be questioned, but in the absence of a clear abuse of the power, the motives that prompt the taking are not the subject of judicial investigation.”); see also Indianapolis Water Co. v. Lux, 64 N.E.2d 790, 791 (Ind. 1946) (noting trial court cannot consider the motive of the condemning authority in bringing the condemnation action); Armory Site in Kan. City v. Aronson, 282 S.W.2d 464, 468 (Mo. 1955) (“As a general rule the purpose of the condemnation, as distinguished from the motive, is a legitimate subject of judicial investigation.”); In re Ely Ave. in N.Y., 111 N.E. 266, 271 (N.Y. 1916). The court stated:  

This court has recently held that the courts will not impute to the Legislature or the discretionary action of municipal bodies clothed with legislative powers other than public motives for their acts, that the presumption that legislative action has been devised and adopted on adequate information and under the influence of correct motives will be applied to the discretionary action of municipal bodies and will preclude all collateral attack, and this rule has long been established by decisions of this court.  

Id. (citations omitted). Motive is subject to judicial scrutiny, however, when it merges with bad faith, a topic taken up below. See infra Part III.B.  
of the motive/purpose distinction translated into a holding that while it was inappropriate for the court to inquire into the motives of the individual board members, the property owner was entitled to show “that the land sought to be taken, [was] sought not for a necessary public purpose, but rather for the sole purpose of preventing [the property owner] from conducting a lawful business.”

In practice, however, the distinction between motive and purpose often blurs because of the difficulty of categorizing legislative actions. If the Park District Board in Deerfield Park actually had constructed a park at the site, would that mean that the taking was legitimate, even if primarily (so long as not solely) motivated by an impermissible goal of preventing integrated housing? At least one court would answer that question, “yes.” In State ex rel. City of Creve Coeur v. Weinstein, the African-American property owners alleged that the city had condemned their residential property for a public park and playground to prevent them from building a home on the property. The court refused to examine the motives behind the city’s actions, stating that if the land was used for the stated purpose, there was “no doubt” that the taking was for a public use. While the court did note that the property owners could show as a defense to the eminent domain action that the land would not be put to the stated use of a public park and playground, so long as the park was built, the court was unwilling to consider whether the taking was animated by racially discriminatory motives.

At bottom, the distinction between motive and purpose is an artificial one, and the courts’ response to this issue is a pragmatic one—if the condemnor puts the land to the articulated public use, the judicial inquiry ceases. The practical effect of the courts’ ineffectual response is

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54 Id. at 855 (stating that the purpose for which the power of eminent domain is exercised is a legitimate subject of judicial inquiry, but “the motives that may have actuated those in authority are not the subject of judicial investigation”).
55 Id.
56 329 S.W.2d 399, 402–03 (Mo. Ct. App. 1959).
57 Id. at 410.
58 Id. Although Creve Coeur is an older case, it apparently remains good law. See Blaske v. Smith & Entzeroth, Inc., 821 S.W.2d 822, 835 (Mo. 1991) (citing Creve Coeur for the proposition that “[c]ourts absolutely may not look behind the legislature’s enactment of a statute to second guess the process by which the legislature arrived at its conclusion”); see also State v. Hutch, 631 P.2d 1014, 1019 (Wash. Ct. App. 1981) (“Although motivated in part by improper considerations, if examination of the facts and circumstances of proposed condemnation demonstrates a genuine need and if in fact the condemnor intends to use the property for its avowed purpose, the condemnor’s action cannot be arbitrary and capricious.”).
to encourage strategic and deceitful behavior by the condemnor. If the only restriction is that the condemnor articulate a proper use for the taking (even if the use is a subterfuge), and then follow through on that articulated use, the judicial inquiry quickly devolves into a variant of Justice Scalia’s “stupid staffer” argument in *Lucas v. South Carolina Coastal Council* — even a condemnor with clearly improper motives can, with a little effort and forethought, articulate a facially valid purpose for the taking and one which is relatively easy and relatively inexpensive to effectuate, such as construction of a park or provision of open space.

Some courts have recognized the inherent opportunity for legislative gaming here, and have tried to address the issue by examining whether the purpose articulated by the condemnor is a real one, or is just a sham. This leads the court into convoluted issues of true versus stated purpose and raises the ill-defined role of bad faith in takings analysis.

**B. Stated Versus True Purpose and the Role of Bad Faith**

Courts sometimes will inquire, at least to a limited extent, into whether the stated purpose of the taking is the true purpose—an inquiry that often spills over into evaluations of bad faith on the part of the condemnor. And, in fact, issues of motive can also be introduced through the back-door of bad faith, further muddying already clouded waters. In Pennsylvania, for example, the courts have stated that “[b]ad faith is generally the opposite of good faith and . . . implies a tainted motive of interest” and that “[b]ad faith becomes palpable when such motive is obvious or readily perceived.”

Thus, although the courts in

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59 See 505 U.S. 1003, 1025 n.12 (1992). Justice Scalia stated:

In [Justice Blackmun’s view, even with respect to regulations that deprive an owner of all developmental or economically beneficial land uses, the test for required compensation is whether the legislature has recited a harm-preventing justification for its action. Since such a justification can be formulated in practically every case, this amounts to a test of whether the legislature has a stupid staff.

Id. (citation omitted).


61 Id. at 247. Thus, where a redevelopment authority sought to condemn private property from one owner “for the sole purpose of obtaining the property in question for the benefit” of another private individual, palpable bad faith was present. Id. at 250; see also City of Atlanta v. First Nat’l Bank of Atlanta, 271 S.E.2d 821, 822 (Ga. 1980) (“[B]ad faith’
theory eschew the notion that they can inquire into the motives underlying a taking, they in practice, by acknowledging a role for evaluating the condemnor’s actions for subterfuge or bad faith, open the door to at least limited inquiries about motive.\textsuperscript{62}

The real difficulty lies in defining legislative actions that constitute bad faith. Some cases are relatively easy—such as where the sovereign articulates a valid public purpose for the taking, but the real purpose is palpably and demonstrably otherwise.\textsuperscript{63} In \textit{City of Miami v. Wolfe}, for example, the City of Miami sought to condemn the appellee’s property, allegedly for the purpose of extending an existing roadway.\textsuperscript{64} The property owner challenged the condemnation action on the grounds that the city’s true purpose was not to acquire the lands for a public street, but rather to acquire the title to contiguous bay-bottom land.\textsuperscript{65} The bay-bottom land in question was owned by the state in trust and, under state statute, could be sold only to the upland riparian owner.\textsuperscript{66} The court found that the record “conclusively indicate[d]” that the city had attempted to condemn the appellee’s land so as to acquire the riparian right to purchase contiguous bay-bottom land under the state statute, and not to construct a road extension.\textsuperscript{67} The court thus concluded that the condemnation action “was brought in bad faith, amounted to a gross abuse of discretion, and should have been dismissed.”\textsuperscript{68}

Not all cases present such forthright facts, however, and many courts, even in the context of allegations of bad faith, will fall back on the rubric that so long as the articulated public purpose is pursued, the taking is valid. For example, in \textit{In re Real Property in Incorporated

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\textsuperscript{62} City of Evansville v. Reising, 547 N.E.2d 1106, 1111 (Ind. Ct. App. 1989). The court stated:

\begin{quote}
[A] trial court could properly decide whether a public body is using subterfuge and bad faith in seizing a citizen’s property, whether the public body has no real intention of applying the property to the public purpose and use alleged and to decide whether a public body is acting outside its power and scope of authority in an arbitrary and capricious manner.
\end{quote}

\textit{Id.}

\textsuperscript{63} See \textit{Casino Reinvestment Dev. Auth. v. Banin}, 727 A.2d 102, 103 (N.J. Super. Ct. Law Div. 1998) (“Where . . . a condemnation is commenced for an apparently valid public purpose, but the real purpose is otherwise, the condemnation may be set aside.”).

\textsuperscript{64} 150 So. 2d 489, 489 (Fla. 1963).

\textsuperscript{65} \textit{Id.} at 490.

\textsuperscript{66} \textit{Id.}

\textsuperscript{67} \textit{Id.}

\textsuperscript{68} \textit{Id.} This case was not a non-use case.
Village of Hewlett Bay Park, the city had proposed to condemn a parcel for construction of a city garage and storage facility after the property owner had petitioned repeatedly to have the parcel rezoned for construction of a parking lot (a use opposed by many neighboring property owners). The trial court found that the facts surrounding the condemnation suggested that the stated purpose was suspect and concluded “that the real purpose of this condemnation proceeding in larger part is not to use this property for something affirmative, so much as it is to prevent its use for something else which the village authorities regard as undesirable. Such is a perversion of the condemnation process.” On appeal, however, the appellate division reversed, stating that because there was no proof that the city would not use the property for the stated public purpose, “there was no proof of ‘bad faith’ on the part of the condemnor, either as to whether the proposed use is a public one or as to whether there would be adherence to such use after the taking of the property.”

Part of the analytical difficulty in these cases lies in the fact that bad faith is a many-nuanced term in the context of eminent domain actions in general, and in non-use cases in particular. In defining the term in Pheasant Ridge Associates, Ltd. v. Town of Burlington, for example, the Massachusetts Supreme Judicial Court noted that bad faith “includes the use of the power of eminent domain solely for a reason that is not proper, although the stated public purpose or purposes for the taking are plainly valid ones”—in short, the court drew a distinct-

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69 265 N.Y.S.2d 1006, 1010 (N.Y. Sup. Ct. 1966), rev’d sub nom., Inc. Vill. of Hewlett Bay Park v. Klein, 276 N.Y.S.2d 312 (N.Y. App. Div. 1966). The parcel was adjacent to the property owner’s shopping center. Id. at 1008. The property owner wanted the parcel rezoned from single family residential to commercial uses, so that it could construct a parking lot. Id. The need for the parking lot was occasioned by the county widening the road in front of the shopping center, causing a loss of parking. Id.
70 See id. at 1010. The trial court stated:

The precipitate way in which the village moved to condemn this property, without any specific plan for its development, on the eve of the hearing of an application by the owner to use it for parking purposes, coupled with its size of more than four times the present site, would seem to belie the bona fides of the petitioner’s position.

Id. Moreover, the court noted, it seemed “highly improbable that the village residents who [were] so adamantly opposed to” the use of the parcel for parking purposes, would really be content with its use as a “storage dump” if that were actually the use to which the village intended to put it. Id.
71 Id.
72 Klein, 276 N.Y.S.2d at 312.
tion between true public purpose and stated (sham) public purpose. Nonetheless, proving bad faith is difficult, and the Pheasant Ridge Court stated that it would not impute improper motives to municipal officers and voters if “valid reasons that would have supported the town’s action” were present.

The Pheasant Ridge court, however, explicitly rejected the notion that so long as the articulated public use was pursued, the taking was legitimate regardless of the underlying legislative motive. The property owner in Pheasant Ridge had filed an application for a comprehensive permit to develop low- and moderate-income apartments. Acting pursuant to a unanimous vote of a town meeting, the town adopted an order to take the land for purposes of parks, recreation, and moderate-income housing.

The Massachusetts Supreme Judicial Court found that it would have been improper for the town to take the land solely to block the construction of low- or moderate-income housing. The court concluded that the “only valid justification” for the taking would be that the town truly intended the land be used for the purpose articulated as the basis for the taking. Yet, the record showed that in recent studies of the town’s parks and recreation needs, the town had never identified this site or this general area for acquisition, nor had the town ever considered providing housing in this area prior to the property owner’s proposal. In fact, the court found that the record as a whole made it apparent that the town’s action was taken in bad faith.

506 N.E.2d 1152, 1156 (Mass. 1987). The South Dakota Supreme Court has taken a similar stance: “A municipality acts in bad faith when it condemns land for a private scheme or for an improper reason, though the superficially stated purpose purports to be valid.” City of Freeman v. Salis, 630 N.W.2d 699, 703 (S.D. 2001) (citing Pheasant Ridge, 506 N.E.2d at 1156); see also Denver W. Metro. Dist. v. Geudner, 786 P.2d 434, 436 (Colo. Ct. App. 1989) (“If the primary purpose underlying a condemnation decision is to advance private interests, the existence of an incidental public benefit does not prevent a court from finding ‘bad faith’ and invalidating a condemning authority’s determination that a particular acquisition is necessary.”).

Pheasant Ridge, 506 N.E.2d at 1156 (“It is not easy to prove that particular municipal action was taken in bad faith.”).

Id.

Id. at 1154.

Id.

Id. at 1156. Nor could the town have taken the property in order to prevent the negative impact of the proposed development on water, sewer, or traffic, as the town was not barring other residential developments (presumably higher-income housing) on these grounds. Id. at 1156–57. While infrastructure impacts might have warranted denial of the comprehensive permit, it would not justify a taking, which the court deemed “an indirect and unfairly selective attack on the problem.” Id. at 1157.

Id.

Pheasant Ridge, 506 N.E.2d at 1157.
clear that the town “was concerned only with blocking the [property owner’s] development.”81 Because the attempted condemnation was intended to prevent an undesired use, not to pursue an affirmative public use, it “was unlawful because [it] was done in bad faith.”82

The Georgia Supreme Court, which has probably confronted the non-use issue more directly than any other state court, has adopted a slightly different definition of bad faith. According to the Georgia Supreme Court, “bad faith is neither negligence nor poor judgment, but involves conscious wrong-doing and a dishonest intent”—that is, actions that are tantamount to fraud.83 The court has also stated that: “This Court has found bad faith in the determination of public purpose only when the stated purpose was a subterfuge.”84 Yet, it is hard to characterize the general rule regarding non-use cases in Georgia because of the specialized nature of the cases presented there.

The Georgia Supreme Court decided one of the earliest cases to take on directly the issue of whether a sovereign can take property for non-use purposes—Earth Management, Inc. v. Heard County.85 The proposed private use at issue there was one that often raises the hackles of municipalities and neighboring property owners alike: a hazardous waste facility. Earth Management, Inc. had done studies and conducted investigations for several months with regard to the acquisition of necessary permits to locate a hazardous waste facility on a parcel of property on which it held an option.86 Before Earth Management exercised

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81 Id. By contrast, in Town of Chelmsford v. DiBiase, the Massachusetts Supreme Judicial Court found that no bad faith had occurred because the taking decision actually predated the unwanted proposed use by the private property owner. 345 N.E.2d 373, 374–75 (Mass. 1976). The Town of Chelmsford had been considering the acquisition of a forty-eight-acre parcel for more than ten years; in part, their interest was generated by the fact that the parcel abutted 100 acres of town forest. Id. at 375. Two town meetings were held to vote on taking the property for conservation purposes, but the first meeting was adjourned for want of a quorum, and the town counsel ruled that the vote taken at the second meeting was invalid. Id. at 374. The property owner then submitted an application for a comprehensive permit to build low- and moderate-income housing; three weeks later, a town meeting was held at which the taking was approved. Id. The judge ruled, in the absence of pleadings to the contrary, that the taking was in good faith and for a public benefit and the appellate court affirmed. Id. at 376. The bottom line is that these determinations are largely fact-specific, and timing of the taking greatly influences the outcome.

82 Pheasant Ridge, 506 N.E.2d at 1158.

83 Earth Mgmt., Inc. v. Heard County, 283 S.E.2d 455, 460 (Ga. 1981); see City of Atlanta v. First Nat’l Bank of Atlanta, 271 S.E.2d 821, 822 (Ga. 1980) (“The term ‘bad faith’ has been used side by side with the word ‘fraud’ in describing those exercises of official discretion to condemn lands with which the courts will interfere.”).


85 283 S.E.2d at 456–61.

86 Id. at 456.
its option, the county instituted condemnation proceedings to take the property for use as a public park.\textsuperscript{87} Earth Management alleged at trial that the county had condemned the property in bad faith and for the “sole purpose” of preventing the construction of the hazardous waste facility.\textsuperscript{88}

As the Georgia Supreme Court put it, the case addressed “the point of impact between two vital competing public interests”—the right of a property owner to prevent the taking of its property except for a public purpose (and with the payment of just compensation), and the right of the state to appropriate private property for public purpose in the interest of its people.\textsuperscript{89} The court acknowledged that a public park was a public purpose and that the court was not in a position to second-guess the county as to the size and scope of a park needed for its people.\textsuperscript{90} The court found, however, that the inquiry did not end there:

The remaining question then is whether the action of the county commissioner in condemning this parcel of land was taken for the purpose of building a public park or whether this was a mere subterfuge utilized in order to veil the real purpose of preventing the construction of a hazardous waste disposal facility.\textsuperscript{91}

Here, while no evidence indicated that the condemned land would not be put to use as a public park, the evidence also indicated that the “real reason for its being taken was to thwart” the use of the property as a landfill, a result the court found untenable.\textsuperscript{92} “There is no law, statutory, constitutional or otherwise, which clothes a governing authority with the right to utilize the power of eminent domain in order to re-

\textsuperscript{87} Id. at 456–57.
\textsuperscript{88} Id. at 459.
\textsuperscript{89} Id.
\textsuperscript{90} Id.
\textsuperscript{91} Earth Mgmt., 283 S.E.2d at 459–60.
\textsuperscript{92} Id. at 460. The court noted that “no other land was ever considered for the public park, no on-site surveying, planning, or inspection” was conducted before the condemnation, and neither the chair of the county recreation commission nor any member of the recreation commission other than the proposing member had visited the site. Id. “The county commissioner and the county attorney had publicly stated that they would do anything within their power to block the proposed hazardous waste disposal facility, and in fact the county commissioner had previously passed three different ordinances and a zoning referendum resolution attempting to prohibit the facility.” Id. In addition, the county did not attempt to negotiate a purchase of the property prior to the condemnation. Id.
strict a legitimate activity in which the state has an interest.” Although a public park is a legitimate public use, the court found that this land was condemned “for the obvious purpose” of preventing the location of the hazardous waste facility and “[s]uch action is beyond the power conferred upon the county by law and amounts to bad faith.”

The court’s language is interesting in two respects. First, the court identified the landfill as a “legitimate activity in which the state has an interest”—suggesting, perhaps, that were the undesired use not serving a general public need, the outcome might have been different. Did the social necessity (and traditional public service overtones) of the landfill use somehow give this case greater urgency than if the undesired use had been a use more traditionally pursued by the private, rather than the public, sector (such as a rehabilitation facility)? Second, the court seemed concerned that the county was engaging in a subterfuge. Would the court have viewed the condemnation as more legitimate had the county been more direct about its legislative objectives?

The non-use issue was presented to the Georgia Supreme Court again just five years later, in *Carroll County v. City of Bremen*, and again the court described the dispute in terms of competing public interests. The City of Bremen had been negotiating with the property owner for “some time” to buy the land for a waste-water facility. After a new county commissioner took office who opposed the location of the facility in Carroll County, the county filed a condemnation action to take the land for use as a training area for county police and fire employees.

The trial court found that the “true reason” for the condemnation was to prevent construction of the public-sewage treatment plant. The Georgia Supreme Court agreed, finding that the county was acting in bad faith. The court stated: “As in *Earth Management*, the use put forth by the county is a public purpose, but there is evidence that the actual purpose was to stop another use, also public, but

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93 Id.
94 Id. at 461.
95 Id. at 460 (emphasis added).
96 Id.
97 347 S.E.2d 598, 599 (Ga. 1986).
98 Id.
99 Id.
100 Id.
101 Id. (“This use of the condemnation process by a county is not within its power and amounts to acting in bad faith.”).
one which the county officers oppose.” Although the “general rule” is that “a court will not substitute its judgment for that of a condemning authority in determining the need for a taking or the type of interest to be taken,” and although the court acknowledged its “reluctance . . . to find bad faith in determining public purpose and thereby overturn the condemnor’s authority to condemn,” the Georgia Supreme Court found that it was “improper” for the county to use its eminent domain power to block the sewage plant when other, legitimate efforts to block the plant had failed.

What is interesting—and perhaps unique—about Earth Management and Carroll County is that they both involved undesired uses with strong public services overtones. In Carroll County, the sewage treatment plant actually was to be constructed and run by the City of Bremen. While the hazardous waste facility in Earth Management was to be constructed and run by a private entity, the land use is of the type that is typically both heavily regulated and essential to modern society—not unlike a traditional sanitary landfill writ large. It may be that these cases can be explained more in terms of a paramount state public interest trumping a weaker local public interest than in terms of outright judicial rejection of non-use takings.

We can only speculate on that point, however, because when we look at subsequent non-use cases where the public nature of the undesired use was weaker, we find the courts have not explicitly drawn such a distinction. In Borough of Essex Fells v. Kessler Institute for Rehabilitation, for example, the borough brought a condemnation action to acquire a 12.5-acre parcel, purportedly for public park purposes. The owner, the Kessler Institute for Rehabilitation, challenged the condemnation on the grounds that the borough’s stated public use was a mere pretext to exclude Kessler and its rehabilitation facility from the community.

The facts showed that, prior to Kessler’s purchase of the parcel, the borough had been “actively soliciting residential developers to acquire” the parcel for construction of single-family residences. After Kessler contracted to purchase the property, it applied for a condi-

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102 Id.
103 Carroll County, 347 S.E.2d at 599–600. The court stated: “The condemning authority of a county may not be used simply to block legitimate public activity.” Id. at 599.
104 Id. at 599.
107 Id.
108 Id.
tional use permit for its rehabilitation facility. Once community re-
sistance to the Kessler plan became clear, the borough hired a planner
and a land use attorney to evaluate the “suitability of the site” for the
proposed use. Both concluded that the proposed use was consistent
with the community’s master plan and zoning ordinances. After a
citizens’ organization was formed to oppose the use, the borough
conducted a survey, which revealed that a majority of the residents
were willing to pay extra taxes to purchase the property for park
uses. The borough passed a resolution stating that “it was in the
public interest to acquire [the parcel] for public use as park land and
recreational use.” The borough started a condemnation action, and
Kessler filed suit, challenging the condemnation.

The New Jersey Superior Court stated that because it is the legis-
lature’s prerogative to determine what is a public use, a presumption
of validity and “great deference” attaches to a municipality’s exercise
of its eminent domain power. The court added that “[c]ourts will
generally not inquire into a public body’s motive concerning the ne-
cessity of the taking . . . .” However, the Essex Fells court went on to
note that the condemnation will “not be enforced where there has
been a showing of ‘improper motives, bad faith, or some other con-
sideration amounting to a manifest abuse of the power of eminent
domain.’”

The court clarified that even if the articulated public purpose
falls within the realm of valid public uses, if the “true reason” for the
taking is *ultra vires*, the court may strike down the condemnation. In
short, the court concluded, “public bodies may condemn for an au-
thorized purpose but may not condemn to disguise an ulterior mo-

109 Id.
110 Id. at 859.
111 Id.
112 Essex Fells, 673 A.2d at 859.
113 Id. at 859–60.
114 Id. at 860.
115 Id.
116 Id.
117 Id. (quoting Tenn. Gas Transmission Co. v. Hirschfield, 120 A.2d 886, 887 (N.J. Su-
per. Ct. App. Div. 1956)). The court stated: “Bad faith generally implies the doing of an act
for a dishonest purpose. The term also ‘contemplates a state of mind affirmatively oper-
ing with a furtive design or some motive of interest or ill will.’” Id. at 861 (quoting Lustre-
118 Essex Fells, 673 A.2d at 860–61.
Although the Essex Fells court could find no relevant New Jersey cases involving bad faith challenges to condemnations, it stated that cases from other jurisdictions “make it clear that where a condemnation is commenced for an apparently valid, stated purpose but the real purpose is to prevent a proposed development which is considered undesirable, the condemnation may be set aside.”

Certainly, the evidence here indicated that the borough was not condemning to satisfy “the public need” for a park, but rather to address community opposition to Kessler’s proposed use. The borough never considered purchasing the land until the public opposition occurred, and evidence suggested borough officials were more interested in controlling who acquired the property than in obtaining open space for its residents. Ultimately, the court found that the condemnation action was brought in bad faith to block a rehabilitation facility that the residents opposed, and so was invalid.

The Essex Falls decision is interesting on several accounts. First, there was no subterfuge involved—the borough council was very open about the proposed taking and its opposition to the property owner’s proposed use of the parcel. While using the land as a park might have been a secondary purpose for the taking (the first clearly being preventing the facility opposed by its residents), there was no evidence that the property would not be put to use as a public park.

Essex Falls is, in this respect, analogous to State ex rel. City of Creve Coeur v. Weinstein and In re Real Property in Incorporated Village of Hewlett Bay Park.
Park, where the courts found the taking to be valid, yet the Essex Fells court reached a very different result.\footnote{Compare Essex Fells, 673 A.2d at 863, with 329 S.W.2d 399, 410 (Mo. Ct. App. 1959) (discussed supra notes 56–58 and accompanying text), and 265 N.Y.S.2d 1006, 1010 (N.Y. Sup. Ct. 1966), rev’d sub nom. Inc. Vill. of Hewlett Bay Park v. Klein, 276 N.Y.S.2d 312 (N.Y. App. Div. 1966) (discussed supra notes 69–72 and accompanying text).}

Second, the court stated that this was a bad faith taking, and yet it never explained why the borough’s actions were tainted.\footnote{See Essex Fells, 673 A.2d at 863.} Certainly, the taxpayers and voters, and even the property owner, were not being misled in any way as to what was going on—the borough surveyed the residents and found that they were prepared to pay additional taxes to acquire the property for recreational purposes to avoid Kessler’s proposed use.\footnote{Id. at 862.}

It may be that the real source of the court’s discomfort is that the borough was using its eminent domain power to accomplish indirectly what it could not do directly through the police power. The borough’s own planning and legal consultants had determined the proposed private use was consistent with the master plan and zoning ordinances—and had indicated that a conditional use permit should issue.\footnote{Id. at 859.} Under the police power, the borough could not completely ban the use from its borders, although it could regulate specific facets of the use, such as the location and operation.\footnote{See supra notes 14–17 and accompanying text (discussing harm-prevention aspects of police power).}

The New Jersey Supreme Court looked at this issue again in 2006, in Mount Laurel Township v. MiPro Homes, L.L.C., with a very different outcome.\footnote{910 A.2d 617, 618 (N.J. 2006).} The township had condemned a 16.3-acre parcel owned by a developer, MiPro Homes, which was zoned for residential uses.\footnote{Mount Laurel Twp. v. MiPro Homes, L.L.C., 878 A.2d 38, 43 (N.J. Super. Ct. App. Div. 2005).} The trial court had found that while the township had articulated a facially valid purpose for the taking—provision of open space—its real purpose in condemning the land was to prevent development of another residential subdivision in what was already a heavily developed township.\footnote{Id. at 44. The court stated: “[T]he public purpose articulated for the taking of Mipro’s property for passive open space was not based on a true public need but solely in response to the community’s sentiment expressed at the polls, coupled with clear indica-}
The trial court had concluded that, while the township could prevent residential development and preserve open space by engaging in a voluntary purchase from the property owners, it was prohibited from using the power of eminent domain to acquire the property.\textsuperscript{134}

The appellate court reversed, stating that even if the township’s “primary goal” was to impede or slow residential development, “this does not provide a foundation for finding that the municipality’s use of eminent domain for this purpose constitutes fraud, bad faith or manifest abuse.”\textsuperscript{135} The appellate court specifically distinguished \textit{Mount Laurel Township} from \textit{Essex Fells}, stating that in \textit{Essex Fells}, the property owner’s proposed use of its property implicated a “significant public interest[]” (a rehabilitation and nursing facility) and that the municipality had abused its power in trying to prevent that use.\textsuperscript{136} The appellate court indicated that “a development of single-family homes that will be affordable only to upper-income families would not serve a comparable public interest.”\textsuperscript{137}

The New Jersey Supreme Court affirmed the decision in a brief opinion, finding that “the citizens of New Jersey have expressed a strong and sustained public interest in the acquisition and preservation of open space,” and that the township’s motivation in condemning the property was “not inconsistent with the motive driving the public interest in open space acquisition generally.”\textsuperscript{138} Justice Rivera-Soto, writing in dissent, argued that the majority had erred in allowing the appellate court’s judgment regarding the social worth (or lack thereof) of MiPro’s development plans to sway the outcome.\textsuperscript{139} In his view, “a judge’s individualized and idiosyncratic view of what is or is not socially redeeming has no place in determining whether the sovereign’s exercise of the power of eminent domain is proper.”\textsuperscript{140}

When we step back and look at the non-use cases decided to date, it is hard to find consistent patterns or rules among them. The courts have essentially stated that in evaluating these cases, they will not look

\textit{Id.} (quoting the trial court).

\textsuperscript{134} \textit{Id.}

\textsuperscript{135} \textit{Id.} at 49.


\textsuperscript{137} \textit{Mount Laurel Twp.}, 878 A.2d at 49.


\textsuperscript{139} \textit{Id.} at 619 (Rivera-Soto, J., dissenting).

\textsuperscript{140} \textit{Id.} at 620.
to the condemnor’s motives, only to its purpose.\textsuperscript{141} However, the courts will look to see if the stated purpose is the true purpose, and further, they will look to motive to the extent that it shows bad faith on the part of the condemnor.\textsuperscript{142} At this point, of course, the analysis becomes circular—bad faith can be evidenced by tainted motive, and yet the courts claim they do not examine motives in takings cases.

It is small wonder, then, that the existing case law is in disarray, and that it is so difficult to draw clear and easily applied rules from the existing jurisprudence on the appropriateness of condemning to prevent undesired uses. Rather than attempting to bring order to what is clearly chaos in the case law, it is more productive to step back and consider what the rule should be. Why can the municipality not decide that the public is best served by a condemnation designed to prevent an undesired use—by a non-use taking—provided the municipality is willing to pay the bill for its decision in the form of just compensation for the property taken?\textsuperscript{143} Might not private property


\textsuperscript{143} I do not pretend that my approach would resolve all problems associated with non-use takings, nor do I profess complete comfort with the result that I have reached. My own strong belief in the sanctity of private property rights caused me initially to resist and reject this outcome, yet I was ineluctably drawn to the conclusion that non-use takings can indeed be public uses. In part, this result may be an unintended consequence of the broad, hands-off approach to legislative determinations occasioned by the Supreme Court’s recent decision in \textit{Kelo v. City of New London}, 545 U.S. 469 (2005). More fundamentally, however, I think that there are occasions when the public good would be better served if a property were condemned to prevent a proposed private use that would be contrary to the wishes or best interests of the public as a whole—provided always, of course, that the condemnation is accompanied by just compensation and is conducted in an open and forthright manner.

There are, of course, problems with this approach. Few issues in the takings law area are clear-cut, and trade-offs are inherent. Society does need landfills, sewage-treatment plants, rehabilitation facilities, and other uses that neighbors may find undesirable, and those uses must be located somewhere—and they will be. At a practical level, at some point, the proponent of the undesired use will find either a community that welcomes the tax dollars, jobs, or other economic benefits associated with the use, or a community that opposes the use but is too poor to buy the use out. The second outcome, of course, is the troublesome one from an economic justice viewpoint because it may well lead to wealthier communities displacing undesired uses onto poorer communities. However, at the most fundamental level, state and federal constitutional provisions protect against improper and illegal discrimination, such as exclusion of racial minorities. Moreover, there is a limit as to how often any given municipality could condemn for non-use purposes. Fiscal realities
IV. RETHINKING NON-USE TAKINGS

When we step back to consider what the rules regarding non-use takings should be, as opposed to what they are, some basic contours quickly emerge. A municipality’s efforts to condemn for a non-use should be stopped if: (1) the municipality runs afoul of statutory or state constitutional limits (for example, the municipality is empowered to condemn only for certain limited purposes, such as roads or schools, and the condemnation does not fall within the specified boundaries); (2) the municipality runs into a federal constitutional limit, such as equal protection (for example, the municipality is condemning the property to prevent the construction of racially integrated housing); or (3) the municipality hides its true intent, thereby acting in bad faith, and subverting the political process and denying accountability to voters.

The first two categories do not cause much concern, as the rules there are straightforward and easy enough to apply, and the results uncontroversial—the municipality has exceeded its statutory or constitutional authority, and its actions must be set aside by the courts. It is the third category—the one that raises convoluted issues of motives versus purpose, true versus stated purposes, and bad faith—that causes the disjointed and often inconsistent outcomes that permeate the current case law on non-use takings. Issues of bad faith, motive, and purpose are already areas of eminent domain law fraught with inconsistent and incomplete analysis and murky relationships. It is small wonder, then, that infusing these issues into non-use cases simply serves to further confuse the analysis rather than illuminate it.

The analysis in non-use cases would be greatly simplified and clarified if these amorphous and ephemeral concepts simply were swept away. Discussions of bad faith, motive, and purpose not only beg

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rights and the public be better served by permitting an open and honest taking, accompanied by just compensation and full disclosure in the public arena, to prevent an undesired use? I address this topic in the concluding Part.144

See infra Part IV.
the question, but they induce and encourage manipulative and deceptive behavior by municipalities. The non-use cases suggest an underlying assumption by condemnors and courts alike that it is not permissible to take property for a non-use. As a result, municipalities tend to hide their true intent by articulating sham reasons for their condemnation—“we suddenly realize we need a park and we need it right here, where this landfill, low-income housing, [fill in the undesired use of your choosing], is proposed!” When courts then look at the underlying facts and see what is really going on, they may call the municipalities on their less-than-forthright behavior, by labeling the behavior as bad faith and setting it aside. Or, worse, the courts may hide behind the flimsy cloak of motive versus purpose and refuse to address a situation that to outsiders goes beyond smelling fishy to stinking to high heaven. When the courts engage in this kind of selective vision, they do little to promote public confidence in the fairness of the constitutional constraints upon the eminent domain power or public respect for the power and integrity of the judiciary.

Condemning authorities feel compelled to hide their true motivations because they, and the courts, feel that taking for non-use purposes is inherently wrong. But why? What is wrong with taking for a non-use, so long as the goal is to benefit the public generally by preventing the undesired use, and not simply to confer private benefit upon a few vocal neighbors? Suppose the law were simply to require the actors to be direct about what they were achieving. Go back to the opening hypothetical, where the municipality has condemned land, ostensibly for park purposes, in order to prevent a large-scale development from going forward. What if the municipality had been honest and had just stated: “We don’t want this development. We think that it will have deleterious effects on our community, because of environmental impacts, noise, and traffic issues, and stigmatizing effects on neighboring property values. But, we also recognize that such a development provides substantial societal benefits, and that the benefits in this instance are not outweighed by the potential harms. Thus, we recognize we cannot ban the use under the police power—that would be a de facto taking. So, fine, we will instead make it an actual taking and provide you, the property owner, with the just compensation the Constitution demands. In return, the public will receive the property for use as a park, open space, or whatever other public use we deem appropriate.” This direct approach gets rid of the clutter of bad faith, the confusion between motive versus purpose, and the judicial second-guessing that drawing such distinctions necessitates.
The real concern here is not that condemnors may engage in non-use takings, but rather that when sovereigns do not openly and honestly discuss the motives behind their actions, they subvert the political process—they prevent open public discussion and dissension about the legislative acts, and they obliterate the opportunity for the public to voice its pleasure or displeasure about the sovereign’s actions, either in open public debate or through the ballot box. Where the stated purpose for the taking is a subterfuge or a sham, there is a breakdown in the political process because there is no way for the public to evaluate the actions of the municipality or to react. Where the municipality is honest in stating its purpose, however, public debate and opportunity for response are fostered.

Moreover, that public debate can itself offer substantial protection for private property rights, as the firestorm of negative reaction to *Kelo v. City of New London* and the resulting legislative efforts to overturn its effects on a state-by-state level indicates.\(^\text{145}\) Fundamentally, a legal rule that would permit municipalities to openly condemn to prevent an undesired use from going forward is considerably less worrisome than a legal rule, such as we currently have, that encourages municipalities to dissemble or even be outright dishonest in pursuing their legislative goals. In this instance, honesty is not only the best policy, but it is critical to ensuring proper protection of private property rights and preservation of constitutional integrity.

\(^{145}\) See *supra* notes 40–42 and accompanying text.
WILD RIVERS AND THE BOUNDARIES OF COOPERATIVE FEDERALISM: THE WILD AND SCENIC RIVERS ACT AND THE ALLAGASH WILDERNESS WATERWAY

SIMON B. BURCE*

Abstract: The Wild and Scenic Rivers Act (WSRA) is a collaboration between the federal and state governments designed to preserve nationally significant rivers. Section 2(a)(ii) is an innovative provision of the WSRA, which allows states to designate rivers for review by the Secretary of the Interior for inclusion in the National Wild and Scenic Rivers System. When federal and state interests align, section 2(a)(ii) designation is an effective tool for encouraging state participation in river management. When state interests in a river diverge from federal interests, however, the contours of this collaboration raise difficult federalism questions because the federal government has traditionally regulated the management of natural resources, while states have traditionally regulated land use. Maine recently provoked these difficult federalism questions by unilaterally downgrading the status of the Allagash Wilderness Waterway. This Note examines the WSRA and argues that it preempts state laws that violate its federal purpose of preservation.

Introduction

Nestled within the timber forests of northwest Maine, a pristine ninety-two mile sanctuary of streams and lakes flows along the Allagash River.1 In 1966, the State of Maine established the Allagash Wilderness Waterway (AWW) to “preserve, protect and develop the maximum wilderness character” of this unspoiled area.2 Four years later, the Governor of Maine also applied to the U.S. Department of the

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1 Maine Department of Conservation, Bureau of Parks & Lands, Allagash Wilderness Waterway, http://www.state.me.us/cgi-bin/doc/parks/find_one_name.pl?park_id=2 (last visited Jan. 16, 2008).

Interior to include the AWW within the National Wild and Scenic Rivers System (National System) as the first state-administered “wild” river area under the Wild and Scenic Rivers Act of 1968 (WSRA).³

In approving the Governor’s application, the Secretary of the Interior noted that public access to the AWW would be limited to one road at each of the northern and southern borders of the protected area, allowing the vast area in between to conform to the WSRA’s mandate that a wild river be “generally inaccessible except by trail.”⁴ Although prior to the application several private roads had been built to the river to facilitate logging for the surrounding timber industry, these roads did not affect significantly the “overall wilderness character” of the river and eventually would be removed.⁵

In 2006, the Maine State Legislature passed—and the Governor approved—Legislative Document 2077, “An Act to Make Adjustments to the Allagash Wilderness Waterway.”⁶ The Act established six public roads and permanent bridges over the waterway, dissecting the AWW into several discrete segments and unilaterally downgrading it from a “wild” to a “scenic” river area within the classification structure of the WSRA.⁷ In so doing, the State of Maine reduced the level of state protection afforded to the AWW and, most likely, violated its mandate to administer the area “in such manner as to protect and enhance the values which caused it to be included in” the National System.⁸

The State of Maine’s recent act raises significant federalism questions with regard to its administration of the AWW.⁹ In the scheme of cooperative federalism established for state-nominated rivers under the WSRA, no federal enforcement mechanism exists for ensuring that a

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⁴ 16 U.S.C. § 1273(b)(1); Notice of Approval, supra note 3, at 11,526.
⁵ Notice of Approval, supra note 3, at 11,526.
⁸ See 16 U.S.C. § 1281(a). In response to the downgrading of the AWW, several plaintiffs filed an action in federal district court arguing, in part, that Legislative Document 2077 is preempted by the WSRA. Fitzgerald v. Harris, No. 07-16-B-W, 2007 WL 2409679, at *1 (D. Me. Aug. 20, 2007). On August 20, 2007, a U.S. Magistrate Judge issued a Recommended Decision to Dismiss the plaintiffs’ complaint. Id. at *13. However, as of the publication of this Note, the district court has yet to accept or reject this recommendation.
⁹ Id. § 1273(a); Act of Aug. 23, 2006, ch. 598, 2006 Me. Acts 1577.
state meets its goals of preserving the river. While the WSRA goes to great lengths to enable state-managed rivers’ inclusion in the system, it does not thereafter provide a federal remedy to protect these rivers when the state government fails to meet its obligations under the statute. Indeed, on the face of the WSRA, it is difficult to identify any power of the federal government to regulate the AWW. Yet, while the power-sharing relationship under the WSRA is unclear at first blush, a Supreme Court decision interpreting an older scheme of cooperative federalism designed to control pre-Prohibition liquor trafficking defines the boundaries of power between the federal and state governments and provides guidance for interpreting this relationship.

Part I of this Note examines the provisions and principles of the Wild and Scenic Rivers Act of 1968. Part II considers the origins and development of cooperative federalism, its current use in the context of environmental regulation, and an early example of cooperative federalism under the Webb-Kenyon Act to control the flow of liquor into “dry” states in the years before Prohibition. Part III examines the applicability of the law articulated by the Supreme Court in examining the Webb-Kenyon Act to the power relationship between the federal government and the State of Maine under the WSRA. Finally, Part IV argues that under any consideration of the statutory scheme established by the WSRA, the State of Maine did not have authority to enact Legislative Document 2077.

I. The Wild and Scenic Rivers Act of 1968

The Wild and Scenic Rivers Act unequivocally pronounced Congress’s intent to protect the natural values of the nation’s untrammelled rivers:

It is hereby declared to be the policy of the United States that certain selected rivers of the Nation which, with their immediate environments, possess outstandingly remarkable . . . values, shall be preserved in free-flowing condition, and that they and their immediate environments shall be protected for

\[10 \text{ See 16 U.S.C. §§ 1271–1287.} \]
\[11 \text{ See id.} \]
\[12 \text{ See id.} \]
the benefit and enjoyment of present and future generations.\textsuperscript{14}

The WSRA was the culmination of numerous bills introduced throughout the Eighty-Ninth and Ninetieth Congresses.\textsuperscript{15} The policy that the WSRA promoted, however, developed over the course of several decades, beginning in the 1930s, as advocates for the development of flood- and drought-protection plans (particularly in the Western States) negotiated with preservationists to determine the best use of the nation’s rivers.\textsuperscript{16} Born amid the collision between regional interests and national desires for preservation, the WSRA was a product of careful compromise.\textsuperscript{17} The two most significant features that spurred the Act’s progress into law were its three-tier system for classifying rivers in the National System and its two-fold method for designating and protecting them as either state-administered rivers or federally administered rivers.\textsuperscript{18}

\textit{A. The Three-Part Classification System}

A primary element of the WSRA that ensured the passage of the bill was its three-fold scheme for classifying protected rivers.\textsuperscript{19} The WSRA contains three categories for preservation: wild, scenic, and recreational.\textsuperscript{20} Each category of river under the WSRA is to be admin-


\textsuperscript{16} \textit{Id.} at 708–09; \textit{see also} Roger Tippy, \textit{Preservation Values in River Basin Planning}, 8 \textit{Nat. Resources J.} 259, 259 (1968). Ironically, although Senator Church’s first bill proposing to create a “National Wild Rivers System” was designed for river preservation, it conjured images of flood control, since the “literal wildness of a river [was] frequently advanced as a justification for flood control projects.” \textit{Id.} at 273.

\textsuperscript{17} \textit{See} Tarlock & Tippy, \textit{supra} note 15, at 713 nn.29 & 32.

\textsuperscript{18} Wild and Scenic Rivers Act § 2.

\textsuperscript{19} \textit{Id.} § 2(b); \textit{see} Tarlock & Tippy, \textit{supra} note 15, at 713 n.29.

\textsuperscript{20} \textit{See} Wild and Scenic Rivers Act, 16 U.S.C. § 1273(b) (2000). The WSRA defines the three categories for inclusion in the National Wild and Scenic Rivers System as follows:

(1) Wild river areas—Those rivers or sections of rivers that are free of impoundments and generally inaccessible except by trail, with watershed or
istered in such a way as to protect “the values which caused it to be included” in the National System. However, not all rivers in each category should be administered in the same way. The WSRA recognizes that different rivers within each category have different values: “scenic, recreational, geologic, fish and wildlife, historic, cultural, or other similar values.” Accordingly, administrators have devised various schemes for regulating individual rivers within each category.

As the WSRA progressed through congressional hearings, lawmakers struggled to reach an appropriate balance between national uniformity and local particularity. Standards for preservation needed to be strict enough so that they could be ascertained and enforced, but also loose enough so that they did not place straight jackets on the administrators’ ability to manage each unique river for its own values. By having three separate categories for preservation, the WSRA allowed for individual rivers to be administered to preserve their own outstandingly remarkable values (ORVs), while also establishing clear management standards that could be followed uniformly throughout the National System. Thus, while the categories do not bind administrators

shorelines essentially primitive and waters unpolluted. These represent vestiges of primitive America.

(2) Scenic river areas—Those rivers or sections of rivers that are free of impoundments, with shorelines or watersheds still largely primitive and shorelines largely undeveloped, but accessible in places by roads.

(3) Recreational river areas—Those rivers or sections of rivers that are relatively accessible by road or railroad, that may have some development along their shorelines, and that may have undergone some impoundment or diversion in the past.

Id.

21 Id. § 1281 (a).


26 See id. at 722–23; see also F. Fraser Darling & Noel D. Eichhorn, Man & Nature in the National Parks: Reflections on Policy 27 (1967) (discussing the importance of individualized park management).

to particular plans, they provide adequate guidelines for courts to determine whether the managers of a designated river violate the WSRA by administering it at a lower level than is required to protect the river’s ORVs.\textsuperscript{28}

\section*{B. Section 5 Rivers Versus Section 2 Rivers}

A second innovation within the WSRA was its two-fold mechanism for designating which rivers to study and subsequently to include in the National System.\textsuperscript{29} First, under section 5, rivers can be designated by an act of Congress and administered by the federal government.\textsuperscript{30} Second, rivers can be designated for study under section 2(a)(ii) when a state requests that the Secretary of the Interior study the river.\textsuperscript{31} If approved under section 2(a)(ii) by the Secretary, the river is included in the National System.\textsuperscript{32} The proposal for a state-nominated component of the WSRA was introduced by Senator Edmund S. Muskie of Maine, in direct response to conflicts among federal and state proposals for preserving the Allagash River.\textsuperscript{33} The section 2(a)(ii) method has subsequently proved to be a powerful incentive for encouraging states to include rivers in the National System.\textsuperscript{34}

\begin{itemize}
\item \textsuperscript{30} 16 U.S.C. § 1276.
\item \textsuperscript{31} \textit{Id.} § 1273. Section 5 rivers are written into the WSRA, but section 2 rivers, which enter the National System by approval of the Secretary of the Interior, are not added to the statute. \textit{See id.} § 1274(a).
\item \textsuperscript{32} \textit{Id.} § 1273; \textit{River Mileage Classifications for Components of the National Wild and Scenic Rivers System 1–17} (2007), http://www.rivers.gov (follow “Publications” hyperlink; then follow “Wild & Scenic Rivers Table” hyperlink) [hereinafter \textit{River Mileage Chart}].
\item \textsuperscript{33} Letter from Sen. Edmund S. Muskie, Me., to Sen. Henry M. Jackson, Chairman Interior & Insular Affairs Comm., U.S. Senate (June 8, 1965) (on file with the Edmund S. Muskie Collection, Bates College) [hereinafter Muskie Proposal Letter].
\item \textsuperscript{34} \textit{See Haas}, \textit{supra} note 24, at 7. The WSRA originally listed eight rivers to be instantly included within the National System and administered by either the Secretary of the Interior or the Secretary of Agriculture (the “Instant” rivers) and designated twenty-seven rivers to be included in the system after study. Wild and Scenic Rivers Act §§ 3, 5. Today, the National System includes at least 187 rivers or sections of rivers, at least twenty of which are state-administered rivers. \textit{River Mileage Chart}, \textit{supra} note 32, at 1–17.
\end{itemize}
1. Federally Administered Rivers: Section 5

Section 5 of the WSRA requires the Secretaries of the Interior and Agriculture to study expeditiously each of the rivers that it lists, and to make a report to the President and Congress.35 While the twenty-seven initial study rivers were to be studied, the WSRA protected them from development for five years, effectively granting the Secretaries power to veto any projects by the Federal Power Commission that would affect the characteristics for which the river was to be included in the National System.36 In addition to the initial study rivers, the WSRA allowed for further study rivers to be included under the WSRA through federal administration by act of Congress, and as of January 2007, at least 137 rivers or sections of rivers had been identified for study through section 5.37

The section 5 study process begins with the nomination of a river for inclusion in the National System, which is typically initiated by local citizens, conservation groups, or Members of Congress interested in preserving a river area.38 As the first step in this process, an interdisciplinary study team (IDT) is convened to work in concert with local stakeholders to make initial findings regarding the river’s eligibility.39 The study team uses these initial findings to prepare a long-term management plan, paying particular attention to areas of the river susceptible to land use changes that would threaten the river’s designation under the WSRA.40

The study process, which can be lengthy, is designed to promote coordination and participation in the management of the river among stakeholders.41 The period from introduction of a study proposal to passage of the congressional act authorizing the study often takes sev-

35 16 U.S.C. § 1275(a). The Secretary of Agriculture administers rivers or sections of rivers that flow through federal lands. Id.
36 Wild and Scenic Rivers Act § 7(b); Tarlock & Tippy, supra note 15, at 714.
39 Id. at 10.
40 Id. at 11.
41 Id. at 8–9. Local participation is essential for preserving ORVs—even in federally administered components of the National System—because many river-related values such as wildlife habitat, water quality, and scenery can be influenced by land use outside of a river’s boundaries. Thomas, supra note 22, at 6–7. To this extent, preservation requires mutual trust and cooperation among federal, state, and local governments and landowners. Id.
eral years. During this time, stakeholders are identified, dialogue is fostered among various interest groups, and the amount of local support for designation is assessed. Through this process, Congress can refer to the various stakeholders in the study and require the administering secretary to consult with the groups to encourage public participation in the study plan. Frequently, the last step in preparing a study is a municipal vote to evaluate local support.

Once a study is complete, the IDT makes a recommendation to include a river in the National System through a formal WSR study report. The report includes a suitability analysis that considers three primary factors: (1) whether a river’s ORVs merit protection; (2) whether these ORVs will be protected through designation; and (3) whether any of the non-federal entities who could be responsible for protecting the river have “demonstrated [a] commitment to protect the river.” The final report must comply with the requirements under the National Environmental Policy Act (NEPA) and is reviewed for ninety days by all concerned federal agency officials, including the Secretary of the Army and the Chairman of the Federal Energy Regulatory Commission, and the governor of the state in which the river is located. After the review period, the study is sent to Congress to decide whether to include the river area in the National System.

2. State-Administered Rivers: Section 2(a)(ii)

Section 2(a)(ii) of the WSRA provides for state-administered rivers to be included in the National System. Under this section, the Secretary of the Interior can include a river in the National System upon receipt of an application by the governor of a state in which the

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42 Diedrich & Thomas, supra note 38, at 8.
43 Id. at 8–9.
44 Id. at 9.
45 Id. at 11.
46 Id. at 19.
47 Id. at 17.
49 Diedrich & Thomas, supra note 38, at 20.
Unlike federally administered rivers, which require acts of Congress both to authorize a study and to designate the river, state-administered rivers are included in the National System by approval of the Secretary of the Interior. In practical terms, this process grants to states more control over the nomination, study, and inclusion of a river because the ultimate decision does not require the deliberation of Congress.

a. The Process for Inclusion Under Section 2(a)(ii)

The WSRA allows for the study process to begin with a state request for a joint study conducted by federal and state agencies. In fact, the WSRA requires the Secretary of the Interior to approve a study if one is requested. In order for a river to qualify as a state-administered river under section 2(a)(ii), it must meet certain qualifications. First, the river must have been designated as part of a state’s system for river protection by an act of the state’s legislature. Second, the criteria for which it is protected at the state level must meet the criteria established in the preamble to the WSRA: it must be “free-flowing” and possess one or more “outstandingly remarkable values.” Third, the non-federal lands surrounding the river must be administered by a state agency, and resources must be in place to ensure protection of the ORVs for which the river is being protected.

If all requirements are met, the Secretary of the Interior is required to foster state participation by determining how state and local governments can participate in a preservation plan, and by providing

51 16 U.S.C. § 1273(a). The Governor of Maine’s letter accompanying the AWW application requested that the entire AWW be included in the National System—rather than a portion of the AWW as had been proposed earlier—because “all concerned feel this is as it should be considering the character of the area and our understanding of the intent of the National Act.” Letter from Kenneth M. Curtis, Governor, State of Me., to Walter J. Hickel, U.S. Sec’y of the Interior (May 4, 1970) (on file with Boston College Environmental Affairs Law Review).

52 16 U.S.C. § 1273(a); see Notice of Approval, supra note 3, at 11,525.

53 Haas, supra note 24, at 2.

54 16 U.S.C. § 1276(c).

55 Id. (“The study of any of said rivers shall be pursued in as close cooperation with appropriate agencies . . . as possible . . . if request for such joint study is made by the State.”) (emphasis added).

56 Haas, supra note 24, at 8.

57 Id.

58 16 U.S.C. § 1271; Haas, supra note 24, at 8; see 16 U.S.C. § 1286(b) (defining “[f]ree-flowing” as “existing or flowing in natural condition without impoundment, diversion, straightening, rip-rapping, or other modification of the waterway”).

59 Haas, supra note 24, at 8.
technical assistance to state and local governments and local private interests. During this time, an environmental impact statement is prepared and circulated to the appropriate reviewing agencies in order to comply with NEPA requirements, and public comments are reviewed. Finally, if the Secretary designates a river, it is assigned one of the three classifications in the Act—wild, scenic, or recreational—in order to guide state and local decisions as to which future land uses might be appropriate along the river.

b. Encouraging State Participation

One of the most significant aspects of the section 2(a)(ii) designation process is the limited role played by the federal government. The WSRA notes that all state-administered lands are to be administered “without expense to the United States.” This language has been interpreted to mean that the WSRA prohibits the federal government from spending money on state-administered rivers. As a result, state participation is imperative for rivers admitted into the National System under section 2(a)(ii).

In the early history of the WSRA, a lack of state participation was a significant stumbling block for including state rivers in the WSRA. Between 1968 and 1978, only five state-administered rivers were nominated for inclusion under the Act, despite the fact that Congress had “envisioned a prominent State role” in river designation. A report by the General Accounting Office—the investigative arm of Congress—identified two reasons for the lack of enthusiasm among the states.

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60 16 U.S.C. § 1276(c); Tarlock & Tippy, supra note 15, at 716.
61 Id., supra note 24, at 9.
62 Id.; see Notice of Approval, supra note 3, at 11,525.
64 Id.
66 See H.R. REP. NO. 90-1623, at 3 (1968), as reprinted in 1968 U.S.C.C.A.N. 3801, 3803 (noting that “since the task of preserving and administering such streams is not one that can or should be undertaken solely by the Federal Government, the States ought to be encouraged to undertake as much of the job as possible”).
67 Id., supra note 24, at 6–7.
68 Id. at 6 (quoting COMPTROLLER GENERAL OF THE U.S., FEDERAL PROTECTION AND PRESERVATION OF WILD AND SCENIC RIVERS IS SLOW AND COSTLY 17 (1978)).
69 COMPTROLLER GENERAL OF THE U.S., supra note 68, at 17; HAAS, supra note 24, at 6; see also Jack Hannon & Tom Cassidy, Section 2(a)(ii) of the Wild and Scenic Rivers Act of 1968:
some states felt that inclusion in the WSRA would be “too costly” because the state would bear the burden of administration and land-acquisition costs.\textsuperscript{70} Second, the Department of the Interior had adopted a narrow interpretation of the “without expense to the United States” provision of the WSRA.\textsuperscript{71} As a result, even if the federal government were to spend money on federal lands within a state-administered system, the river could not be admitted under the WSRA.\textsuperscript{72}

An amendment passed in 1978 remedied many of these problems by providing that state-administered rivers would be administered without expense to the federal government “other than for administration and management of federally owned lands.”\textsuperscript{73} Since the 1978 amendment, at least fifteen rivers or segments of rivers have been added as state-administered rivers under the WSRA.\textsuperscript{74}

\textbf{C. Corridor Management After a River is Included in the National System}

Once a river is included in the National System under either section 5 or section 2(a)(ii), it is immune from any new federal resource development project such as dams, water conduits, reservoirs, powerhouses, or transmission lines.\textsuperscript{75} Nonetheless, since protected river areas often include private or state-owned land, this prohibition leaves room for local discretion in land use decisions that could affect the river’s ORVs.\textsuperscript{76} The federal government has “little or no control” over such decisions.\textsuperscript{77} For federally administered rivers, the WSRA grants to Congress some authority to acquire land within a congressionally designated river’s boundaries.\textsuperscript{78} However, owing to the limitations on federal funding and the slowness of the purchase process, these remedies often

\textsuperscript{70} Comptroller General of the U.S., \textit{supra} note 68, at 17.
\textsuperscript{71} See \textit{id.} at 18–19.
\textsuperscript{72} See \textit{id.} at 19.
\textsuperscript{73} National Parks and Recreation Act of 1978, Pub. L. No. 95-625, § 761, 92 Stat. 3467; see Haas, \textit{supra} note 24, at 7.
\textsuperscript{74} River Mileage Chart, \textit{supra} note 32, at 1–18.
\textsuperscript{76} Thomas, \textit{supra} note 22, at 6.
\textsuperscript{77} Id.
leave a large hole in protection. Likewise, for state-administered rivers, the federal government has virtually no recourse for mismanagement because the river area is administered “without expense to the United States.”

In order to mitigate this protection gap, the WSRA relies heavily on cooperation among state and local governments, landowners, and private organizations. This strategy allows a great deal of creativity in developing river management plans, but also demands careful maintenance of relationships among the various entities. For section 5 rivers, federal agencies must tread lightly, balancing their desire to establish uniformity among rivers in the system against the deference required to avoid micromanaging state and local agencies and undermining the trust required for a successful strategy.

Notwithstanding the disparity of federal power between federal and state-administered rivers, the WSRA makes no distinction between the level of rigorousness used to administer each type of river. To that end, the three-tiered category system is used as administration guidelines for all rivers in the system. Within these guidelines, the Secretaries have great discretion in carrying out the purposes of the WSRA. Nonetheless, protection standards still should ensure that a river segment’s classification does not change from one category to another. Thus, while each category should be administered equally to ensure the preservation of ORVs in that category, as a practical matter, wild rivers require more stringent levels of protection than scenic or recreational rivers. Ultimately, although the federal government has virtually no power over state rivers, the WSRA demands that state-administered rivers are not run as “second class” rivers.

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79 Thomas, supra note 22, at 6–7.
81 Thomas, supra note 22, at 6–7.
82 Id.
83 See id.
85 Thomas, supra note 22, at 8.
86 See McMichael v. United States, 355 F.2d 283, 286 (9th Cir. 1965) (noting that “[t]he choice of what shall be preserved is an administrative choice in which geographical and topographical considerations are certainly germane but hardly are subject to judicial review”).
87 Thomas, supra note 22, at 8; Tarlock & Tippy, supra note 15, at 719–20.
89 Marsh, supra note 65, at 23.
D. Incentive and Accountability for State Governments Under Section 2(a)(ii)

The regulatory scheme established by the WSRA includes an ambiguous balance of power between the federal and state governments, particularly with regard to section 2(a)(ii) rivers. The language of the statute does not indicate why the state governments would have any incentive to participate in the WSRA. Equally unclear is the incentive provided for states to administer their rivers in conformance with the categories established by the Act is equally unclear. Although the WSRA explicitly announces a federal interest in preserving the nation’s rivers in their free-flowing condition, it does not issue a mandate to the states to protect this interest. Especially considering that the federal government is prohibited from spending money on state-administered rivers, states are neither persuaded nor explicitly required under the WSRA to adhere to federal standards.

Notwithstanding the lack of explicit incentives in the statute, there are several advantages available to states participating in the WSRA under section 2(a)(ii). The incentive most clearly implicated in the statute is the protection that the WSRA affords against federally sponsored dam projects. This grant of power allowing the states to circumvent congressional designation is most significant when Congress would otherwise reject a designation under section 5 in favor of developing a hydroelectric project. A second advantage of participation in the WSRA is that states may prevent federal control over the rivers within their boundaries. A third, and often noted, purpose for including a river in the system is the publicity value of having it included in the National System.

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92 See id.
93 See id. § 1271.
94 See id. § 1273(a).
95 Hannon & Cassidy, supra note 69, at 151–52; Tarlock & Tippy, supra note 15, at 715.
97 See Hannon & Cassidy, supra note 69, at 151–52 (citing an instance where state designation was used as a political maneuver to prevent dam construction in order to protect the New River in North Carolina).
98 See id. at 152 (noting that the designation of the AWW “came about as a result of a desire within the state to prevent federal control of the river”).
99 See id. (explaining that the designation of the Lumber River in North Carolina under section 2(a)(ii) “appears to have been motivated at least in part by a desire to promote
Moreover, once a river is included in the WSRA, the National System does not encumber the state government with much accountability. Of course, during the application process, states must comply with federal designation requirements, including the preparation of reports to satisfy NEPA requirements. Once a river is in the system, however, the state does not report to the federal government, nor does the federal government have any immediate recourse to ensure that the state administers its rivers for the reasons that the rivers were included in the WSRA. As such, while the federal government must strive to maintain a balance between uniform preservation of national rivers and formation of individual management plans to protect each river’s specific ORVs, the state and local governments owe no such regard to the National System. This distinction places states in a position of power, and reveals at least one unilateral advantage for the states in this particular form of cooperative federalism.

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100 See 16 U.S.C. § 1284(d) (“The jurisdiction of the States over waters of any stream included in a national wild, scenic or recreational river area shall be unaffected by this chapter to the extent that such jurisdiction may be exercised without impairing the purposes of this chapter or its administration.”).

101 See 16 U.S.C. §§ 1271–1287; see H.R. Rep. No. 90-1623, at 3 (1968), as reprinted in 1968 U.S.C.C.A.N. 3801, 3803. As noted above, the WSRA is designed in part to allow rivers to be administered on an individualized basis, since each river is unique. See Haas, supra note 24, at 10–19. Once admitted into the National System under one of the three protective categories, a river can be administered in any number of ways to preserve the values for which it was included. See id.


103 See Robert L. Fischman, Cooperative Federalism and Natural Resources Law, 14 N.Y.U. Envtl. L.J. 179, 200 (2005) (characterizing the section 2(a)(ii) designation process as an example of “procedural favoritism” employed in several schemes of cooperative federalism).
II. The Development of Cooperative Federalism: A “Field of Experiment”

The tradition of dividing power between the federal and state governments in environmental regulation traces its roots to the founding of the Nation. The Supremacy Clause of Article VI of the Constitution states that the “Constitution, and the Laws of the United States which shall be made in Pursuance there of ... shall be the supreme Law of the Land.” Also, the Tenth Amendment declares that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” Throughout the history of the United States, the ongoing effort to interpret this balance of power between the federal and state governments has inspired both creativity and conflict.

While the phrase “cooperative federalism” has its jurisprudential roots in a 1950 decision of the U.S. Court of Appeals for the Ninth Circuit, a symposium published by the Iowa Law Review in 1938 traced the mechanics of cooperative federalism to the middle of the nineteenth century. The symposium identified “an entirely new field of experiment characterized by the participation of several governments in cooperative legislative or administrative action.” In subsequent case law, courts have characterized cooperative federalism in different ways, but have not significantly deviated from this initial description. Yet for as long as this form of cooperation has been an operative principle in government, scholars and statespersons have struggled to identify the allocations of power specific to the federal and state governments in this “field of experiment.”

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105 ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 100 (2d ed. 2005).
106 U.S. CONST. art. VI.
107 U.S. CONST. amend. X.
110 Foreword, Symposium on Cooperative Federalism, 23 IOWA L. REV. 455, 455 (1938).
111 See New York v. United States, 505 U.S. 144, 167 (1992) (stating that cooperative federalism includes statutory programs that “anticipate[] a partnership between the States and the Federal Government, animated by a shared objective”); see also Hodel v. Va. Surface Mining & Reclamation Ass’n, 452 U.S. 264, 289 (1981) (describing “cooperative federalism” as a model “that allows the States, within limits established by federal minimum standards, to enact and administer their own regulatory programs, structured to meet their own particular needs”).
112 Foreword, supra note 110, at 456.
commentators have argued that the ambiguity over these power assignments is an advantage deliberately built into the Republic by the Framers themselves.113

A. Cooperative Federalism in Environmental Regulation

1. Federal Regulation in Pollution Control and Resource Management

The history of a significant federal government presence in the arena of pollution control began in 1970.114 Until then, the regulation of the environment was an area left largely to the states.115 Acting through their residuary Tenth Amendment police powers to protect the health, safety, and welfare of their citizens, the states took primary responsibility for regulating pollution through local land use laws, elementary pollution control statutes, and common law litigation.116 The federal government intervened only after it became clear that pollution did not conform neatly within state boundaries, and that states could not regulate pollution effectively on their own.117

In 1970, the federal government embarked on an initiative to take control of pollution regulation.118 That year, Congress enacted the Clean Air Act (CAA), and President Nixon issued an executive order creating the Environmental Protection Agency.119 In the following decade, Congress enacted more than twenty federal environmental laws, exercising its authority under the Commerce Clause to absorb the responsibilities of the states in the arena of national pollu-

113 See id. at 455 (“This interminable disagreement, with its occasional bitterness, is itself testimony to the wisdom of the constitutional generalization. Had the controls been locked, had the framers precluded the continual experiment and adjustment of state-federal relationships to changing circumstances, the union could not possibly have endured.”).


117 See Percival, supra note 114, at 1157.

118 Id. at 1159.

The development of strong federal legislation during this period was due to a public recognition that the states could not by themselves address the problem of pollution. Not only was the federal government better equipped to provide resources to confront national pollution problems, but it also was immune to interstate competition for pollution control restrictions that devolved into a “race to the bottom” among states vying to attract business. As a result, when states challenged Congress’s authority to regulate under the Commerce Clause, they often lost.

In comparison to the field of pollution control, the federal presence in the arena of resource management is significantly older. Dating from 1849, when Congress created the Department of the Interior to regulate the transfer of public lands to private parties, the federal environmental policy in the mid-nineteenth century focused on the development of natural resources. This period saw a flurry of congressional activity designed to encourage private development of the federal government’s massive land holdings. However, as the century drew to a close, scientific studies challenged the wisdom of unchecked exploitation of natural resources. Federal policy shifted from resource development to resource conservation, resulting in a conflict between federal and state interests that had previously been aligned under development policies. While the conservation movement was not without initial controversy, the Supreme Court ultimately validated the power of the federal government as preempting state laws that conflicted with federal policy.

2. Recent Supreme Court Jurisprudence

The expansive power granted to the federal government in the field of environmental regulation corresponded with a broad interpre-

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120 U.S. Const. art. I, § 8; Glicksman, supra note 108, at 728; Percival, supra note 114, at 1160.
121 Glicksman, supra note 108, at 731–32.
122 Id. at 730–31, 736.
123 Id. at 747; see, e.g., Pennsylvania v. EPA, 500 F.2d 246, 259 (3d Cir. 1974) (noting that “it has seldom if ever been doubted that Congress has power in order to attain a legitimate end” (citing McCulloch v. Maryland, 17 U.S. 316, 420 (1819))).
124 Percival, supra note 114, at 1147.
125 Id.
128 Percival, supra note 114, at 1147–48.
129 Tarlock, supra note 127, at 1342.
tation of the Commerce Clause by the Supreme Court. During the period from 1937 until 1995, the Supreme Court did not strike down a single federal law for exceeding Congress’s power under the Commerce Clause. However, in 1995 in United States v. Lopez, and in 2000 in United States v. Morrison, the Court invalidated two federal statutes as exceeding the scope of Congress’s commerce power. These statutes were invalidated on the grounds that the activities that they regulated did not substantially affect interstate commerce. Since 2000, the Court has not invalidated any further laws as exceeding congressional commerce power. Yet the specter of Lopez and Morrison overshadows all contemporary considerations of Congress’s power to regulate the activities of state and local governments.

Another significant development in constitutional law affecting contemporary conceptions of cooperative federalism is the Supreme Court’s expansive interpretation of the federal government’s power over interstate commerce in the early twentieth century. The Supreme Court affirmed an expansive interpretation of the federal government’s power over interstate commerce in the early twentieth century. See Wickard v. Filburn, 317 U.S. 111, 127–28 (1942) (affirming Congress’s power to regulate intrastate wheat production of local farmers because, although the individual effects of each farmer were trivial, their contributions “taken together with that of many others similarly situated, is far from trivial”); United States v. Darby, 312 U.S. 100, 113 (1941) (holding that Congress had power to regulate manufacturing because “[w]hile manufacture is not of itself interstate commerce the shipment of manufactured goods interstate is such commerce”); Nat’l Labor Relations Bd. v. Jones & Laughlin Steel Corp., 301 U.S. 1, 31 (1937) (finding congressional power to regulate a labor dispute because it affected commerce in so far as it “burden[ed] or obstruct[ed] commerce or the free flow of commerce”).


Morrison, 529 U.S. at 613; Lopez, 514 U.S. at 561.

See generally Gonzales v. Raich, 545 U.S. 1 (2005) (holding that the federal Controlled Substances Act, which criminalized the manufacture and possession of marijuana, did not exceed Congress’s authority, notwithstanding the provisions of California’s Compassionate Use Act of 1996 that authorized the cultivation and use of marijuana for medical purposes).

See Morrison, 529 U.S. at 613; Lopez, 514 U.S. at 561; see also Rapanos v. United States, 126 S. Ct. 2208, 2223 (2006) (interpreting narrowly the definition of “waters” in the Clean Water Act, as applied to wetlands within a state to exclude areas that the federal government sought to regulate); Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng’rs, 531 U.S. 159, 174 (2001) (holding that federal jurisdiction over a waste disposal site exceeded the authority granted under the Clean Water Act, despite the fact that migratory birds used the waters).
Court’s recent jurisprudence on federal preemption of state laws.\footnote{Chemerinsky, supra note 105, at 366–81.} In addition to express preemption, in which Congress explicitly preempts state law on the face of a statute, the Court has found three types of implied preemption: field preemption, conflict preemption, and a state law impeding a federal objective.\footnote{Gade v. Nat’l Solid Wastes Mgmt. Ass’n, 505 U.S. 88, 98 (1992). In Gade, the Court articulated its preemption analysis as follows:}

Pre-emption may be either expressed or implied, and “is compelled whether Congress’ command is explicitly stated in the statute’s language or implicitly contained in its structure and purpose.” Absent explicit pre-emptive language, we have recognized at least two types of implied pre-emption: field pre-emption, where the scheme of federal regulation is “so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it,” and conflict pre-emption, where “compliance with both federal and state regulations is a physical impossibility,” or where state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”

\textit{Id.} (citation omitted).

Congress’ intent, of course, primarily is discerned from the language of the pre-emption statute . . . and the ‘structure and purpose of the statute as a whole,’ as revealed not only in the text, but through the reviewing court’s reasoned understanding of the way in which Congress intended the statute . . . to affect . . . the law.

\textit{Id.} (citation omitted).
B. Federal and State Power Is Unclear from Statutory Language That Explicitly Provides for State Participation

While many federal environmental statutes explicitly delineate the cooperative relationship that they seek to establish among the levels of government, the enforcement of these statutes often reveals different relationships in practice. In the pollution control context, most statutes reflect congressional mindfulness of the traditional role assumed by states for protecting public health, safety, and welfare. The Clean Water Act, for example, states that “[i]t is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution . . . .” Many environmental statutes buttress this policy by allowing states to regulate at stricter levels than the federal government if they choose to do so. However, notwithstanding this deferential language to state regulation, the federal government retains significant, and often primary, enforcement power under these statutes.

In the context of resource management, many statutes emphasize the principal role of the federal government. Rather than recognizing the primary authority of state governments, as pollution control statutes do, these resource management statutes conceive of the federal government sharing its own power with the states. However, many of these statutes simultaneously carve out specific provisions for

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144 33 U.S.C. § 1251(b).


146 See Glicksman, supra note 108, at 740 (“The terminology of state primacy and of federal-state partnerships is misleading, however. The federal pollution control statutes unquestionably put the federal government . . . in the driver’s seat.”).

147 See Fischman, supra note 104, at 200–03.

state power in federal management processes. In statutes that contain language identifying concurrent federal and state power, the assignment of power can be ambiguous on the face of the statute.

The language of power arrangements in these statutes does not ring hollow, and courts often use this language to inform their interpretations of the substantive provisions of these statutes. Yet the language of the statutes themselves offer little insight into the sources of power from which they draw their authority because courts use traditional conceptions of federal and state power to inform their statutory interpretation. Therefore, rather than examining statutory language, a more useful method for analyzing the balance of power in cooperative federalism is to consider how courts have articulated the interaction of the sources of federal and state power when confronted with questions of statutory interpretation.

C. An Early Example of Cooperative Federalism: Liquor Control

One early example of the use of cooperative federalism emerged in the pre-Prohibition control of liquor traffic. In the period between 1843, when Oregon enacted the first territory-wide prohibition law, and the passage of the Eighteenth Amendment in 1919, the federal and state governments experimented with various forms of liquor regulation. During this time, the number of prohibition states ebbed and flowed, falling as low as three in 1904 and rising as high as thirty-two in 1918. States attempting to enforce their prohibition requirements faced significant challenges from outside exporters because state statutes could not interfere with interstate commerce, an area of power explicitly granted to the federal government in the Constitution.

149 See, e.g., Wild and Scenic Rivers Act § 5, 16 U.S.C. § 1276(c) (2000) (requiring the Secretary of the Interior to pursue “[t]he study of any of said rivers . . . if request for such joint study is made by the State”).


152 Id. at 2223 n.7, 2224 (noting that such an expansive interpretation of “waters of the United States” implicated the “outer limits of Congress’s commerce power”).

153 Id.

154 Notes, Symposium on Cooperative Federalism, 23 IOWA L. REV. 635, 637 (1938).

155 Id. at 637–43.

156 Id. at 637.

Without supplemental federal regulation, states were powerless to enforce their prohibition laws.\footnote{\textsuperscript{158}}


To facilitate the states in regulating liquor traffic, Congress passed the Wilson Act, which allowed the states to regulate liquor as soon as it “arrived” within their boundaries.\footnote{\textsuperscript{159}} Under the Wilson Act, intoxicating liquors shipped in interstate commerce could be regulated by state law upon arrival “to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory.”\footnote{\textsuperscript{160}} While the Supreme Court upheld this creative solution as a valid exercise of Congressional authority, the Court almost immediately undercut its effectiveness by holding in several cases that “arrival” into a state meant receipt by an in-state recipient, rather than entrance into state territory.\footnote{\textsuperscript{161}} In response to the Wilson Act, out-of-state shippers simply shipped alcohol directly to customers through mail-order businesses.\footnote{\textsuperscript{162}} Thus, despite Congress’s effort to grant states more regulatory power, neither government retained any control over the liquor industry.\footnote{\textsuperscript{163}} Congress lacked the wherewithal to enact a uniform regulation over interstate commerce that would place the interests of “dry states” over “wet states,” and states could not manage this traffic without interfering with interstate commerce.\footnote{\textsuperscript{164}}

In response, Congress supplemented the Wilson Act with the Webb-Kenyon Act, which explicitly “divest[ed] intoxicating liquors of their interstate character in certain cases.”\footnote{\textsuperscript{165}} Under the Webb-Kenyon Act, Congress deemed it illegal to ship or transport liquor into any

\textsuperscript{158} Notes, supra note 154, at 638.


\textsuperscript{160} 27 U.S.C. § 121.

\textsuperscript{161} Wilkinson v. Rahrer, 140 U.S. 545, 562 (1891) (“No reason is perceived why, if congress chooses to provide that certain designated subjects of interstate commerce shall be governed by a rule which divests them of that character at an earlier period of time than would otherwise be the case, it is not within its competency to do so.”); see also Heyman v. S. Ry. Co., 203 U.S. 270, 274 (1906); Rhodes v. Iowa, 170 U.S. 412, 426 (1898); Vance v. Vandercook, 170 U.S. 438, 452–53 (1898).

\textsuperscript{162} Jane Perry Clark, Interdependent Federal and State Law as a Form of Federal-State Cooperation, 23 IOWA L. REV. 539, 550 (1938); Notes, supra note 154, at 640.


\textsuperscript{164} Id.

state where the liquor was intended to be used in violation of that state’s laws.\textsuperscript{166} As a result, state law provided the substance of the federal law, and liquor was subject to state law as soon as it entered into the state, rather than when it reached its destination.\textsuperscript{167} The Webb-Kenyon Act provided no penalties and could have no practical effect unless the states acted.\textsuperscript{168} Yet this piece of “permissive legislation” allowed the federal government to regulate liquor effectively.\textsuperscript{169} As a result, even after the federal government assumed complete dominion over the field of liquor control through the passage of the Eighteenth Amendment in 1919, the Supreme Court held that the Webb-Kenyon Act was consistent with federal law.\textsuperscript{170}

2. Initial Reactions to the Webb-Kenyon Act

Some early commentators reacting to the Webb-Kenyon Act questioned its constitutional validity.\textsuperscript{171} These responses echoed the sentiments of President Taft, who vetoed the bill on the grounds that it illegally delegated federal authority to the states.\textsuperscript{172} A central purpose for the formation of the United States, Taft argued, “was to relieve the commerce between the States of the burdens which local State jealousies and purposes had in the past imposed upon it . . . .”\textsuperscript{173} By granting states the power to regulate a subject of interstate commerce, states could not only control shipments of liquor within their borders, but also incidentally could control the formation of contracts in other states to which this liquor would be shipped.\textsuperscript{174} Moreover, if this novel legislation could withhold federal regulation over a subject so important as liquor control, “it is difficult to see how [Congress] may not suspend interstate commerce in respect to every subject of commerce whenever the police power of the State can be exercised to hinder or obstruct that commerce.”\textsuperscript{175}

\textsuperscript{166} 27 U.S.C. § 122.
\textsuperscript{167} Id.; Notes, supra note 154, at 641.
\textsuperscript{168} Notes, supra note 154, at 641.
\textsuperscript{169} Id. at 650.
\textsuperscript{170} McCormick Co. v. Brown, 286 U.S. 131, 141 (1932); Notes, supra note 154, at 644.
\textsuperscript{172} 49 Cong. Rec. 4291, 4291–92 (1913) (veto message of President Taft). Congress subsequently overrode President Taft’s veto. Clark, supra note 162, at 552.
\textsuperscript{173} 49 Cong. Rec. 4291, 4292 (1913) (veto message of President Taft); Denison, supra note 163, at 322.
\textsuperscript{174} Kerr, supra note 171, at 580.
\textsuperscript{175} 49 Cong. Rec. 4291, 4292 (1913) (veto message of President Taft).
3. The Supreme Court Rules: *James Clark Distilling Co. v. Western Maryland Railway Co.*

Four years after the passage of the Webb-Kenyon Act, the Supreme Court affirmed its validity in *James Clark Distilling Co. v. Western Maryland Railway Co.* In upholding the Act, Chief Justice Edward Douglass White analyzed in surgical detail the argument that Congress had impermissibly delegated its authority to the states, and concluded that it “rest[ed] on a mere misconception.” Chief Justice White noted that the federal power to regulate interstate commerce is plenary. Congress could use the states in its regulatory scheme if it wanted to do so, and to hold otherwise would be to “announce the contradiction in terms that because Congress had exerted a regulation lesser in power than it was authorized to exert, therefore its action was void for excess of power.” Delegation was not abdication simply because Congress chose to lessen its own power to accomplish a purpose entrusted to it by the Constitution. On the contrary, “the will which causes the prohibitions to be applicable is that of Congress, since the application of state prohibitions would cease the instant the act of Congress ceased to apply.”

III. COMPARING THE WEBB-KENYON ACT TO THE WSRA

A. Similarities Between the Webb-Kenyon Act and the WSRA

Although the Webb-Kenyon Act and the WSRA address fundamentally different subject matters, the relationships that they establish between the federal and state governments are strikingly similar. First, under the WSRA’s section 2(a)(ii), the federal and state governments have entered into a regulatory relationship to accomplish a goal that neither level of government could reach on its own: a uniform system for preserving certain of the nation’s rivers that allows each river to be regulated for its own particular values. Without the

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176 242 U.S. 311, 327 (1917).
177 Id. at 326.
178 Id. at 328.
179 Id. at 331.
180 Id. at 326.
181 Id.
protection of the Federal Act, the states would not be able to preserve their rivers against federal agencies seeking to develop dams and other hydroelectric projects.\textsuperscript{184} Much like state laws under the Webb-Kenyon Act, without federal support the states’ regulatory purposes would be rendered completely powerless due to the federal government’s plenary grant of power under the Commerce Clause to regulate the nation’s rivers.\textsuperscript{185} Likewise, under the WSRA the federal government cannot unilaterally enforce the provisions of the Act among the states, just as it could not under the pre-Prohibition Webb-Kenyon Act.\textsuperscript{186} Rather, preservation of a river requires the coordination of the river’s various stakeholders, just as the regulation of liquor required the cooperation of a multitude of state and local officials.\textsuperscript{187} Thus, without either level of government, both laws would fail to accomplish their purposes.\textsuperscript{188}

Second, under both the WSRA and the Webb-Kenyon Act, in order for the federal government to accomplish its purposes, its regulatory regime provides a place for the states to exercise police powers.\textsuperscript{189} In the context of liquor control, states that chose to prohibit liquor within their borders exercised their police power to protect the health, safety, and welfare of their citizens.\textsuperscript{190} Likewise, in the context of river preservation, the states exercise their traditional powers over land use.\textsuperscript{191} These valid exercises of police power occur through a self-imposed limitation of the federal government’s plenary authority over interstate commerce.\textsuperscript{192} These limitations provide states with the power to regulate an otherwise impermissible area of interstate commerce in conformance with its local preferences.\textsuperscript{193} Yet in each case, “the will which causes [these preferences] to be applicable is that of Congress.”\textsuperscript{194}

\begin{itemize}
  \item \textsuperscript{184} Tarlock & Tippy, supra note 15, at 715.
  \item \textsuperscript{185} U.S. Const. art. I, § 8; H.R. Rep. No. 90-1623, at 3; Tarlock & Tippy, supra note 15, at 715.
  \item \textsuperscript{186} See H.R. Rep. No. 90-1623, at 3; Thomas, supra note 22, at 6.
  \item \textsuperscript{187} See Thomas, supra note 22, at 6–7; Notes, supra note 154, at 641.
  \item \textsuperscript{188} See Thomas, supra note 22, at 6; Tarlock & Tippy, supra note 15, at 715. Moreover, each of these laws required a preceding period of development before reaching an effective balance between federal and state power. Hannon & Cassidy, supra note 69, at 151–52; Notes, supra note 154, at 641–42. These adaptations are consistent with the characterization of cooperative federalism as a “field of experiment.” Foreword, supra note 110, at 456.
  \item \textsuperscript{190} Denison, supra note 163, at 326.
  \item \textsuperscript{191} Rapanos v. United States, 126 S. Ct. 2208, 2223 (2006).
  \item \textsuperscript{192} U.S. Const. art. I, § 8; U.S. Const. art. VI.
  \item \textsuperscript{193} 16 U.S.C. § 1273(a); 27 U.S.C. § 122.
  \item \textsuperscript{194} James Clark Distilling Co. v. W. Md. Ry. Co., 242 U.S. 311, 326 (1917).
\end{itemize}
Finally, under both the WSRA and the Webb-Kenyon Act, if the federal government had elected to exercise its plenary authority under the Commerce Clause, its activity would substantially resemble an exercise of power traditionally reserved to the states.\(^{195}\) In the context of liquor control, the federal government had plenary power to regulate the flow of interstate trafficking.\(^{196}\) Notwithstanding the provisions of the Webb-Kenyon Act, the federal government could exercise this control within a state’s boundaries until the liquor reached its final destination.\(^{197}\) From the time that the liquor crossed state lines until the time that it reached its final destination, the federal government could regulate the flow of liquor entirely within a state.\(^{198}\) This regulation would closely resemble a state’s police power to regulate liquor, but would in fact be a separate exercise of power, drawn from a direct grant of constitutional authority over interstate commerce.\(^{199}\) Similarly, notwithstanding the section 2(a)(ii) provision of the WSRA, the federal government could exercise complete control over “certain selected rivers of the Nation . . . possess[ing] outstandingly remarkable . . . values.”\(^{200}\) If Congress had chosen to regulate these rivers, in spite of the practical challenges of doing so, its regulation would closely resemble an exercise of a state’s traditional police power to regulate land use.\(^{201}\) Yet, again the federal power would be drawn from a higher authority.\(^{202}\)

**B. Differences Between the Webb-Kenyon Act and the WSRA**

No two schemes of cooperative federalism are exactly alike; each is the product of a unique set of circumstances confronting the federal and state governments.\(^{203}\) While the regulatory structure of the WSRA bears substantial similarities to the Webb-Kenyon Act, the two are not identical.\(^{204}\) The most significant difference is the manner in which the

\(^{195}\) *Rapanos*, 126 S. Ct. at 2223; *James Clark Distilling Co.*, 242 U.S. at 326.


\(^{197}\) See *Clark*, *supra* note 162, at 550.

\(^{198}\) See *id.*

\(^{199}\) U.S. Const. art. I, § 8; *Clark*, *supra* note 162, at 550.


\(^{201}\) See *Rapanos v. United States*, 126 S. Ct. 2208, 2223 (2006); *Thomas*, *supra* note 22, at 6–7.

\(^{202}\) See U.S. Const. art. I, § 8.

\(^{203}\) See Foreword, *supra* note 110, at 456 (describing judicial determinations of federal and state power as a “kaleidoscopic federalism”).

Acts allow for state regulation.205 Under the Webb-Kenyon Act, the federal government literally completely divested itself of authority over liquor shipped in interstate commerce when use of that liquor would conflict with state laws.206 In contrast, under the WSRA the federal government simply provides an independent method for states to participate in regulation, but does not cut short its own power.207

Moreover, under the WSRA, a state’s regulatory authority is conditioned upon its fulfillment of its obligation to administer rivers in a manner that protects the values for which the rivers are included in the system.208 In *James Clark Distilling Co. v. Western Maryland Railway Co.*, Chief Justice White noted that even when the federal government divests itself of regulatory control, it retains power over the subjects entrusted to it by the Constitution.209 Thus, the relationship established by the WSRA lends even stronger force to Chief Justice White’s argument that the federal government does not delegate power to the states simply when it includes them as part of a regulatory system.210

IV. THE BOUNDARY BETWEEN FEDERAL AND STATE POWER IN THE WSRA

A basic premise of constitutional law is that the federal government can only act to the extent of its constitutionally allotted power.211 Yet when the federal government does act, its laws are supreme.212 In schemes of cooperative federalism, the boundary between this plenary federal power and the residual police power belonging to the states is difficult to distinguish, and the WSRA is no exception.213 However, the Supreme Court clearly determined this boundary under the regulatory regime established by the Webb-Kenyon Act.214 Because of the similari-

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208 16 U.S.C. § 1284(d). (“The jurisdiction of the States over waters of any stream included in a national wild, scenic or recreational river area shall be unaffected by this [Act] to the extent that such jurisdiction may be exercised without impairing the purposes of [the Act] or its administration.” (emphasis added)).
209 242 U.S. 311, 326 (1917).
210 See 16 U.S.C. § 1273(a); *James Clark Distilling Co.*, 242 U.S. at 326.
212 U.S. Const. art. VI; McCulloch v. Maryland, 17 U.S. 316, 406 (1819).
ties between the WSRA and the Webb-Kenyon Act, much of the Court’s analysis of the Webb-Kenyon Act is applicable to the WSRA.\textsuperscript{215}

\textbf{A. The State of Maine’s Exercise of its Police Power}

In passing Legislative Document 2077, the Maine legislature used its police power to downgrade the AWW from a “wild” river area to a “scenic” river area by adding six roads and permanent bridges to the river area.\textsuperscript{216} In doing so, the legislature shattered the compromise that Senator Muskie had carefully brokered between federal and state interests under section 2(a)(ii) of the WSRA.\textsuperscript{217} Congress made careful provisions in the WSRA to protect the states’ police power to regulate national wild and scenic rivers.\textsuperscript{218} It noted in the WSRA that so long as the states fulfilled the declared federal purpose, the jurisdiction of the states over waters within their boundaries would not be affected by the Act.\textsuperscript{219} In exchange for this grant of power, the federal government filled a critical gap in its preservation scheme.\textsuperscript{220} When the federal government restricts itself, the states can exercise their police powers free of the federal government, and this freedom translates into a more powerful cooperation among state and local stakeholders in protecting rivers in the National System.\textsuperscript{221}

Neither the Webb-Kenyon Act nor the WSRA can function effectively without state participation.\textsuperscript{222} Moreover, neither statute provides the federal government with a remedy when the states do not adhere to the federal regulatory scheme.\textsuperscript{223} But neither of these characteristics alone determines the boundaries of power between the federal and state governments.\textsuperscript{224} Because statutes are specific exercises of underlying constitutional authority, many schemes of cooperative federalism include statutory language that does not adequately reflect

\begin{flushleft}
\textsuperscript{216} 16 U.S.C. § 1273(b); Act of Aug. 23, 2006, ch. 598, 2006 Me. Acts 1577.  \\
\textsuperscript{217} See Muskie Proposal Letter, \textit{supra} note 33.  \\
\textsuperscript{218} 16 U.S.C. § 1273(a).  \\
\textsuperscript{219} Id. § 1284(d).  \\
\textsuperscript{221} See \textit{Thomas, supra} note 22, at 6–7.  \\
\textsuperscript{222} See \textit{id. at} 6; Notes, \textit{supra} note 154, at 641.  \\
\textsuperscript{224} See U.S. Const. art. VI.; U.S. Const. amend. X.
\end{flushleft}
the balance of power among levels of government.\textsuperscript{225} It is only when courts examine the constitutionality of these statutes that the sources of power from which they derive are identified.\textsuperscript{226}

In \textit{James Clark Distilling Co. v. Western Maryland Railway Co.}, the Supreme Court held that when a state exercises its police power as part of a federal regulatory scheme, its power is subject to the will of Congress.\textsuperscript{227} Under both the Webb-Kenyon Act and the WSRA, the federal regulatory scheme grants nearly unbridled authority to the state governments to regulate within the federal system.\textsuperscript{228} Also, in both cases the state’s regulation closely resembles an activity traditionally regulated under the state’s police power; states have traditionally regulated both alcohol and land use to protect health, safety, and welfare.\textsuperscript{229} Yet the fact that both regulations are part of a larger federal scheme implicates the Supremacy Clause.\textsuperscript{230} The broad power to regulate that the states enjoy derives not from their traditional authority, but from a grant of power from the federal government to fulfill a federal purpose.\textsuperscript{231} When Maine downgraded the AWW from a "wild" to a "scenic" river, it ceased to fulfill the purpose of the federal act that granted its own power to regulate.\textsuperscript{232} Therefore, Maine’s legislature exceeded its authority to regulate the river within the three categories established by the WSRA.\textsuperscript{233}

While Maine could argue that passing Legislative Document 2077 was a valid act of its traditional police power over land use, this argument would implicate the absurdity identified by Chief Justice White in \textit{Clark Distilling Co.}\textsuperscript{234} Maine would either argue that it was the will of Congress for Maine to violate the purpose of its own Federal Act, or, if downgrading the AWW was not Congress’s purpose, then Congress delegated its authority to Maine under the WSRA.\textsuperscript{235} Such an argument would result in one of two possible absurdities: if Congress did not delegate its power to Maine, then Congress intentionally violated

\begin{itemize}
\item \textsuperscript{225} See supra Part II.B.
\item \textsuperscript{227} 242 U.S. at 326.
\item \textsuperscript{228} 16 U.S.C. § 1284(d); 27 U.S.C. § 122.
\item \textsuperscript{229} See \textit{Rapanos}, 126 S. Ct. at 2223; \textit{Bowman v. Chi. & Nw. Ry.}, 125 U.S. 465, 476 (1888).
\item \textsuperscript{230} U.S. CONST. art. VI; \textit{McCulloch v. Maryland}, 17 U.S. 316, 406 (1819).
\item \textsuperscript{231} 16 U.S.C. § 1273(a); 27 U.S.C. § 122.
\item \textsuperscript{233} See 16 U.S.C. § 1284(d); Act of Aug. 23, 2006, ch. 598, 2006 Me. Acts 1577.
\item \textsuperscript{234} See 242 U.S. 311, 331 (1917).
\item \textsuperscript{235} See id.
\end{itemize}
its own Act; but if Congress unconstitutionally delegated its own power to Maine, then Congress exceeded its authority by exerting less power than it was required to assert.236

B. Analyzing the WSRA Under Contemporary Environmental Law

Like other federal resource management statutes, the WSRA draws its power from the Commerce Clause.237 Congress could have developed a hydroelectric project on the AWW, but decided instead to preserve the AWW for its natural beauty as a wilderness canoe area.238 Having decided that preservation is in the best interests of the nation, the federal government must rely on the State of Maine for assistance to maintain the river perpetually so as to preserve those values for which it was included in the National System.239

In maintaining the AWW, the State of Maine acts under its traditional police power to regulate land use.240 Yet, while Maine is charged with administering the AWW, it does not have a concurrent obligation to ensure that the AWW is regulated consistently with other rivers in the National System with similar values.241 Indeed, one of the principle strengths of the WSRA is that Maine need not concern itself with other rivers, but only must manage the AWW to preserve its particular values as a canoe area.242 Under the WSRA, the interest in uniformity of preservation is a federal concern, one that the federal government addresses by admitting state-administered rivers under one of the three protective categories.243

By admitting the AWW as a “wild” river area, the federal government established it as a “nationally significant waterway[].”244 Even under a narrow interpretation of the congressional Commerce Clause power, a court would most likely find that the WSRA is a valid exercise of federal power.245 The AWW attracts visitors from Maine, Massachusetts, Connecticut, New Hampshire and Vermont, all of whom must

236 See id.
237 U.S. Const. art. I, § 8; see Glicksman, supra note 108, at 748–49.
238 16 U.S.C. § 1273(a); Notice of Approval, supra note 3, at 11,525; Maine State Park and Recreation Comm’n, supra note 23, at 13.
241 See Notice of Approval, supra note 3, at 11,525; Fischman, supra note 104, at 200.
242 See 16 U.S.C. § 1284(d) (“The jurisdiction of the States over waters of any stream ... shall be unaffected by this Act ...” (emphasis added)).
243 16 U.S.C. §§ 1271, 1273; Thomas, supra note 22, at 8.
244 Notice of Approval, supra note 3, at 11,525; Muskie Proposal Letter, supra note 33.
245 16 U.S.C. § 1273(a); see discussion supra Part II.A.
pay for the privilege of enjoying its outstanding wilderness experience. Thus, the regulation of the AWW almost certainly implicates activities that “substantially affect” interstate commerce.

While the federal government has authority under the Commerce Clause to regulate the AWW under the WSRA, the issue of preemption presents a more interesting question, particularly given Maine’s role under section 2(a)(ii). When a state fulfills its obligations under the WSRA to protect the values for which a river was included in the National System, that state acts within its grant of statutorily permitted power from the federal government. However, when the state fails to preserve such values, or takes affirmative steps in contradiction to federal regulatory objectives, it is not immediately clear which type of preemption applies. Under the WSRA, the federal government did not expressly preempt state regulation, nor did it intend to occupy the field; the statutory language is clear that the federal government intended at least some participation from state governments.

Although the Federal Government intended participation from state governments, it granted power to the states to regulate only “to the extent that such jurisdiction may be exercised without impairing the purposes of [the WSRA] or its administration.” Therefore, when a state administers a river in such a way as to downgrade it within the National System, it infringes on federal regulatory authority. Interestingly, the WSRA does not specifically declare that downgrading a river constitutes an infringement of its federal purposes. However, when the WSRA states that “certain selected rivers . . . possessing outstandingly remarkable . . . values, shall be preserved in free-flowing condition,” it implicitly provides that these ORVs are pre-

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249 Id. § 1284(d).


252 Id. § 1284(d).

253 See id.

254 See id. §§ 1271–1287.
served when a river is administered in its free-flowing condition within its designated category in the National System.\textsuperscript{255} When a state passes legislation to downgrade a river, it fails to preserve these ORVs, and violates the explicit mandate to protect the designated rivers “for the benefit and enjoyment of present and future generations.”\textsuperscript{256} Under the WSRA, any such action is preempted as either directly conflicting with the federal statute or impeding its purpose.\textsuperscript{257}

Federal law requires a “clear and manifest purpose” for Congress to preempt an area of law such as land use that is traditionally regulated under a state’s police power.\textsuperscript{258} Although Maine regulates the AWW using its state police power, it exercises this power on behalf of the federal government, which could exercise its own power over the AWW if it chose to do so.\textsuperscript{259} Thus, the regulation of the AWW is not an area of law traditionally regulated under the state’s police power because Congress has declared that preservation of the AWW is “the policy of the United States.”\textsuperscript{260} Congress has a history of managing the nation’s resources that dates to the mid-nineteenth century, and it applied its traditional federal power over rivers to the AWW by admitting it to the National System as a wild river.\textsuperscript{261} Because this area of law is not regulated traditionally under the state’s police power, Congress does not require a clear and manifest purpose to preempt state law in order to regulate the AWW.\textsuperscript{262}

Nevertheless, although Congress’s clear and manifest purpose is not required to preempt the Maine law, such purpose is evident from the terms of the WSRA.\textsuperscript{263} The WSRA states that “[t]he jurisdiction of the States over waters of any stream included in a national wild . . . river area shall be unaffected by this [Act] to the extent that such jurisdiction may be exercised without impairing the purposes of this [Act] or its administration.”\textsuperscript{264} However, the WSRA also states that its purpose is to implement the federal policy that the AWW “shall be

\begin{itemize}
\item[255] See id. §§ 1271, 1273(b).
\item[256] See id. § 1271.
\item[257] See 16 U.S.C. § 1284(d).
\item[261] H.R. Rep. No. 90-1623, at 3; Percival, supra note 114, at 1147.
\item[262] Contra Rapanos, 126 S. Ct. at 2223.
\item[263] Id. §§ 1271, 1273.
\item[264] Id. § 1284(d).
\end{itemize}
preserved in free-flowing condition.” Therefore, to the extent that the State of Maine violates its obligation to preserve the AWW as a “wild” river, the State’s legislation is clearly and manifestly preempted by this federal purpose.

C. Federal Supremacy Under James Clark Distilling Co. v. Western Maryland Railway Co.

The example of the Webb-Kenyon Act brings into relief the power relationship between the federal and state governments under the WSRA. Under both Acts, the federal government granted power to the states to regulate a subject of interstate commerce uninhibited by federal government intervention. In the Webb-Kenyon Act, Congress enabled the states to regulate liquor that would be imported into their boundaries through interstate commerce. Likewise, under the WSRA, the federal government granted the State of Maine power to perpetually administer the AWW as a wild river.

Under the Supremacy Clause, the WSRA governs the administration of the AWW as the supreme law of the land. In the WSRA, the federal government carves out a certain amount of its own power to allow Maine to regulate the AWW. While the WSRA establishes a relationship of mutual dependence between the federal and state governments, any power that Maine exerts under the WSRA is exercised by the will of Congress. The presumption that Maine’s regulation is better suited to preserving the federal purpose is why the federal government grants such broad authority to Maine in the regulatory scheme. Thus, while the WSRA distinguishes between a uniform federal classification scheme and a process of individualized local administration, this regulation falls entirely under the auspices of Congress. Once Maine failed to preserve the AWW in order to

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265 Id. § 1271.
266 See id. § 1273(b); Act of Aug. 23, 2006, ch. 598, 2006 Me. Acts 1577.
269 27 U.S.C. § 122; Notes, supra note 154, at 641.
270 16 U.S.C. § 1273 (a); Notice of Approval, supra note 3, at 11,526.
271 U.S. CONST. art. VI.
275 See 16 U.S.C. §§ 1273(a), 1281(a); James Clark Distilling Co., 242 U.S. at 327.
protect its ORVs, it threatened the federal interests in the river, and exceeded the boundaries of power allocated to it by the federal government.²⁷⁶

**Conclusion**

The AWW is one of the nation’s most treasured canoe areas, and under the protective auspices of Congress and the State of Maine, it has enjoyed the protection of the “wild” river designation since 1970. That year represented a landmark in the federal government’s foray into the field of environmental protection, and it is fitting that the AWW is a memorial to the strong federal presence in environmental law. Nevertheless, the federal power over resource management dates to the middle of the nineteenth century. In this traditional area of federal concern, the power of the federal government stands as an obstacle to any state or local authorities that seek to deteriorate the values for which the AWW was included in the National System.

The WSRA is an example of cooperative federalism in the “field of experiment” between the federal and state governments. Under this form of regulation, the states can exercise their police powers over land use, while the federal government can harness the power of the states to fulfill its federal objectives. When the states fulfill their obligations under the WSRA, it represents a unique and inventive answer to a preservation challenge facing both levels of government. However, if the states use their authority in contravention of the federal purpose, their acts are preempted by the Supremacy Clause. Only when Maine’s legislation is deemed preempted by federal law can the WSRA continue to protect the AWW as a vestige of primitive America for the benefit of present and future generations.

ZONING OUT: STATE ENTERPRISE ZONES’ IMPACT ON SPRAWL, JOB CREATION, AND ENVIRONMENT

Sarah Kogel-Smucker*

Abstract: State enterprise zone programs are a common type of economic development incentive. These programs designate certain geographical areas as enterprise zones and provide tax breaks to qualified businesses located within those zones. Depending on the location of the geographical area chosen, enterprise zone programs may contribute to sprawl development. This Note first provides an overview of state enterprise zone programs. Second, this Note examines the programs’ environmental impact by exploring their link to sprawl development. This Note ultimately argues that states should bring enterprise zone programs in line with smart growth principles. This Note also argues that advocates for such reform will be more successful if they are mindful of communities’ need for job creation and economic development. Consequently, this Note provides an overview of the economic literature evaluating state enterprise zone programs, and an overview of the evolving dynamic between job proponents and environmental advocates.

INTRODUCTION

In today’s global marketplace, states struggle to ensure that their local economies prosper.1 To encourage economic development, most states invest significant revenue in a variety of tax incentives.2 One common type of economic development incentive is state enterprise zone programs, which are employed by over forty states in the

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United States. These programs designate certain geographical areas as enterprise zones and provide tax breaks to qualified businesses located within those areas. While the goals of the state programs vary, most programs aim to stimulate business and investment in economically depressed areas, create jobs, generate economic growth, and address the impacts of economic dislocations.

Environmental advocates, however, have linked state enterprise zone programs to sprawl development. This link concerns environmentalists because they contend that sprawl development causes the destruction of natural areas, and increases air and water pollution. For environmental advocates, then, states should avoid these environmental harms by promoting smart growth instead of sprawl development. Attempts by advocates to address the environmental impact of enterprise zone programs, however, could be interpreted by zone communities as demanding a choice between jobs and environmental conservation, since enterprise zones are, in part, job creation programs.

Since state enterprise zone programs are job creation programs that have been linked to sprawl, a critical evaluation of these programs requires both an evaluation of the programs’ environmental impact and of their success at job creation. Many communities view these two needs—job creation and environmental protection—as conflicting. Consequently, successful reform of any of the programs’ shortcomings requires an understanding of the evolving dynamic be-


8 Paving Paradise, supra note 7.

9 See Engberg & Greenbaum, supra note 4, at 165; Paving Paradise, supra note 7.

10 See Engberg & Greenbaum, supra note 4, at 165; Subsidizing Sprawl, supra note 6, at 9, 12.

tween job proponents and environmental advocates. In addition, reform of the programs to address their links to sprawl may pit proponents of unfettered economic growth against advocates of more targeted planning.

Part I of this Note provides an overview of state enterprise zone programs in regards to the programs’ history, goals, structures, and benefits. Part II documents the environmental impact of the programs, stemming from the programs’ contribution to sprawl development. Since addressing the environmental impact raises a potential conflict between jobs and environmental protection, Part III reviews the dynamic of the potential conflict between advocates of jobs and environmental advocates. Part IV surveys the economic literature’s evaluation of state enterprise zone programs. Part V argues that states should explicitly consider the environmental impact of state enterprise zones. Part V further argues that state legislatures should revise their enterprise zone programs to address the programs’ links to sprawl development and to bring the programs in line with smart growth. Lastly, Part V argues that environmental advocates attempting to revise state enterprise zone programs should evaluate the programs against their stated economic goals, since, as evaluated in the bulk of economic literature, many of these programs fail to meet these goals.

I. Overview of State Enterprise Zone Programs

States forgo significant revenue to provide economic development incentives in order to attract business development and create jobs. One study estimated that in 1996, states and localities nationwide forwent $48.8 billion dollars in revenue through tax credits and subsidies to businesses. State enterprise zone programs are one

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15 Lynch, supra note 2, at 1.
common type of incentive that designate certain geographical areas as enterprise zones and provide tax breaks to qualified businesses located within those areas. Typical incentives include “property tax abatements, state corporate income tax credits for job creation and investment, sales and use tax exemptions, lower utility rates, and tax-free low-interest loans.” As of 2004, more than forty states had some form of enterprise zone program.

A. History and Goals of State Enterprise Zone Programs

Localities in the United States have used tax incentives to attract businesses since the colonial period. In fact, Alexander Hamilton received a tax incentive to site a factory in New Jersey in 1791. The concept of enterprise zone programs, however, was developed by British academics in the late 1970s and championed by conservative members of Parliament who believed that lessening the tax burden in struggling cities would spur local investment and business growth. The idea was popularized in the United States by Stuart Butler, a policy analyst at the conservative think tank, the Heritage Foundation. Though national legislation initially failed, states began enacting enterprise zone programs in the early 1980s.

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16 Greenbaum, supra note 2, at 67; see Engberg & Greenbaum, supra note 4, at 165.
17 Talanker, Davis & LeRoy, supra note 3, at 5.
18 Greenbaum, supra note 2, at 67.
19 Buss, supra note 1, at 91.
20 Id.
21 Alan H. Peters & Peter S. Fisher, State Enterprise Zone Programs: Have They Worked? 24 (2002). The constitutionality of state tax incentives under the Commerce Clause was challenged by local taxpayers in a recent case, DaimlerChrysler Corp. v. Cuno, 126 S. Ct. 1854, 1859 (2006). The Court rejected the plaintiffs’ claims by holding that they lacked standing to challenge the state tax incentives in federal court. Id. at 1864. It is beyond the scope of this Note to address Commerce Clause challenges to these programs. While a Supreme Court ruling that state tax incentives violate the Commerce Clause could alter drastically the analysis provided in this Note, the impact of state enterprise zone programs is significant enough to warrant analysis under the current state of the law. See generally Sherry L. Jarrell et al., Law and Economics of Regulating Local Economic Development Incentives, 41 Wake Forest L. Rev. 805 (2006), for an overview of this issue.
State enterprise zone programs vary in goals, structure, and benefits. Stated goals often include stimulating business and investment in economically depressed areas, creating jobs, generating economic growth, and addressing the impact of economic dislocations. For example, the Alabama enterprise zone statute states:

[T]here are certain economically depressed areas in such cities that need particular attention to create new jobs, stimulate economic activity and attract private sector investment rather than government subsidy to improve the quality of life of their citizens. It is the purpose of this section to encourage new economic activity in these depressed areas . . . .

Similarly, the California enterprise zone statute’s stated purpose is “to stimulate business and industrial growth in the depressed areas of the state by relaxing regulatory controls that impede private investment.”

Justifications for using enterprise zone programs to achieve such goals vary. Some proponents argue that areas that businesses regard as high-risk need additional incentives to secure investment. According to these proponents, it is worthwhile to attract such investment because poverty tends to concentrate in certain geographical areas; therefore, one must stimulate economic growth in economically depressed areas to address poverty. Enterprise zone programs are thus developed from a belief that anti-poverty policies must address community development rather than solely focusing on individual achievement. For instance, the Illinois enterprise zone statute’s stated purposes include “stimulating neighborhood revitalization of depressed areas of the State . . . .” Enterprise zones located in urban areas also address the perceived inequity often referred to as the “spatial mismatch hy-

24 Peters & Fisher, supra note 21, at 27.
27 Cal. Gov’t Code § 7071; see also La. Rev. Stat. Ann. § 51:1782 (2003) (declaring the purpose of the state’s enterprise zone program as “to stimulate business and industrial growth in these areas of the state by the relaxation of governmental controls, by providing assistance to businesses and industries, and by providing tax incentives in these areas”).
28 Buss, supra note 1, at 91.
30 Greenbaum, supra note 2, at 68–69.
31 Engberg & Greenbaum, supra note 4, at 165.
hypothesis.” This hypothesis states that inner-city residents are often barred from accessing flourishing suburban job markets by inadequate transportation and cultural barriers.

Other proponents focus on the state economy, arguing that enterprise zone incentives are needed to keep businesses from moving to other states, aid struggling firms, and attract out-of-state businesses. The California enterprise zone statute, for instance, states that the enterprise zone program will serve to “help attract business and industry to the state, to help retain and expand existing state business and industry, and to create increased job opportunities for all Californians.”

B. Structure and Benefits of State Enterprise Zone Programs

The structures of enterprise zone programs vary by state, and some state programs adopt different names such as Pennsylvania’s Keystone Opportunity Zones. Despite these variations, most programs share common characteristics. Each state program has a “central zone-coordinating agency” that administers the program statewide and a local body that governs individual zones. Each state program also delineates criteria for an area to be designated as an enterprise zone. Many states limit the total number of enterprise zones that can be created in a year and the total number of enterprise zones statewide. As a result of such limitations, every qualifying area is not guaranteed zone

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33 Peters & Fisher, supra note 21, at 41.
34 Id. at 41–42.
35 Buss, supra note 1, at 91.
36 Cal. Gov’t Code § 7071 (West 2007); see also S.C. Code Ann. § 12-10-20 (2000) (stating that an intent of the state’s enterprise zone act was “to induce the location or expansion of manufacturing, processing, services, distribution, warehousing, research and development, corporate offices, and certain tourism facilities within the State”).
38 Engberg & Greenbaum, supra note 4, at 165.
39 Id. The programs are usually administered under the state departments of economic development or departments of commerce. See, e.g., Cal. Gov’t Code §§ 7072(a), 7073(b)(1) (West 2007) (stating that the Department of Housing and Community Development shall designate enterprise zones); N.Y. Gen. Mun. Law §§ 957(b), 959 (McKinney 2004) (stating that New York’s empire zone program is administered by the Commissioner of Economic Development).
40 Engberg & Greenbaum, supra note 4, at 165.
41 Talanker, Davis & LeRoy, supra note 3, at 5.
status. Some states require the passage of a local ordinance, public notice, and a public hearing before a locality can apply for zone designation. States’ criteria for zone designation may include unemployment level, a maximum threshold for zone resident income levels, population loss, and a certain percentage of vacant buildings. States sometimes set stricter criteria for zone designation initially and then amend the program so that more areas qualify for enterprise zones. At least eleven states have expanded their original zone eligibility criteria by extending enterprise zone benefits throughout the state, adding “non-contiguous land” to a zone, extending eligibility benefits to businesses not located within a zone, or enlarging the size of their zones.

All states also require businesses to meet certain criteria in order to qualify for zone benefits, but criteria vary by state. The vast majority of programs require a business to be located in the zone. Many programs require either a “minimal capital investment” or that businesses create a certain number of jobs within the zone. Some states tie incentive levels to the number of jobs created or the level of capital investment. Other states require businesses to hire employees who live within the zone and some require businesses to pay at least a minimum specified wage.

States also differ with respect to the benefits they provide. Typical zone benefits include an investment tax credit and a job tax credit. Other benefits include: assistance for job training; increased funding for infrastructure and public services; sales tax exemption; local property tax abatement applied to real property improvements; and full or partial exemption from income tax on profits attributable to zone investment. Some states provide certain benefits statewide, with additional benefits for businesses located within the zones, while other states limit benefits to businesses located within the zones. A

42 See id.
43 Id.
44 Id.; Engberg & Greenbaum, supra note 4, at 165.
45 See Talanker, Davis & LeRoy, supra note 3, at 38–39.
46 See id.
47 Engberg & Greenbaum, supra note 4, at 165.
48 Id.
49 Id.
50 Id.
51 Talanker, Davis & LeRoy, supra note 3, at 5.
52 Engberg & Greenbaum, supra note 4, at 165.
53 Peters & Fisher, supra note 21, at 32.
54 Id.; Engberg & Greenbaum, supra note 4, at 166.
55 See Peters & Fisher, supra note 21, at 32.
1992 survey of 112 cities, forty-four of which contained enterprise zones, found that the total incentive package for businesses in cities that had enterprise zones was on average two to three times higher than the average incentive package for businesses in cities without enterprise zones.\textsuperscript{56}

C. Example: New York State’s Empire Zone Program

New York State’s empire zone program provides an example of how one state has structured its enterprise zone program.\textsuperscript{57} New York State’s empire zone program designates targeted areas across the state as “empire zones.”\textsuperscript{58} As of November 2007, there were eighty-two empire zones statewide.\textsuperscript{59} To be considered for zone designation by the state, a municipality must adopt a local law authorizing a municipal corporation to submit an application for zone designation.\textsuperscript{60} To be eligible for zone designation, an area must be characterized by “pervasive poverty, high unemployment and general economic distress.”\textsuperscript{61} The application must demonstrate local support, economic planning, and existing infrastructure within the zone.\textsuperscript{62} Once a zone is designated, all businesses located within the zone may apply for a real property tax exemption, a tax credit for qualified investments in the empire zone capital corporation and community development projects, and a refund or credit of state and local sales taxes for purchases of goods or services within the zone.\textsuperscript{63}

\textsuperscript{56} Id. at 33.

\textsuperscript{57} Though the program was established in 1986, from 1986 until 1999 empire zones were called economic development zones. Office of Budget & Policy Analysis, Office of the State Comptroller, New York State: The Agenda for Reform 91, 93 (2006). New York is one of many state enterprise zone programs that has a name other than enterprise zones. See Peters & Fisher, supra note 21, at 21.

\textsuperscript{58} N.Y. Gen. Mun. Law § 957(d) (McKinney 2004).


\textsuperscript{60} N.Y. Comp. Codes R. & Regs. tit. 5, § 10.3(a) (2007).

\textsuperscript{61} Id. § 10.4(a). A zone is designated by the Empire Zone Designation Board, which is comprised of the Commissioner of Taxation and Finance, the Director of the Budget, the Commissioner of Labor, two members appointed by the governor, one member appointed by the president of the state senate, and one appointed by the speaker of the state assembly. N.Y. Gen. Mun. Law § 960(a).

\textsuperscript{62} N.Y. Gen. Mun. Law § 961. In 2005 the New York State Legislature amended its empire zone program to require that any application for zone designation demonstrate that there is no viable alternative area that has existing public water or sewer infrastructure. Id.

\textsuperscript{63} N.Y. Real Prop. Tax Law § 485-e (McKinney 2006); N.Y. Tax Law §§ 210(20), 606(i), 606(l), 1456(d), 1511(h), 1119(a), 1210 (McKinney 2006); N.Y. Comp. Codes R. &
Businesses within the zone that become jointly certified by the local zone administrators and the state are eligible to receive additional incentives, including an investment tax credit against corporate franchise tax and personal income tax, a wage tax credit, and a real property tax credit. The result of these incentives is that certified businesses that create jobs can operate on an almost “tax-free” basis for up to ten years. To become certified, a business located within an empire zone must submit a completed application that must be approved by the local zone administration board, local zone certification officer, the Commissioner of Economic Development, and the Commissioner of Labor. As of November 2007, the State’s zones contained over 9800 certified businesses that reported employing over 380,000 people.

II. ENVIRONMENTAL IMPACT OF STATE ENTERPRISE ZONE PROGRAMS

The environmental impact of state enterprise zone programs largely depends on where the zones are designated. Under the original vision of state enterprise zone programs, the programs could function as part of smart growth efforts at urban revitalization because they encouraged businesses to redevelop blighted urban areas. In many

Regs. tit. 5, § 11.1(c)(1)–(3). An empire zone capital corporation is a corporation that may be established through approval by the zone board and the Commissioner of the Department of Economic Development to raise funds to make both loans to certified businesses and investments in those businesses. N.Y. Gen Mun. Law § 964 (Consol. 2006).

64 N.Y. Tax Law §§ 14, 15, 210, 606, 1456(e), 1456(o), 1511(t), 1511(s) (McKinney 2006); N.Y. Comp. Codes R. & Regs. tit. 5, § 11.1.


66 See N.Y. Gen. Mun. Law §§ 957(b), 963(a) (Consol. 2006).


states, however, enterprise zones have not been limited to blighted urban communities. Rather, zones have been designated outside urban centers in a manner that environmental advocates contend contribute to sprawl.

A. Enterprise Zones’ Impact on Development Patterns: Sprawl and Smart Growth

Sprawl has a range of definitions. Richard Moe, President of the National Trust for Historic Preservation, has defined sprawl as “low-density development on the edges of cities and towns that is poorly planned, land-consumptive, automobile-dependent [and] designed without regard to its surroundings.” Similarly, the organization Smart Growth America has defined sprawl as “the outcome of four factors: low residential density; a poor mix of homes, jobs, and services; limited activity centers and downtown areas; and limited options for walking and biking.” Development advocates contend, however, that many Americans favor so-called sprawl development.

Enterprise zone programs can increase sprawl development if structured in ways that incentivize that sort of development. Environmentalists contend that one way enterprise zone programs contribute to sprawl development is by failing to ensure that zone locations are accessible by public transportation. A 2003 report, Missing the Bus,
concluded that no state “effectively coordinat[ed] its economic development spending with public transportation planning.”

Another way enterprise zone programs can be viewed as contributing to sprawl development is by encouraging business relocation within a state. This encouragement can contribute to sprawl development if a business relocates from an older, established community into a newly expanding community. A study of companies that relocated into enterprise zones in Ohio found that of the seventy-six business relocations in 1998, sixty-eight corporate relocations impacting 6523 jobs were intrastate moves, and only six relocations impacting 323 jobs were interstate relocations. Thus, by a ratio of twenty to one, more jobs were moved within the state than from other states. A 2003 study of population and land use trends in upstate New York found that although the population of upstate New York only grew by 2.6% between 1982 and 1997, urban acreage increased by 30%. This increase resulted from the conversion of “over 425,000 acres of land from rural uses (mostly agricultural and forest land) to urban development.”

The report cited New York State’s empire zone program as one of the causes of this “sprawl without growth,” as it “often encourag[ed] jobs to simply move from one Upstate location to another.” Similarly, an article in the Kansas City Star examined the links between tax incentive programs—including the State’s enterprise zone program—and business relocation from Kansas City to surrounding suburbs and towns. Prominent companies such as Toys “R” Us, Inc., and Sealright Co., Inc., had taken tax incentives to move from Kansas City to surrounding suburbs and

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78 Id. This report was produced by Good Jobs First, a policy resource center. See id.; Good Jobs First, About Us, http://www.goodjobsfirst.org/about_us.cfm (last visited Jan. 16, 2008).
82 Id.
83 Pendall, supra note 80, at 1, 3.
84 Id.
85 Id. at 1, 7, 9.
tours. Speaking on this loss of business, Philip Kirk Jr., president of a downtown Kansas City development force, commented: “Some of the tools we’ve designed to reverse the trends of sprawl are being applied anywhere and everywhere.”

By contrast, Maryland explicitly links its economic development subsidies to smart growth planning. Maryland’s Smart Growth and Neighborhood Conservation Initiative won the Harvard University John F. Kennedy School of Government and Ford Foundation Award for Innovation in American Government. Maryland directs state spending into established communities. The program seeks to preserve natural resources, ensure that state expenditures support existing communities and neighborhoods, and save funds by avoiding the cost of building the new public infrastructure that sprawl requires. The program creates Priority Funding Areas (PFAs) as areas “targeted for future growth” and prohibits state spending on “growth-related projects” outside PFAs. State spending also must be consistent with local development plans. All previously designated state enterprise zone programs were included in a PFA.

B. Environmental Impact of Sprawl Development

Environmental advocates contend that the environmental impact of sprawl development includes the destruction of natural areas and increased pollution. Sprawl development’s contribution to the de-

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87 Id.
88 See id. In contrast, a 2004 study of ten state enterprise zone programs found that states did target economically distressed areas for zone benefits. Greenbaum, supra note 2, at 67, 78.
89 Parris N. Glendening, Smart Growth: Maryland’s Innovative Answer to Sprawl, 10 B.U. PUB. INT. L. J. 416, 416, 421 (2001) [hereinafter Maryland’s Innovative Answer to Sprawl]. Other states require individual zones to be consistent with local development goals. See, e.g., Ohio Dep’t of Dev., Enterprise Zone Creation and Amendment Process 1 (2005), http://www.odod.state.oh.us/cms/uploadedfiles/EDD/OTI/Zone%20Create%20Amend. pdf (stating that the guidelines for operating a local enterprise zone in Ohio must be consistent with local development goals).
90 Parris N. Glendening, Maryland’s Smart Growth Initiative: The Next Steps, 29 FORDHAM URB. L. J. 1493, 1493–94 (2002) [hereinafter Maryland’s Smart Growth Initiative].
91 Maryland’s Innovative Answer to Sprawl, supra note 89, at 420–21.
92 Id. at 421.
93 Id.
94 Bolen et al., supra note 69, at 172.
95 Maryland’s Innovative Answer to Sprawl, supra note 89, at 420–21.
96 Paving Paradise, supra note 7.
struction of open space is well-documented. It is estimated that one million acres of farmland are developed in the United States annually. The Department of Agriculture reported that sixteen million acres of forest, cropland, and open space were developed between 1992 and 1997. Development often exceeds population growth. A Brookings Institution study found that urbanized land area increased by 47% between 1982 and 1997, but the United States population only increased by 17% during the same period.

In addition, sprawl development leads to increased use of automobiles as people travel farther for work, errands, and recreation. Congestion caused by sprawl cost $72 billion per year nationally in lost time and expended fuel. Increased automobile usage increases air pollution, degrades air quality, and contributes to global warming. In 1994, the U.S. Environmental Protection Agency (EPA) stated that “[u]nhealthy air pollution levels still plague virtually every major city in the United States,” concluding that “[t]his is largely because development and urban sprawl have created new pollution sources and have contributed to a doubling of vehicle travel since 1970.” In terms of global warming, approximately 32%, or 450 million metric tons, of the United States’ total of carbon dioxide emissions into the atmosphere each year come from transportation.

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99 Dowling, supra note 98, at 878.

100 See LeRoy, supra note 6, at 10.

101 Id.

102 Paving Paradise, supra note 7.

103 Dowling, supra note 98, at 875.

104 Benfield et al., supra note 69, at 51–52, 55.

105 Paving Paradise, supra note 7. In 1998, EPA estimated that the health effects of ozone pollution related to traffic cost between $1 and $2 billion per year. Benfield et al., supra note 69, at 56–57.

106 Paving Paradise, supra note 7.
Environmental advocates further contend that sprawl development threatens water quality due to increased stormwater runoff.\textsuperscript{107} Sprawl development increases the amount of impervious surface—such as rooftops and paved parking lots—in a watershed.\textsuperscript{108} When it rains on an impervious surface, water does not get absorbed into the ground, but instead accumulates on that surface and then runs into nearby waterbodies carrying pollutants.\textsuperscript{109} For example, a one-inch rain storm would result in 3450 cubic feet of runoff from a one-acre paved parking lot, but only 218 cubic feet from a one-acre meadow.\textsuperscript{110} Impervious surface thus increases the volume and speed of stormwater runoff, which in turn increases flooding, erosion, and pollutant discharges into waterbodies.\textsuperscript{111} Runoff pollution is estimated to affect 40\% of surveyed rivers, lakes, and estuaries in the United States.\textsuperscript{112}

Sprawl development threatens wildlife through habitat loss, habitat fragmentation, and increased pollution in wildlife habitats.\textsuperscript{113} For example, the Natural Resources Defense Council (NRDC) reported that sprawl development has eliminated over 90\% of the coastal sage ecosystem in Southern California, which the U.S. Fish and Wildlife Service called “one of the most depleted habitats in the United States.”\textsuperscript{114} In Florida, an estimated thirty to fifty adult Florida panthers remain in a limited habitat that continues to be converted for residential and agricultural uses.\textsuperscript{115}

In response to these environmental problems, development advocates contend that the impact of the development of farmland and natural areas has been exaggerated.\textsuperscript{116} They argue that increased productivity compensates for a loss of farmland.\textsuperscript{117} Moreover, significant farmland still exists—farmland comprises approximately half of the 1.9 billion acres in the contiguous forty-eight states; by comparison, wooded land comprises 33\% of those acres, while developed land is

\textsuperscript{107}Benfield et al., supra note 69, at 80.  
\textsuperscript{108}Id.  
\textsuperscript{109}Id.  
\textsuperscript{110}Id. at 81.  
\textsuperscript{111}Id. at 80.  
\textsuperscript{112}Id.  
\textsuperscript{114}Id.  
\textsuperscript{115}Id.  
\textsuperscript{117}Id. at 17.
only 3%. Likewise, development advocates challenge the link between increased vehicle usage due to sprawl development and increased vehicle emissions. They contend that overall highway vehicle emissions have declined, even with increased vehicle usage, because of ongoing technological improvements. They argue that programs encouraging people to reduce their vehicle usage have failed to improve air quality and that traffic congestion is not caused by sprawl, but rather by inadequate road construction. More generally, development advocates counter concerns about the environmental impact of sprawl development by emphasizing that development decisions should be the free choice of property owners and that attempts to limit development tread upon this freedom.

III. Jobs Versus the Environment: An Evolving Dynamic

Zone communities could interpret attempts by environmental advocates to address the environmental impact of enterprise zone programs as demanding a choice between jobs and environmental conservation since enterprise zones are, in part, job creation programs. This conflicting dynamic is one that environmental organizations have tried to avoid in recent years.

Environmental protection was not always viewed as threatening job creation. In fact, labor unions were generally strong supporters of the modern environmental movement at its beginning. Initially, unions were mostly concerned about the environment as it affected public health. Unions, however, also allied with the conservation movement. In 1958, the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) supported the National Wilderness Preservation System’s creation. The AFL-CIO was the largest individ-

118 Id.
119 The Quality Growth Coalition, supra note 75, at 27.
120 Id.
121 Id. at 27, 28.
122 Id. at 11–12. Many state and local initiatives to address sprawl development, such as zoning codes, restrict land use options. Id. at 11.
123 See Engberg & Greenbaum, supra note 4, at 165; Paving Paradise, supra note 7.
124 See Ellis, supra note 12.
125 See Obach, supra note 11, at 47.
126 Id.
127 Id.
128 Id.
129 Id.

In the 1980s, however, several high-profile conflicts cemented public perception that communities had to choose between jobs and environmental protection. Specifically, in the Pacific Northwest, local communities rallied around the timber industry when it alleged that environmental regulations designed to protect old-growth forests and the habitat of the spotted owl would cost communities thousands of timber industry jobs. Similarly, the United Mine Workers clashed with environmental advocates over the acid rain provisions in the Clean Air Act’s 1990 amendments.

In 1999, the high-profile coalition of the International Brotherhood of Teamsters and environmentalists in opposition to the World Trade Organization (WTO) illustrated a shift towards more concerted cooperative attempts between labor unions and environmental organizations. Commentators challenged the notion that communities must chose between jobs and the environment. The United Steelworkers of America’s 1990 report, Our Children’s Future, stated:

Steelworkers have heard the jobs argument before. For many years companies have tried to use economic and environmental blackmail on the union and its members. In every fight for a new health and safety regulation . . . there is a corporate economist to tell us that if we persist, the company or industry will fold, with hundreds or thousands of lost jobs. It rarely turns out to be true.

Some of these alliances have been formalized. The United Steelworkers Union and the Sierra Club announced a “strategic alliance” in June 2006 to create a “Blue-Green Alliance” focusing on three major issues: global warming and clean energy, fair trade, and reducing toxins. Another formal alliance is the Apollo Alliance, a coalition of

\[\text{id. at 48; Richard Toshiyuki Drury, Rousing the Restless Majority: The Need for a Blue-Green-Brown Alliance, 19 ENVTL. L. & LITIG. 5, 20 (2004).}\]
\[\text{Obach, supra note 11, at 54, 57, 61.}\]
\[\text{See id. at 54.}\]
\[\text{Id. at 59.}\]
\[\text{See Fred Rose, Labor-Environmental Coalitions, WORKINGUSA, Spring 2003, at 51, 56.}\]
\[\text{See id. at 54.}\]
\[\text{Id.}\]
\[\text{See Ellis, supra note 12, at 1.}\]
\[\text{Id.}\]
labor unions and environmental organizations. The Alliance’s mission is “to build a broad-based constituency in support of a sustainable and clean energy economy that will create millions of good jobs for the nation, reduce our dependence on foreign oil, and create cleaner and healthier communities.”

Challenging the notion that communities must choose between jobs and environmental conservation, some economists have argued that the impact of environmental regulations on jobs is unproven or exaggerated and that environmental regulations can have a positive effect on jobs. For example, a Boston University study of Los Angeles area refineries found that air pollution regulations increased employment, likely because companies hired workers to install and maintain abatement equipment. In The Trade-Off Myth, the author’s review of the economic effects of environmental regulations found that environmental regulations caused less than one-tenth of one percent of yearly layoffs in the United States, approximately 3000 jobs.

IV. Economic Evaluation of State Enterprise Zone Programs

In addition to examining environmental impact, state enterprise zone programs can be evaluated on their own terms, by examining if the programs meet their stated goals of economic development, firm attraction and retention, and job creation.

A. Economic Evaluation of State Enterprise Zone Programs

Most states do not evaluate the efficacy of their tax incentive programs, including enterprise zone programs. The National Association of State Development Agencies (NASDA) found that states did not conduct comprehensive evaluations of the cost and benefit of the financial incentives they provided to businesses. The Council of State

139 The Apollo Alliance for Good Jobs and Clean Energy, http://www.apolloalliance.org/about_the_alliance/ (last visited Jan. 16, 2008). Union members include the AFL-CIO, Transportation Workers Union, United Mine Workers of America, and UNITE HERE!
140 Id. Environmental organization members include the Environmental Law and Policy Center, Greenpeace USA, Natural Resources Defense Council, and the Sierra Club.
141 See Drury, supra note 130, at 16–17.
142 Id. at 17.
143 Obach, supra note 11, at 36 (citing Eban Goodstein, The Trade-Off Myth: Fact and Fiction about Jobs and the Environment (1999)).
144 See Buss, supra note 1, at 93.
145 Id.
Governments’ 1997 annual incentive study reported that a limited number of states used a formal cost-benefit model to determine the economic impact of tax and financial incentives.\(^\text{146}\) Likewise, the National Conference of State Legislators (NCSL) found that “few states know the exact amount they spend on economic development initiatives.”\(^\text{147}\) While states rarely conduct comprehensive reviews of their enterprise zone programs, a growing body of economic literature has evaluated state enterprise zone programs in terms of their influence on firm locating decisions, economic growth, and job creation.\(^\text{148}\)

1. State Enterprise Zone Programs’ Effect on Firm Location Decisions

The general consensus among economists until 1980 was that taxes had a minimal effect on business location decisions, but current surveys vary in results.\(^\text{149}\) One review of the literature reported that since 1980 most economic studies “have found a negative relationship between taxes and growth,” indicating that firms consider tax policy and benefits when making siting decisions.\(^\text{150}\) By contrast, another review of the literature concluded that there was “scant evidence” in such studies that tax cuts and incentive packages induce firms to relocate to communities with low income levels and high unemployment.\(^\text{151}\)

Some economists argue that when tax incentives fail to influence business location decisions, it may be because the taxes are too small a percentage of profits to have a significant impact.\(^\text{152}\) Peters and Fisher, urban and regional planning professors specializing in state and local...
economic development policy, conducted a 1997 study of 112 cities from twenty-four states and found that general tax incentives on average totaled 0.7% of the studied industries’ pre-tax profit while enterprise zone tax incentives were, on average, 1.5% of pre-tax profits. This minimal difference in profit rate would therefore be eclipsed by minor differences in the cost of doing business. Accordingly, Peters and Fisher’s 2002 study found that a wage premium can eliminate the financial advantages of enterprise zone tax incentives. That study found that for sixteen industries in seventy-five cities across thirteen states, a wage premium of eighty-three cents per hour would offset the total value of all tax incentives at the state and local level.

2. State Enterprise Zone Impact on Economic Growth

Most recent studies of state enterprise zone programs have found that the zones have little or no impact on economic growth. A 1996 study of New Jersey’s enterprise zone program “found no evidence that the New Jersey enterprise zone program resulted in increased economic activity.” A 1998 study that examined the impact of state enterprise zone programs on business and housing market outcomes in six states found that overall, zones have minimal impact on business growth. While zones did create new business activity, the total number of businesses in the zone actually decreased. Similarly, a 1999 study found that, on average, enterprise zones had little impact on housing markets, which the study asserted as an indicator of zone success. A 2000 study found that the total amount of financial benefits the zones provided was not a meaningful factor for predicting growth. Likewise, the different types of benefits the zones provided were not meaningful factors. By contrast, a 2003 report on California’s state enterprise zone program concluded that the taxes collected

153 Id.; Peters & Fisher, supra note 21, at 325.
154 Lynch, supra note 2, at 15–16.
155 Id. at 16. A wage-premium is a difference in wages. Id.
156 Id. at 16. Thus, if wages were over eighty-three cents lower or workers were eighty-three cents per hour more productive in another locality, it would offset any enterprise zone incentives. See id.
157 Peters & Fisher, supra note 21, at 165.
158 Id.
159 Id. at 165–66.
160 Id.
161 Engberg & Greenbaum, supra note 4, at 164, 180.
162 Peters & Fisher, supra note 21, at 166.
163 Id.
from jobs generated by state enterprise zones “returned to the state treasury enough new taxes to pay for the program costs.”

In a review of these studies, Peters and Fisher concluded that while econometric studies of enterprise zones were “controversial,” and the results were “not in agreement,” the majority of recent literature concluded that state enterprise zones had “little or no impact on growth.” Peters and Fisher conducted their own analysis that compared sixty-five zones in thirteen states by developing hypothetical representative firms and applying each zone’s benefits to the firms. They concluded that enterprise zones have “no discernable positive effect on new economic activity.” In addition, a study of Louisville, Kentucky’s enterprise zone did not observe economic benefits or neighborhood revitalization that could be attributed to the enterprise zone program.

3. State Enterprise Zone Impact on Job Creation

Studies also vary regarding the impact of state enterprise zones on job creation. A 1994 study of Indiana’s enterprise zone program found roughly a 19% decrease in unemployment claims within an enterprise zone the year after zone designation, indicating that the zones had a significant impact on job creation. By contrast, a 2000 study evaluating the impact of enterprise zones in six states concluded that enterprise zones have little positive impact on “employment outcomes.” Similarly, Peters and Fisher’s analysis of seventy-five zones in thirteen states concluded that “the average labor price reduction” due

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165 Peters & Fisher, supra note 21, at 166. Peters and Fisher focus their analysis on econometric studies instead of other methods to evaluate state enterprise zone programs, such as surveys of zone administrators. Id. at 44–45; see Webster’s Third New International Dictionary 720 (1986) (defining “econometrics” as “the application of mathematical form and statistical techniques to the testing and quantifying of economic theories and the solution of economic problems”).

166 Peters & Fisher, supra note 22, at 4, 172–73.

167 Id. at 185. Please note that the authors acknowledged that their study was not definitive. Id. at 192.


170 Id.

to zone incentives was greater than 1% in only two states, and that the “maximum price reduction” due to zone incentives was never greater than 3%. In addition, Peters and Fisher concluded that for zones that “spatially targeted” blighted communities, the targeted communities might not benefit most from the jobs. Their study suggested that the zones did not create many additional jobs, and that jobs that were created were often held by employees living outside the zones. In fact, these employees who commuted from outside the zones appeared to live in wealthier neighborhoods.

V. Need for Reform

A. Addressing the Environmental Impact of State Enterprise Zone Programs

While the stated goals of state enterprise zone programs may be solely economic and socioeconomic—to stimulate business and investment in economically depressed areas, create jobs, generate economic growth, and address the impact of economic dislocations—the impact of these programs is also environmental. By designating geographical areas for economic development, state enterprise zone programs make decisions about where to encourage development. However, the zone designation process generally does not include a consideration of the environmental consequences of these decisions. Zone designation criteria generally focus on indicators of poverty or economic need, such as high unemployment, a maximum threshold for zone resident income levels, and population loss; these criteria rarely include coordination with regional planning, statewide conservation goals, or an evaluation of the environmental impact of zone locations. Moreover, enterprise zone programs are usually administered under the state departments of commerce or economic development and do not involve input from environmental conservation departments or those with the

172 Peters & Fisher, supra note 21, at 54, 99, 100.
173 See id. at 212–13.
174 Id. at 213.
175 Id.
177 See Engberg & Greenbaum, supra note 4, at 163, 164–65; Greenbaum, supra note 2, at 67.
178 See Engberg & Greenbaum, supra note 4, at 164–65.
179 Talanker, Davis & LeRoy, supra note 3, at 5; Engberg & Greenbaum, supra note 4, at 165; McElfish, supra note 6, at 144.
expertise to critically examine these development choices. Although local authorities may consider their own communities’ physical development goals when deciding where to locate a zone within their locality, broader patterns of urban, suburban, and rural development are rarely examined on a regional or statewide level during the zone designation process.

The physical development impact of state enterprise zones should be explicitly examined and considered, as these programs represent significant forgone revenue. For example, a Wisconsin Legislative Audit Bureau report found that the state awarded $41,176,300 in enterprise development zone tax credits to businesses from 2001 to 2004. Before Wisconsin, or any other state, forgoes over forty-one million dollars, it should carefully consider the impact of such spending. In addition, if the programs’ impact on development patterns is not examined, this spending may inadvertently conflict with state spending on land conservation and planning. For example, voters in many states have approved spending to protect natural areas from sprawl development. From 1998 to 2002, voters approved more than $20 billion for the purchase of open space in state and local ballot initiatives. In the November 2004 election, voters approved 120 ballot measures that allotted $3.25 billion for land conservation measures. It makes little sense for a state to spend taxpayer money to conserve natural areas while providing tax incentives that might encourage the destruction of those same areas.

State legislatures should revise their enterprise zone programs to address links to sprawl development and to bring the programs in line with smart growth strategies. Links to sprawl development are signifi-

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180 See, e.g., CAL. GOV’T CODE §§ 7072(a), 7073(b)(1) (West 2007) (stating that the Department of Housing and Community Development shall designate enterprise zones); N.Y. GEN. MUN. LAW §§ 957(b), 959 (McKinney 2004) (stating that New York’s empire zone program is administered by the Commissioner of Economic Development).

181 McElfish, supra note 6, at 144; see, e.g., OHIO DEP’T OF DEV., supra note 89 (stating that the guidelines for operating a local enterprise zone in Ohio must be consistent with local development goals).

182 See LYNCH, supra note 2, at 1.

183 STATE OF WIS. LEGISLATIVE AUDIT BUREAU, supra note 14, at 92. The Iowa Legislative Services Agency reported that Enterprise Zone program tax credits were $45.8 million in fiscal year 2005. ÉLIS & BRUNER, supra note 14, at 4.

184 See STATE OF WIS. LEGISLATIVE AUDIT BUREAU, supra note 14, at 92.


186 Greening the Garden State, supra note 185, at A16.

187 Id.

188 Rogers, supra note 185, at A19.
cant enough to warrant amending the programs.\textsuperscript{189} Several studies have documented these links.\textsuperscript{190} For example, a study of companies that relocated into enterprise zones in Ohio found that, by a ratio of twenty to one, more jobs were moved within the state than from other states.\textsuperscript{191} Of the seventy-four company relocations in 1998, sixty-eight relocations—affecting 6523 jobs—were moves within the state and six relocations—impacting 323 jobs—were moves from other states.\textsuperscript{192} A 2003 study of population and land use trends in upstate New York cited New York State’s empire zone program as one of the causes of “sprawl without growth,” as it often encouraged employers to move jobs within upstate New York.\textsuperscript{193} The report found that although the population of upstate New York only grew by 2.6% between 1982 and 1997, urban acreage increased by 30%, since the region converted over 425,000 acres of land from rural uses, such as agricultural and forest land, to urban ones.\textsuperscript{194} Further, the very nature of enterprise zone programs leads to the conclusion that they could be linked to sprawl because the intent of the programs is to direct business to locate in a designated geographical area.\textsuperscript{195} When a program’s links to sprawl have been documented, the program should be amended to address these links.\textsuperscript{196} The information gap that exists when a program’s links to sprawl development remain unknown highlights the need for states to conduct more comprehensive review of the environmental impact of their enterprise zone programs.\textsuperscript{197}

States should amend their programs so as to limit the destructive environmental impact of sprawl development.\textsuperscript{198} First, when development increases faster than the population, as it does in many areas of the country, new development unnecessarily converts natural areas and farmland into strip malls, houses, and office parks.\textsuperscript{199} A Brookings Institution study found that between 1982 and 1997 the United States population increased by 17% while urbanized land increased by 47%.\textsuperscript{200} This

\textsuperscript{189} See LeRoy, supra note 68, at 129.
\textsuperscript{190} See Pendall, supra note 80, at 1, 3, 9; Development Subsides and Labor Unions, supra note 81.
\textsuperscript{191} Development Subsides and Labor Unions, supra note 81.
\textsuperscript{192} Id.
\textsuperscript{193} Pendall, supra note 80, at 3, 9.
\textsuperscript{194} Id. at 1, 9.
\textsuperscript{195} See Engberg & Greenbaum, supra note 4, at 164–65.
\textsuperscript{196} See, e.g., Pendall, supra note 80, at 3, 7, 9.
\textsuperscript{197} See Buss, supra note 1, at 93; Economic Development Subsidies, supra note 79.
\textsuperscript{198} See Paving Paradise, supra note 7.
\textsuperscript{199} See Benfield et al., supra note 69, at 12; Dowling, supra note 98, at 877–78.
\textsuperscript{200} Subsidizing Sprawl, supra note 6, at 10.
unnecessary destruction of farmland and natural areas is a matter of concern. An increase in existing farmland’s productivity does not necessarily compensate for the destruction of farmland, as contended by development advocates. Farmland has unique sociological and aesthetic benefits. In addition, while development advocates may be correct in pointing out that significant farmland and rural areas still exist nationwide, these overall statistics mask the trend to develop the highest quality farmland, leaving lower quality land in agricultural production.

Secondly, enterprise zone programs’ links to sprawl should be addressed because the expansion of sprawl development increases automobile usage. Sprawl development leads to increased use of automobiles as people travel farther for work, errands, and recreation. Congestion caused by sprawl costs $72 billion per year nationally in lost time and expended fuel. Increased automobile usage degrades air quality, increases air pollution, and contributes to global warming. While development advocates are correct in contending that technological improvements decrease overall vehicle emissions, air pollution is still a serious problem. In 1994, EPA concluded that the vast majority of major U.S. cities had unhealthy levels of air pollution because development sources contributed to a 100% increase in vehicle usage from 1970. In 1998, EPA estimated that the health effects of ozone pollution related to traffic cost between one to two billion dollars per year. Given the tremendous cost of air pollution, states should address the ways in which enterprise zone programs exacerbate this problem. As tax incentive programs that reflect state investments, enterprise zones should incorporate policy choices that

201 See id.
204 Dowling, supra note 98, at 878.
205 See Paving Paradise, supra note 7.
206 Benfield et al., supra note 69, at 36; Paving Paradise, supra note 7.
207 Dowling, supra note 98, at 878.
208 Benfield et al., supra note 69, at 51–52, 55.
209 See Paving Paradise, supra note 7; The Quality Growth Coalition, supra note 75, at 27.
210 Paving Paradise, supra note 7.
211 Benfield et al., supra note 69, at 56–57.
212 See id.; Paving Paradise, supra note 7.
minimize air pollution. Because enterprise zone programs are tax incentive programs, states can address the programs’ contribution to sprawl that causes air pollution without limitations on vehicle travel or new development.

Likewise, state programs should not invest in unnecessarily increasing impervious surface or threatening wildlife habitat by encouraging sprawl development. The environmental impact of increased impervious surface includes increased flooding, erosion, and pollutant discharges into waterbodies. Additionally, sprawl development threatens wildlife through habitat loss, habitat fragmentation, and increased pollution in wildlife habitat. Enterprise zone programs’ contribution to these results can be minimized by addressing their links to sprawl development.

The free-choice concerns of property rights advocates should not stop states from reforming enterprise zone programs to promote smart growth. These programs represent state policy choices about where to provide significant tax incentives to encourage development. Since businesses may still locate in areas that lack enterprise zones, limiting zones to areas consistent with smart growth strategies should not implicate property rights advocates’ concerns about free-choice that lead them to argue against limitations on development such as zoning or planning requirements. In addition, if development advocates are correct that most Americans prefer to live in areas of sprawl development—a contention that many smart growth advocates would counter—there would be little need to provide incentives to develop such areas.

The goals of enterprise zone programs can likely be met just as effectively without promoting sprawl. To the extent that the programs’

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213 See Paving Paradise, supra note 7; Engberg & Greenbaum, supra note 4, at 165.
214 See Paving Paradise, supra note 7; The Quality Growth Coalition, supra note 75, at 17, 19; Greenbaum, supra note 2, at 67.
215 See Benfield et al., supra note 69, at 80; Terris, supra note 113.
216 Benfield et al., supra note 69, at 80.
217 Terris, supra note 113.
218 See Benfield et al., supra note 69, at 80; Terris, supra note 113.
219 See The Quality Growth Coalition, supra note 75, at 19.
220 Lynch, supra note 2, at 1; Greenbaum, supra note 2, at 67.
221 See The Quality Growth Coalition, supra note 75, at 11, 17 (arguing against smart growth zoning and planning as restrictions on development); Geller, supra note 69, at 1411 (describing smart growth strategies).
222 See Paving Paradise, supra note 7 (arguing that Americans place a high value on natural areas and have a low approval rating for images of sprawl development); Gordon & Richardson, supra note 13, at 25.
goals include community development and stimulating economic growth in blighted communities, it makes little sense to develop rapidly expanding communities instead of strengthening existing ones.\(^{223}\) When the programs’ goals focus on improving the statewide economy by keeping businesses from moving to other states, aiding struggling firms, and luring out-of-state businesses, the rationale for providing incentives for businesses to relocate from an established community to an expanding community is weak.\(^{224}\) One could argue that moving a business from an established community to an expanding one will help the business grow or encourage the business to remain in the state. However, encouraging relocation from within a state does not attract outside firms, and it seems just as likely that existing firms could either expand or be persuaded to remain in the state with an incentive package at their current location, or for relocation consistent with smart growth plans.

Addressing the environmental impact of state enterprise zone programs would bring the programs more in line with their original purpose.\(^{225}\) As originally envisioned, the programs were intended to revitalize blighted communities in urban areas.\(^{226}\) Though the conservative members of Parliament and the academics at the Heritage Foundation who championed the policy would not likely have called their goal “smart growth,” urban revitalization is a central tenet of smart growth.\(^{227}\) Consequently, states could achieve reform of the programs to promote smart growth by focusing on the programs’ original goal of urban revitalization.\(^{228}\)

Even if an individual state’s program did not originate from urban revitalization goals, the nature of the programs makes them well-suited to promote smart growth without forgoing many of their other goals.\(^{229}\) If enterprise zone programs targeted geographical areas in keeping with smart growth planning, the state programs could still keep businesses from moving to another state, aid struggling firms,

\(^{223}\) See Greenbaum, supra note 2, at 68–69.
\(^{224}\) See Buss, supra note 1, at 91.
\(^{225}\) See Peters & Fisher, supra note 21, at 24.
\(^{226}\) Id.
\(^{227}\) See Benfield et al., supra note 69, at 138; Peters & Fisher, supra note 21, at 24; Geller, supra note 69, at 1411.
\(^{228}\) See Benfield et al., supra note 69, at 138; Peters & Fisher, supra note 21, at 24; Geller, supra note 69, at 1411.
\(^{229}\) See Buss, supra note 1, at 91; Engberg & Greenbaum, supra note 4, at 164–65; Greenbaum, supra note 2, at 67.
and lure out-of-state businesses. Smart growth planning can achieve its goals without reducing the effective incentives provided by enterprise zone programs.

While the ideal program structure is likely to vary by state, Maryland provides a strong example of an enterprise zone program that promotes smart growth as opposed to sprawl development. The Maryland smart growth program directs state spending into established communities. The program creates PFAs as areas “targeted for future growth” and prohibits state spending on “growth-related projects” outside PFAs. By targeting economic development spending to existing communities in a manner consistent with statewide development goals, the program ensures that economic development incentives will promote smart growth. While Maryland’s program provides the most comprehensive example, other states have enacted reforms to address the programs’ links to sprawl, demonstrating the viability of such reforms.

B. An Economic Evaluation of State Enterprise Zone Programs

Attempts by environmental advocates to address the links between enterprise zone programs and sprawl development could be interpreted by potential zone communities as demanding a choice between jobs and environmental conservation, as enterprise zones are, in part, job creation programs. Environmental organizations and labor unions have good reason to form strategic alliances to avoid the jobs-versus-the-environment dynamic that pins environmental protection against community jobs. A person’s basic needs include both the

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230 See Buss, supra note 1, at 91; Geller, supra note 89, at 1411.
231 Maryland’s Innovative Answer to Sprawl, supra note 89, at 420–21.
232 Id.
233 Id. at 421.
234 Id.
235 See id.
236 See N.Y. GEN. MUN. LAW § 961(b)(xiii) (Consol. 2006). For example, in 2005 the New York State Legislature amended its empire zone program to require that any application for zone designation demonstrate that there is no viable alternative area that has existing public water or sewer infrastructure. Id. This amendment helps curb the program’s encouragement of sprawl development by prioritizing already developed areas. See id. § 961. Environmental advocates also recommend tying enterprise zone benefits to accessibility to public transit so that access to enterprise zone jobs does not require automobile usage, though this reform has not been enacted in any state as of March 2007. LeRoy, supra note 68, at 194–95.
237 See Greenbaum, supra note 2, at 67.
238 See Ellis, supra note 12; Rose, supra note 134, at 51, 56.
economic sustenance provided by jobs and the physical well-being provided by a healthy environment. Consequently, environmental advocates who fail to take the economic needs of a community into account can appear either out of touch with those needs or indifferent to them. Conversely, those who champion jobs over environmental protection ignore the physical need workers have for a healthy environment and livable community.

While efforts to amend state enterprise zone programs to limit their link to sprawl and refashion the programs as smart growth initiatives may appear to demand a choice between jobs and environmental protection, they likely do not. Although the majority of states do not evaluate the efficacy of their tax incentive programs—including enterprise zone programs—economic evaluations of the programs have shown mixed results at best. In terms of job creation, the economic studies have not found that state enterprise zones created significantly more jobs than would have existed without the zone. A 2000 study concluded that enterprise zones have little positive impact on “employment outcomes.” Similarly, an analysis of sixty-five zones in thirteen states by Peters and Fisher concluded that zones that “spatially targeted” blighted communities created few additional jobs, and many employees of businesses within the zone lived outside of the enterprise zone, undermining the goal of job creation for the zone community.

In terms of the zones’ impact on economic growth, Peters and Fisher’s 2002 review of the economic literature concluded that, while econometric studies of enterprise zones were “controversial,” and the results were “not in agreement,” the majority of recent literature found that state enterprise zones had “little or no impact on growth.” While more economic literature exists finding evidence of enterprise zone programs’ impact on firm location decisions, the literature is still divided.

See Drury, supra note 130, at 13.
See id. at 13.
See id. at 11–12.
See Benfield et al., supra note 69, at 138; Drury, supra note 130, at 13.
See Peters & Fisher, supra note 21, at 164–65; Buss, supra note 1, at 93; Jarrell et al., supra note 21, at 805, 824. In terms of economic evaluation, this Note attempts a synthesis of the literature rather than an evaluation of the methodology or conclusions of any economic literature on state enterprise zones.
Peters & Fisher, supra note 21, at 166.
Id.
See id. at 213.
Id. at 166.
Jarrell et al., supra note 21, at 824.
Environmental advocates attempting to address the environmental impact of state enterprise zone programs should evaluate the programs on their own terms. As evaluated in the bulk of economic literature, these programs fail to meet their stated goals of stimulating business and investment in economically depressed areas, creating jobs, generating economic growth, and addressing the impact of economic dislocations. Critiquing programs on their own terms avoids the jobs-versus-the-environment dynamic—if the programs have not created significantly more jobs than would have existed without them, then addressing environmental impact does not threaten job creation. Moreover, if the programs have little or no impact on economic growth, then economic benefits of the programs cannot be used to justify their environmental costs. If the benefits provided by enterprise zones fail to impact firm location decisions—an area where the economic literature is in sharper conflict—then there is little justification for these programs at all.

A critique of enterprise zone programs that addresses both their links to sprawl development and their economic failings invites a broader reform coalition than would a more limited environmental critique. Labor unions, community development advocates, and taxpayer advocates all should have an interest in ensuring that job creation programs actually create jobs. Moreover, any constituency vying for state funding has an interest in limiting inefficient tax breaks to increase available revenue. A focus on enterprise zone programs’ economic accountability, therefore, could not only help environmental advocates avoid conflict over job creation, but also invite a broad-based coalition to advance reform.

**Conclusion**

States began enacting enterprise zones in order to meet the economic needs of struggling communities. Accordingly, most state enterprise zone programs’ zone designations are run by the state’s department of commerce or economic development and focus on local economic indicators. By targeting designated areas for economic development incentives, however, the programs make implicit environ-

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250 See Jarrell et al., supra note 21, at 824.

251 See McNichol & Harris, supra note 1, at 5.
mental policy decisions. In many states the programs fuel sprawl development by encouraging business relocation into rapidly developing areas. Sprawl, in turn, contributes to the destruction of natural areas, the degradation of air and water quality, and the depletion of wildlife habitat.

An explicit evaluation of this environmental impact should be built into the zone designation process. Moreover, states should reform their programs to minimize these impacts. The environmental impact of enterprise zone programs, however, should not be evaluated in a vacuum. Enterprise zone programs are primarily economic development programs, and therefore community needs for job creation must be recognized. When enacted successfully, smart growth principles encourage states, regions, and local communities to promote both economic development and environmental conservation. Consequently, reform of state enterprise zone programs in accordance with smart growth principles can attempt to minimize the programs’ environmental impact and ensure the programs’ economic viability. States can therefore maximize the benefit of their expenditures by reforming their enterprise zone programs to ensure that the programs promote economically accountable smart growth.
LIABILITY UNDER CERCLA § 9601(35)(C) FOR INTERMEDIATE LANDOWNERS WHO DISCOVER CONTAMINATION, DO NOT DISCLOSE, AND SELL TO INNOCENT BUYERS

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Abstract: Section 9601(35)(C) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) may amend the traditional classes of liable parties, holding responsible intermediate landowners who convey properties without disclosing their knowledge of contamination. To date, however, courts have failed to settle on whether § 9601(35)(C) constitutes a new and independent basis for liability. This Note provides a discussion of the current status of the law on intermediate landowner liability, presents four scenarios in which the lack of consistency in judicial interpretation of § 9601(35)(C) results in mischievous land transfers, and finally, suggests that courts should use the section as an independent basis for intermediate owner liability to achieve the policy goals of CERCLA.

Introduction

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), the federal hazardous waste site cleanup statute, traditionally imposes liability as potentially responsible parties (PRPs) on both the current owner of a contaminated “facility” and the former owner who disposed of hazardous materials. The intermediate

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1 The Superfund created by CERCLA for hazardous waste site cleanup has run dry. See Anthony R. Chase & John Mixon, CERCLA: Convey to a Pauper and Avoid Cost Recovery Under Section 107(a)(1)?, 33 Envtl. L. 293, 339 (2003). Imposing liability on the intermediate owner who deceitfully transfers title will decrease the costs currently born by taxpayers. Id. This Note considers whether courts can force intermediate owners to pay a portion of cleanup costs and, in turn, increase the money available for remediation of waste sites as a potential solution to the lack of funds problem.
landowner, who did not himself dispose of contaminants and later sells the facility, may escape liability under the statute because he does not fall within the traditional classes of PRPs.\(^3\) Section 9601(35)(C) potentially amends CERCLA's list of liable parties.\(^4\) It states that a defendant possessing actual knowledge of a release or threatened release of hazardous materials, who conveys the property without disclosing his knowledge, is liable.\(^5\) Both CERCLA and case law, however, fail to confirm whether the section serves as an independent basis of liability for intermediate landowners who would not be responsible under the statute otherwise.\(^6\)

This Note discusses whether § 9601(35)(C) should impose liability on an intermediate landowner in order to close the potential loophole in responsibility. Part I summarizes the CERCLA liability scheme—including the theory of intermediate owner responsibility for passive disposal of contaminants—and introduces § 9601(35)(C).\(^7\) Part II discusses whether the provision constitutes an independent basis for liability or merely denies the statute's innocent owner defense to intermediate landowners who did not dispose of hazardous materials.\(^8\)


\(^4\) See 42 U.S.C. § 9601(35)(C). Compare United States v. CDMG Realty Co., 96 F.3d 706, 717 n.9 (3d Cir. 1996) (stating § 9601(35)(C) is an independent basis for liability), with Westwood, 964 F.2d at 91 (deciding § 9601(35)(C) is not a basis for liability).

\(^5\) Compare CDMG Realty, 96 F.3d at 717 n.9 (“By its plain language, [§ 9601(35)(C)] appears to create a substantive basis of liability.”), with Westwood, 964 F.2d at 91 (holding that the provision applied only to persons who were already PRPs and denied them CERCLA's innocent owner defense), and Fallowfield, 1993 WL 157723, at *7 (determining that a plaintiff must show an intermediate landowner was a disposer of hazardous materials in order for § 9601(35)(C) to apply). See generally Catherine S. Stempfen, Sins of Omission, Commission, and Emission: Does CERCLA's Definition of “Disposal” Include Passive Activities?, 9 J. Env'tl. L. & Litig. 1 (1994) (discussing arguments and cases on both sides of the issue of intermediate landowner liability for passive disposal; concluding that passive intermediate landowners should be liable).

\(^6\) See infra Part I.
termediate landowners with knowledge of releases. Part III examines several scenarios in which mischievous land transfers call into question the applicability of § 9601(35)(C). Lastly, Part IV proposes that the section should be used as an independent basis for intermediate owner liability in order to promote the purposes of CERCLA and achieve fair results.

I. CERCLA’s Liability Scheme

The scope of intermediate landowner liability is unclear, and courts have not settled on a single interpretation of § 9601(35)(C). This Part outlines CERCLA liability in order to provide a foundation for scrutinizing the applicability of the section.

A. Traditionally Liable Parties Under CERCLA

Both the current owner of a facility and the party who owned the facility at the time of disposal are responsible for the costs of site cleanup under CERCLA’s traditional classes of PRPs. These parties are strictly liable for the cleanup costs—called response costs—if there is a release or threatened release of hazardous materials at the facility. The U.S. Environmental Protection Agency (EPA) may undertake cleanup and recover its expenditures from PRPs. Also, a PRP may receive an EPA order to remediate the site or may voluntarily remove the

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8 See infra Part II.
9 See infra Part III.
10 See infra Part IV.
11 See, e.g., United States v. CDMG Realty Co., 96 F.3d 706, 717 n.9 (3d Cir. 1996); Nurad, Inc. v. William E. Hooper & Sons Co., 966 F.2d 837, 846–47 (4th Cir. 1992) (holding an intermediate landowner liable for passive migration of contaminants during ownership); Stempien, supra note 6, at 21–24.
13 E.g., 3550 Stevens Creek Assocs. v. Barclays Bank, 915 F.2d 1355, 1357 (9th Cir. 1990) (CERCLA “generally imposes strict liability on owners and operators of facilities at which hazardous substances were disposed”); United States v. Aceto Agric. Chems. Corp., 872 F.2d 1373, 1377 (8th Cir. 1989) (“Most courts have held CERCLA imposes strict liability . . . .”). In reference to response costs, the term “response” means “remove, removal, remedy, and remedial action,” including “enforcement activities related thereto.” 42 U.S.C. § 9601(25).
14 See, e.g., United States v. 150 Acres of Land, 204 F.3d 698, 702 (6th Cir. 2000) (discussing EPA’s removal operation and subsequent suit to recover costs); Smith Land & Improvement Corp. v. Celotex Corp., 851 F.2d 86, 90 (3d Cir. 1988) (“CERCLA authorizes the government to seek reimbursement of response costs from any of the responsible parties, leaving them to share the expense equitably.”).
contamination. A PRP who incurs response costs may sue other PRPs for recovery if he is innocent, or for contribution if he is liable. Courts will consider relative degrees of fault in determining the amount of contribution owed by each party.

Liability is subject to several narrow affirmative defenses. CERCLA includes an innocent owner defense, which absolves PRPs who can prove that at the time they acquired the property they “did not know and had no reason to know that any hazardous substance which is the subject of the release or threatened release was disposed of on, in, or at the facility.” The statute also grants freedom from liability for contamination caused by acts of God or war, or acts or omissions of third parties.

Intermediate landowners—those who did not dispose of hazardous materials and transferred title to subsequent purchasers—do not fall within the statute’s traditional classes of PRPs because they are neither current owners nor disposers. Intermediate landowners seem-

15 E.g., Hemingway Transp., Inc. v. Kahn, 993 F.2d 915, 921 (1st Cir. 1993) (“EPA is invested with broad administrative discretion to compel PRPs to undertake immediate cleanup measures . . . .”); Nurad, 966 F.2d at 845–46 (noting that CERCLA’s liability scheme encourages voluntary cleanup).

16 42 U.S.C. §§ 9607(a)(4)(B), 9613(f)(1). Section 9607(a)(4)(B) explains that a PRP is liable for costs incurred by any other person in cleaning the facility. Id. § 9607(a)(4)(B). Section 9613(f)(1) states, “Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title . . . .” Id. § 9613(f)(1); see also Hemingway, 933 F.2d at 922 (explaining that CERCLA authorizes PRPs “to initiate private actions for full or partial contribution from [other] PRPs”); Smith Land, 851 F.2d at 90 (discussing the right of any PRP who incurs response costs to bring a contribution action); McDonald v. Sun Oil Co., 423 F. Supp. 2d 1114, 1123 (D. Or. 2006) (summarizing plaintiff’s claim for cost recovery of cleanup expenditures and defendant’s counterclaim for contribution for response costs incurred).

17 See 42 U.S.C. § 9613(f)(1); Carson Harbor Vill., Ltd. v. Unocal Corp., 270 F.3d 863, 871 (9th Cir. 2001); Hemingway, 933 F.2d at 921–22.


19 42 U.S.C. § 9601(35)(A), (A)(i); see Carson Harbor, 270 F.3d at 882–83 (discussing the innocent owner defense as applied to intermediate owners).

20 42 U.S.C. § 9607(b). The provision states:

There shall be no [traditional] liability . . . for a person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by . . . (1) an act of God; (2) an act of war; (3) an act or omission of a third party . . . .

Id. (emphasis added).

21 See 42 U.S.C. § 9607(a)(1)–(4); Bronston, supra note 18, at 609–10.
ingly escape liability when they convey facilities, despite the fact that they may gain knowledge of a release or threatened release of hazardous materials during ownership. The two primary goals of CERCLA are “the expeditious cleanup of sites contaminated or threatened by hazardous substance releases which jeopardize public health and safety, and the equitable allocation of cleanup costs among all potentially responsible persons.” Some scholars advocate a scheme that imposes liability on intermediate landowners who gain knowledge of contamination and fail to disclose it because relieving them of responsibility and leaving contamination to fester frustrates the purposes of the statute.

B. The Passive Disposal Theory

As a result of the failure of CERCLA’s traditional classes of PRPs to encompass intermediate landowners, courts developed various methods to determine intermediate owner liability. For instance, if an intermediate landowner disturbed a prior owner’s hazardous materials during ownership, such an action could represent new disposal activity, giving rise to traditional liability. In United States v. CDMG Realty Co., the U.S. Court of Appeals for the Third Circuit concluded that the intermediate owner was liable as a disposer because the corporation’s drilling of soil samples caused the dispersal of hazardous materials bur-

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22 See, e.g., Stempien, supra note 6, at 24 (discussing United States v. Petersen Sand & Gravel, Inc., 806 F. Supp. 1346 (N.D. Ill. 1992): “The court held that the corporation could avoid liability because no actual disposal occurred during its operation, even though it had full knowledge of the contamination on the site”). But see Bronston, supra note 18, at 609–10 (arguing that an intermediate owner aware of contamination is liable under § 9601(35)(C)).

23 Hemingway Transp., Inc. v. Kahn, 993 F.2d 915, 921 (1st Cir. 1993); accord Carson Harbor, 270 F.3d at 880; Mardan Corp. v. C.G.C. Music, Ltd., 804 F.2d 1454, 1455 (9th Cir. 1986).


25 See, e.g., United States v. CDMG Realty Co., 96 F.3d 706, 718–19 (3d Cir. 1996) (disturbing previous owner’s hazardous wastes); Nurad, 966 F.2d at 844–46 (failing to remedy passive migration of contaminants during ownership).

26 See CDMG Realty, 96 F.3d at 718–19.
ied by a previous owner. The court did not resolve whether an intermediate landowner who did not physically disturb contaminates onsite could be considered a disposer.

In a number of cases, CERCLA plaintiffs have attempted to hold intermediate landowners liable under a theory of “passive disposal.” Under this theory, plaintiffs claimed that hazardous substances that were disposed of by a former owner leaked or migrated during the time an intermediate owner held the land, and that this passive migration should suffice as evidence an intermediate owner was a disposer. Their arguments centered on CERCLA’s incorporation of the Resource Conservation and Recovery Act (RCRA) definition of disposal, which states, “The term ‘disposal’ means the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water . . . .” Since the statutory definition of disposal included “spilling” and “leaking,” plaintiffs argued that if contaminates moved during intermediate ownership, those owners should be considered disposers, and thus, traditional PRPs. Courts did not unanimously adopt this argument.

The U.S. Court of Appeals for the Fourth Circuit accepted the passive disposal theory in a case in which hazardous waste leaked from un-

27 Id.
28 See id. (imposing liability on intermediate owner for disturbing hazardous waste while drilling test wells); see also Carson Harbor, 270 F.3d at 877 (concluding that movement of hazardous materials resulting from affirmative conduct was disposal, but that CERCLA was unclear whether passive movement of contaminates constituted disposal).
29 E.g., Carson Harbor, 270 F.3d at 868, 881 (considering intermediate owner liability for migration of prior owner’s lead contamination in stormwater runoff); Nurad, 966 F.2d at 844–46 (arguing that intermediate owner liability should attach when prior owner’s underground storage tanks leaked); United States v. Petersen Sand & Gravel, Inc., 806 F. Supp. 1346, 1350–53 (N.D. Ill. 1992) (discussing plaintiff’s argument that leaking and leaching of contaminates from barrels constituted disposal).
30 See, e.g., Carson Harbor, 270 F.3d at 879–80; Nurad, 966 F.2d at 844–46; Petersen, 806 F. Supp. at 1350–53.
33 See, e.g., Carson Harbor, 270 F.3d at 881 (rejecting liability for passive soil migration of contaminates); Nurad, 966 F.2d at 846–47 (accepting theory of passive disposal); Petersen, 806 F. Supp. at 1350–53 (rejecting passive disposal as basis for imposing liability); Bronston, supra note 18, at 610–11.
derground storage containers during intermediate ownership. The court held that CERCLA “imposes liability not only for active involvement in the ‘dumping’ or ‘placing’ of hazardous waste at the facility, but for ownership of the facility at a time that hazardous waste was ‘spilling’ or ‘leaking.’” On the other hand, several courts have refused to impose liability on an intermediate landowner unless he undertook positive action that led to a release or threatened release. For instance, in United States v. Petersen Sand & Gravel, Inc., the U.S. District Court for the Northern District of Illinois rejected the theory that the leaking and leaching of barrels of hazardous materials constituted disposal, concluding that disposal was a separate action from the spreading of toxics, which is better categorized as a release.

The U.S. Court of Appeals for the Ninth Circuit advocated an approach in the middle of the spectrum of court responses to the passive disposal theory. In a case in which stormwater runoff caused the spread of lead contamination, the Ninth Circuit stated that while the passive soil migration at issue did not fit the plain meaning of the word “disposal,” other forms of passive migration would, and liability should attach in those situations. In sum, the lack of consensus among courts on the applicability of the passive disposal theory suggests that a subsequent purchaser may not have a remedy against an intermediate landowner who fails to disclose the presence of hazardous materials at the time of sale.

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35 Nurad, 966 F.2d at 846; Bronston, supra note 18, at 610–11, 613–15.


37 806 F. Supp. at 1350–51; accord United States v. 150 Acres of Land, 204 F.3d 698, 706 (6th Cir. 2000) (“[I]t makes sense . . . to have ‘disposal’ stand for activity that precedes the entry of a substance into the environment and ‘release’ stand for the actual entry of substances into the environment.”).

38 See Carson Harbor, 270 F.3d at 881.

39 Id. at 869–70, 881 (“[I]f ‘disposal’ is interpreted to exclude all passive migration, there would be little incentive for a landowner to examine his property for decaying disposal tanks, prevent them from spilling or leaking, or to clean up contamination once it was found.”).

40 See Chase & Mixon, supra note 1, at 293 (“A title owner who discovers waste and falls short of innocent purchaser immunity, but is not otherwise at fault, may seek to eliminate ownership status (and owner liability) by conveying . . . .”).
C. Section 9601(35)(C) Amends CERCLA

The Superfund Amendments and Reauthorization Act of 1986 (SARA) may close the intermediate landowner liability loophole.\textsuperscript{41} The SARA amendments arguably impose liability on intermediate landowners who knowingly transfer contaminated property without disclosing the presence of hazardous materials.\textsuperscript{42} Section 9601(35)(C) states:

Nothing in this paragraph . . . shall diminish the liability of any previous owner or operator of such facility who would otherwise be liable under this chapter. Notwithstanding this paragraph, if the defendant obtained actual knowledge of the release or threatened release of a hazardous substance at such facility when the defendant owned the real property and then subsequently transferred ownership of the property to another person without disclosing such knowledge, such defendant shall be treated as liable . . . and no defense under [the innocent owner defense] shall be available to such defendant.\textsuperscript{43}

A release is “any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment (including the abandonment or discarding of barrels, containers, and other closed receptacles containing any hazardous substance or pollutant or contaminant).”\textsuperscript{44} An intermediate landowner who “obtained actual knowledge of the release or threatened release” of hazardous materials and failed to disclose that knowledge to the subsequent purchaser may be liable if § 9601(35)(C) is a basis for liability.\textsuperscript{45}

II. Section 9601(35)(C) as an Independent Basis for Liability

Courts disagree whether § 9601(35)(C) provides an independent basis for liability under CERCLA or instead denies an intermediate


\textsuperscript{43} Id. (emphasis added).

\textsuperscript{44} Id. § 9601(22) (emphasis added). A number of cases indicate that because the statute defines both disposal and release, they are separate events. E.g., United States v. 150 Acres of Land, 204 F.3d 698, 706 (6th Cir. 2000); United States v. Petersen Sand & Gravel, Inc., 806 F. Supp. 1346, 1351 (N.D. Ill. 1992).

\textsuperscript{45} See 42 U.S.C. § 9601(35)(C); Stempien, supra note 6, at 21–24; Tracy, supra note 24, at 193.
landowner who is already a PRP the innocent owner defense.\textsuperscript{46} Some courts have advocated that because the section begins, “Nothing in this paragraph . . . shall diminish the liability of any previous owner or operator of such facility \textit{who would otherwise be liable} under this chapter,” it only applies to those parties who are already PRPs.\textsuperscript{47} Supporters of this position maintain that § 9601(35)(C) only functions to deny the innocent owner defense to traditional PRPs when they fail to disclose discovered contamination.\textsuperscript{48} These supporters point to the use of the word “defendant” in the section and urge that it was meant to limit the applicability of § 9601(35)(C).\textsuperscript{49} As such, some courts conclude that only a person who is already a party to the suit, and thus, clearly fits into the classes of PRPs, must comply with the disclosure requirement.\textsuperscript{50}

For example, in \textit{Fallowfield Development Corp. v. Strunk}, the court concluded that in order for § 9601(35)(C) to apply, the plaintiff must prove the intermediate landowners were within one of the traditional classes of PRPs.\textsuperscript{51} Likewise, the U.S. Court of Appeals for the Second Circuit decided that the section only applies to current owners and disposers of hazardous materials.\textsuperscript{52} The court emphasized that if Congress wanted to include intermediate landowners in CERCLA’s responsibility scheme, it would have amended the traditional classes of PRPs, rather than burying a sweeping change in liability in § 9601(35)(C).\textsuperscript{53}

In response to the argument that § 9601(35)(C) only applies to traditional classes of PRPs, at least one court concluded the provision’s reference to the innocent owner defense shows that it has a broader

\textsuperscript{46} \textit{Compare} United States v. CDMG Realty Co., 96 F.3d 706, 717 n.9 (3d Cir. 1996) (“By its plain language [§ 9601(35)(C)] appears to create a substantive basis of liability.”), \textit{with} Westwood Pharm., Inc. v. Nat’l Fuel Gas Distribution Corp., 964 F.2d 85, 91 (2d Cir. 1992) (holding the section applied only to intermediate owners who were already PRPs and denied them the innocent owner defense), \textit{and} Fallowfield Dev. Corp. v. Strunk, Nos. CIV. A. 89-8644, CIV. A. 90-4431, 1993 WL 157723, at *8 (E.D. Pa. May 11, 1993) (discussing the application of § 9601(35)(C) to intermediate landowners who neatly fit within the traditional classes of PRPs), \textit{aff’d}, 43 Env’t Rep. Cas. (BNA) 1428 (3d Cir. Aug. 20, 1996).

\textsuperscript{47} 42 U.S.C. § 9601(35)(C) (emphasis added); \textit{e.g.}, Ne. Doran, Inc. v. Key Bank of Me., 15 F.3d 1, 3 (1st Cir. 1994); \textit{Westwood}, 964 F.2d at 90–91; Stempien, \textit{supra} note 6, at 21–22.

\textsuperscript{48} \textit{E.g.}, Ne. Doran, 15 F.3d at 3; \textit{Westwood}, 964 F.2d at 90–91; Stempien, \textit{supra} note 6, at 21–22.

\textsuperscript{49} Stempien, \textit{supra} note 6, at 22.

\textsuperscript{50} \textit{Id.} at 21–22.

\textsuperscript{51} 1993 WL 157723, at *7–8.

\textsuperscript{52} \textit{Westwood}, 964 F.2d at 91.

\textsuperscript{53} \textit{Id.} at 90.
Section 9601(35)(C) states that a person with actual knowledge of a release or threatened release who transfers title without disclosing what he knows “shall be treated as liable . . . and no defense under [the innocent owner defense] shall be available.” The court in *United States v. Petersen Sand & Gravel, Inc.* noted, “The innocent owner defense is never available to a person who obtained actual knowledge of a release while [he] owned the property and subsequently transferred the property without disclosing the release.” Owners with actual knowledge of contamination, regardless of § 9601(35)(C), likely will be denied the innocent owner defense when they deceitfully transfer land because foisting responsibility for contaminated land onto an unknowing purchaser is unfair, and the defense is an equitable one. Thus, the *Petersen* court argues that interpreting § 9601(35)(C) such that it applies only to those parties who are traditionally liable renders the provision’s reference to the innocent owner defense meaningless.

Some courts have decided that the proper interpretation of § 9601(35)(C) is as an independent basis for liability. These courts read the first sentence of the provision, “Nothing in this paragraph . . . shall diminish the liability of any previous owner . . . who would otherwise be liable,” as separate from the second sentence describing the consequences of nondisclosure. The provision’s second sentence states that “if the defendant obtained actual knowledge of the release or threatened release” then he must disclose that information.

For instance, the U.S. Court of Appeals for the Third Circuit stated in as to § 9601(35)(C), “By its plain language, this provision appears to create a substantive basis of liability,” and concluded that an intermediate landowner with knowledge of contamination who did not disclose

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56 806 F. Supp. at 1353.

57 *See id.; Stempien, supra* note 6, at 21–24.

58 See *Petersen*, 806 F. Supp. at 1353; Stempien, *supra* note 6, at 21–24.


60 42 U.S.C. § 9601(35)(C); see *CDMG Realty*, 96 F.3d at 717 n.9; *Ford Motor*, 1997 WL 594498, at *2–3.

that knowledge remained liable even after transferring the facility.\textsuperscript{62} Similarly, in \textit{Anheuser-Busch, Inc. v. Ford Motor Co.}, the court adopted the plaintiff’s argument that the section provided a basis to hold the intermediate landowner liable under CERCLA.\textsuperscript{63} The court noted that a former owner who failed to disclose the presence of contamination “may be liable even if no disposal of hazardous substances took place during its period of ownership.”\textsuperscript{64} Courts advancing this interpretation emphasize that imposing intermediate landowner liability comports with the twin policy goals of the statute.\textsuperscript{65} Holding responsible the intermediate landowner with knowledge of contamination both forces the information to become public and obligates the intermediate landowner to pay his share of response costs.\textsuperscript{66}

III. The Intermediate Landowner Who Attempts to Escape Liability by Conveying the Facility

Whether intermediate landowners are liable for contaminated site cleanup is unclear; courts have settled neither on the validity of the passive disposal theory nor the use of § 9601(35)(C) to hold an intermediate landowner responsible.\textsuperscript{67} The lack of clarity in the case law may result in mischievous land transfers.\textsuperscript{68} A clever landowner could take advantage of the ambiguities in the statute and the inconsistencies in judicial interpretation and avoid responsibility by transferring title upon discovery, or near discovery, of hazardous materials.\textsuperscript{69} This Part

\textsuperscript{62} See \textit{CDMG Realty}, 96 F.3d at 717 & n.9.

\textsuperscript{63} 1997 WL 594498, at *2–3.

\textsuperscript{64} Id.

\textsuperscript{65} See, e.g., \textit{CDMG Realty}, 96 F.3d at 717–18; \textit{Nurad, Inc. v. William E. Hooper & Sons Co.}, 966 F.2d 837, 845–46 (4th Cir. 1992) (requiring an intermediate landowner to qualify as disposer was at odds with CERCLA’s strict liability scheme and policy of encouraging expeditious, voluntary cleanup).

\textsuperscript{66} See, e.g., \textit{CDMG Realty}, 96 F.3d at 717–18; \textit{Nurad}, 966 F.2d at 845–46.

\textsuperscript{67} Compare \textit{United States v. CDMG Realty Co.}, 96 F.3d 706, 717 n.9 (3d Cir. 1996) (concluding that § 9601(35)(C) provides an independent basis for imposing liability), and \textit{Nurad Inc. v. William E. Hooper & Sons Co.}, 966 F.2d 837, 846 (4th Cir. 1992) (accepting passive disposal theory), with \textit{Westwood Pharm., Inc. v. Nat’l Fuel Gas Distribution Corp.}, 964 F.2d 85, 90–91 (2d Cir. 1992) (holding that § 9601(35)(C) only applies to the four classes of traditionally liable parties), and \textit{United States v. Petersen Sand & Gravel, Inc.}, 806 F. Supp. 1346, 1350–51 (N.D. Ill. 1992) (rejecting passive disposal theory).

\textsuperscript{68} See generally Chase & Mixon, \textit{supra} note 1 (selling to a pauper to escape liability).

\textsuperscript{69} See id. at 293 (suggesting that the sale of property upon discovery of contamination to a fully informed pauper relieves intermediate owner of liability); Glass, \textit{supra} note 24, at 440 (noting that intermediate landowners who attempted to escape liability by selling property could be liable for fraud); Tracy, \textit{supra} note 24, at 195–96 (discussing the inadequacy of penalties for nondisclosure).
details four such scenarios: (1) the intermediate landowner with actual knowledge of a release who transfers title without disclosing the discovery; (2) the intermediate landowner who fully discloses the release but transfers title to a penniless person in a sham transaction; (3) the intermediate landowner who detects a putrid smell, then quickly sells the property; and (4) the intermediate landowner who would have been on notice of contamination had he conducted a careful title search. Whether liability for response costs will attach in any of these scenarios is unclear.\(^{70}\)

A. The Intermediate Landowner Who Gains Actual Knowledge of a Release, Then Transfers Title Without Disclosing the Knowledge

Prior to the enactment of the SARA amendments, CERCLA’s liability scheme created a disincentive to disclose because an intermediate landowner with knowledge of the presence of hazardous contamination could avoid responsibility by selling and keeping quiet.\(^{71}\) Such a result was in opposition to the goals of swift cleanup of hazardous waste sites to protect public health and of fair allocation of cleanup costs—the hazardous condition would fester on the property and an unsuspecting purchaser would be responsible for expensive cleanup once the contamination is discovered.\(^{72}\) Section 9601 (35) (C) altered the statute, potentially creating the harsh penalty of liability for expensive response costs for the intermediate landowner who failed to disclose actual knowledge of a discovered release.\(^{73}\)

1. Defining and Proving Actual Knowledge

Under § 9601 (35) (C), the intermediate landowner who gains actual knowledge of a release and transfers title to an unknowing purchaser is potentially liable for response costs.\(^{74}\) Establishing the point at which

\(^{70}\) Compare CDMG Realty, 96 F.3d at 717 n.9 (noting that § 9601 (35) (C) may create an independent basis for holding intermediate owners liable for response costs), with Westminster, 964 F.2d at 90–91 (rejecting the claim that intermediate owner who was not otherwise a PRP could be sued for contribution).

\(^{71}\) See Tracy, supra note 24, at 193 (“[T]his potential liability loophole is a definite disincentive to thorough environmental assessment and might encourage landowners to adopt a ‘see no evil’ approach to site evaluation.”).

\(^{72}\) See, e.g., CDMG Realty, 96 F.3d at 717–18; Hemingway Transp., Inc. v. Kahn, 993 F.2d 915, 921 (1st Cir. 1993); Nurad, 966 F.2d at 845; Tracy, supra note 24, at 193.

\(^{73}\) See, e.g., CDMG Realty, 96 F.3d at 717 n.9; Tracy, supra note 24, at 193.

the intermediate landowner obtains actual knowledge of a release is
difficult to determine and harder to prove. Actual knowledge can be
distinguished from constructive knowledge because with actual knowl-
edge the owner witnesses a release event himself. For example, in Fallowfield Development Corp. v. Strunk, employees of the defendant testified that he ordered them to bury bottles of medical waste on the property. When the substance in the bottles produced a foul smell, the employees brought the defendant to the trench, at which point he or-
dered them to cover the broken bottles with dirt. The court in Fallow-
field accepted the testimony of the employees and concluded that the
defendant landowner had actual knowledge of a release because he
watched as his employees buried the hazardous materials.

In Hemingway Transport, Inc. v. Kahn, the court did not have evi-
dence that the intermediate landowner witnessed a release, but the
state environmental protection agency notified the owner of leaking
barrels in a letter and requested removal of the hazardous waste. On
this basis, the court concluded that the intermediate landowner had
actual knowledge of the presence of leaking barrels. Because the
intermediate landowner knew of the spreading contamination and
failed to remediate the site, the corporation was a “‘covered person,’
strictly liable to the EPA for future response costs.” Absent evidence
such as a letter from a government agency or testimony that the in-
termediate owner saw a release taking place, a subsequent purchaser
may not be able to prove that the intermediate owner had actual
knowledge of a release and should therefore be liable.

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75 See Tracy, supra note 24, at 196 (noting that a seller may “choose nondisclosure, hop-
ing that the buyer never finds out or that the buyer at least will not be able to prove that
the seller had knowledge before the property was transferred”).
78 Id.
79 See id. at *8.
80 993 F.2d 915, 919, 925 (1st Cir. 1993).
81 Id.
82 Id. at 925.
83 See id. at 919, 925; Fallowfield, 1993 WL 157723, at *8; Chase & Mixon, supra note 1,
at 303–06 (discussing the moment at which owner’s awareness of contamination constit-
tutes actual knowledge such that liability should attach); Tracy, supra note 24, at 195–96.
2. Imposing Liability for Nondisclosure Under CERCLA

Should a CERCLA plaintiff successfully show that an intermediate landowner had actual knowledge in witnessing a release and failed to disclose it, the statute would not necessarily provide a remedy if the intermediate landowner would not neatly fit within the statutorily defined classes of PRPs. For instance, in *Northeast Doran, Inc. v. Key Bank of Maine*, the defendant bank, holder of a security interest, conducted an environmental assessment, discovered possible environmental contamination, and then promptly sold the property at a foreclosure sale without disclosing the results of the assessment. The court in *Northeast Doran* held that the defendant was not liable because it merely held a security interest in the property; it was neither a disposer nor the current owner, and thus, not a PRP.

In *Fallowfield Development Corp. v. Strunk*, the court concluded that the intermediate landowner was a *disposer*. The intermediate landowner watched his employees bury and break bottles of medical waste on his property, then transferred the property after representing that the land did not contain hazardous material. In this case, the court concluded that the owner was a disposer of hazardous materials because he ordered the bottled be buried and watched his employees cover the waste with dirt. The *Fallowfield* court went on to apply § 9601(35)(C) and concluded that the provision simply precluded use of the innocent owner defense because the intermediate landowner was obviously a PRP.

When sellers actually discover contamination, they must choose between disclosing the knowledge of the release of hazardous materials or remaining silent, hoping the purchaser will fail to either discover the contamination or prove that the intermediate owners had actual knowledge. The U.S. Court of Appeals for the Third Circuit noted that in-

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84 See *Ne. Doran, Inc. v. Key Bank of Me.*, 15 F.3d 1, 2 (1st Cir. 1994); *Westwood Pharm., Inc. v. Nat’l Fuel Gas Distribution Corp.*, 964 F.2d 85, 91 (2d Cir. 1992); *Fallowfield*, 1993 WL 157723, at *7–8; *Tracy*, supra note 24, at 195.
85 15 F.3d at 2.
86 Id. at 3.
88 Id. at *2.
89 Id. at *2, *6–7.
90 See id. at *7–8.
91 *Tracy*, supra note 24, at 195–96 (“[C]urrent owners who know their land is contaminated . . . choose between nondisclosure, taking a chance that the buyer will not be able to prove that the seller knew about the contamination, and disclosure, with its serious consequences of lowered property value . . . .”).
intermediate owners “pay” when they transfer land and disclose the presence of hazardous materials because their low selling prices reflect the cost of CERCLA liability. Either Congress or the courts will have to decide whether §9601(35)(C) imposes liability on parties who withhold knowledge of contamination but do not fit neatly within the classes of PRPs, otherwise those with actual knowledge may choose to conceal the presence of hazardous materials to keep their selling prices high.

3. Court-Imposed and State Law Disclosure Requirements

Outside the CERCLA context, courts increasingly are imposing a duty to disclose negative conditions on the property, such as contamination. Specifically, courts’ refusal to enforce the caveat emptor defense and the proliferation of state statutes requiring disclosure demonstrate a demand for transparency in land sales.

Some courts reject the caveat emptor—or buyer beware—defense to seller liability, shifting responsibility to the seller to disclose the presence of hazardous materials onsite. The seller is usually in a position to know more about possible contamination, and utilizing caveat emptor as a defense only increases the disparity in bargaining power in land sales. The U.S. Court of Appeals for the Third Circuit recognized the inherent unfairness caveat emptor imparted on the modern land transaction, concluding that caveat emptor is not a permissible defense under CERCLA. The Third Circuit emphasized that the use of the defense frustrates the policy of expeditious site cleanup, as parties will not undertake cleanup promptly if they are unsure whether they can

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92 United States v. CDMG Realty, Co., 96 F.3d 706, 717 (3d Cir. 1996); see Chase & Mixon, supra note 1, at 303; Tracy, supra note 24, at 195–96.
93 See Tracy, supra note 24, at 220 (“To accomplish [CERCLA’s] goals, cleanup statutes should be designed to provide incentives for thorough site evaluation [and] encourage disclosure of relevant information . . . .”).
95 Smith Land, 851 F.2d at 90; Tracy, supra note 24, at 173, 174, 196–200.
96 Smith Land, 851 F.2d at 90 (concluding that caveat emptor defeated purposes of CERCLA and was not a defense); Tracy, supra note 24, at 173, 174 (arguing that courts should reject caveat emptor and impose affirmative duty to disclose presence of hazardous materials).
97 See Tracy, supra note 24, at 172 (“In contaminated land transactions, the seller often has access to more definitive information about the site and, in many transactions, the seller may be much more sophisticated than the buyer. An information and bargaining strength disparity might arise . . . .”).
98 Smith Land, 851 F.2d at 87, 90.
seek contribution from other PRPs. The person who learned of contamination would refuse to act until a court decided which parties were liable. In addition to court-imposed duties to disclose, many states have enacted mandatory disclosure laws as possible solutions to the disincentive to make revelations created by caveat emptor.

To summarize, there is a trend in the law of land transactions toward imposing a duty upon the seller to make full disclosure. Some scholars argue that because the CERCLA statutory scheme motivates recovery of cleanup costs suits, the best solution to provide consistency and predictability lies in a conclusive and effective interpretation of the disclosure requirements of the statute.

B. The Intermediate Landowner with Actual Knowledge of a Release Who Transfers Title to a Penniless Person in a Sham Transaction

An intermediate landowner who discovers the release or threatened release of hazardous materials may seek to avoid liability by conveying the facility to a penniless person for nominal consideration and making full disclosure of the presence of contamination. By fully informing the penniless person, the intermediate landowner seemingly escapes not only traditional liability, but also any possible liability under § 9601(35)(C). The statute does not appear to prohibit mischievous transfers to a penniless person who could not pay for site remediation, so long as EPA has not already brought suit against the intermediate landowner as a PRP. Scholars suggest that considerations of fairness and the policies underlying CERCLA, however, demand that such a sham transaction should not eliminate one’s liability.

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99 Id. at 90.
100 Id.
102 See Glass, supra note 24, at 441, 442; Tracy, supra note 24, at 173, 220, 215–19.
103 See Tracy, supra note 25, at 215–19, 220 (“[W]e should not lose sight of the fact that it is CERCLA’s liability provisions that are the driving force behind site evaluation, site cleanup, and in the long term, prevention of site contamination through improvement of environmental management practices.”).
104 See generally Chase & Mixon, supra note 1 (providing detailed discussion of strategic conveyance to pauper by potential CERCLA defendant).
105 See id. at 293.
106 See id. at 306.
107 See id. at 335–36 (“One could argue that Congress ‘intended’ its program to operate in a world of ordinary transactions. However, people do not ordinarily seek out indigents and give them land.”); Tracy, supra note 24, at 220 (“The goals of the nation’s site cleanup programs, both federal and state, are to promote effective and efficient cleanup
A possible solution lies in Sanford Street Local Development Corp. v. Textron, Inc., in which the court held that the sale of a manufacturing facility containing hazardous waste at a drastically reduced price constituted disposal of the hazardous materials. The court wrote that a “party is a responsible person when a transaction—even though characterized as a ‘sale’—is a sham for disposal.” Therefore, an intermediate landowner with actual knowledge of a release who transfers title to a penniless person could be a disposer within the traditional classes of PRPs, and so, the sham land transfer would not relieve him of liability.

C. The Intermediate Landowner on Notice of a Release Who Transfers Title

In United States v. Buckley, the court delivered jury instructions reading, “[A]n individual cannot avoid knowledge by deliberately closing his eyes to what would otherwise be obvious or by failing to investigate if he is in possession of facts which cry out for investigation.” Though § 9601(35)(C) requires “actual knowledge,” the phrase “release or threatened release” may be read to mean that something approaching actual knowledge, such as being on notice that a release occurred or may occur, could implicate the provision. In Fertilizer Institute v. EPA, the court defined a threatened release as exposure of a hazardous substance to the environment. The court accepted EPA’s conclusion that placing hazardous materials in an unenclosed container, exposed to the air, was a threatened release.

of sites and encourage efficient use of cleanup resources, while protecting public health and the environment.


110 See, e.g., Petersen, 806 F. Supp. at 1354; Sanford, 768 F. Supp. at 1222–23; Chase & Mixon, supra note 1, at 293.

111 934 F.2d 84, 87 (6th Cir. 1991) (emphasis omitted) (holding the district court’s jury instructions were an accurate articulation of the law).

112 CERCLA, 42 U.S.C. § 9601(35)(C) (2000) (emphasis added); see Buckley, 934 F.2d at 87.

113 935 F.3d 1303, 1307 (D.C. Cir. 1991).

114 Id. at 1306, 1310.

Other sections of CERCLA incorporate knowledge requirements, namely the notification to EPA of a release provision and the innocent owner defense.\textsuperscript{116} Examination of what constitutes knowledge in those situations helps to shed light on the proper meaning of the knowledge requirement of § 9601(35)(C).\textsuperscript{117}

1. The Intermediate Landowner Who Detects a Putrid Smell, Then Transfers Title

Section 9601(35)(C) is ambiguous as to whether strong evidence that a release occurred, such as detection of a putrid smell, constitutes the requisite knowledge.\textsuperscript{118} Another portion of CERCLA requires an owner to notify EPA of contamination if he has knowledge of or is on notice of a release exceeding a certain quantity.\textsuperscript{119} Comparing the circumstances in which notice of a release suffices in the reporting context helps illuminate whether an intermediate landowner with similar knowledge should be liable under § 9601(35)(C).\textsuperscript{120} In the context of reportable releases, in Thoro Products Co., the Office of the Administrator of EPA determined that the owner of a facility suspected a significant release.\textsuperscript{121} The owner responded to a call from one of his employees describing a huge cloud of foul-smelling fog emanating from his factory.\textsuperscript{122} He “clearly possessed knowledge of such circumstances as would ordinarily lead upon investigation, in the exercise of reasonable diligence which a prudent person ought to exercise, to a knowledge of actual facts.”\textsuperscript{123} The Office of the Administrator concluded that the owner violated CERCLA by waiting too long to report his knowledge.\textsuperscript{124} To summarize, the site owner was on notice of a release, and he violated the statute in failing to immediately investigate and report to EPA.\textsuperscript{125}

\textsuperscript{116} Id. §§ 9601(35)(B) (requiring all appropriate inquiries into contamination to assert innocent owner defense), 9603 (reporting requirements).


\textsuperscript{118} See 42 U.S.C. § 9601(35)(C).

\textsuperscript{119} See id. § 9603.

\textsuperscript{120} See id.; Thoro Prods., 1992 WL 143993 (discussing the precise moment at which site owner had actual knowledge of release requiring reporting).

\textsuperscript{121} 1992 WL 143993.

\textsuperscript{122} Id.

\textsuperscript{123} Id.

\textsuperscript{124} Id.

\textsuperscript{125} See id.
Thus, other CERCLA sections require owners to investigate possible contamination when they are on notice of a release, such as when an owner detects a putrid smell. It is unclear, however, whether the knowledge requirement of § 9601(35)(C) similarly includes an intermediate landowner who is on notice of the need to investigate further the presence of contamination.

2. The Careful Title Search Revealing the Disposal of Hazardous Materials by a Previous Owner

When an intermediate landowner conducts a careful title search that reveals disposal of hazardous waste by a previous owner, he cannot be sure whether a release has occurred on site or is threatened. Thus, it is unclear whether he has actual knowledge of a release or threatened release as required by § 9601(35)(C). In another context, for a PRP to successfully assert the innocent owner defense, he must show that a careful title search would not have exposed the presence of hazardous materials on the site. An owner must show, inter alia, that he conducted “all appropriate inquiries” into the presence of hazardous materials onsite. To determine whether an owner conducted all appropriate inquiries, courts consider:

[A]ny searches conducted of historical sources and public records; relevant specialized knowledge; the relationship of the purchase price to the value of the property if the property was not contaminated; commonly known . . . information about the property; the degree of obviousness of the presence or likely presence of contamination; and the ability to detect the contamination by appropriate investigation.

Section 9601(35)(C) does not clarify whether, similarly, an intermediate landowner, who would have been on notice of the potential release of contaminants had he conducted a thorough title search, has actual

130 Id. § 9601(35)(B).
131 Id.
132 McDonald, 423 F. Supp. 2d at 1130 (summarizing 42 U.S.C. § 9601(35)(B)).
knowledge of the release or threatened release of hazardous substances and may be liable. 133

In the context of the innocent owner defense, in *McDonald v. Sun Oil Co.*, the current owners of the property knew the land was formerly a mercury mine, that mercury was dangerous, and that contaminated bricks were onsite. 134 In addition, the owners indicated that they thought the land had more value than the price they paid. 135 The court concluded that the owners—because of their knowledge of mercury contamination and the dubious purchase price—should have been suspicious and conducted appropriate inquiries into other possible contamination. 136 Similarly, in *Acme Printing Ink Co. v. Menard, Inc.*, the court concluded that the purchaser was not an innocent owner because the mere fact that the land was formerly a dump should have put him on notice that hazardous materials were present onsite. 137 Likewise, the court in *Advanced Technology Corp. v. Eliskim, Inc.* indicated that the owner had knowledge of environmental contamination because a portion of the parcel that the corporation planned to purchase was “held back.” 138 EPA would not approve the conveyance of that parcel because it suspected the presence of hazardous materials. 139 The landowner, thus, was on inquiry notice that lead contamination also existed on its site, but failed to conduct an environmental assessment. 140 As such, the court denied the corporation the innocent owner defense. 141

In these three cases, each owner knew of facts that should have prompted him to investigate his chain of title further. 142 Because all failed to do so, they remained PRPs. 143 CERCLA does not clarify whether an intermediate landowner who would have obtained actual knowledge

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134 423 F. Supp. at 1130.
135 Id.
136 See id.
139 Id. at 782–83, 785.
140 Id. at 785.
141 Id. at 785–86.
of a release or threatened release had he conducted a careful title search is similarly liable under § 9601(35)(C).¹⁴⁴

IV. ATTACHING LIABILITY TO INTERMEDIATE LANDOWNERS WITH KNOWLEDGE OF CONTAMINATION TO ENCOURAGE CLEANUP AND ACHIEVE EQUITABLE RESULTS

Section 9601(35)(C) should constitute an independent basis for imposing liability on intermediate landowners.¹⁴⁵ Even though intermediate landowners did not dispose of hazardous materials, those who gain actual knowledge of releases or threatened releases and keep that knowledge secret should not escape responsibility.¹⁴⁶ Permitting intermediate landowners to extinguish their liability by transferring title unfairly shifts the entire cost of waste site cleanup onto the unknowing purchasers.¹⁴⁷ This Note suggests that utilizing § 9601(35)(C) to impose liability on intermediate landowners is necessary both because courts have failed to adopt a single interpretation of the passive disposal theory and in order to achieve the two primary goals of the statute.¹⁴⁸ As previously discussed, the principal purposes of CERCLA are to encourage voluntary, expeditious waste site cleanup and to equitably allocate response costs.¹⁴⁹ Utilizing § 9601(35)(C) as an independent basis for liability achieves both goals by forcing discovered contamination to become

¹⁴⁵ See, e.g., United States v. CDMG Realty Co., 96 F.3d 706, 717 n.9 (3d Cir. 1996) ("By its plain language [§ 9601(35)(C)] appears to create a substantive basis of liability."); Anheuser-Busch, Inc. v. Ford Motor Co., No. 93-526, 1997 WL 594498, at *2–3 (W.D. Ky. Feb. 10, 1997) (concluding that a former owner who failed to disclose the presence of hazardous materials "may be liable even if no disposal of hazardous substances took place during its period of ownership"); Glass, supra note 24, at 441 ("SARA added [§ 9601(35)(C)] which imposes liability upon sellers who knew of the existence of a site and failed to disclose it to the purchaser.").
¹⁴⁶ See CDMG Realty, 96 F.3d at 717–18; Nurad, Inc. v. William E. Hooper & Sons Co., 966 F.2d 837, 845–46 (4th Cir. 1992) (requiring that intermediate landowner qualify as disposer was at odds with CERCLA’s strict liability scheme and policy of encouraging expeditious, voluntary cleanup); Ford Motor, 1997 WL 594498, at *2–3; Glass, supra note 24, at 440–41.
¹⁴⁷ See Nurad, 966 F.2d at 845–46; Tracy, supra note 24, at 181 ("The cost of cleaning up a site may be overwhelming to an individual or small business and may even exceed the value of the property.").
¹⁴⁸ See infra Part IV.A–B.
¹⁴⁹ See, e.g., Carson Harbor Vill., Ltd. v. Unocal Corp., 270 F.3d 863, 880–81 (9th Cir. 2001); Hemingway Transp., Inc. v. Kahn, 993 F.2d 915, 921 (1st Cir. 1993); Mardan Corp. v. C.G.C. Music, Ltd., 804 F.2d 1454, 1455 (9th Cir. 1986).
public information and by eliminating the gaps in liability left by inconsistent judicial application of the passive disposal theory.\textsuperscript{150} Lastly, interpreting the provision to impose liability on intermediate landowners who deceitfully transfer title helps to resolve the four mischievous land transfers introduced in Part III.\textsuperscript{151}

A. The Necessity of a Broad Interpretation of Liability Under § 9601(35)(C): Failure of the Passive Disposal Theory to Provide Recourse to an Innocent Purchaser

A broad interpretation of the scope of § 9601(35)(C) applicability is necessary to hold the mischievous intermediate owner liable.\textsuperscript{152} Courts failed to settle on a single interpretation when asked to stretch the definition of disposers under the traditional classes of PRPs to include intermediate landowners and, to date, have not unanimously adopted the passive disposal theory.\textsuperscript{153} The U.S. Court of Appeals for the Fourth Circuit, for example, accepted the passive disposal theory as a basis for imposing liability when a prior owner’s hazardous waste barrels leaked while the intermediate landowner possessed the facility.\textsuperscript{154} The court emphasized that absent a definition of disposal that includes passive migration of hazardous materials, “[A]n owner could avoid liability simply by standing idle while an environmental hazard festers on his property.”\textsuperscript{155} In the Fourth Circuit’s view, such a result defeated the goal of voluntary, expeditious site cleanup.\textsuperscript{156}

Equally, several U.S. district courts require that an intermediate landowner take positive action leading to the spread of hazardous materials before attaching liability.\textsuperscript{157} The court in United States v. Petersen Sand & Gravel Inc. reasoned that “‘disposal’ does not contemplate pas-

\begin{itemize}
\item \textsuperscript{150} See infra Part IV.B.
\item \textsuperscript{151} See infra Part IV.C.
\item \textsuperscript{152} See Bronston, supra note 18, at 610–11; Stempien, supra note 6, at 24–25.
\item \textsuperscript{153} See, e.g., Carson Harbor, 270 F.3d at 881 (rejecting passive disposal theory for passive soil migration of contaminants, but leaving open use of the theory in future); Nurad, Inc. v. William E. Hooper & Sons Co., 966 F.2d 837, 844–46 (4th Cir. 1992) (accepting theory of passive disposal); United States v. Petersen Sand & Gravel, Inc., 806 F. Supp. 1346, 1350–53 (N.D. Ill. 1992) (rejecting passive disposal as basis for liability).
\item \textsuperscript{154} Nurad, 966 F.2d at 844–46.
\item \textsuperscript{155} Id. at 845.
\item \textsuperscript{156} Id. (“[A] requirement conditioning liability upon affirmative human participation in contamination . . . frustrates the statutory purpose.”).
\item \textsuperscript{157} E.g., Petersen, 806 F. Supp. at 1350–53 (spreading of toxics should be categorized as a release, not disposal); Snediker Developers Ltd. P’ship v. Evans, 773 F. Supp. 984, 989 (E.D. Mich. 1991) (“[T]he mere migration of hazardous waste, without more, does not constitute disposal . . . .”); Ecodyne Corp. v. Shah, 718 F. Supp. 1454, 1457 (N.D. Cal. 1989).
\end{itemize}
sive migration” because passive migration of contaminants is better categorized as a release.\(^\text{158}\) Leaking and spreading of hazardous materials during ownership did not constitute disposal as required for liability, especially because an intermediate landowner might never learn of the leaking.\(^\text{159}\)

In the middle of the spectrum of court responses, the U.S. Court of Appeals for the Ninth Circuit rejected passive migration as a basis for liability when stormwater runoff caused the spread of lead contamination during the intermediate landowner’s possession.\(^\text{160}\) The Ninth Circuit noted, however, that its ruling did not preclude the application of the passive disposal theory in cases involving the spread of contaminants by means other than passive soil migration.\(^\text{161}\)

These scattered rulings on the applicability of the passive disposal theory show that a subsequent purchaser of a waste site may not find recourse against the intermediate landowner who sold the property and did not disclose the presence of contamination.\(^\text{162}\) As a result of the inconsistent application of the passive disposal theory, the goals of CERCLA remain unserved in a jurisdiction that does not accept passive migration as grounds for liability because the intermediate landowner will both keep the information to himself and escape responsibility.\(^\text{163}\)

B. Achieving the Goals of CERCLA

Imposing liability on intermediate landowners serves the two principal goals of CERCLA—swift facility remediation and equitable allocation of costs.\(^\text{164}\) The threat of responsibility for response costs is a strong incentive to investigate and reveal a discovered release or threatened

\(^{158}\) 806 F. Supp. at 1351.

\(^{159}\) Id. But see Stempien, supra note 6, at 20 (discussing Petersen, 806 F. Supp. 1346: “The Petersen court was sorely mistaken in its belief that interpreting ‘disposal’ to include acts of commission but not omission would not frustrate the purposes of CERCLA”).

\(^{160}\) Carson Harbor Vill., Ltd. v. Unocal Corp., 270 F.3d 863, 868, 881 (9th Cir. 2001).

\(^{161}\) Id. at 881.

\(^{162}\) See, e.g., Carson Harbor, 270 F.3d at 881 (rejecting passive disposal theory); Nurad, Inc. v. William E. Hooper & Sons Co., 966 F.2d 837, 844–46 (4th Cir. 1992) (accepting theory of passive disposal); Petersen, 806 F. Supp. at 1350–53 (rejecting passive disposal theory); Bronston, supra note 18, at 610–11.

\(^{163}\) See Nurad, 966 F.2d at 845–46 (“A CERCLA regime which rewards indifference to environmental hazards and discourages voluntary efforts at waste cleanup cannot be what Congress had in mind.”); Tracy, supra note 24, at 172.

\(^{164}\) See, e.g., Carson Harbor, 270 F.3d at 880–81; Hemingway Transp., Inc. v. Kahn, 993 F.2d 915, 921 (1st Cir. 1993); Mardan Corp. v. C.G.C. Music, Ltd., 804 F.2d 1454, 1455 (9th Cir. 1986).
release.\textsuperscript{165} Once the information becomes public, cleanup can begin.\textsuperscript{166} Thus, the purpose of expeditious site cleanup to protect public health and safety is served by an interpretation of § 9601(35)(C) that imposes liability on intermediate landowners and forces them to disclose knowledge of contamination.\textsuperscript{167} In addition, imposing liability on intermediate landowners who choose to conceal knowledge of releases serves the purpose of fair allocation of costs among all responsible parties.\textsuperscript{168} Holding intermediate landowners responsible is no more unfair than imposing liability on current innocent owners as traditional PRPs.\textsuperscript{169}

1. The Importance of Prompt Disclosure to Ensure Remediation

One of CERCLA’s principal objectives is the voluntary and expeditious cleanup of hazardous waste sites that threaten human health and the environment.\textsuperscript{170} Interpreting § 9601(35)(C) as an independent basis for liability promotes this goal because it encourages disclosure, which will lead to facility remediation.\textsuperscript{171} An intermediate landowner who learns of the release of hazardous materials will be more likely to reveal the information at the time of sale rather than face expensive response costs with no hope of successfully arguing the innocent owner defense.\textsuperscript{172}

\textsuperscript{165} See Tracy, \textit{supra} note 24, at 192–93, 220.
\textsuperscript{166} See id. at 220.
\textsuperscript{167} See Stempnien, \textit{supra} note 6, at 20 (discussing Petersen, 806 F. Supp. 1346: “[O]wners will be discouraged from initiating private cleanups; instead, they will attempt to sell the property without disclosure so as to escape liability entirely”); Tracy, \textit{supra} note 24, at 220 (“To accomplish [CERCLA’s] goals, cleanup statutes should be designed to provide incentives for thorough site evaluation, encourage disclosure of relevant information, and involve the use of private sector resources and expertise.”).
\textsuperscript{168} See, e.g., Carson Harbor, 270 F.3d at 880–81; Hemingway, 993 F.2d at 921; Mardan, 804 F.2d at 1455.
\textsuperscript{169} See Nurad, Inc. v. William E. Hooper & Sons Co., 966 F.2d 837, 845 (4th Cir. 1992) (rejecting intermediate owner liability “introduces the anomalous situation where a current owner . . . who never used the storage tanks could bear a substantial share of the cleanup costs, while a former owner who was similarly situated would face no liability at all”).
\textsuperscript{170} E.g., Carson Harbor, 270 F.3d at 880–81; Hemingway, 993 F.2d at 921; Mardan, 804 F.2d at 1455 (“CERCLA was a response by Congress to the threat to public health and the environment posed by the widespread use and disposal of hazardous substances. Its purpose was to ensure the prompt and effective cleanup of waste disposal sites . . . .”).
\textsuperscript{171} See Stempnien, \textit{supra} note 6, at 20; Tracy, \textit{supra} note 24, at 192–93, 220.
\textsuperscript{172} See Glass, \textit{supra} note 24, at 441; Stempnien, \textit{supra} note 6, at 20 (“CERCLA encourages private cleanup because it is usually less expensive for a PRP to undertake a cleanup itself. EPA, as a federal agency, notoriously spends more money than is necessary to remedy a site.”); Tracy, \textit{supra} note 24, at 192–93.
Some cases require sellers to disclose negative information about the sale property, though it may decrease purchase prices. For instance, many courts have rejected caveat emptor in modern land transactions, noting that it creates a disincentive to disclosure and a disparity in bargaining position. The court in *Smith Land & Improvement Corp. v. Celotex Corp.* reasoned that caveat emptor frustrated the policies of CERCLA because the party who discovered contamination would refuse to act until a court decided who was liable. Also, many states now have mandatory disclosure laws, requiring sellers to reveal the presence of contamination at a site to the purchaser. Thus, sellers increasingly are required to reveal discovered contamination or face liability in court.

While court-imposed duties to reveal contamination and state mandatory disclosure laws create a strong incentive to disclose, the goal of expeditious hazardous facility identification and cleanup is best accomplished by a comprehensive, uniform interpretation of CERCLA. CERCLA’s statutory scheme provides the motivation for most suits. Courts should use § 9601(35)(C) as an independent basis of intermediate landowner liability in order to provide consistency and predictability in land sales transactions. Doing so will also motivate expeditious site cleanup because intermediate landowners will reveal the information to avoid liability under CERCLA, and once the presence of hazardous materials becomes public information, cleanup operations can commence.

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174 *See Smith Land*, 851 F.2d at 87, 90; *Tracy, supra* note 24, at 172–73.

175 851 F.2d at 90.

176 *Tracy, supra* note 24, at 196–200 (citing examples from California, New Jersey, Connecticut, Missouri, and Illinois laws).

177 *See, e.g.*, *Smith Land*, 851 F.2d at 87, 90; *Tracy, supra* note 24, at 196–200.

178 *See* *Tracy, supra* note 24, at 215–19, 220.

179 *Id.* at 220.

180 *See id.*

181 *See id.* at 192–93, 220.
2. The Goal of Equitable Allocation of Costs

Another primary goal of CERCLA is the equitable allocation of costs among all responsible parties. The statute holds the current owners of facilities strictly liable, regardless of their status as disposers of hazardous materials. The imposition of liability on an intermediate landowner who deceitfully transferred title to contaminated land is no less fair than holding the innocent purchaser responsible for cleanup. The U.S. Court of Appeals for the Fourth Circuit wrote that rejecting intermediate landowner liability “introduces the anomalous situation where a current owner . . . who never [disposed of hazardous waste] could bear a substantial share of the cleanup costs, while a former owner who was similarly situated would face no liability at all,” and noted that “[a] CERCLA regime which rewards indifference to environmental hazards and discourages voluntary efforts at waste cleanup cannot be what Congress had in mind.” As such, imposing liability on an intermediate landowner who knowingly concealed information about hazardous contamination promotes fairness.

In addition, as previously discussed, state statutes and judicial decisions increasingly impose a positive duty to disclose on sellers of properties with defects. Thus, a seller forced to pay for failing to disclose actual knowledge of a release or threatened release should not be surprised. Imposing liability on him is both fair and serves the goal of equitable allocation of costs.

When parties bring a CERCLA claim, courts have authority to “allocate response costs among liable parties using such equitable factors as the court determines are appropriate.” In resolving contri-

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182 E.g., Carson Harbor Vill., Ltd. v. Unocal Corp., 270 F.3d 863, 880–81 (9th Cir. 2001); Hemingway Transp., Inc. v. Kahn, 993 F.2d 915, 921 (1st Cir. 1993); Mardan Corp. v. C.G. Music, Ltd., 804 F.2d 1454, 1455 (9th Cir. 1986).
184 See Chase & Mixon, supra note 1, at 337 (“All entrepreneurs enter transactions knowing they may lose all the money they invested.”); Glass, supra note 24, at 441 (“[T]he law will protect neither purchasers of land who were not prudent in making their purchase, nor sellers who unfairly foisted their hazard on another.”).
186 Id.
187 See supra Part IV.B.1.
188 See Glass, supra note 24, at 441; Tracy, supra note 24, at 196–200.
189 See Glass, supra note 24, at 441; Tracy, supra note 24, at 196–200.
bution claims, courts will consider relative degrees of fault.\textsuperscript{191} The amount paid in response costs will be dependent on the intermediate landowner’s role in contaminating the facility.\textsuperscript{192} As such, an intermediate landowner may only pay a small portion of any response costs if he is relatively innocent as compared to the disposer.\textsuperscript{193}

Intermediate landowners who choose disclosure in compliance with the statute would likely have to accept low purchase prices.\textsuperscript{194} A seller’s forced acceptance of a decreased purchase price should not discourage a court from adopting § 9601(35)(C) as a basis for liability.\textsuperscript{195} Innocent purchasers who discover contamination lose significant value in their investments, yet the statute imposes liability on them despite their lack of fault.\textsuperscript{196}

In sum, holding intermediate landowners responsible for response costs when they fail to disclose the presence of contamination at the time of sale promotes the goal of equitable allocation of costs.\textsuperscript{197} Imposing liability on the intermediate landowner is as fair, if not more so, than imposing liability on the current owner.\textsuperscript{198} In addition, other areas of the law require disclosure of defects, and the portion of response costs the intermediate landowner pays will be proportionate to his fault.\textsuperscript{199} Utilizing § 9601(35)(C) as a basis for liability does not create injustice and further encourages the equitable allocation of costs.

\textsuperscript{191} See id.; Hemingway Transp., Inc. v. Kahn, 993 F.2d 915, 921 n.4 (1st Cir. 1993).
\textsuperscript{192} Carson Harbor Vill., Ltd. v. Unocal Corp., 270 F.3d 863, 871 (9th Cir. 2001) (“A PRP’s contribution liability will correspond to that party’s equitable share of the total liability’ . . . . The contribution provision aims to avoid a variety of scenarios by which a comparatively innocent PRP might be on the hook for the entirety of a large cleanup bill.” (quoting Pinal Creek Group v. Newmont Mining Corp., 118 F.3d 1298, 1301 (9th Cir. 1997))).
\textsuperscript{194} See United States v. CDMG Realty, Co., 96 F.3d 706, 717 (3d Cir. 1996) (noting intermediate owners “pay” when they transfer land and disclose the presence of hazardous materials because their low “selling price[s] will reflect the cost of CERCLA liability”); Tracy, supra note 24, at 184 (“[C]ontaminated property is almost certain to be devalued as a result of the presence of hazardous substances.”).
\textsuperscript{195} See CDMG Realty, 96 F.3d at 717; Nurad, 966 F.2d at 845; Chase & Mixon, supra note 1, at 337.
\textsuperscript{196} See CERCLA, 42 U.S.C. § 9607(a)(1) (2000); Tracy, supra note 24, at 181–83 (“Ownership of contaminated land brings with it a host of costly responsibilities and constraints, including management of site cleanup, possible land use restrictions, and vulnerability to legal claims.”).
\textsuperscript{197} See, e.g., Carson Harbor, 270 F.3d at 880–81; CDMG Realty, 96 F.3d at 717–18; Hemingway Transp., Inc. v. Kahn, 993 F.2d 915, 921 (1st Cir. 1993).
\textsuperscript{198} See CDMG Realty, 96 F.3d at 717–18; Nurad, 966 F.2d at 845.
\textsuperscript{199} See, e.g., 42 U.S.C. § 9613(f)(1); Glass, supra note 24, at 441.
among all parties that contributed to the growing threat of contamination.200

C. Resolving the Four Mischievous Land Transfer Scenarios

Part III of this Note introduced four scenarios in which the lack of clarity as to the applicability of § 9601(35)(C) resulted in mischievous land transfers: (1) the intermediate landowner with actual knowledge of a release who transferred title without disclosing the discovery; (2) the intermediate landowner who fully disclosed the release, transferring title to a penniless person in a sham transaction; (3) the intermediate landowner who detected a putrid smell, then quickly sold the property; and (4) the intermediate landowner who would have been on notice of contamination if he had conducted a careful title search.201 Utilizing § 9601(35)(C) as an independent basis for liability helps to resolve the unfairness in the four deceitful conveyance scenarios.202

1. The Intermediate Landowner Who Transfers Title Without Disclosing Actual Knowledge of a Release Should Be Liable for Response Costs

The intermediate owner who transfers title without disclosing actual knowledge of a release or threatened release is responsible if § 9601(35)(C) is read to impose liability regardless of the intermediate landowner’s status as a disposer.203 If intermediate landowners conceal their knowledge, contamination remains untreated and continues to pose a threat to human health and the environment.204 Also, when intermediate landowners with knowledge of a release escape liability, the unwitting purchaser is left to pay the response costs for site cleanup.205 Imposing liability, however, serves the two primary goals of CERCLA because the information about contamination will become public so

200 See, e.g., Carson Harbor, 270 F.3d at 880–81; CDMG Realty, 96 F.3d at 717–18; Nurad, 966 F.2d at 845; Mardan Corp. v. C.G.C. Music, Ltd., 804 F.2d 1454, 1455 (9th Cir. 1986).
201 See supra Part III.
202 See infra Part IV.C.1–4.
203 See CDMG Realty, 96 F.3d at 717 & n.9 (reasoning that CERCLA may impose liability on intermediate landowners who fail to disclose upon discovering a release of hazardous materials, regardless of their status as disposers); Anheuser-Busch, Inc. v. Ford Motor Co., No. 93-526, 1997 WL 594498, at #2–3 (W.D. Ky. Feb. 10, 1997).
204 See, e.g., Carson Harbor, 270 F.3d at 880–81; Hemingway Transp., Inc. v. Kahn, 993 F.2d 915, 921 (1st Cir. 1993); Nurad, 966 F.2d at 845; Mardan, 804 F.2d at 1455.
205 See Nurad, 966 F.2d at 845; Tracy, supra note 24, at 181–83.
that facility remediation can begin and the entire burden of response costs will not shift unjustly to the unknowing purchaser.206

2. Transferring Title to a Penniless Person in a Sham Transaction Should Amount to Disposal

Transferring the title to a contaminated facility to a penniless person in a sham transaction should not satisfy the demands of § 9601(35)(C).207 An intermediate landowner who conveys the facility and makes full disclosure seemingly meets the requirements of the provision and is free from responsibility.208 Considerations of the policies of CERCLA and of fairness, however, indicate transferring title in a sham transaction should not defeat liability.209 The penniless person who receives title to the facility will not be able to pay for cleanup, frustrating the goal of equitable allocation of response costs.210 Instead, the government will have to pay for cleanup and will not have PRPs from whom to seek recovery of expenses.211

The case of Sanford Street Local Development Corp. v. Textron, Inc. proposes a possible solution.212 The Sanford court treated a sale for nominal consideration to a penniless person as “disposal” and imposed liability on the mischievous seller as a disposer of hazardous materials.213 Courts should not have difficulty seeing beyond an intermediate landowner’s characterization of the transfer as a valid sale to see that it is indeed a sham transaction designed to relieve him of liability.214 Thus, a court should scrutinize conveyances of contaminated facilities to penni-

206 See supra Part IV.B.
207 See Chase & Mixon, supra note 1, at 293, 339.
208 See id. at 293.
209 See id. at 340 (“Whatever the extent of the practice, a plethora of strategic conveyances would not be good for the public. Conveying contaminated land to an indigent grantee is the functional equivalent of abandonment. The land will sit vacant, perhaps leaking or leaching contaminants . . . .”).
210 See id.
211 See id. (“[I]f at-fault parties cannot be located and sued, some level of government will bear the cost of cleanup.”).
213 Sanford, 768 F. Supp. at 1222–23.
less people and hold sellers liable if the evidence reveals the sales were merely attempts to escape responsibility.  


The use of § 9601(35)(C) as a basis for intermediate landowner liability does not solve the difficult problem of proving actual knowledge of a release or threatened release. Courts have relied on letters from government environmental protection agencies and testimony of witnesses regarding an owner’s disposal activities to establish actual knowledge in prior cases. Whether information short of a notification letter or eyewitness testimony would satisfy the knowledge requirement of § 9601(35)(C) is unclear. Thus, a subsequent purchaser may be unable to show that an intermediate owner deceitfully transferred title without disclosing knowledge of a release, and the mischievous seller would escape liability.

This Note argues that courts should accept facts indicating that an intermediate landowner was on notice of a release as satisfying the knowledge requirement of § 9601(35)(C). The provision states that an intermediate owner must have knowledge of “release or threatened release.” The phrase “threatened release” suggests that circumstances other than eyewitness knowledge may satisfy the knowledge requirement, such as events putting an intermediate landowner on notice of a

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215 See, e.g., Aceto Agric., 872 F.2d at 1381; Petersen, 806 F. Supp. at 1354; Chase & Mixon, supra note 1, at 333.

216 See Tracy, supra note 24, at 196.


218 See Hemingway, 993 F.2d at 925; Fallowfield, 1993 WL 157723, at *2, *6, *8; Chase & Mixon, supra note 1, at 303–06 (discussing moment at which owner’s awareness of contamination constitutes actual knowledge such that liability should attach); Tracy, supra note 24, at 195–96.

219 See Glass, supra note 24, at 441; Stempien, supra note 6, at 23–24; Tracy, supra note 24, at 196.


release.\textsuperscript{222} The court in \textit{Fertilizer Institute v. EPA} found that a container of hazardous waste without a lid was a threatened release because volatile contaminants could escape into the air.\textsuperscript{223} When an intermediate owner detects a putrid smell, he is on notice that a release occurred and that contaminants are escaping into the environment, and CERCLA should impose some consequence.\textsuperscript{224}

Notice meets the knowledge requirements of other provisions in the statute.\textsuperscript{225} For instance, CERCLA requires owners to notify EPA of the release of hazardous materials in excess of certain amounts within hours of the owner gaining constructive knowledge of the release.\textsuperscript{226} In \textit{Thoro Products, Co.}, the Office of the Administrator of EPA determined that the owner, upon receiving reports of a foul-smelling odor emanating from his factory, “clearly possessed knowledge of such circumstances as would ordinarily lead upon investigation, in the exercise of reasonable diligence which a prudent person ought to exercise, to a knowledge of actual facts” that required reporting.\textsuperscript{227}

To summarize, other sections of CERCLA require investigation upon notice of a release, such as the detection of a putrid smell.\textsuperscript{228} In the context of the statute’s reporting requirement, demanding that those on notice investigate evidence of hazardous conditions ensures the discovery of contamination.\textsuperscript{229} Likewise, requiring intermediate landowners who detect putrid smells to investigate further and to reveal the information gained advances the goal of expeditious site cleanup; they will discover releases and make their knowledge public at the time of sale so that cleanup can begin.\textsuperscript{230} In order to both avoid the difficulty of proving actual knowledge and to advance the goals of CERCLA, courts should accept notice indicating a release or threat-

\textsuperscript{222} See Tracy, \textit{supra} note 24, at 216 (“Sellers may claim that they had no way of knowing about any contamination . . . [I]t is quite possible that a seller would consider himself free of any obligation to inform potential buyers about the land’s condition.”).
\textsuperscript{223} 935 F.2d 1303, 1306–07 (D.C. Cir. 1991).
\textsuperscript{225} 42 U.S.C. §§ 9601(35)(B) (innocent owner defense), 9603 (reporting requirements).
\textsuperscript{226} Id §§ 9603; \textit{Thoro Prods.}, 1992 WL 143993.
\textsuperscript{228} See 42 U.S.C. § 9603; \textit{Thoro Prods.}, 1992 WL 143993.
\textsuperscript{229} See Hemingway Transp., Inc. v. Kahn, 993 F.2d 915, 921 (1st Cir. 1993); Glass, \textit{supra} note 24, at 441; Tracy, \textit{supra} note 24, at 220.
ened release occurred, such as the detection of a putrid smell, as evidence fulfilling the knowledge requirement of § 9601(35) (C). 231

4. Section 9601(35) (C) Should Apply to the Intermediate Landowner Whose Careful Title Search Would Reveal Disposal by a Prior Owner

When a careful title search would reveal the disposal of hazardous materials by a prior owner, the intermediate owner is on notice that a release may or may not occur. 232 Whether courts should treat this situation differently than detecting a putrid smell, where a release clearly occurred, is uncertain. 233 Additionally, courts must consider whether failure to investigate suspected contamination exposed by a title search should trigger liability for response costs under § 9601(35) (C) or merely deny an intermediate owner the innocent owner defense. 234

A careful title search is required to successfully assert the innocent owner defense. 235 For example, in Acme Printing Ink Co. v. Menard, Inc., the court held that the mere fact the property formerly was a dump put the purchaser on notice that hazardous materials were present on site. 236 Because the corporate purchaser failed to conduct a careful investigation before buying the facility, it could not assert the innocent owner defense. 237 Similarly, in McDonald v. Sun Oil Co., the purchasers knew that the site was formerly a mercury mine and thought they paid an unusually low price for the property. 238 The


233 Compare Thoro Prods., 1992 WL 143993 (cloud of foul-smelling fog), with McDonald, 423 F. Supp. 2d at 1130 (land formerly a mercury mine), and Acme Printing, 870 F. Supp. at 1480–81 (careful records search revealed land was a dump).


236 870 F. Supp. at 1480–81.

237 Id.

238 423 F. Supp. 2d at 1130.
court denied the purchasers the innocent owner defense because they knew or should have known that the site was contaminated.\footnote{Id.}

Because failure to conduct a thorough title search defeats the innocent owner defense and possibly imposes responsibility, an intermediate purchaser whose title search would reveal hazardous materials onsite should also receive a penalty—liability for failing to disclose his knowledge of the possibility of a release when he later conveys the property.\footnote{See, e.g., United States v. CDMG Realty Co., 96 F.3d 706, 717 n.9 (3d Cir. 1996); McDonald, 423 F. Supp. 2d at 1130; Glass, \textit{supra} note 24, at 441; Tracy, \textit{supra} note 24, at 220.} The threat of denial of the innocent owner defense alone is insufficient to encourage disclosure if an intermediate owner knows he can conceal the information and gamble that the purchaser will not be able to prove he is a PRP.\footnote{See Tracy, \textit{supra} note 24, at 192–93, 195–96.} Utilizing § 9601(35)(C) as an independent basis of liability, and accepting notice of a release or a threatened release as the requisite knowledge, will ensure both that intermediate landowners conduct thorough title searches and that they do not mischievously transfer title.\footnote{See, e.g., Carson Harbor Vill., Ltd. v. Unocal Corp., 270 F.3d 863, 880–81 (9th Cir. 2001); Glass, \textit{supra} note 24, at 441; Tracy, \textit{supra} note 24, at 192, 220.}

**Conclusion**

Section 9601(35)(C) of CERCLA arguably imposes liability on an intermediate landowner who sells a facility without disclosing actual knowledge of a release or threatened release. Considerations of fairness and the policies underlying the statute’s liability scheme dictate that an intermediate landowner should not be able to remain silent and escape liability by conveying the facility to an unknowing purchaser.

Failure of the passive disposal theory to provide a remedy for a subsequent purchaser against an intermediate landowner who deceitfully conveyed the facility demonstrates that § 9601(35)(C) should be used as an independent basis for imposing liability in order to provide consistency. Otherwise, the goals of CERCLA will not be met in some jurisdictions where a mischievous intermediate landowner can slip through the liability cracks while the threat of contamination grows.

In order to hold responsible an intermediate landowner with knowledge of a release, courts should utilize § 9601(35)(C) as an independent basis for liability. Courts should consider both the relative fault of an intermediate landowner and decreased proceeds from the sale of the facility in resolving contribution claims. As such, an inter-
mediate landowner would pay a fair sum of response costs. Courts should also look past an intermediate landowner’s characterization of a land transfer as a sale and treat a sham transaction to a penniless person as disposal activity triggering liability.

Lastly, courts should permit notice of contamination to satisfy the knowledge requirements of § 9601(35)(C). Doing so will further encourage disclosure and avoid the situation in which an intermediate landowner on notice of a release transfers contaminated land, without investigating, to an unwitting purchaser. Courts should not hesitate to use § 9601(35)(C) as an independent basis of intermediate landowner liability because doing so both ensures the remediation of hazardous waste sites and prevents an intermediate landowner from mischievously transferring title to an unknowing, innocent purchaser.