THE LAW AND PLANNING OF PUBLIC OPEN SPACES: BOSTON’S BIG DIG AND BEYOND

SYMPOSIUM ARTICLES AND ESSAYS

INDELIBLE PUBLIC INTERESTS IN PROPERTY: THE PUBLIC TRUST AND THE PUBLIC FORUM

Karl P. Baker
Dwight H. Merriam

Abstract: In response to the ongoing debate over how much of the surface real estate reclaimed by the Big Dig should be devoted to open space, and how much to other uses, this Article examines two legal doctrines that are frequently implicated by plans for changes in use and disposition of publicly-owned property. While these doctrines stand on distinct historical and theoretical foundations and diverge from each other in many respects, there are important parallels between them in how they conceptualize the relationship between government’s power to regulate, control, and dispose of land it owns, and the rights belonging to what one scholar has called the “unorganized public” in that same property. On a more pragmatic level, commonality between these two doctrines arises from their applicability to the same physical spaces and their concern with the same types of governmental actions. Therefore, while both the courts and the academy have largely examined these doctrines separately, this Article employs a comparative analysis to better understand the relationship between government and the “unorganized public” with respect to publicly-owned property, and to more fully appreciate the limitations on the use of currently and formerly publicly-owned lands.

LESSONS FROM THE WORLD TRADE CENTER FOR OPEN SPACE PLANNING GENERALLY AND BOSTON’S BIG DIG SPECIFICALLY

Mary L. Clark

Abstract: This paper looks to several land use planning issues at stake in both the World Trade Center redevelopment and Central Artery/Tunnel Project, offering some lessons for the future of public open space planning with respect to the influence of the press, the centrality of politics, the urgency of addressing public and
private claims of land ownership, the need to engage the public, and seizing the opportunity to create new public transportation links.

WINDFALLS, WIPEOUTS, GIVINGS, AND TAKINGS IN DRAMATIC REDEVELOPMENT PROJECTS: BARGAINING FOR BETTER ZONING ON DENSITY, VIEWS, AND PUBLIC ACCESS

*Daniel J. Curtin, Jr.*
*Jonathan D. Witten*

Abstract: Large-scale redevelopment projects such as Boston’s “Big Dig” bestow numerous public benefits—often without charge—to nearby property owners. In the case of the Big Dig, these benefits include twenty-seven acres of newly created parkland, where once an elevated freeway stood. Beyond the immediate and obvious beneficiaries are nearby landowners seeking “better zoning” that might include a relaxation of maximum height or floor area ratios to enjoy the new view. This Article explores the often hidden impact of the nearby landowners’ means of accomplishing their desired result: bargaining with municipalities for private, derivative benefits. The Article compares legislative and judicial responses to land use bargaining in California and Massachusetts, states with dramatically different approaches to land use planning. The Article concludes that bargaining in the absence of a guiding land use plan—the Massachusetts “model”—results in a chaotic land use policy and unpredictable development.

REFLECTIONS ON COMMUNITY PROCESS IN THE MULTI-LAYERED COMMUNITIES OF A MAJOR URBAN DEVELOPMENT PROJECT

*Stephanie Pollack*

Abstract: Many legal, political and informal “community processes” were undertaken to shape the future of the land created by the underground rerouting of Boston’s Central Artery. In order to assess whether these processes were valuable, the Essay proposes an approach to determining what constitutes a successful community process in the context of a complicated urban development challenge. First, a typology of community processes is developed, involving both different layers of community and a spectrum of processes from the legal to the political. Next, four criteria are proposed for evaluating the efficacy of community processes: inclusiveness, integrity, influence and implementation. Finally, these evaluation criteria are applied to determine the extent to which the different types of community processes used to shape the Central Artery Project’s open spaces were successful. The Essay concludes that the lessons learned in Boston can be used to shape more effective community processes elsewhere.
PUBLIC PROJECTS AND CITIZEN PARTICIPATION: THE CHALLENGE OF COORDINATING MEANINGFUL PUBLIC INVOLVEMENT OVER TIME

Robert Tuchmann

[pages 355–364]

Abstract: Consensus to proceed with Boston’s Big Dig Project was only reached after the Commonwealth agreed to perform a long list of mitigation measures to satisfy the objectives of numerous interest groups. To ensure that those measures would be implemented and to avoid project-stopping litigation, the Central Artery Environmental Oversight Committee was formed. Its work over the last fourteen years is a unique blend of lawyering and leadership. For the redevelopment of the surface above the downtown portions of the Project, the Mayor’s Central Artery Completion Task Force was created to implement neighborhood task forces to work with park and building designers and to coordinate the neighborhood views with the interests of regional park, transit, tourism, and similar groups. The results of the Task Force’s work over the last six years will soon be seen as the parks and civic structures are built.

ARTICLE

PRIORITIZING MULTIPLE USES ON PUBLIC LANDS AFTER BEAR LODGE

Erik B. Bluemel

[pages 365–394]

Abstract: This Article analyzes the courts’ application of First Amendment jurisprudence to Native American cultural activities on federal land. The author concludes that the courts’ use of existing First Amendment law has been strained, especially with respect to Native American cultural practices on federal land. The Article analyzes Bear Lodge Multiple Use Association v. Babbitt within this context to conclude that First Amendment jurisprudence may not be the most appropriate legal construct for determining whether to allow or protect Native American cultural activities on federal land. Instead, the Article suggests that Native American practices are often best considered cultural, rather than religious, and as such, a First Amendment analysis, which has not been particularly favorable to Native American interests, would not apply. Applying a cultural lens to Native American practices, the Article concludes that federal land managers act well within their prescribed authority when they protect such activities.
Notes

SUBSTANTIVE DUE PROCESS SINCE EASTERN ENTERPRISES, WITH NEW DEFENSES BASED ON LACK OF CAUSATIVE NEXUS: THE SUPERFUND EXAMPLE

Philip Jordan

(pages 395–420)

Abstract: Eastern Enterprises v. Apfel has renewed the relevance of one type of substantive due process reasoning by implicitly ruling that future statutory obligations to pay compensation are tempered by an analysis of the party’s actions and the alleged harm. Though the legal commentary has focused on Eastern Enterprises’s implications for cases involving takings and retroactive liability, the causative nexus analysis adds another dimension to its importance. This analysis is relevant to Superfund actions, particularly when innocent landowners are involved. Courts should address the causative nexus issue when determining liability to ensure that Superfund does not place unconstitutional burdens on private citizens. After Eastern Enterprises, proper substantive due process analysis requires courts to ask why a Potentially Responsible Party is the appropriate party to pay for a cleanup and whether such a burden is in line with this nation’s traditional notions of fairness.

PUBLIC AND PRIVATE PROPERTY RIGHTS: REGULATORY AND PHYSICAL TAKINGS AND THE PUBLIC TRUST DOCTRINE

Zachary C. Kleinsasser

(pages 421–459)

Abstract: In Lucas v. South Carolina Coastal Council, the Supreme Court held that, when a regulation has deprived a landowner of all economically beneficial use, a threshold issue in determining whether compensation is due is whether the landowner’s rights of ownership are confined by the limitations on the use of land which “inhere in the title itself.” For land that may fall within the public trust doctrine, Lucas’s threshold determination has significant consequences. Because the public trust doctrine is a “background principle,” buyers and sellers of real property may not be able to claim full title, and should be cognizant of the potential application of the doctrine to their land. Further, state and local regulatory bodies should strategically employ the public trust doctrine in environmental protection regulation. Finally, the public trust doctrine’s role in a takings analysis suggests that property rights are perhaps more communal than generally acknowledged, and reveals that it may make sense to evaluate property rights from a community-based perspective.
CITIZEN RESISTANCE TO CHEMICAL WEAPONS INCINERATION: CAN NEPA GIVE LOCAL COMMUNITIES LEVERAGE OVER MILITARY ARMS DECOMMISSIONING PROGRAMS?

Heather Pierce

[pages 459–491]

Abstract: Thousands of tons of chemical weapons are currently being stored in eight locations across the United States. Both a congressional act and an international treaty require the U.S. Army to destroy these chemical weapon stockpiles. The Army plans to use on-site incineration to destroy the weapons stored at four of these sites, and it has recently decided to use non-incineration processes to destroy the chemical agents stored at the other four sites. Two recent cases have been filed challenging the Army’s decision to continue pursuing incineration at half of the sites, alleging that the Army has violated the National Environmental Policy Act (NEPA) by failing to complete a supplemental environmental impact statement for the incineration program. This Note discusses why a court considering these issues should find that the Army has violated NEPA, and it also considers whether NEPA will be successful in stopping the Army’s use of incineration.
INDELIBLE PUBLIC INTERESTS IN PROPERTY: THE PUBLIC TRUST AND THE PUBLIC FORUM

Karl P. Baker*
Dwight H. Merriam**

Abstract: In response to the ongoing debate over how much of the surface real estate reclaimed by the Big Dig should be devoted to open space, and how much to other uses, this Article examines two legal doctrines that are frequently implicated by plans for changes in use and disposition of publicly-owned property. While these doctrines stand on distinct historical and theoretical foundations and diverge from each other in many respects, there are important parallels between them in how they conceptualize the relationship between government’s power to regulate, control, and dispose of land it owns, and the rights belonging to what one scholar has called the “unorganized public” in that same property. On a more pragmatic level, commonality between these two doctrines arises from their applicability to the same physical spaces and their concern with the same types of governmental actions. Therefore, while both the courts and the academy have largely examined these doctrines separately, this Article employs a comparative analysis to better understand the relationship between government and the “unorganized public” with respect to publicly-owned property, and to more fully appreciate the limitations on the use of currently and formerly publicly-owned lands.

Introduction

“Indelible” can be defined in absolute or relative terms.1 The “indelible public interest” we address here is mostly of the latter type, difficult but not impossible to extinguish. While the public trust is of-


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1 Webster’s Third New International Dictionary of the English Language, Unabridged 1147 (Phillip B. Gove et al. eds., 1986) (defining “indelible” as “1: that cannot be removed, washed away, or erased; that cannot be effaced or obliterated: PERMANENT, LASTING 2: that makes marks that cannot easily be removed”).
ten misunderstood as an inalienable public interest, there have been very few cases in which judicial review has found a modification or disposal of public trust lands to be beyond the scope of the legislature’s power. As a derivative of the First Amendment, the public forum doctrine does categorically limit the ways in which government may restrict or regulate free speech in public forums, but it does not create permanent public forums that government cannot extinguish through sale or substantial modification of the physical space. While not absolute, these sometimes indelible public interests in land may condition or even preclude implementation of certain plans for the disposition or development of publicly-owned land.

I. How Indelible Public Interests Relate to the Big Dig

The question of how to utilize the surface real estate reclaimed by Boston’s Central Artery/Tunnel Project (Big Dig) continues to preoccupy politicians, design professionals, and laypersons. These twenty-seven acres in the heart of Boston offer opportunities rarely seen in this or any other city. Arguments over how to use this found land demonstrate an overarching acknowledgement that it is imbued with the public interest and the intrinsically indelible public rights of access and use.

One of the key debates thus far has addressed the appropriate balance between open space and development. Much of the wrangling has been about the idea that seventy-five percent of the reclaimed surface area should be open space. One staunch supporter of the seventy-five percent requirement is John DeVillars, who in August of 1990, as Massachusetts Environmental Affairs Secretary, demanded that seventy-five percent of the reclaimed land be designated as open space, after stating publicly that he intended to “extract every last ounce of environmental and recreational benefit that the law and

2 See infra Part II.B.
3 The strict dichotomy between open space and development is not so clear. Article 49 of the Boston Zoning Code, which covers the Central Artery Special District, allows for several different types of open space designations within what is now referred to as the Rose Kennedy Greenway. These include Urban Plaza Open Space Subdistricts, Recreation Open Space Subdistricts, and Parkland Open Space Subdistricts. The allowed uses in these “open space” subdistricts include building types such as restaurants, cafes, community and recreation centers, and a conservatory complex which could include “accessory office, retail, educational, public assembly, Restaurant, and storage uses, and Cultural Uses.” Boston, Mass., Zoning Code art. 49 (1991), available at http://www.cityofboston.gov/bra/pdf/ZoningCode/Article49.pdf.
common sense allow.” The seventy-five percent requirement was memorialized as “an essential mitigation measure” in the Secretary’s Certificate on the final supplemental environmental impact report issued in 1991. DeVillars has remained a vocal supporter of the seventy-five percent requirement. In an April 2002 op-ed piece in the *Boston Globe*, DeVillars acknowledged the controversy the seventy-five percent requirement had caused, but remained resolute stating, “if I had it to do over again, it would be 90 percent.” In addition, DeVillars asserted that the seventy-five percent requirement and other environmental mitigation measures “continue to represent the legally binding obligations of the Commonwealth.”

Later in 2002, another opinion—written by a partner at a local law firm—appeared in the *Boston Globe*, setting forth a different view of the seventy-five percent rule. This piece made several arguments against retaining the seventy-five percent rule. In terms of process-oriented issues, the writer argued that the rule was not preceded by a planning process and engendered a stifling inflexibility in the planning and design of the twenty-seven acres. In terms of the substantive concept behind the rule, the writer argued that it “treats open space as a commodity to be maximized when, in reality, urban open space is valuable only if it’s used.” By replicating the form of the old elevated highway, the writer argued that it “merely compounds a 50-year-old planning failure.” It was further suggested that opening up more land to development would help pay for the open spaces to be created, given the challenges in funding the greenway. While the writer minimized the “supposed legal difficulties” of changing the seventy-five percent requirement, he cautioned that “[s]hould a [new] greenway be created, and should it prove to be a mistake, the Massachusetts constitution would require a two-thirds vote of the Legislature to undo it.”

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6 Id.
7 Id.
9 See id.
10 Id.
11 Id.
12 See id.
13 Id.
The requirement for a two-thirds vote of the legislature is contained in article 49 of the Massachusetts constitution.\footnote{Mass. Const. art. XLIX. The 1972 adoption of article 97 annulled original article 49 and adopted the present version in its place. Id. art. XCVII.} A supermajority is required to approve changes in the use or disposition of land or easements taken or acquired to further the rights of the people to “clean air and water, freedom from excessive and unnecessary noise, and the natural, scenic, historic, and esthetic qualities of their environment.”\footnote{Id.} Considering the purposes for which public parks are conceived, it is readily apparent how this provision could apply to future plans to convert open space in the Rose Kennedy Greenway to a different use, whether private development or another public use such as a museum or police station. While the current version of article 49 was ratified just thirty years ago, it builds on and follows the principles of the older prior public use doctrine. In the way it limits local governments and state agencies from changing the use of public parks without legislative authorization, it grants a kind of protection to parks that closely parallels protections carried out under the ancient “public trust doctrine” in other states. Furthermore, dedicated public parks, sidewalks, and roadways along the Rose Kennedy Greenway would all most likely qualify as traditional public forums, another form of public interest that might be difficult to extinguish.

II. The Public Trust Doctrine

At its core, the public trust doctrine stands for the proposition that certain resources are held in trust by the government for the benefit of the “people” or the “public at large.” It is commonly stated that the emergence of the public trust doctrine can be traced to at least the sixth century AD, and that it has been a fixture of the common law since at least the signing of the Magna Carta.\footnote{See, e.g., Jose L. Fernandez, Untwisting the Common Law: Public Trust and the Massachusetts Colonial Ordinance, 62 ALB. L. REV. 623, 626–27 (1998). Carol Rose has taken issue with this understanding, stating that “[a]lthough American and English jurists confidently espoused the sovereign’s ‘trust’ ownership of the tidelands as if it dated at least from Magna Carta, strong evidence exists that the theory originated much more recently.” Carol Rose, The Comedy of the Commons: Custom, Commerce, and Inherently Public Property, 53 U. CHI. L. REV. 711, 728 (1986) (footnote omitted).} While historically the public trust doctrine applied to navigable or tidal waterways, it has expanded in some jurisdictions to protect certain inland re-
sources, such as public parks. While the limitations imposed on government by the public trust doctrine are often overstated and the public’s rights are not per se inalienable, the public trust does impose important restrictions on government in its ability to dispose of or change the use of publicly owned lands.

A. The Jus Publicum

In one of his famous treatises, Lord Chief Justice Hale delineated three classes of interests in navigable waterways: the *jus privatum*, the *jus publicum*, and the *jus regium*. These can be translated, respectively, as the “private right,” the “public right,” and the “royal right.” Each term conforms to an idea still relevant in American public trust jurisprudence. The *jus privatum* can be understood as the rights granted to private individuals in public trust lands, whether in fee, licenses, or easements; these rights are subordinate to the *jus publicum*. The *jus publicum* essentially represents the rights of the “unorganized public” in public trust lands; these rights originally were defined in the context of tidal waterways, essentially as access to fishing and navigation. The *jus regium* is often left out of discussions of the public trust, but it is noteworthy: these rights essentially embody the state’s police power, encompassing the dual role of government as trustee and police officer with respect to public trust lands.

It is important to understand that the *jus publicum* is not per se inalienable. Historically, Parliament had the power to extinguish the *jus publicum*; after the American Revolution, this power passed to the


19. See *id*.


21. Carol Rose makes a useful distinction between the “unorganized public” and the “governmentally-organized public” in describing that nature of the rights implicated by the public trust doctrine and other doctrines that similarly touch upon “inherently public property.” Rose, *supra* note 16, at 721.


23. See *id*.

state legislatures.\textsuperscript{25} The role of the state legislature as trustee for the \textit{jus publicum} is important in understanding the functioning of the public trust doctrine because local governments and state agencies are powerless without delegated authority from the legislature.\textsuperscript{26} While there have been a few instances in which courts have prevented the legislature from alienating the \textit{jus publicum},\textsuperscript{27} there have been many more cases in which the alienation of the \textit{jus publicum} by the legislature has been held permissible.\textsuperscript{28}

\section*{B. Extinguishing the Public Trust?}

\subsection*{1. Can the Federal Government Extinguish the Public Trust?}

It is “the settled law of this country” that the title to public trust lands—that is, tidal and navigable waterways—that vested in the States upon their entry into the Union, is subordinate to the authority of the federal government to regulate navigable waterways under the Commerce Clause.\textsuperscript{29} There is a split of opinion, however, on the relationship between the rights of the unorganized public—the \textit{jus publicum} and the federal government’s authority.

The U.S. District Court for the District of Massachusetts has held that “the federal government is \textit{as restricted} as the Commonwealth in its ability to abdicate to private individuals its sovereign \textit{jus publicum} in the land.”\textsuperscript{30} This court strongly endorsed the theory that the \textit{jus publicum} is inalienable, noting that “neither sovereign may alienate this land free and clear of the public trust” and that “[n]either the federal government nor the state may convey land below the low water mark to private individuals free of the sovereign’s \textit{jus publicum}.”\textsuperscript{31}

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\textsuperscript{25} Appleby v. City of New York, 271 U.S. 364, 381 (1926).
\textsuperscript{27} See Appleby, 271 U.S. at 393–95 (interpreting Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387 (1892)).
\textsuperscript{28} See id. at 384–91 (listing several cases under New York law where the \textit{jus publicum} had been alienated); see also Opinion of the Justices to the Senate, 424 N.E.2d 1092, 1099 (Mass. 1981) (“The general view in this country is that constitutional considerations do not bar legislative grants of absolute rights in submerged lands, although a gross or egregious disregard of the public interest would not survive constitutional challenge.”).
\textsuperscript{31} Id. at 124.
\end{flushright}
However, the U.S. District Court for the Northern District of California has held that “[b]ecause . . . the United States’ power of eminent domain is supreme to the State’s power to maintain tidal lands for the public trust, the . . . United States’ condemnation of these lands extinguishes the State’s public trust easement.”\(^\text{32}\) This court made note of the Massachusetts decision but maintained that “[b]ecause this Court believes it is bound by the Supremacy Clause of the United States Constitution to hold otherwise, . . . it respectfully declines to follow that court’s ruling.”\(^\text{33}\)

Since neither case has been overruled, the question of whether the federal government is subject to the \textit{jus publicum} remains open.\(^\text{34}\)

2. Local Governments Cannot Extinguish the \textit{Jus Publicum}

Before acting with respect to public trust rights, local governments generally must obtain specific legislative permission. A Massachusetts court recently explained the origin of that doctrine and clarified how absolute the authority of the state legislature is in Massachusetts:

> [The] history of the origins of the Commonwealth’s public trust obligations and authority, as well as jurisprudence and legislation spanning two centuries, persuades us that only


\(^\text{33}\) \textit{Id.} at 217. The court here also declined to follow its own precedent from two years earlier, \textit{City of Alameda v. Todd Shipyards Corp.}, 632 F. Supp. 333 (N.D. Cal. 1986). In that case, the court cited \textit{1.58 Acres of Land} and held that, “[s]ince the State and the City both held the land subject to the public trust, the United States could take the land only subject to the public trust.” \textit{Id.} at 341.

\(^\text{34}\) Some courts have sided with the court in \textit{1.58 Acres of Land}, finding that the federal government is subject to the limitations of the \textit{jus publicum}. See, e.g., United States v. Burlington N. R.R. Co., 710 F. Supp. 1286, 1287 (D. Neb. 1989); \textit{In re Steuart Transp. Co.}, 495 F. Supp. 38, 40 (E.D. Va. 1980) (“Under the public trust doctrine, the State of Virginia and the United States have the right and the duty to protect and preserve the public’s interest in natural wildlife resources. Such right does not derive from ownership of the resources but from a duty owing to the people.”); \textit{see also} District of Columbia v. Air Fla., Inc., 750 F.2d 1077, 1083 (D.C. Cir. 1984) (“[N]either the Supreme Court nor the federal courts of appeals have expressly decided whether public trust duties apply to the United States. There appear to be only two district court cases which explicitly hold that this common-law rule applies to the federal government as well as to the states.”) (footnote omitted). Only one court has cited to \textit{11.037 Acres of Land} in support of the notion that the Supremacy Clause trumps the state’s public trust rights and it was not in a public trust case but rather in a case addressing the doctrine of prior public use. \textit{See United States v. Acquisition of 0.3114 Cuerdas of Condemnation Land}, 753 F. Supp. 50, 53 (D.P.R. 1990) (“The power of the federal government to condemn state land is well-settled. The State cannot limit or frustrate that power.”) (citation omitted).
the Commonwealth, or an entity to which the Legislature properly has delegated authority, may administer public trust rights. This authority derives from the passage of trusteeship and ownership of lands from one sovereign authority to the sovereign authority of the Commonwealth. Absent a grant of authority from the Commonwealth, a municipality may not claim powers to act on behalf of public trust rights.\footnote{Fafard v. Conservation Comm’n of Barnstable, 733 N.E.2d 66, 71 (Mass. 2000) (footnote omitted).}

Given that local governments are merely instruments of the state and may only exercise powers granted to them by the state, this statement does not seem surprising. Especially when applied to navigable waterways, one can see the rationale in limiting local control. With respect to such activities as regulating town beaches and public parks, one might begin to question the wisdom of vesting paramount control of the state in dictating the uses of these spaces. Nevertheless, with respect to the public trust, it is clear that the trustee is the state legislature.\footnote{See id.}

3. Trustee Obligations of States with Respect to the Public Trust

a. Illinois Central: The Outlier of Public Trust Jurisprudence?

\textit{Illinois Central Railroad Co. v. Illinois},\footnote{146 U.S. 387 (1892).} an 1892 Supreme Court decision, is widely cited as the most influential decision in American public trust jurisprudence.\footnote{For an in-depth discussion of the facts in \textit{Illinois Central} and the mythology surrounding that case, see Joseph D. Kearney & Thomas W. Merrill, \textit{The Origins of the American Public Trust Doctrine: What Really Happened in Illinois Central}, 71 U. Chi. L. Rev. 799 (2004).} In holding “inoperative” an act of the Illinois Legislature that purported to convey title to one thousand acres of submerged lands in the Chicago harbor to a railroad company,\footnote{\textit{Illinois Central} represents one of the few instances where a court has invalidated an act of the legislature under the public trust doctrine. See Sax, \textit{supra} note 24, at 489 (“The Supreme Court [in \textit{Illinois Central}] . . . wrote one of the very few opinions in which an express conveyance of trust lands has been held to be beyond the power of a state legislature.”).} \textit{Illinois Central} represents one of the few instances where a court has invalidated an act of the legislature under the public trust doctrine.\footnote{\textit{Ill. Cent. R.R. Co.}, 146 U.S. at 454, 460.} The decision must be read in light of the extraordinary terms of the grant itself, acknowledged in the Court’s opinion: “We cannot, it is true, cite any authority where a grant of this kind has been held invalid, for we believe that no instance exists where the
harbor of a great city and its commerce have been allowed to pass into the control of any private corporation.”

In *Appleby v. New York*, decided thirty-four years after *Illinois Central*, the Supreme Court interpreted *Illinois Central* as allowing the grant of full fee to submerged waterways off Manhattan Island. The *Appleby* Court read *Illinois Central* as having prohibited only the “gross perversion” of the public trust and “abdication of sovereign governmental power,” not the alienation per se of the *jus publicum*.

b. Massachusetts

The long and convoluted history of the Massachusetts public trust doctrine begins with the Colonial Ordinance of 1647. This ordinance granted private property rights in the land between the high and low tide marks—known as the “flats”—to the upland property owners. While the Colony did retain an interest in the flats similar to an easement for navigation, this Ordinance can be viewed as an alienation of the public trust since it departed from the law of England, which had been brought to the Colony and did not allow private ownership of the flats.

Some Massachusetts decisions have suggested that the public trust is inalienable. For example, in *Newburyport Redevelopment Authority v. Commonwealth*, a Massachusetts Appeals Court stated that “land below the natural low water mark is impressed with a public trust, which gives the public’s representatives an interest and responsibility in its development which cannot be extinguished.” This formulation is not in conformity, however, with the opinion of the Massachusetts Supreme Judicial Court (SJC), which has accepted the *Appleby* interpretation of *Illinois Central*—that is, public trust lands are not inalienable. The SJC opinion was expressed in response to issues raised in *Boston Waterfront Development Corp. v. Commonwealth*, which was controversial when decided because it held that a parcel of private property

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43 *Sax*, supra note 24, at 489 (“But the Court did not actually prohibit the disposition of trust lands to private parties; its holding was much more limited.”).
44 The Ordinance of 1647 is sometimes referred to as the Ordinance of 1641. *See Commonwealth v. Alger*, 61 Mass. 53, 67 (1851).
45 *Id*. at 67–68.
46 *Sax*, supra note 24, at 487.
along the Boston waterfront was held subject to a “condition subsequent that it be used for the public purpose for which it was granted.” Many worried that this decision clouded the title of much of the valuable real estate in downtown Boston that at one time was waterfront property, and presumably under the common law, remained a part of the public trust.49

Many of the legal uncertainties raised by this case were eventually resolved with the exclusion of “landlocked tidelands” from the purview of the regulations promulgated under chapter 91 of the General Laws of Massachusetts—the codification of the public trust doctrine in Massachusetts.50 This had important implications for much of the land under which the Central Artery now flows, since much of this land was at one time part of the tidal flats subject to the common law public trust doctrine.51 The Massachusetts Senate asked the SJC to comment on the constitutionality of a draft of chapter 91, which explicitly extinguished the *jus publicum* in parts of downtown Boston that were historically impressed by the public trust, but no longer adjacent to or related to the operation of the waterfront.52 The SJC found “no hesitancy in accepting the legislative conclusion that it is substantially in the public interest that such land be free from any claim of a public trust and any other vestigial interest of the Commonwealth.”53


any filled tidelands which on January 1, 1984 were entirely separated by a public way or interconnected public ways from any flowed tidelands, except for that portion of such filled tidelands which are presently located:

(a) within 250 feet of the high water mark, or

(b) within any Designated Port Area. Said public way or ways shall also be defined as landlocked tidelands, except for any portion thereof which is presently within 250 feet of the high water mark.


51 The Massachusetts Department of Environmental Protection regulation exempts from chapter 91 regulation “landlocked tidelands,” defined as filled tidelands separated from the waterfront by a public way and more than 250 feet from the water’s edge as of January 1, 1984. See Mass. Regs. Code tit. 310, § 9.02. Much of the Central Artery runs through areas that were at one time either part of the tidal flats or underwater lands, but are now farther than 250 feet from the waterfront.


53 Opinion of the Justices to the Senate, 424 N.E.2d at 1103.
The SJC recognized two conditions that must be met in order for the alienation of submerged lands to be upheld. First, in order for the Commonwealth to “abandon, release, or extinguish the public interest in submerged land,” there must be explicit legislation that details the particular property involved, the interest being surrendered, and an acknowledgment of the public use served by the transfer. In Massachusetts, “[s]imilar principles properly apply to any relinquishment or surrender of a public interest in real estate.”

Second, in Massachusetts, dispositions of public assets must be “for a valid public purpose, and, where there may be benefits to private parties, those private benefits must not be primary but merely incidental to the achievement of the public purpose.” While legislative and administrative determinations of the public interest are given some deference, these determinations are subject to judicial review. In Massachusetts, the “paramount test” for whether the public purpose requirement is satisfied is a two pronged inquiry that looks for (1) the existence of a direct public benefit that reaches “a significant part of the public;” and (2) “whether the aspects of private advantage . . . are reasonably incidental to carrying out a public purpose.”

III. Application of Public Trust Principles to Parks

A. Public Parks and the Public Trust

States differ as to whether the public trust doctrine applies to public parks. The law in some states, including Massachusetts, is consistent, at least in formal terms, with the ruling of the Connecticut Supreme Court that the public trust doctrine applied to shorefront property is “entirely separate and distinct” from doctrines that protect parks. In other states, such as Illinois and New York, the courts have at least ostensibly applied the same doctrine to parks as to tidelands. Despite the formal differences, however, the prior public use doctrine
protects parks in Massachusetts in substantially the same way that the public trust doctrine protects parks in Illinois and New York. The same general concepts are controlling in both regimes: (1) the requirement of legislative permission to divert or alienate park space; and (2) the importance of formal dedication in determining whether extra protection applies to public parks.

B. Illinois

Illinois is one of the few states to have judicially expanded the public trust doctrine to public parks. This was first accomplished in Paepcke v. Public Building Co., a 1970 Illinois Supreme Court decision holding that citizens had standing as beneficiaries of the *jus publicum* to challenge a diversion of public park space. In *Paepcke*, the plaintiffs challenged a diversion of park space for the construction of public school buildings. The court made clear that the public trust doctrine did not prohibit per se the diversion or alienation of public trust property, and focused on the question of whether or not the legislature had granted sufficient authority to the city agencies named as defendants in the action, such that those agencies could divert park space to build schools. The court concluded that the legislation was "sufficiently broad, comprehensive and definite" to allow the construction of the schools and affirmed the dismissal of the complaint. Since *Paepcke*, the Illinois courts have continued to show deference, and not a single government act with respect to public parks has been found to violate the public trust doctrine. In the meantime, courts have found permissible diversions of parks for use as a golf course, a driving range, parking lots for Soldier Field, and the construction of a highway bridge.

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61 See infra Part III.B–C.
62 See infra Part III.B–C.
64 Id. at 13.
65 Id. at 18 (“If we understand plaintiffs’ position correctly they do not contend, as far as the rights of the public in public trust lands are concerned, that the legislature could never, by appropriate action, change or reallocate the use in any way. (This would be contrary to well established precedent.)” (citations omitted)).
66 See id. at 17–18.
67 Id. at 19, 21.
71 See Friends of the Parks, 786 N.E.2d at 163, 164.
The importance of formal dedications in determining whether or not public parks are protected under the public trust doctrine was underscored by an Illinois Appellate Court decision finding the doctrine inapplicable to a parcel of land that was coded on the city land use plan as “Public Park/Open Space.” \(^{73}\) There had never been a formal dedication of the property as a public park and the court characterized the property as “an empty lot with drainage improvements.” \(^{74}\)

C. New York

New York has perhaps gone furthest in enforcing the public trust doctrine with respect to public parks. \(^{75}\) In Friends of Van Cortlandt Park v. City of New York, the State’s highest court held that the city of New York could not construct a water treatment plant in a public park because it had not received “the direct and specific approval of the State Legislature, plainly conferred.” \(^{76}\) This was true despite the recognition by the court that “the water treatment plant plainly serves an important public purpose,” and the fact that the diversion would only be temporary. \(^{77}\) The court quoted an earlier case where a New York court invalidated a ten-year lease of a building in Central Park in explaining the absolute prohibitions against alienation or diversion of park space by park commissioners: “‘[Central Park] must be kept free from intrusion of every kind which would interfere in any degree with its complete use for this end [as a public park].’” \(^{78}\)

The question of what qualifies as a “park use” was addressed in 795 Fifth Avenue Corp. v. New York, an action challenging a park commissioner’s decision to allow construction of a restaurant pavilion near the southeast corner of Central Park. \(^{79}\) The court held that this use did not violate the public trust doctrine and that it was within the powers granted to the commissioner by the legislature because it


\(^{74}\) Id. at 174.

\(^{75}\) In New York, the public trust doctrine as it applies to parks is codified in General City Law section 20: “the rights of a city in and to its waterfront, ferries, bridges, wharf property, land under water, public landings, wharves, docks, streets, avenues, parks, and all other public places, are hereby declared to be inalienable.” N.Y. Gen. City Law § 20 (2003).

\(^{76}\) Friends of Van Cortlandt Park v. City of New York, 750 N.E.2d 1050, 1055 (N.Y. 2001) (internal quotation marks omitted).

\(^{77}\) Id. at 1054–55.

\(^{78}\) Id. at 1053 (quoting Williams v. Gallatin, 128 N.E. 121, 123 (N.Y. 1920)).

qualified as a “park use,” and thus the park commissioner’s plan “merely involve[d] a change from one proper park use to another.”

The court concluded that the proposed structure was a park use because it “offer[ed] substantial satisfactions to the public, which would only be possible in a park setting.” This reasoning was explained through analogy to other park uses that could exist outside the park, such as ice skating or Shakespearean theatre, but were enhanced by location inside the park.

With respect to the proposed pavilion, the court noted that “the savor of a meal or evening coffee, a snack or an aperitif, in the park setting is a unique one.” The court dismissed the idea that the elimination of green space implied a violation of the public trust, stating that the “transformation of parklands from their natural state to other park uses—e. g., into recreation areas, such as tennis courts and bridle paths, bandstands, beaches or open-air theatres—does not involve a violation of park purposes.” Interestingly, the court also discussed the design and character of the structure as a relevant factor. In enthusiastic praise, the court stated that the proposed pavilion had “a ‘feel’ to it—which expresses joy, openness and light, and, according to the expert testimony, it is of a type which has long been found as part of parks in this country as well as western Europe. . . . It is as natural to the park as a boat house is to a lake.” As a final endorsement, the court stated that “[i]n all likelihood it will be considered in the future as one of the finest of its kind in the United States.”

Similar to Illinois courts, New York courts attach significance to formal dedications in determining whether the public trust doctrine applies. This was demonstrated in a recent controversy arising out of the city of New York’s plan to use community gardens as sites for the development of affordable housing. The trial court dismissed the action to prevent the diversion on the grounds that “community gardens are not considered dedicated Parkland pursuant to the Public Trust Doctrine.” In its decision, the court explained the many ways

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80 Id. at 968.
81 Id. at 969.
82 Id.
83 Id.
84 Id. at 968.
86 Id.
87 Id.
89 Id.
parks could be dedicated and become subject to the public trust doctrine, such as by private donation, formal public declaration, and “implied” dedication where “there is evidence of an unequivocal intent on the part of the municipality . . . to abandon the property and devote it to public use.” The court noted that “an inference that a dedication has taken place may properly be drawn where the land was specifically purchased with the intention of constructing a park and the changes were indicated on City maps and the record map.” However, the court found no evidence that the city had taken such actions, noting that “[t]here have been no changes to any maps or public records.” This was despite the fact that the city “assisted with the care and security of these gardens.”

D. Massachusetts—Prior Public Use Doctrine

While the Massachusetts courts have not explicitly applied the public trust doctrine to parklands, at least one commentator has noted that the Massachusetts courts have applied “public trust principles” to parks through its application of the prior public use doctrine. While different in name, this doctrine has substantially the same requirements for alienating or diverting public parks to other uses.

The prior public use doctrine is rooted in the idea that cities are administrative conveniences of the state. An important consideration in deciding if the prior public use doctrine applies is whether the use of the property is one that is classified as a proprietary or governmental function of the local government. Property held in the proprietary capacity of a municipality “is not subject to the unrestricted authority of the Legislature, and no person can deprive it of such property rights against its will, except by the exercise of eminent domain with payment of full compensation.” Conversely, property held by the municipality in its governmental capacity “is subject to

90 Id. (citations omitted).
91 Id.
92 Id.
93 Id.
95 See Higginson v. Slattery, 99 N.E. 523, 524 (Mass. 1912) (“Cities and towns are territorial subdivisions of the State created as public corporations for convenience in the administration of government. They exercise only the powers which have been conferred by express enactment of the Legislature or by necessary implication from undoubted prerogatives vested in them.”).
96 Id. at 525.
legislative control. It may be transferred to some other agency of government charged with the same duties, or it may be devoted to other public purposes.”97 The maintenance of public parks is considered a governmental function and therefore subject to the authority of the legislature.98 The reasoning behind this classification was spelled out in Higginson v. Slattery:

[T]he dominant aim in the establishment of public parks appears to be the common good of mankind rather than the special gain or private benefit of a particular city or town. The healthful and civilizing influence of parks in and near congested areas of population is of more than local interest and becomes a concern of the state under modern conditions. . . . We should hesitate to say that the state would be powerless to exert compulsion if a city or town should be found so unmindful of the demands of humanity as to fail to provide itself with adequate public grounds.99

Similar to the public trust doctrine applied to parklands in Illinois and New York, “plain and explicit legislation” is required in Massachusetts to divert the parkland to another “inconsistent public use.”100 The court in Higginson granted an injunction prohibiting the construction of a school in the Back Bay Fens area after finding that “statutes upon which the respondents rely do not show a legislative intent to permit the erection of the kind of building here proposed.”101 This decision was made despite the fact that the legislature had passed a statute allowing for the “erection of a building for the High School of Commerce within the limits of the Back Bay Fens.”102 The court arrived at its seemingly untenable conclusion on the basis that about twenty-one percent of the proposed building would be utilized as administrative offices.103 This underscored how the requirement for explicit legislation has been more “stringently applied” with respect to public parks than to other uses because of “[t]he policy of the Commonwealth has been to add to the common-law inviolability

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97 Id.
98 See id. at 525–26.
99 Id. at 527.
101 Higginson, 99 N.E. at 527.
102 Id. at 528 (internal quotation marks omitted).
103 Id.
of parks express prohibition against encroachment by buildings, highways, steam or street railways.”

Formal dedications are also important in determining the protections afforded to public parks in Massachusetts. In *Muir v. City of Leominster*, for example, the court held that a parcel that had been used for several decades as a playground was not subject to the prior public use doctrine because it had not been “devoted to one public use,” largely because there had been “no formal dedication by the city of this area as park land.” Private charitable dedications to park use are governed somewhat differently and create generally greater restrictions on alienation.

**IV. PUBLIC FORUM ISSUES**

The public forum doctrine operates to guarantee First Amendment rights of free speech. Like the public trust doctrine and the prior public use doctrine, it limits the ability of government to control and make changes to publicly-owned property.

**A. Development—Linkage to Public Trust**

The public forum doctrine is a relatively recent incarnation. Some have pinpointed its origin to an article written by Professor Harry Kalven in 1965, the Supreme Court has identified its 1939

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104 See id. at 526. There is also a statutory restriction on buildings in public parks:

Land taken for or held as a park under this chapter shall be forever kept open and maintained as a public park, and no building which exceeds six hundred square feet in area on the ground shall be erected on a common or park dedicated to the use of the public without leave of the general court; but, except in parks in Boston and in parks comprising less than one hundred acres in extent, structures for shelter, refreshment and other purposes may be erected of such material and in such places as, in the opinion of the fire commissioners, if any, do not endanger buildings beyond the limits of such park. The superior court shall have jurisdiction in equity, upon petition of not less than ten taxable inhabitants of the city or town in which such common or park is located, to restrain the erection of a building on a common or park in violation of this section.

- **Mass Gen. Laws ch. 45, § 7 (2002).**


decision *Hague v. Committee for Industrial Organizations* as the beginning of the doctrine’s formation.\(^{108}\)

The parallels between the conceptual framework of the public forum doctrine and the public trust doctrine are discernible early in the public forum doctrine’s development. For example, Kalven describes “a kind of First-Amendment easement” on certain types of public property,\(^{109}\) which sounds similar to the *jus publicum*. Likewise, in the following well-known and frequently cited passage from *Hague v. Committee for Industrial Organizations*, public trust is linked with speech:

> Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.\(^{110}\)

**B. What Is a Public Forum?**

While public forum issues most often arise with respect to publicly-owned property, a public forum can also exist on privately-owned property.\(^{111}\) Moreover, not all publicly-owned property is a protected public forum.\(^{112}\)

There are three general categories of public forums: (1) the traditional or “quintessential” public forum; (2) the designated public forum; and (3) the nonpublic forum.\(^{113}\) While this Article concerns itself primarily with defining traditional public forums, a brief sketch of


\(^{109}\) See Kalven, *supra* note 107, at 13; see also Haggerty, *supra* note 107, at 1128.


\(^{111}\) See, e.g., Venetian Casino Resort, L.L.C. v. Local Joint Executive Bd., 257 F.3d 937, 948 (9th Cir. 2001).

\(^{112}\) See Perry Educ. Ass’n v. Perry Local Educators’ Ass’n, 460 U.S. 37, 46 (1983) (“[T]he First Amendment does not guarantee access to property simply because it is owned or controlled by the government . . . . [T]he State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated.”) (internal quotations omitted).

\(^{113}\) See id. at 45–46.
these three classes and their general characteristics may still be helpful. Traditional public forums are defined as places that have a long tradition of being places of free expression and assembly.\textsuperscript{114} Public streets and parks are the most important examples of traditional or quintessential public forums.\textsuperscript{115} In these areas, the ability “of the State to limit expressive activity [is] sharply circumscribed.”\textsuperscript{116} Designated public forums are properties on which, by some voluntary act, the government has allowed free public expression.\textsuperscript{117} Examples of such designated public forums are meeting facilities, school board meetings, and municipal theaters.\textsuperscript{118} Nonpublic forums are essentially public properties that are neither traditional nor designated public forums.\textsuperscript{119} In nonpublic forums, speech restrictions only need to be “reasonable.”\textsuperscript{120}

C. Extinguishing Forums

Justice Kennedy, in his concurrence in \textit{International Society for Krishna Consciousness, Inc. v. Lee}, affirmatively answered this basic question of whether a public forum can be extinguished:

In some sense the government always retains authority to close a public forum, by selling the property, changing its physical character, or changing its principal use. Otherwise the State would be prohibited from closing a park, or eliminating a street or sidewalk, which no one has understood the public forum doctrine to require.\textsuperscript{121}

While there may be no such thing as a permanent public forum, a State’s actions must conform to a certain standard in order for the forum to be extinguished.\textsuperscript{122} Traditional public forums—such as parks and streets—are “defined by the objective characteristics of the

\begin{itemize}
\item \textsuperscript{114} \textit{Id.} at 37.
\item \textsuperscript{115} \textit{See Frisby v. Schultz}, 487 U.S. 474, 480–81 (1988) (rejecting an argument that these were clichés); \textit{Hague}, 307 U.S. at 515–16.
\item \textsuperscript{116} \textit{Perry Educ. Ass’n}, 460 U.S. at 45.
\item \textsuperscript{117} \textit{See id.}
\item \textsuperscript{118} \textit{See id.} at 45–46.
\item \textsuperscript{119} \textit{Id.}
\item \textsuperscript{120} \textit{Id.} at 46.
\item \textsuperscript{121} \textit{505 U.S. 672, 699–700} (1992).
\item \textsuperscript{122} \textit{See First Unitarian Church v. Salt Lake City Corp.}, 308 F.3d 1114, 1124 (10th Cir. 2002) (“The government cannot simply declare the First Amendment status of property regardless of its nature and its public use.”).
\end{itemize}
property.” 123 Whether or not a given area is considered a public forum “hinges on a case-by-case inquiry in which no single factor is dispositive.” 124 In *Utah Gospel Mission v. Salt Lake City Corp.*, the Court of Appeals for the Tenth Circuit refuted the argument that private property that was held open to the public should always be considered a public forum:

Such an argument could be made with respect to almost every retail and service establishment in the county, regardless of size or location. In addition, . . . to find state action based upon the mere fact that private property was open to the public, would constitute an unwarranted infringement of long-settled rights of private property owners protected by the Fifth and Fourteenth Amendments . . . . [Furthermore, it] would transform many religious property owners into state actors, a conclusion without any support in the case law. Thus, Plaintiffs’ allegations that the Plaza serves as a park where the public is invited to gather, relax, and enjoy the open space are irrelevant. 125

There are three primary factors that courts look to in determining whether a forum has been extinguished: (1) the ownership interest retained by the government; (2) the changes made to the physical nature or purpose of the property; and (3) the property’s function.

1. Ownership Interest Retained by the Government

Whether or not the government retains a property interest is an important factor in determining if a public forum has been extinguished. Easements are constitutionally protected property interests and the retention of a public easement can perpetuate a public forum. 126 The importance of property interests in forum analysis was underscored by a series of recent cases respecting the forum status of the plaza fronting the headquarters of the Church of Jesus Christ of Latter-day Saints (Church) in Salt Lake City. 127 Prior to becoming a

126 See *First Unitarian Church*, 308 F.3d at 1122–23.
plaza, this area had been a section of Main Street and a traditional public forum. The Church negotiated for the purchase of this property from the City. Under the terms of the conveyance, the City retained a pedestrian easement for public passage through the plaza. In the first round of litigation concerning the forum status of this plaza, the Court of Appeals for the Tenth Circuit determined that, despite terms in the conveyance specifying that the easement was not a public forum, a traditional public forum survived on the portion of the plaza covered by the easement.

After this adverse decision, the City and the Church negotiated a new deal whereby the City conveyed its easement to the Church at a price that was a multiple of the appraised value. After this deal, the U.S. District Court for the District of Utah found that the relinquishment of the easement helped extinguish the public forum, concluding that “[t]he Property at issue is now an entirely private, Church-owned Plaza devoid of any government property interests that could possibly create a public forum.”

2. The Importance of Physical Characteristics

Physical characteristics and design of space are important considerations in forum analysis. For instance, in Citizens to End Animal Suffering & Exploitation, Inc. v. Faneuil Hall Marketplace, Inc., the U.S.
District Court for the District of Massachusetts noted the lack of clearly distinguishable boundaries between the publicly-owned and privately-owned property as relevant to its forum analysis:

The similarity of the Marketplace to a municipal park is underscored by the absence of any discernable boundaries between the Marketplace and the immediately-adjacent, public areas, such as Faneuil Hall Square. The absence of such boundaries has proven to be critical in distinguishing between purely private shopping centers and shopping centers to which the Constitution applies.133

Similarly, the Court of Appeals for the Sixth Circuit recently looked at the physical character of the sidewalk as one of “two key reasons” why the sidewalk in question was a public forum.134 The case involved the status of a privately-owned sidewalk that ran through a sports complex housing the Cleveland Indians baseball stadium.135 Specifically, the court noted how it “blends into the urban grid, borders the [public] road, and looks just like any public sidewalk.”136 The court discounted the importance of landscaping that “roughly delineated” some portions of the sidewalk from the public realm, concluding that “the average observer would be unfamiliar with the geographic significance of this sporadic vegetation.”137 Apparently, this conclusion was buttressed by the fact that “the public and Gateway sidewalks are made of the same materials and share the same design.”138

In some cases, a physical transformation may be so dramatic as to extinguish the public forum in property still owned by the government. For example, in Hawkins v. City & County of Denver, the Court of Appeals for the Tenth Circuit held that in constructing a covered walkway leading to a performing arts complex, “Denver has altered the physical characteristics and function of the former public street sufficiently to remove its status as a traditional public forum.”139 The court noted that “[t]he government may, by changing the physical

135 Id.
136 Id.
137 Id.
138 Id.
139 Hawkins v. City & County of Denver, 170 F.3d 1281, 1288 (10th Cir. 1999).
nature of its property, alter it to such an extent that it no longer retains its public forum status.”\textsuperscript{140}

3. Function

As a criterion for determining whether a public forum survives, “function” is closely aligned with questions about the modification of physical characteristics. In the above-described case relating to the sidewalk outside the Cleveland Indians’ stadium, the court looked to how the sidewalk functioned as “a public thoroughfare” as one of the “key reasons” the sidewalk remained a public forum.\textsuperscript{141} The court noted that “[b]y design, the Gateway Sidewalk contributes to the City’s downtown transportation grid and is open to the public for general pedestrian passage. Indeed, rather than leading to the rest of the Complex, the Gateway Sidewalk encircles it as a through route.”\textsuperscript{142}

Conversely, the court in Hawkins noted that the Galleria did not “form part of Denver’s automotive, bicycle or pedestrian transportation grid, for it is closed to vehicles, and pedestrians do not generally use it as a throughway to another destination. Rather, the Galleria’s function is simply to permit ingress to and egress from the . . . various complexes.”\textsuperscript{143}

\textbf{Conclusion}

The public trust doctrine and public forum doctrine both imply that there is infused in certain property a public interest that may only be extinguished when certain conditions are met. While the two doctrines diverge in defining these conditions—for example, legislative authority is an important consideration under the public trust doctrine but not at all under the public forum doctrine—the central notion of a public right that the government is bound to respect is found in both.

In her article \textit{The Comedy of the Commons},\textsuperscript{144} Carol Rose offers a way of reconciling the two doctrines. First, she argues that “there lies outside purely private property and government-controlled ‘public property’ a distinct class of ‘inherently public property’ which is fully

\begin{footnotesize}
\begin{enumerate}
\item Id. at 1287.
\item United Church of Christ, 383 F.3d at 452.
\item \textit{Id.}
\item Hawkins, 170 F.3d at 1287.
\item Rose, \textit{supra} note 16.
\end{enumerate}
\end{footnotesize}
controlled by neither government nor private agents.”

Rose explores the apparent incongruity between “inherently public property” and the classical economic property rights theory, which holds that property rights exist because the right to exclude encourages investment and efficiency and avoids the much celebrated “tragedy of the commons.” Rose ultimately concludes that “commerce was clearly the central object” of the public trust doctrine and other nineteenth century doctrines that created “inherently public property,” and that these doctrines are consistent with classical economic property rights theory. This is because commerce, “of all activities, is ever more valuable as more participate.” In other words, since “we all become exponentially richer as more of us truck, barter, and exchange,” barriers to participation, such as private property, are considered undesirable from an efficiency standpoint. Given the focus throughout on economics, it is somewhat surprising that Rose concludes her article with a discussion of “sociability.” This discussion builds on the premise that wealth creation was not the sole objective of commerce in the nineteenth century; Rose gives several examples of Enlightenment and nineteenth century thinkers speaking to the value of commerce as “an educative and socializing institution.” Rose goes further, stating that “[c]ommerce still seems to be our quintessential mode of sociability,” because “[d]espite its appeal to self-interest, it also inculcates rules, understandings, and standards of behavior enforced by reciprocity of advantage.”

Rose then outlines how the same “returns to scale” argument that justifies “inherently public property” as a better means to wealth creation can be used to justify it as a better means of “socialization,” noting that “perhaps our most important ‘returns to scale’ involve activities that are somehow sociable or socializing—activities that allow us to get along with each other.” Identifying free speech as a socializing institution, Rose sees a connection between the public trust doctrine and the public forum doctrine. Drawing on Justice Brennan’s

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145 Id. at 720.
146 Id. at 711–12, 717.
147 Id. at 774.
148 Id.
149 Id. (internal quotation marks omitted).
150 Rose, supra note 16, at 775.
151 Id. at 775.
152 Id. at 776.
153 Id.
154 See id. at 778.
dissent in *Members of City Council v. Taxpayers for Vincent*, Rose states that Brennan’s argument that posting signs on telephone polls should be allowed “could be stated as a public trust concept: this property is needed for the public’s political communication, thus governments hold the property in ‘trust’ for this communication, and have only limited abilities to divest the public of its trust rights.”\(^{155}\) For Rose, “inherently public property” is not a static concept but, rather, it is tied to changing notions about what constitutes “valuable socializing institutions.”\(^{156}\)

Public parks represent an important nexus between the public trust and public forum doctrines. Rose discusses in passing how the socialization rationale might apply to protecting public parks for reasons other than commerce and free speech, noting that Frederick Law Olmsted had argued that

recreation can be a socializing and educative influence, particularly helpful for democratic values. Thus rich and poor would mingle in parks, and learn to treat each other as neighbors. Parks would enhance public mental health, with ultimate benefits to sociability; all could revive from the antisocial characteristics of urban life under the refining influence of the park’s soothing landscape.\(^{157}\)

It is clear that parks are protected in ways that other public uses are not. Parks, however, are only one of many valuable uses for public lands and their protection is not absolute. Furthermore, their effectiveness in terms of fostering socialization or allowing for recreation or free speech is largely influenced by the extent to which they are used. While an unused park may still be an asset from an environmental standpoint—giving lungs to the city or helping preserve groundwater quality by reducing the amount of impermeable surface—it does not add much in terms of socialization.\(^{158}\) If Rose’s socialization thesis is correct in explaining inherently public property, the question then emerges as to how different modes of socialization,

\(^{155}\) Id.


\(^{157}\) Id. at 779 (footnotes omitted, but citing in particular Frederick Law Olmsted, *Public Parks and the Enlargement of Towns* (1870), reprinted in *Civilizing American Cities: A Selection of Frederick Law Olmsted’s Writings on City Landscapes* 65–66, 74–81, 96 (S. Sutton ed., 1971)).

\(^{158}\) While environmental protection has been offered as a rationale for the public trust doctrine, this was not its historical origin and has no potential in explaining the public forum doctrine.
such as commerce, free speech, and cultural institutions, should be balanced in the city. To a large extent, this is what Boston has been grappling with in recent years in deciding how to use the twenty-seven acres of surface area reclaimed by the Big Dig.

While it would not be accurate to say that parks represent permanent or inalienable interests of the public, we can still call them “inherently public property.” Government, especially local government, should be ever aware of the public’s interest in the land and be mindful of how the law protects this interest before proceeding with plans to alienate or change the use of publicly-owned property. The public interest may be indelible.
LESSONS FROM THE WORLD TRADE CENTER FOR OPEN SPACE PLANNING GENERALLY AND BOSTON’S BIG DIG SPECIFICALLY

MARY L. CLARK*

Abstract: This paper looks to several land use planning issues at stake in both the World Trade Center redevelopment and Central Artery/Tunnel Project, offering some lessons for the future of public open space planning with respect to the influence of the press, the centrality of politics, the urgency of addressing public and private claims of land ownership, the need to engage the public, and seizing the opportunity to create new public transportation links.

INTRODUCTION

This paper focuses on five issues raised by the World Trade Center redevelopment that have direct application to Boston’s Central Artery/Tunnel Project: (1) questions of the public versus private nature of the site; (2) the role of public consultation in open-space planning; (3) the selection of, and reliance on, a master plan; (4) the use of landfill produced by site excavation; and (5) the use of the building project as an opportunity for creating new public transportation services. My central concern is for the future applicability of the New York and Boston experiences. I argue that they are not *sui generis* as many commentators have suggested; rather, these two examples offer important lessons in open-space planning writ large.

I. THE PUBLIC VERSUS PRIVATE NATURE OF THE SITE

A. The World Trade Center

In the period immediately following the end of the Second World War, it was uncertain whether New York City would remain a viable business center in the face of an increasingly globalized commercial

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realm. The original World Trade Center project was developed in response to this concern, principally by New York Governor Nelson Rockefeller and his brother, Chase Manhattan Bank Chair David Rockefeller. The Port of New York Authority was brought into the World Trade Center project for two main reasons: (1) as a state agency—indeed as a bi-state agency—the Port Authority possessed bonding power—that is, it could finance the project by selling bonds; and (2) the Port Authority had eminent domain power to condemn private lots in order to clear land for the towers and other related construction.

The sixteen-acre parcel on which the World Trade Center complex was built was originally composed of thriving electronics shops, giving rise to the neighborhood’s moniker, “Radio Row.” In exercising its eminent domain power to clear this land, the Port Authority relied on the stated public purpose of “world trade.” Whether such a pur-

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1 See James Glanz & Eric Lipton, City in the Sky: The Rise and Fall of the World Trade Center 49 (2003) (“[M]ingling with the sweet smell of fruits and vegetables along the waterfront now was a whiff of fear that the preeminence of Manhattan’s port could be challenged, could even come to an end if something was not done.”); Carol Willis, Introduction to The Lower Manhattan Plan: The 1966 Vision for Downtown New York 11 (Carol Willis ed., 2002) (“This modernization answered an urgent need, for as the [1966] statistics and analysis . . . demonstrate, downtown was in danger of complete eclipse. A major problem was the exodus of corporate headquarters and jobs to midtown and beyond . . . . Choked by traffic and challenged . . . by its congested physical conditions, downtown was in jeopardy.”).

2 The Chase Manhattan Bank completed a new headquarters building in Lower Manhattan, directly opposite the eventual World Trade Center site, in 1969. With the movement of many Wall Street firms to midtown, the bank did not wish to stand alone downtown. See Willis, supra note 1, at 12–13.

3 At the time of the original World Trade Center development, the Port Authority was known as the Port of New York Authority. Glanz & Lipton, supra note 1, at 47. In 1972, it changed its name to Port Authority of New York and New Jersey to recognize the joint control by the two states, though nothing in its substantive governance changed at that time. See id. at 52.

4 See, e.g., Alexander Garvin, The American City: What Works, What Doesn’t 361 (2d ed. 2002); Glanz & Lipton, supra note 1, at 52; Paul Goldberger, Up From Zero: Politics, Architecture, and the Rebuilding of New York 22 (2004) (“[T]urning the World Trade Center over to the Port Authority . . . meant that Rockefeller did not have to carry the enormous cost of the project on his state budget.”).

5 See Glanz & Lipton, supra note 1, at 39 (“The easy answer was that without the Port Authority—without its power to condemn land . . . —there would be no World Trade Center . . . .”). There was a third advantage to having the Port Authority oversee construction of the World Trade Center towers: the agency’s ability, as a government entity, to work beyond the constraints of New York City’s zoning and building codes. See Goldberger, supra note 4, at 59.

6 This stated purpose was challenged and upheld in Courtesy Sandwich Shop, Inc. v. Port of New York Authority, 190 N.E.2d 402, 404–05 (N.Y. 1963). The Supreme Court granted
pose would be recognized today may be addressed by the Supreme Court this term.

A mere six weeks before the September 11, 2001 attacks, the Port Authority leased all of the office space contained within the towers for ninety-nine years to Silverstein Properties, Inc., owned by New York City real estate developer Larry Silverstein. This lease poses significant complications for the redevelopment of the World Trade Center site. By effectively granting Silverstein an ownership interest in the office space, even while recognizing the Port Authority’s ongoing ownership interest in the underlying land, the lease requires the Port Authority to work closely with Silverstein in rebuilding the site.


7 Ronald Smothers, Leasing of Trade Center May Help Transit Projects, Pataki Says, N.Y. Times, July 25, 2001, at B7 (discussing the World Trade Center lease). At the same time that the Port Authority leased all of the office space to Silverstein, it entered into a long-term lease with Westfield America, Inc., to operate the underground retail space located at the World Trade Center. See Charles V. Bagli, Retail Operator at Trade Center Is Pulling Out of the Deal, N.Y. Times, Sept. 16, 2003, at B1. New York Governor George Pataki celebrated the World Trade Center leases as a major victory for the Port Authority, enabling the agency to return to its core mission of transportation management by getting out of the business of real estate development. After the September 11 attacks, the Port Authority bought out Westfield’s lease, gaining a degree of flexibility over the site’s redevelopment. See id. At approximately the same time, the Port Authority repaid Silverstein’s mortgage on the office space, originally held by the General Motors Assurance Corporation, thereby gaining even greater flexibility over the site’s redevelopment. See Sabrina Tavernise, Settlement in Trade Center Dispute, N.Y. Times, Dec. 2, 2003, at B4.

8 Long term leases, particularly when of a 99-year duration as here, create fee simple-like ownership interests, especially given understandings of the life expectancies of buildings, typically considered no more than forty to forty-five years. See Michael T. Madison et al., Modern Real Estate Finance and Land Transfer 2 (2d ed. 1999). Thus, as Alex Krieger noted at the Symposium, we may think we are planning for perpetuity when we undertake major urban redevelopment projects, but our plans are inevitably subject to forces of growth, change, and destruction. Alex Krieger, Remarks at the 2004 Boston College Environmental Affairs Law Review Symposium, The Law and Planning of Public Open Spaces: Boston’s Big Dig and Beyond (Oct. 7, 2004).

In late February 2004, the Port Authority, together with the Lower Manhattan Development Corporation (LMDC), announced its intention to negotiate the purchase of, or, if necessary, seek condemnation of, the Deutsche Bank site immediately to the south of the original World Trade Center parcel.\textsuperscript{11} Such expansion of the site facilitates the rebuilding of the entire ten million square feet of office space obligated in Silverstein’s lease.\textsuperscript{12} Consistent with the original lease, Silverstein will have a long-term leasehold interest\textsuperscript{13} in any office space developed on this new parcel, while the Port Authority will own the underlying land.\textsuperscript{14}

\textsuperscript{10} Goldberger, \textit{supra} note 4, at 16. At times, the Port Authority has acted with surprisingly little deference to Silverstein, as evident by his near exclusion from the master plan selection process. \textit{See} discussion \textit{infra} Part III. At other times, the Port Authority’s deference to Silverstein has been notable, as was the case with its fidelity to his lease obligation to replace all of the office space lost in the event of the towers’ destruction. This may well have been motivated by the widely held perception, until recently, that Silverstein was the only figure with the money to pay for the rebuilding, in light of the insurance proceeds from the loss of the towers. With Silverstein’s defeat in much of the post-September 11 insurance litigation—most significantly, over whether September 11 involved one or two attacks, that is, one or two insured events—it has become increasingly clear that he will not have the funds to pay for all or even most of the office space reconstruction. \textit{See} Alex Frangos, \textit{Uncertainties Soar at Ground Zero: Freedom Tower Is Under Way, But Financing Plan Is Lacking for Rebuilding of Entire Site}, \textit{WALL ST. J.}, Oct. 20, 2004, at B1. Thus, the question now is whether the Port Authority will hold Silverstein to his obligation of full replacement of the office space, or whether the parties will negotiate a compromise.

\textsuperscript{11} \textit{See} Charles V. Bagli, \textit{As He Visits New PATH Terminal, Governor Praises the Pace of the Rebuilding Effort}, \textit{N.Y. TIMES}, Oct. 31, 2003, at B3. Former Senator George Mitchell was appointed by New York Governor George Pataki to mediate a dispute between Deutsche Bank and its insurer, Allianz Insurance, regarding coverage for damage rendered by the falling towers. Allianz maintained that the building could be restored for less than the cost of its demolition. \textit{See id}. The resolution of this dispute was a necessary first step for the Port Authority to purchase or condemn the Deutsche Bank parcel for expansion of the World Trade Center site. \textit{See id}.

\textsuperscript{12} \textit{See} David W. Dunlap, \textit{How a Verdict Could Change the Future of Downtown}, \textit{N.Y. TIMES}, May 1, 2004, at B1. The site’s purchase was reported to have been completed in August 2004, but recent reports suggest otherwise. \textit{See} David W. Dunlap, \textit{Last Piece of Trade Center Puzzle May Not Be an Easy Fit}, \textit{N.Y. TIMES}, Mar. 17, 2005.


\textsuperscript{14} \textit{See} Katia Hetter, \textit{Silverstein Scrambles for WTC Funds; Billions for Rebuilding Effort at Stake in Bid to Prove to Jury Attacks Were Separate}, \textit{NEWSDAY} (N.Y.), Oct. 21, 2003, at A59. Silverstein expressed concern that acquisition of the Deutsche Bank site not expose him to greater property tax liability: “Silverstein wants assurances that his taxes won’t increase because some of the 10 million square feet of office space moves off the trade center site onto city land.” \textit{Id}. 
Adding to the complexity of the ownership interests at stake in the World Trade Center redevelopment are several other claims to ownership of the site. For example, New York City, led by Deputy Mayor Daniel Doctoroff’s office, recently asserted ownership of the land underlying the streets that crossed the site before its late 1960s consolidation as a superblock. The city threatened to withhold building permits for the redevelopment unless some of those streets were reopened. The city also advocated a land swap that would have given it significant control over the site’s redevelopment. That proposal, involving a transfer of the land underlying the World Trade Center for that underlying LaGuardia and JFK airports—historically leased by the Port Authority from the city—was rejected in the fall of 2003.

Upon rejecting the city’s land swap proposal, the Port Authority agreed to make payments of $14 to $55 million per year in lieu of real estate taxes on the World Trade Center site. As a government agency, the Port Authority is not obligated to pay property taxes, but, as is often done, the Port Authority undertook a commitment to make payments in lieu of taxes.

The question of tax liability for the World Trade Center property has a fascinating history. In the 1960s, New York City joined a suit against the Port Authority seeking to stop the original World Trade Center project because of the city’s concern for loss of real estate tax revenue on the site, which had previously been a thriving commercial

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15 See David W. Dunlap, Mayor’s Office Seeks More Retail Space at Ground Zero, N.Y. TIMES, Oct. 29, 2003, at B3.
16 See id. The city has suggested that it might withhold permits for the World Trade Center redevelopment absent agreement by the Port Authority to reopen certain streets crossing the site, specifically Greenwich Street, running north-south, and Fulton Street, running east-west. See id. The city’s push to reopen the street grid echoes its 1960s opposition to closing these streets for the towers’ original construction. At that time, the city attempted to block the project by asserting its authority to issue, or withhold, permits for developments impacting the city’s ownership interest in the streets. GLANZ & LIPTON, supra note 1, at 145–46.
17 See GOLDBERGER, supra note 4, at 129.
18 See Michael Cooper, City Offers Longer Airport Leases for $700 Million and More Rent, N.Y. TIMES, Oct. 16, 2003, at A1. Cooper writes:

The agreement formally ended talks of a so-called land swap in which the city was to have traded the land under the two airports, which it owns, to the Port Authority in exchange for the World Trade Center site, which the authority owns. The city had proposed the trade to win more control over the rebuilding of the site.

Id.
19 Id. The amount of the payment in lieu of taxes is to increase as the site is rebuilt. Id.
20 See id.
zone paying ample taxes. This effort failed. Then, immediately following the Port Authority’s entry into the lease with Silverstein, the city sued Silverstein, seeking to establish his real estate tax liability on the World Trade Center site. This action was stayed in New York Supreme Court following the September 11 attacks, and was subsequently resolved when the Port Authority agreed to significantly increase its payment in lieu of taxes.

In addition to the city’s claims to the World Trade Center site, Congress recently considered—though did not vote on—a proposal to grant National Historic Landmark status to the site in light of its role in the events of September 11. The proposal, introduced by Representatives Carolyn Maloney of Long Island and Christopher Shays of Connecticut, would have transferred title to the footprints underlying the twin towers to the federal government for historic site designation, thereby preventing private or commercial development in perpetuity.

The mix of public and private ownership interests at stake in the World Trade Center necessarily complicates any land use planning for the site. While the particular complexities of title are unique, the practical reality of such a mix is not. Boston’s Central Artery/Tunnel Project (Big Dig), like the World Trade Center site, also presents a mix of claims for control by city, state, federal, and private parties, to which I will now turn.

B. Comparison with the Big Dig

The master plan for the twenty-seven acres of new surface land created by the Big Dig indicates that 75% of the land is to be used as open space, with 25% allocated for modest development, principally of a low-rise retail and residential nature. The 75%-25% split reflects the site description stated in the project’s environmental certification. That 25%, or more, of the surface land may be used for devel-

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21 World Trade Center Site Historic Study Act, H.R. 3471, 108th Cong. (2003). The bill was introduced in the House on November 6, 2003 “[t]o authorize the Secretary of the Interior to conduct a special resource study of the area at or near the footprints of the former World Trade Center towers for possible inclusion in the National Park System to commemorate the tragic events of September 11, 2001.” Id.

22 See id.

23 Indeed, symposium participants suggested that the open space-to-development ratio will more likely approximate 45% to 55%.

24 John DeVillars, Massachusetts’s former Secretary of Environmental Affairs, issued the environmental certification for the Big Dig project, requiring that 75% of the new
velopment raises questions for the public versus private control of the site. One immediate question is whether the parcels earmarked for development are to be sold outrightly or leased. The Massachusetts Turnpike Authority (MTA) has indicated that the parcels will not be subject to sale to private parties, and thus will only be subject to lease.\textsuperscript{25} Even so, a follow-up consideration is whether they might be subject to long-term leases, approximating ownership interests, similar to that which is at stake in the World Trade Center site.

After years of rancorous debate over proposals to create a trust to manage the newly created surface land, the Rose Fitzgerald Kennedy Greenway Conservancy was established in July 2004.\textsuperscript{26} While the MTA has not divested itself of its ownership interest in the land by virtue of joining the conservancy, it has, practically speaking, been joined at the decisionmaking table by a number of credible forces that may well impact the MTA’s ability to exert autonomous control over the site, thereby paralleling the Port Authority’s experience with the World Trade Center site.

Staying for the moment with questions of complex claims to ownership or control of land, note that Spectacle Island—which was significantly rebuilt using land excavated by the Big Dig,\textsuperscript{27} is now part of the Boston Harbor Islands National Recreation Area, supervised by surface land be used for “public open space,” a rule later enacted into the city’s zoning law.

\textsuperscript{25} Fred Yalouris, Director of Architecture and Urban Design for the Massachusetts Turnpike Authority, stated at the symposium that the MTA had no intention of selling any of the land at issue to private parties. Fred Yalouris, Remarks at the 2004 Boston College Environmental Affairs Law Review Symposium, The Law and Planning of Public Open Spaces: Boston’s Big Dig and Beyond (Oct. 7, 2004).

\textsuperscript{26} Anthony Flint, Pact Reached on Greenway Management: Turnpike Will Help Jump-Start Conservancy, \textit{Boston Globe}, July 12, 2004, at A1 (reporting that “[t]he city, the Romney administration, and the Massachusetts Turnpike Authority have agreed to establish an independent, nonprofit organization to run the Rose Kennedy Greenway, ending years of political turf battles over the parklands and development set for the footprint of the old Central Artery.”). According to IssueSource,

The deal called for the Turnpike Authority to pay for all operational and maintenance costs through 2012 and to match, dollar-for-dollar, the money raised by the conservancy (up to $5 million). In return, the Turnpike got the right to appoint five of the 10 conservancy board members and [MTA Chairman] Amorello was granted the power to appoint the executive director. The state and the city got two appointments each and the Kennedy family got one.


\textsuperscript{27} See infra Part IV.B.
the National Park Service. This suggests a further parallel with the World Trade Center site and the claim for federal preservation at issue there.

C. Lessons Learned from the New York and Boston Experiences

The New York and Boston examples demonstrate the necessity of clarifying questions of complex claims of site ownership and control before proceeding with any major urban planning efforts. These questions have significant implications for the autonomy of land use planning, flexibility of decisionmaking, and even practical considerations of tax liability and revenue.

II. The Role of Public Consultation in Open Space Planning

A. World Trade Center Redevelopment

1. Overview

New York Governor George E. Pataki established the LMDC in November 2001 to work with the Port Authority and other stakeholders in overseeing redevelopment planning for Lower Manhattan. Approximately two-thirds of the original LMDC board was appointed by Governor Pataki, with a handful of members named by outgoing mayor Rudolph Giuliani and incoming mayor Michael Bloomberg. John Whitehead, former chair of Goldman Sachs, was named chair of the board, a position he maintains today.


29 For in-depth treatment of these issues, see Daniel R. Mandelker, Land Use Law (5th ed. 2003), and Daniel R. Mandelker & John M. Payne, Planning and Control of Land Development: Cases and Materials (5th ed. 2001).

30 Press Release, Office of the Governor of New York, Governor, Mayor Name Lower Manhattan Redevelopment Corp. (Nov. 29, 2001), available at http://www.state.ny.us/governor/press/year01/nov29_1_01.htm (last visited Apr. 10, 2005). The LMDC was established as a subsidiary of the Empire State Development Corporation, and is chaired by Charles Gargano, who also serves as vice chair of the Port Authority. Gargano was appointed to both positions by Pataki. The current LMDC Executive Director is Kevin Rampe, likewise appointed by Pataki. The $21 billion in federal aid earmarked by Congress for the post-September 11 recovery was channeled to the LMDC through New York State. See Charles V. Bagli, Report Fuels Fear that City Won’t Get All of Promised 9/11 Aid, N.Y. Times, Oct. 6, 2003, at B1.


Among other things, the LMDC has established a series of advisory groups, composed of victims’ family members, downtown business interests, downtown residents, and other interested parties. In conjunction with these advisory groups, the LMDC has conducted a series of public hearings on various aspects of the World Trade Center redevelopment, including selection of the master plan and planner and consideration of the public memorial design.

Among the LMDC’s “principles for action” are to “[m]ake decisions based on an inclusive and open public process” and to “[a]ssist the rapid revitalization of Lower Manhattan, in a manner that does not preclude desirable future development plans.” To what extent has the LMDC abided by these principles in its planning process, and to what extent does the LMDC serve as a model for public open space planning moving forward? For that, we return to the rebuilding story.

In the spring of 2002, the LMDC commissioned the Beyer Blinder Belle architecture firm to create six alternative designs addressing the then-recognized demands for the World Trade Center site. The designs were to account for the rebuilding of all of the office space cited in the lease; creation of a memorial, open space, one or more cultural institutions, and an expanded transit hub; and the re-opening of one or more streets transecting the site.

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33 See Goldberger, supra note 4, at 64–65.
36 Edward Wyatt, Design Firm Chosen to Oversee Rebuilding of Lower Manhattan, N.Y. TIMES, May 23, 2002, at B1 (“Beyer Blinder Belle . . . was chosen yesterday as the urban planning consultant to oversee the rebuilding of Lower Manhattan.”).
37 See Press Release, supra note 34. The LMDC states that

[a]ll of the proposed options have common elements, including:
- A permanent memorial
- Public open space
- 11 million square feet of commercial office space
- A 600,000 square-foot hotel and 600,000 square feet of retail space
- A transportation hub serving New York and New Jersey
- Cultural and civic institutions
- A rebuilt St. Nicholas Greek Orthodox Church
- Residential facilities off-site

Id.
In July 2002, the LMDC hosted a “Listening to the City” event to generate feedback on the six designs. Over 5000 members of the public with varying affiliations gathered to speak of their aspirations for the World Trade Center site, resoundingly rejecting all of the Beyer Blinder Belle proposals. Among other things, participants showed familiarity with Jane Jacobs’s concern for preserving and promoting the life of the street. Participants likewise echoed Jacobs’s emphasis on welcoming mixed uses, nurturing organic communities, and connecting communities to one another, whereas the original World Trade Center project had isolated Battery Park City to the west and TriBeCa to the north.

Shortly after the July 2002 event, the LMDC announced an open competition for selection of a master plan and planner that, the agency underscored, would provide a guiding vision for the site, but not the actual building specifications. After the field was winnowed from more than four hundred entries, Daniel Libeskind of Studio Libeskind was selected as the site’s master planner. His winning

39 See Edward Wyatt & Charles V. Bagli, Visions of Ground Zero: The Public; Officials Re-think Building Proposal for Ground Zero, N.Y. Times, July, 21, 2002, at A1. Two of the universal criticisms of the Beyer Blinder Belle plans were that the six designs did not differ notably from one another, and that they were too constrained by the lease obligation to replace 10 million square feet of office space. See id. “[T]hey wanted bolder, more innovative designs and asked the planners to seek other ways to fulfill the lease requirements for commercial and retail space.” Id.
41 See Edward Wyatt, Support Builds for One Plan for Center Site, N.Y. Times, Feb. 20, 2003, at B1 (“Some members of Community Board No. 1 have also said they dislike the way the sunken portion of the Libeskind plan cuts off Battery Park City from the rest of the trade center site—a complaint often voiced about the World Trade Center itself.”). See generally Jacobs, supra note 40.
42 See Julie V. Iovine, Ground Zero Spotlight: Architects Ambivalent, N.Y. Times, Jan. 1, 2003, at E1 (“The development corporation has frequently said that the object of the competition, a master land-use plan, is not to ‘include the detailed architecture of individual structures.’ But many architects worry that the teams’ detailed models and impressively realistic video presentations will encourage the public to perceive them as concrete plans.”); Press Release, Lower Manhattan Dev. Corp., Lower Manhattan Development Corporation Announces Design Study for World Trade Center Site and Surrounding Areas (Aug. 14, 2002), http://www.renewnyc.com/News/DisplayStory.asp?id=30 (last visited Apr. 10, 2005).
43 In February 2003, the master plan field was narrowed to two entrants, THINK, formed by Rafael Vinoly and other architects, and Studio Libeskind. See Edward Wyatt, Design Chosen for Rebuilding at Ground Zero, N.Y. Times, Feb. 27, 2003, at A1. Governor Pataki met privately with each of the finalists, and reportedly favored the Libeskind plan. See id.
plan, Memory Foundations, includes a series of office towers, the tallest and most ambitious being Freedom Tower.\footnote{44 See David W. Dunlap, \textit{1,776-Foot Design Is Unveiled for World Trade Center Tower}, \textit{N.Y. Times}, Dec. 20, 2003, at A1. Freedom Tower is intended to be the tallest building in the world. \textit{Id}.}

Following Libeskind’s selection, the LMDC announced an open call for the site’s memorial design in the fall of 2003.\footnote{45 \textit{Visions for Ground Zero; What’s Next}, \textit{N.Y. Times}, Dec. 19, 2002, at B10. (“After the [master] plan is finished, the Lower Manhattan Development Corporation begins an international design competition for a memorial on the site, with the goal being selection of a design memorial by Sept. 11, 2003.”).} The LMDC received over 5200 responses.\footnote{46 See David W. Dunlap, \textit{The Ground Zero Memorial: The Competition; Presenting Several Versions of the Shape of Grief and Recollection}, \textit{N.Y. Times}, Nov. 20, 2003, at B3.} As part of its selection process, the memorial design committee heard testimony throughout the metropolitan region from victims’ family members, as well as from the general public and other interested parties.\footnote{47 See Press Release, Lower Manhattan Dev. Corp., LMDC and Port Authority Extend Public Outreach Campaign to All Five Boroughs and New Jersey (Aug. 19, 2002), \url{http://www.renewnyc.com/News/DisplayStory.asp-id=32.asp} (last visited Apr. 10, 2005).} The victims’ families were given a private viewing of the memorial design finalists and were reported to have had a significant impact on the ultimate design selection.\footnote{48 See Press Release, Lower Manhattan Dev. Corp., The Lower Manhattan Development Corporation Announces Number of Submissions Received from Institutions Interested in Locating or Proposing Cultural Programs on The Future World Trade Center Site, (Sept. 24, 2003), \url{http://www.renewnyc.com/News/displaystory.asp-id=81.asp} (last visited Apr. 10, 2005).}

With the memorial design competition underway, in April 2004 the LMDC invited cultural institutions to compete to be housed at the site.\footnote{49 See id. Two other smaller cultural institutions are likewise to be included at the World Trade Center site: The Drawing Center and the International Freedom Center. See \textit{Lower Manhattan Dev. Corp., Cultural Institutions on the World Trade Center Site}, \url{http://www.renewnyc.com/ProgramsResources/CulturalCivic.asp} (last visited Apr. 10, 2005).} This was a direct response to the public’s criticism of the original project, from which cultural institutions had been strikingly absent. More than 110 submissions were received, with two principal art institutions—the Joyce International Dance Center and the Signature Theatre invited to join the site.\footnote{50 See \textit{id}. Two other smaller cultural institutions are likewise to be included at the World Trade Center site: The Drawing Center and the International Freedom Center. See \textit{Lower Manhattan Dev. Corp., Cultural Institutions on the World Trade Center Site}, \url{http://www.renewnyc.com/ProgramsResources/CulturalCivic.asp} (last visited Apr. 10, 2005).}
2. Reflections on What Happened and Why It Happened that Way

As this brief history indicates, the public, both in New York and beyond, has had genuine input into, and impact on, the shape of the World Trade Center redevelopment decisionmaking and the final product itself. How has this happened, and why?

A key element throughout the process has been the influence of the New York press. Regular columns by Herbert Muschamp, David Dunlap, James Glanz, and Eric Lipton of the New York Times, as well as occasional editorials, brought significant influence to bear on the redevelopment decisionmaking process and outcomes.

Beyond the influence of the press, discussions with key players in the redevelopment decisionmaking process suggest that promotion of the LMDC’s credibility, assurance that the public would “buy into” the final product, and concern for redressing the top-down decisionmaking and closed-door management of the original World Trade Center project motivated the LMDC to engage the public as it did.

B. Comparison with the Big Dig

1. Overview

The initial absence of public consultation regarding the Big Dig by the Massachusetts Turnpike Authority (MTA) led the Conservation Law Foundation to sue to compel the MTA to employ a more transparent public consultation process. Since that time, the MTA has held a

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51 See Glanz & Lipton, supra note 1; see, e.g., David W. Dunlap, Architects’ Clashing Visions Threaten to Delay World Trade Center Tower, N.Y. Times, Oct. 23, 2003, at B1; Herbert Muschamp, Critic’s Notebook: Vision vs. Symbols and Politics at Ground Zero, N.Y. Times, Nov. 29, 2003, at B9. All four have reported, and continue to report, on various aspects of the World Trade Center redevelopment, with Muschamp, the chief architectural critic, reporting primarily on the design element, David Dunlap and Eric Lipton reporting on city politics, and James Glanz reporting principally on the engineering of the site.

52 Maureen Dowd, Editorial, The Unbearable Lightness of Memory, N.Y. Times, Nov. 30, 2003, § 4, at 9 (castigating the eight memorial finalists for failing to depict the despair wrought by September 11).

53 Paul Goldberger’s writings in the New Yorker were similarly influential. See, e.g., Goldberger, supra note 4. Architecture critic for the New Yorker, Dean of the Parsons School of Design, and former New York Times architecture critic, Goldberger has written extensively on the World Trade Center redevelopment.

number of public forums to plan for the new surface space. It has also provided liaisons to neighborhoods affected by the construction.

The Boston Redevelopment Authority (BRA) has played host to an ongoing public meeting convened by the Mayor’s Central Artery Task Force to discuss open space planning for the Big Dig. The Task Force serves a principally advisory role, and the MTA continues to exert decisive control over the project.

Besides the MTA and the BRA, a mix of private individuals and interests formed the Beyond the Big Dig project to bring together business leaders, landscape architects, urban planners, academics, community advocates, and others in a series of so-called Creative Community Conversations. These meetings allowed members of the public to exchange ideas concerning potential uses of the newly created open space. The Beyond the Big Dig project also included a Town Forum hosted at Faneuil Hall in 2002, at which a panel of distinguished citizens presented its recommendations for the project, and heard testimony from local respondents.

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59 According to the *Boston Globe*:

More than 350 people took part in a pair of public events [sponsored by the Boston Foundation and the Boston Society of Architects], called Creative Community Conversations, about the future of the parks that will be developed above and beyond the Big Dig.

Participants shared ideas for uses of the Big Dig parkland, drawing upon memories and experiences of urban open space that works, with special emphasis on what would keep them coming back again and again.

The ideas generated were offered as guidance for designers and decisionmakers as they plan how to use the newly created parkland.

*Id.*
2. Reflections on What Happened and Why It Happened that Way

Two key elements of the New York experience were altogether absent from the Big Dig project: the national security crisis represented by the September 11 attacks, and the substantial influence exerted by the World Trade Center victims’ families. These elements provoked greater public engagement in New York than might otherwise have occurred, or than has happened with Boston’s Big Dig project.

C. Lessons Learned from the New York and Boston Experiences

Both the New York and Boston experiences highlight the challenge of engaging in genuine community-based decisionmaking in the face of significant political and economic constraints. The ongoing dominance of the Port Authority in New York and the Massachusetts Turnpike Authority in Boston is arguably out of step with the public’s increasingly sophisticated understanding of land use needs and concomitant expectation for transparency of process.

Starting with the World Trade Center, despite the ongoing public engagement process there, the decisionmaking has been too politicized, too secretive, and too hurried. By “too politicized,” I mean not only the rhetoric of the 1776-foot Freedom Tower and Park of Heroes, as Libeskind’s open space was originally called, but more importantly, Governor Pataki’s central role in orchestrating the most significant elements of the redevelopment process.

By “too secretive,” I refer to the high-level, closed-door meetings to select Libeskind as master planner and later hammer out a compromise between Libeskind and David Childs, the site planner and architect. Finally, by “too hurried,” I mean the obedience to deadlines which were insisted upon by Governor Pataki throughout the process, driven largely by his re-election concerns, and subsequently, by his goal that the Freedom Tower groundbreaking coincide with the Republican National Convention in August 2004. It was only in response to intense public pressure that

60 Press Release, supra note 48; see Dunlap, supra note 44, at A1.
61 Bagli, supra note 11.
62 For more discussion, see infra Part IV.
63 Dunlap, supra note 44, at A1 (“Governor Pataki had asked that the cornerstone for the Freedom Tower be laid by the third anniversary of the attack. Though this falls within two weeks of the Republican National Convention, Mr. Pataki said in a telephone interview that there was ‘zero’ connection.”); Robin Pogrebin, The Incredible Shrinking Daniel Libeskind, N.Y. Times, June 20, 2004, § 2, at 1 (“Those close to the process say his loyalty was consistent: not to a particular aesthetic vision but to whoever could guarantee a ground-
Governor Pataki moved the date of the Freedom Tower groundbreaking away from the Convention to July 4, 2004, nevertheless in keeping with the politicized rhetoric characterizing redevelopment of the site.  

### III. Selection of and Reliance on a Master Plan

#### A. World Trade Center Redevelopment

1. Master Planning Process Generally

   As noted earlier, Libeskind's master plan was selected from more than 400 entries and a field of highly regarded finalists. Throughout the master plan selection process, the LMDC insisted that it was not selecting the actual blueprint for the site but, rather, a “vision.” The actual blueprint, the public was told, would be left to the project architects in consultation with the relevant authorities.

   Not only did this invite potential (later realized) for substantial conflict between the master planner and the actual project architect, but there was also potential for conflict between the LMDC and the Port Authority in implementing the master plan. To their credit, the two planning agencies entered into a memorandum of understanding breaking in time for the opening of the Republican National Convention.”). Herbert Muschamp also reported:

   > If the design process were not held hostage to the fast-track timetable approved by Gov. George E. Pataki, there would be less pressure to substitute symbolic manipulation for thought. If the timetable were not tied, however coincidently, to the Republican National Convention to be held in New York in August, there would be less temptation to mistake politics for culture.

   Muschamp, supra note 51.

   64 David W. Dunlap, Rebirth Marked by Cornerstone at Ground Zero, N.Y. TIMES, July 5, 2004, at A1 (reporting, “In the dusty bowl of ground zero, a garnet-speckled granite cornerstone was laid yesterday for the Freedom Tower, the tallest skyscraper planned at the World Trade Center site.”).

   65 See discussion supra Part II.A.1.

   66 See supra text accompanying note 42.

   67 See David W. Dunlap & Edward Wyatt, Leaseholder Sees Limited Role for Libeskind at Trade Center, N.Y. TIMES, May 30, 2003, at B3. Dunlap & Wyatt reported:

   > Larry A. Silverstein, the leaseholder of the World Trade Center site, said yesterday that Studio Daniel Libeskind would inspire but not actually design the office buildings he is planning there . . . .

   > Roland W. Betts, a director of the Lower Manhattan Development Corporation, said in an interview last week that there was “no expectation that Libeskind would design the different buildings.”

   Id.
whereby the LMDC agreed to oversee the cultural and memorial elements of the site redevelopment, while the Port Authority concentrated on the commercial office and retail space reconstruction.68

A key question for our purposes, given similar reliance on a master plan in Boston, is the extent to which Libeskind’s master plan has been followed in New York, and why or why not. What we find is that there have been broad—and, I would assert, unsurprising—departures from Libeskind’s master plan, both with respect to Freedom Tower and the memorial design.

2. Freedom Tower

The planning of Freedom Tower, the most ambitious building anticipated for the World Trade Center redevelopment, exploded into a very public struggle for control between Libeskind and David Childs, Silverstein’s personal architect. Spilling onto the pages of the New York Times and elsewhere,69 the conflict became so fetid that Governor Pataki mediated a highly publicized compromise, whereby Childs was recognized as the design architect for Freedom Tower, and Libeskind the collaborating architect.70

Thereafter, the LMDC announced a revised master plan,71 with final plans for Freedom Tower departing significantly from Libeskind’s original vision, from matters of size and placement on the parcel, to issues of the shape and torque of the building. While Libeskind anticipated a tower directly echoing the Statue of Liberty in its twisting, turn-


69 See, e.g., Dunlap, supra note 51. (“Only 10 months before groundbreaking is expected to take place for the Freedom Tower at the World Trade Center site, the master planner of the site and the architect for the tower’s developer, who are supposed to be collaborating, have reached an impasse on how the skyscraper should look.”); Pogrebin, supra note 63 (“The wrestling for control of the Freedom Tower became daily fodder for the news media for several weeks running.”).


ing manner,72 Childs’s tower slopes directly upward and is capped by a series of complex radio towers and wind-power-generating cables.73

3. Memorial Design

Not only did the design of Freedom Tower depart significantly from Libeskind’s master plan, but so did the winning design for the memorial, to be located on the site of the original towers’ footprints.74 Michael Arad’s design, entitled, “Reflecting Absence,” and supplemented by the work of landscape designer Peter Walker, is fundamentally different from Libeskind’s proposal, which, among other things, did not anticipate depression of the memorial below ground level.75

B. Comparison with the Big Dig

In the early 1990s, the MTA announced its first master plan for the Big Dig site.76 That was supplemented in 2000–01 by a parcel-by-parcel master plan for the twenty-seven acres of new open space.77 Teams were selected to design the final parcels in 2002–03, to be completed by 2005.78 Thus, the Big Dig, like the World Trade Center redevelopment, has seen two master plans.

One of the elements called for by the more recent Big Dig master plan is a “Garden Under Glass,” the pet project of the Massachusetts Horticultural Society. To what extent does this Garden play a role parallel to that of the memorial at the World Trade Center site? While not a memorial, and while the Big Dig site does not have the tragic history of the World Trade Center, the Garden Under Glass is the

72 See Marvin Trachtenberg, A New Vision for Ground Zero Beyond Mainstream Modernism, N.Y. TIMES, Feb. 23, 2003, § 2, at 54 (“[T]he particular shape of Mr. Libeskind’s spire repeats the lines of Liberty’s upraised arm and torch; in fact, the silhouette of the entire tower seems to retrace in the sky the contours of the entire statue.”).
73 Childs intends Freedom Tower to be a leader in “green” architecture, planning for a significant percentage of the building’s power to be generated by the wind cables at the top. See Dunlap, supra note 44.
74 See Goldberger, supra note 4, at 225.
75 See Pogrebin, supra note 63 (“In January 2004, Mr. Libeskind’s plan was further eroded with the selection of a memorial design. Mr. Arad’s plan called for the memorial to be brought level with the surrounding terrain. Mr. Libeskind’s hallmark, the memorial pit, was now to be flat.”).
78 See id.
most self-consciously “public art” element of the Big Dig, and in that way parallels the World Trade Center memorial.

In stark contrast, however, to Reflecting Absence’s design selection following a public competition involving more than 5200 entries, the proposed Garden Under Glass was not chosen through a competition, either open or closed. Rather, it was the only idea—and the only design—proffered by the Massachusetts Horticultural Society for that site. It has generated significant detractors in part because of this fact.

C. Lessons Learned from the New York and Boston Experiences

Some have criticized the master plan competition for the World Trade Center redevelopment as flawed in its overweening control by Governor Pataki; still others have complained that the memorial competition sacrificed quality and dramatic effect in the interest of democracy. Directly in tension with advocacy of a transparent public engagement process, some have argued that an autocratic, top-down selection of a memorial designer would have produced a more compelling design than did the actual public competition. It is noteworthy then that the Garden Under Glass bypassed any manner of public engagement or competition.

IV. Use of Landfill Generated by Site Excavation

A. Original World Trade Center Development

Battery Park City was built on the landfill excavated by the original World Trade Center project. Generally perceived as a success story,

79 Dunlap, supra note 46.
82 See Goldberger, supra note 4, at 226.
83 See Pogrebin, supra note 63.
84 See Garvin, supra note 4, at 361; see also Glanz & Lipton, supra note 1, at 177. (“[T]he excavated soil from the foundation would be poured into the Hudson to create the newest piece of Manhattan real estate at Battery Park City.”); Willis, supra note 1, at 13 (“Battery Park City . . . was created in its first stage of landfill from the excavations for the Trade Center.”).
Battery Park City is nevertheless substantially cut off from the rest of Lower Manhattan.\textsuperscript{85} Today’s redevelopment planning is seen as an opportunity to connect Battery Park City to Lower Manhattan by reopening streets closed by the formation of the original superblock.\textsuperscript{86}

\section*{B. Comparison with the Big Dig}

As part of the Big Dig, Spectacle Island—a former city dump—received 3.7 million cubic yards of clay and dirt to cap the dump and create new topsoil for a park.\textsuperscript{87} Spectacle Island is now part of the Boston Harbor Islands National Recreation Area, supervised by the National Park Service.\textsuperscript{88} As with Spectacle Island, material produced by the Big Dig excavation was used to cap Quarry Hills and create a new recreation area for that neighborhood.\textsuperscript{89}

\section*{C. Lessons Learned from the New York and Boston Experiences}

Both the New York and Boston experiences suggest the creative potential for landfill generated by excavation of a large urban development site. In New York, the excavated landfill enabled the construction of allegedly middle-income housing in the urban downtown. In Boston, the excavated landfill enabled the capping of a dump that was thought to be leaking into the harbor and the creation in its place of new major green space. What remains to be seen is whether Spectacle Island in particular becomes a destination for Boston urbanites and others. As with Battery Park City, the question is one of access.

\section*{V. Creating New Public Transportation Opportunities}

\subsection*{A. World Trade Center Redevelopment}

It is fitting that we conclude our discussion of lessons learned from the World Trade Center and Big Dig with issues of public transportation opportunities created by large-scale open-space projects because, in many respects, that is where both projects began. The origi-
nal World Trade Center project took its shape in significant part from mass transit concerns. Initially, the project was conceived for Manhattan’s lower east side, but was quickly moved to the west side to address concerns of the then-New Jersey governor, who, as co-director of the Port Authority board, insisted that the World Trade Center be located closer to New Jersey for purposes of better access to jobs, etc. In addition to addressing these concerns, the Port Authority agreed to assume management of the failing Hudson and Manhattan sub-Hudson rail line from the New Jersey government. In fact, the towers were built on the site of the rail line’s former headquarters. The rail line was re-named the PATH train, which continues to operate today, connecting Lower Manhattan with northern New Jersey.

As part of its current redevelopment planning, the LMDC commissioned a study of post-September 11 transportation options for Lower Manhattan. Completed in May 2004, the report prioritized downtown New York’s transportation needs as follows:

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90 See Glanz & Lipton, supra note 1, at 51–61; Goldberger, supra note 4, at 22.
91 Glanz & Lipton note:

New Jersey abruptly balked on the entire World Trade Center plan . . . .

. . . New Jersey governor Robert Meyner made the plain observation that a pile of office buildings, parking lots, and exhibition space on the east side of Manhattan did not seem to have a hell of a lot to do with New Jersey. . . . If the Port Authority was going to spend millions of dollars on new infrastructure, Meyner wanted the money to go toward saving the H&M.

See Glanz & Lipton, supra note 1, at 55. Similarly, Willis states:

The Port Authority had tentatively agreed to develop that complex [on the east side], but in 1961 the site shifted to the Hudson River waterfront in a political accommodation with New Jersey interests that required the agency to take over the bankrupt Hudson and Manhattan Railroad and tubes and to operate them as the PATH commuter rail system.

See Willis, supra note 1, at 14.
92 See Glanz & Lipton, supra note 1, at 56.
93 See id. at 57. Glanz and Lipton write:

If they would have to tear down the H&M terminal buildings anyway, Sullivan thought, why not save themselves a lot of trouble and put the World Trade Center right on top of a new train terminal? Moving the trade center from the east side to the west would mean that not only the H&M buildings but acres of the surrounding cityscape would also have to be razed. . . .

. . . [N]o major structures would have to be demolished except the H&M terminal buildings themselves.

Id.
94 See id. at 59.
95 See Lower Manhattan Dev. Corp., Transportation Priorities for Lower Manhattan (“In May, 2004 the results of a coordinated study on a new rail line between Lower Manhattan
• Access to JFK, LaGuardia, and Newark Liberty International airports;\textsuperscript{96}
• Lower Manhattan Transit Complex;\textsuperscript{97}
• Bus Facilities and Below-Grade Infrastructure;\textsuperscript{98} and
• Ferry service.\textsuperscript{99}

There has been active consideration of using the World Trade Center redevelopment as an opportunity to link Lower Manhattan with the three major regional airports: LaGuardia in Queens, JFK on Long Island, and Newark in New Jersey.\textsuperscript{100} The PATH train to Newark airport is already running, and the LMDC continues to study the feasibility of establishing a baggage check-in for JFK Airport in downtown Manhattan, where security is a major concern.\textsuperscript{101}

Finally, one element of the expanded transit hub is a direct transfer to the subway from the PATH train, which was previously unavailable. The PATH station has already reopened on the World Trade Center site,\textsuperscript{102} making it the first element of Libeskind’s master plan to bear fruit.


\textsuperscript{97} Id. at 22–27. The complex will consist of a new PATH terminal located on the World Trade Center site, as well as a new Fulton Street Transit Center at Broadway and Fulton. The PATH terminal, which will be completed over a three to six year period, is estimated to cost $1.7 to $2 billion. The Fulton Street Transit Center, which will be completed over a three to four year period, will cost $750 million. Id.

\textsuperscript{98} Id. at 36–40. A secure facility for the storage of tour and charter buses is expected to accommodate between 75 and 150 buses daily. Id. The location of the facility has not yet been determined, though the cost of the bus facility and below-grade infrastructure work is estimated at $500 million. Id.

\textsuperscript{99} Id. at 76–83. Enhancing and expanding ferry service to Lower Manhattan is planned as a means of linking Lower Manhattan to the region. Id.

\textsuperscript{100} Id.

\textsuperscript{101} Id. at 66.

\textsuperscript{102} See David W. Dunlap, Again, Trains Put the World in Trade Center, N.Y. Times, Nov. 24, 2003, at A1 (“The World Trade Center PATH Station opened at 2 p.m. after a $323 million, 16-month reconstruction, to applause and tears along the platforms and aboard the trains.”).
B. Comparison with the Big Dig

Like the original World Trade Center project, the Big Dig took its shape from concerns for transportation, albeit of a very different sort—cars, not trains. The master plan for the Big Dig open space includes reference to a water shuttle dock on parcel 24, located at Russia Wharf between Congress Street and the Evelyn Moakley Bridges.\(^{103}\) Presumably, this shuttle dock represents ferry service to Logan Airport, located across from the Wharf District. Whether the Big Dig project was seen as an opportunity to improve Boston’s mass transit infrastructure and not just submerge its major highways underground is unclear, though the Massachusetts Bay Transit Authority (MBTA) and Massport are listed as key partners on the project’s official website.\(^{104}\)

C. Lessons Learned from the New York and Boston Experiences

In light of the fact that the Big Dig project was initiated largely out of concern for transportation congestion in downtown Boston, whereas the World Trade Center redevelopment was undertaken in the wake of a national security crisis, it is striking the extent to which it is New York, and not Boston, that has used the resulting planning process to consider how best to create new or expanded public transportation opportunities. While planning officials in New York have studied possibilities for the expansion of the region’s mass transit systems, officials in Boston largely have not.

Conclusion

In reflecting on the World Trade Center and Big Dig projects, I return to where I began: to what extent are these examples \textit{sui generis}, or are there lessons to be learned for public open space planning generally?

The New York and Boston experiences teach us much about the types of constraints placed on public open space planning. One unsurprising but critical lesson is, of course, for the centrality of politics

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\(^{104}\) The official Big Dig website listed key partners as including: the Massachusetts Turnpike Authority (of which the Big Dig project is a part); the Federal Highway Administration; the Massachusetts Highway Department; the Metropolitan District Commission; the Commonwealth of Massachusetts; the MBTA; Massport; and the City of Boston. “Big-dig.com” has now been merged with the MTA website. See Mass. Tpk. Auth., \textit{The Big Dig}, at http://www.masspike.com/bigdig/index.html (last visited Apr. 10, 2005).
to any land use planning. Other transferable lessons include: recognition of the influence of the press, as with the *New York Times*’s reporting on the World Trade Center and the *Boston Globe*’s reporting on the Big Dig project; constraints on the autonomy and flexibility of decisionmaking presented by the complex public and private ownership of land; the potential for using excavated landfill to create new urban spaces; and the potential for generating new public transportation opportunities through open space planning.

I look forward to seeing how these lessons are applied to urban-centered public open space planning in the future.
WINDFALLS, WIPEOUTS, GIVINGS, AND TAKINGS IN DRAMATIC REDEVELOPMENT PROJECTS: BARGAINING FOR BETTER ZONING ON DENSITY, VIEWS, AND PUBLIC ACCESS

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Abstract: Large-scale redevelopment projects such as Boston’s “Big Dig” bestow numerous public benefits—often without charge—to nearby property owners. In the case of the Big Dig, these benefits include twenty-seven acres of newly created parkland, where once an elevated freeway stood. Beyond the immediate and obvious beneficiaries are nearby landowners seeking “better zoning” that might include a relaxation of maximum height or floor area ratios to enjoy the new view. This Article explores the often hidden impact of the nearby landowners’ means of accomplishing their desired result: bargaining with municipalities for private, derivative benefits. The Article compares legislative and judicial responses to land use bargaining in California and Massachusetts, states with dramatically different approaches to land use planning. The Article concludes that bargaining in the absence of a guiding land use plan—the Massachusetts “model”—results in a chaotic land use policy and unpredictable development.

Introduction

When completed in 2007, Boston’s Central Artery/Tunnel Project (commonly referred to as the “Big Dig”) will have replaced the city’s elevated downtown expressway, the Central Artery, with a two-mile, twin-decked tunnel and opened over twenty-seven acres of pre
viously inaccessible land to public use. The result will be to re-unite a
city once divided—like so many other American cities—by an above-
ground highway system laid out in the 1950s.\(^1\) While the obvious
beneficiaries of one of the nation’s largest ever public works projects
will be the public, tangible and quantifiable benefits also will accrue
to readily identifiable individuals and business entities.\(^2\)

Consider, for example, the cylindrical office towers One and Two
International Place, built on the edge of Boston’s financial district in
the late 1980s. Until the spring of 2004, these structures stood within
forty feet of the elevated highway. The offices of several of Boston’s
most prominent firms—at least those situated on floors six through
forty-six—overlooked traffic so dense and continuous that the Central
Artery was labeled as “one of the most congested highways in the
United States.”\(^3\) Occupants below floor six had views of rusting steel
beams and support pylons for the elevated highway.

Today, however, all of these office floors overlook what will
shortly become a public park, greenway, botanical garden, and open
space festooned with public art.\(^4\) The noise and visual assault of the
elevated highway is, literally, out of mind and sight, having been “de-
pressed” fifty to seventy feet beneath its former location.\(^5\) This seem-
ingly magical transformation from blight to beauty has granted an
enormous public benefit to the owners and tenants of One and Two
International Place, as well as those of hundreds of similarly situated
properties.

This type of “giving” has been the focus of several excellent arti-
cles over the past thirty years, spurred by Professor Donald Hagman’s
work, *Windfalls for Wipeouts: Land Value Capture and Compensation.*\(^6\)
More recent articles have sought to analogize “givings” with regula-

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\(^3\) See *id.


tory takings.\(^7\) The argument made by givings advocates is that if a court can order compensation due when it concludes that a regulatory taking has occurred, the same fact pattern—only in reverse—should support an order requiring the beneficiary of a “giving” to pay the government for the benefits bestowed upon it. Simply put, givings theory argues that instead of government compensating the landowner for that which was taken, the landowner should pay the government for that which was given.

While requiring individual beneficiaries of projects such as the Big Dig to pay for the benefits directly bestowed has some appeal because the reciprocity of advantage is complete,\(^8\) we recommend against adoption of this theory. Our principal concern, and that expressed by others before us, is that givings awards likely would lead to increased approvals of regulatory takings claims; such an outcome could easily upset the delicate balance currently preserved by the absence of anything beyond basic ad hoc factual inquiries for each and every takings claim.\(^9\)

And while we decline to advocate for the adoption of formalized givings jurisprudence for projects such as the Big Dig, we believe a derivative issue is of concern: the temptation to bargain away local land use controls in proximity to the newly created public benefit.

The bargaining away is tantamount to a giving, but more subtle and more destructive to the basic tenets of land use planning.\(^10\) Whereas an overt giving such as the creation of twenty-seven acres of


\(^8\) “The conclusion seems to rest upon the assumption that in order to justify such exercise of the police power there must be ‘an average reciprocity of advantage’ as between the owner of the property restricted and the rest of the community . . . .” Pa. Coal Co. v. Mahon, 260 U.S. 393, 422 (1922) (Brandeis, J., dissenting).


> In engaging in these essentially ad hoc, factual inquiries, the Court’s decisions have identified several factors that have particular significance. The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. So, too, is the character of the governmental action.

438 U.S. at 124 (citations omitted).

public open space across from an office building is a transparent gift, the beneficiaries of this gift are not limited to immediate neighbors. Indeed, while the owners and tenants of One and Two International Place clearly are beneficiaries, perhaps they are merely incidental beneficiaries. Perhaps instead, the residents of the city of Boston and the Commonwealth of Massachusetts are the true winners in measuring benefit.

A different conclusion results where subsequent to the “public” giving, incremental petitions for rezoning or other private land use entitlements occur within proximity to the public works project. For example, only time will tell how many property owners that could have a view of the new greenway and public parks but for a zoning change will now petition the City Council for zoning relief.

Our concern for the derivative impacts of projects such as the Big Dig is particularly acute in non-plan states, such as Massachusetts, which do not require any rational connection between planning and land use controls.\textsuperscript{11} For example, the Massachusetts Supreme Judicial Court (SJC) recently approved a town’s decision to rezone land for an energy facility where the rezoning was contingent upon the payment to the town of $8 million.\textsuperscript{12} Using this logic, property owners within feet, blocks, or even greater distances could simply purchase more beneficial zoning.\textsuperscript{13} There is every indication that property owners are lining up to purchase more attractive zoning in the wake of this 2003 SJC ruling.\textsuperscript{14}

The result can be noticeably different in plan states, which require a level of consistency between a plan and resulting regulatory instruments such as zoning and subdivision control.\textsuperscript{15} A plan state re-


\textsuperscript{12} Durand, 793 N.E.2d at 363–64.

\textsuperscript{13} See id. at 363.

\textsuperscript{14} Equally remarkable to the holding in Durand is the SJC’s decision in Zuckerman v. Town of Hadley, 813 N.E.2d 843 (Mass. 2004). In Zuckerman, the SJC struck down a regulation limiting the number of lots within a subdivision that could be built upon within any 12-month period, concluding that the bylaw did not serve a permissible public purpose. Id. at 851. The SJC reprimanded the town for its failure to link the growth management regulation to studies or planning for future growth, but ignored the fact that no legal framework for developing such studies exists in the state. Id. at 848–49. Additionally, it ignored an earlier Appeals Court ruling that “[n]either the master plan itself nor the law requires that zoning be in strict accordance with a master plan.” See Rando v. Town of N. Attleborough, 692 N.E.2d 544, 550 (Mass. App. Ct. 1998).

quires an amendment to the comprehensive plan as a condition precedent to the adoption of the new and beneficial zoning. Thus, while the results of bargaining in plan versus non-plan states may be the same—the zoning is changed—the process is very different. In a non-plan state, the municipality has sold—bargained—some aspect of its land use controls in exchange for some promise. This transaction is completed outside of a plan and has no relationship to a plan. In a plan state, however, while the end result may be identical, the process ensures that the bargaining is in accordance and consistent with a plan or planning analysis.

The result of the bargaining, whether in non-plan states or in plan states, is derivative of the public giving, which in many ways defines land use planning—or lack of it—in the United States. Rather than plan for the derivative uses or demands that would logically follow a public project—for example, gasoline service stations at exits off a state highway system—these needs develop independently and haphazardly following the completion of the project. This predictable outcome, however, need not follow large-scale projects such as the Big Dig; the result can be avoided by careful attention to, and respect for, the integrity of planning and zoning, and the rejection of the sale or bargaining away of land use control, which is an insidious form of givings.

As discussed below, while bargaining may be a basic human behavioral characteristic carried forward from the days of bartering and exchange in the public marketplace, bargaining without a plan against which the legitimacy of the bargain can be measured will lead to chaotic development. This simple requirement—having a plan which guides growth, against which decisions regarding land use can be evaluated—is what separates plan states from non-plan states. Plan states impose the guidance requirement; non-plan states do not.

17 See id. at 594–99.
19 The Massachusetts statute calling for a master plan does not require zoning to be subsequently in accordance with the plan, but rather merely that town officials, prior to making a decision, take land use into consideration. See MASS. GEN. LAWS ch. 41, § 81D (2002).
20 See Curtin, supra note 15, at 147; see also Witten, supra note 16, at 594–99.
22 See id. at 76.
23 See id.
We discuss below the clear distinction between plan and non-plan states using two extreme examples. In California, a true plan state, the courts have consistently ruled that land use ordinances, entitlements, requests, approvals, or the like, when inconsistent with the plan, are void ab initio.\textsuperscript{24} In Massachusetts, a non-plan state, the courts have regularly ruled that ordinances need not be in accordance with a plan and that, as a legal or practical matter, a plan has no meaning.\textsuperscript{25}

The problem encountered in non-plan states such as Massachusetts, as discussed below, is the absence of any predictive tool to determine the future of land use decisions.\textsuperscript{26} Thus, particularly in the wake of large-scale projects as noted above, not only are subsidiary pressures to rezone for more financially attractive uses inevitable, but the results are also unpredictable. Whereas plan states provide for logical and predictable bargaining because the bargaining will be consistent with the plan,\textsuperscript{27} non-plan states simply allow the bargaining in a manner that effectively resembles the unchecked mercantile market places of centuries past.\textsuperscript{28}

There are, of course, a whole host of problems with the latter. First, as the bargaining is not tied to a plan, there are few bargains that will fail to pass court scrutiny.\textsuperscript{29} Second, precisely because of the first problem, the neighborhood abutting the bargained-for land use has little, if any, opportunity to rationally contest the bargaining: since the bartering need not be consistent with a plan, anything goes.\textsuperscript{30} Third, unlike produce for sale at a weekend farmer’s market, the police powers are not a fungible product.\textsuperscript{31} While a bushel of apples can readily be exchanged for a five-dollar bill, is it possible to quantify the price that should be paid for the requested rezoning?

\textsuperscript{24} See, e.g., Lesher Communications, Inc. v. City of Walnut Creek, 802 P.2d 317, 322 (Cal. 1990).
\textsuperscript{26} See id.
\textsuperscript{27} See Curtin, \textit{supra} note 15, at 147.
\textsuperscript{28} See Sullivan & Michel, \textit{supra} note 21, at 82.
\textsuperscript{30} See Durand, 793 N.E.2d at 363–64, 369; \textit{McLean Hosp.}, 778 N.E.2d at 1022–23.
\textsuperscript{31} “But the power of governing is a trust committed by the people to the government, no part of which can be granted away.” Stone v. Mississippi, 101 U.S. 814, 820 (1879).
A pragmatic response to this question is found in “development agreements,” which are contractual tools found in plan states.\textsuperscript{32} A development agreement recognizes that the marketplace—especially in the land use context—is forever pressuring for change. However, development agreements also recognize that the bargaining must be consistent and in accordance with a rationally developed plan to avoid the uncertain and chaotic outcome of bargaining in its absence.\textsuperscript{33}

I. Plan States Contrasted with Non-Plan States

In dealing with the derivative benefit issue of future but definite public projects, such as Boston’s Big Dig, plan states’ zoning authorities’ bargaining to achieve the appropriate land use controls would be guided by their general plans, especially in those states where the general plan is considered a constitution for all future development.\textsuperscript{34}

The importance of the [comprehensive plan\textsuperscript{35} or] General Plan sprang from the model legislation for planning and zoning promulgated in 1926 and 1928 by the U.S. Department of Commerce under the leadership of the Secretary of Commerce Herbert Hoover. The [model] statutes were labeled the Standard State Zoning Enabling Act—1926 (SZEA) and the Standard Planning Enabling Act—1928 (SPEA). Section 3 of SZEA stated that zoning and other regulations be “in accordance with a General Plan.”\textsuperscript{36}

\textsuperscript{33} See id. at 103–04.
\textsuperscript{34} See id.
\textsuperscript{35} The term “comprehensive plan” is commonly called the “general plan” or “master plan.” The term “general plan” is being more commonly used today. Curtin, supra note 15, at 136 n.3.
A. Use of the Plan in the United States

Regulation of land use in the United States occurs almost exclusively at the local level. Consequently, regulations and procedures vary widely from jurisdiction to jurisdiction, with varying degrees of success. From a national perspective, it is highly unlikely that Congress will undertake either land use regulation or an effort to standardize land use processes across the country. Consequently, reforms to deal with common problems likely will continue to develop at the local level.

Increasingly, local jurisdictions are implementing the comprehensive plan as part of their land use planning process. Although specifics vary widely, most jurisdictions with a comprehensive plan view it as the “constitution” for development within that community. Typically, all subsequent land use decisions must be “consistent” with the vision for growth and development reflected in the comprehensive plan.37

B. The California Model

In California, land use regulations and approvals made by a city or county must, in most instances, be consistent with the city or county’s general plan.38 The general plan has been declared by the California Supreme Court as the single most important document and the “constitution for all future development.”39 Since the general plan has such primacy, any decision of a city or county affecting land use, development, or public works projects must be consistent with its general plan.40 Under California Government Code section 65,860(a), for example, a zoning ordinance is consistent with a general plan only if: (1) the city or county has officially adopted such a plan; and (2) the various land uses authorized by the zoning ordinance are compatible with the objectives, policies, general land uses, and programs specified in the plan.41

In City of Irvine v. Irvine Citizens Against Overdevelopment, a California court of appeal held that a land use regulation is consistent with a city’s general plan where, considering all of its aspects, the ordinance

38 CAL. GOV’T CODE §§ 65,860(a), 65,867.5(c) (West 1997).
39 Lesher Communications, Inc. v. City of Walnut Creek, 802 P.2d 317, 321 (Cal. 1990).
41 CAL. GOV’T CODE § 65,860.
furthers the objectives and policies of the general plan and does not obstruct their attainment.\textsuperscript{42} A city’s finding that a land use regulation is consistent with its general plan can be reversed only if it is based on evidence from which no reasonable person could have reached the same conclusion.\textsuperscript{43}

The California courts have stated that a land use regulation inconsistent with a general plan at the time of enactment is “invalid[] \textit{ab initio},” meaning it was void when passed.\textsuperscript{44} If a land use regulation becomes inconsistent with a general plan by reason of an amendment to the plan, or to any element of the plan, the regulation must be amended within a reasonable time so that it is consistent with the amended general plan.\textsuperscript{45} Since general plan consistency is required, the absence of a valid general plan, or the failure of any relevant elements thereof to meet statutory criteria, “precludes the enactment of zoning ordinances and the like.”\textsuperscript{46}

To ensure that a Machiavellian community cannot avoid the planning requirements embodied in the statute by repeatedly and routinely amending its plan to achieve its zoning objectives, the legislation limits the number of times mandatory elements of the plan may be amended per year to four.\textsuperscript{47}

\textbf{C. Other States}

Nearly all states, in following the Standard Zone Enabling Act, require that zoning take place “in accordance with” some sort of comprehensive or master plan.\textsuperscript{48} States vary, however, in the degree to which the comprehensive plan is made a significant or decisive factor in evaluating land use regulations, although over time there has been a slow and incremental trend nationwide toward it having quasi-

\textsuperscript{42} 30 Cal. Rptr. 2d 797, 803 (Cal. Ct. App. 1994).
\textsuperscript{43} A Local & Reg'l Monitor v. City of Los Angeles, 20 Cal. Rptr. 2d 228, 239 (Cal. Ct. App. 1993).
\textsuperscript{44} Bldg. Indus. Ass'n, Inc. v. City of Oceanside, 33 Cal. Rptr. 2d 137, 146 (Cal. Ct. App. 1994); \textit{see also} Lesher Communications, 802 P.2d at 322; \textit{City of Irvine}, 30 Cal. Rptr. 2d at 803; deBottari v. Norco City Council, 217 Cal. Rptr. 790, 794 (Cal. Ct. App. 1985).
\textsuperscript{45} \textit{Cal. Gov't Code} § 65,860(c) (setting forth the rule for zoning ordinances).
\textsuperscript{46} Res. Def. Fund v. County of Santa Cruz, 184 Cal. Rptr. 371, 373 (Cal. Ct. App. 1982).
\textsuperscript{47} \textit{Cal. Gov't Code} § 65,358(b). In addition, plan amendments are subject to detailed review pursuant to the California Environmental Quality Act and public hearings before the local planning commission and local legislative body. \textit{See Cal. Gov't Code} § 65,350; \textit{Cal. Pub. Res. Code} §§ 21,000–21,177; \textit{see also} Daniel J. Curtin, Jr., \textit{California Land Use and Planning Law} 29 (24th ed. 2004).
\textsuperscript{48} Callies et al., \textit{supra} note 32, at 41.
constitutional status. As categorized by one of the nation’s foremost commentators on the subject of the comprehensive plan, the states currently fall into three major classifications with respect to the role of the comprehensive plan in the land use regulatory process.

The first category, the “unitary view” states, represents probably a majority of the states. In this category, the comprehensive plan is accorded no special significance, meaning there is no requirement that local governments prepare a plan that is separate from zoning regulations. Examples of states falling into this category and having recent judicial decisions upholding the “unitary view” are Arkansas, Connecticut, Illinois, New York, and, as discussed below, Massachusetts.

States in the second category, termed the “planning factor” states, give some significance to the comprehensive plan, if one exists, as a factor in evaluating land use regulations, but do not make it the exclusive factor. The weight to be given the plan varies from state to state. Examples of states in this category are Missouri, Montana, and New Jersey.

The third category of states, called “plan as the constitution or the law” states, are those which, like California, grant the general plan quasi-constitutional status in regulating ordinances and other actions

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49 Id.
50 See Edward J. Sullivan, Comprehensive Planning, 36 Urb. Law. 541, 541 (2004); Curtin, supra note 15, at 137. See generally Sullivan & Michel, supra note 21 (tracing developments in the role of the comprehensive plan since a 1975 article was published).
51 See Sullivan, supra note 50, at 541.
52 See id.
55 City of Chi. Heights v. Living Word Outreach Full Gospel Church & Ministries, Inc., 749 N.E.2d 916, 920 (Ill. 2001) (failing to list accordance with the comprehensive plan as a criterion for special uses).
57 See Sullivan, supra note 50, at 541.
of the local government in implementing the plan. Other states within this category include Florida, Oregon, and Washington.

Clear-cut policies and goals in a city’s or county’s general plan, which guide all developments and approval of development agreements, would assure that any bargaining for land use entitlements adheres to the public goals and policies in the adopted general plan, thus preventing piecemeal, ad hoc, or arbitrary and capricious decisions.

In California and other plan states, “the general plan is the most important legal planning tool” for city and county officials to utilize in their efforts to regulate development. It is unequivocally the “constitution for all future development.” The goals and policies of the general plan can be used not only in managing growth, regulating development, and imposing land use regulations, but also in imposing dedications and impact fees on new projects, rezoning, and other approvals, especially those not directly authorized under state law. Examples in California “include dedications for libraries, police stations, and fire station sites, and fees for affordable housing or child day care centers, provided there is a legally established nexus.”

In states such as California, Florida, Oregon, and Washington, for example, since the general plan is the controlling document, it provides protection against “knee-jerk,” Gallup poll-like land rezonings, insures appropriate due process, and leads to better-conceived planning to achieve the goals and policies of the municipality. Therefore, when derivative benefits are being considered, they must be weighed against the goals and policies of the plan as a whole.

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61 See Sullivan, supra note 50, at 541.
66 Curtin, supra note 15, at 149.
67 Lesher Communications, Inc. v. City of Walnut Creek, 802 P.2d 317, 321 (Cal. 1990).
68 Curtin, supra note 15, at 149.
69 Id.
D. The Massachusetts “Model”

Unlike each of the states discussed above and a great many others, Massachusetts does not require or even encourage cities and towns to plan.\(^71\) The very notion of “planning in Massachusetts” is an oxymoron.\(^72\) The courts have responded to challenges to rezonings or the issuance of adjudicative permits that argue “inconsistency with a plan” by summarily ruling that a master plan has no legal meaning in Massachusetts.\(^73\)

The American Planning Association has criticized the Massachusetts Zoning Act as contradictory, too “confusing,” and “outdated,”\(^74\) while the Massachusetts Appeals Court has characterized the vested rights portion of the Act as “infelicitous.”\(^75\) The results of such an “anti-planning” platform are far-reaching. The Massachusetts courts have held that cities and towns:

- are free to engage in rezoning of property conditioned upon the payment of money—lots of money;\(^76\)

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\(^72\) Two notable exceptions exist. The Martha’s Vineyard Commission Act, 1974 Mass. Acts 637, and the Cape Cod Commission Act, 1989 Mass. Acts 716, provide for planning consistency among the Vineyard’s six towns and Cape Cod’s 15 municipalities. Section 9(d) of the Cape Cod Commission Act provides that if a town prepares a plan consistent with the regional plan prepared by the Cape Cod Commission, the town may elect to impose impact fees and enter into development agreements. Towns wishing to execute development agreements must then adopt the terms and conditions of the Commission’s Model Development Agreement Bylaw. See Cape Cod Comm’n, An Introduction to the Cape Cod Commission Model Bylaws and Regulations Project (Nov. 5, 2002) (drafted for the Commission by Jonathan Douglas Witten in 1997), http://www.capecodcommission.org/bylaws.

\(^73\) “Neither the master plan itself nor the law requires that zoning be in strict accordance with a master plan.” Rando v. Town of N. Attleborough, 692 N.E.2d 544, 550 (Mass. App. Ct. 1998). Section 81D of chapter 41 of the Massachusetts General Laws requires planning boards to “make a master plan,” but provides no requirement that regulations adopted by the city or town be consistent with the plan. Mass. Gen. Laws ch. 41, § 81D. The plan is adopted by a majority of the members of the planning board, not the local legislative body. See id. The verb “planning” does not appear once in the entirety of the Massachusetts Zoning Act or the Subdivision Control Law. See id. ch. 40A; id. ch. 41, § 81L.


• are free to engage in rezoning of property conditioned upon completion of specific public improvements;\textsuperscript{77}
• are not bound by the goals or policies of a locally adopted plan—if one exists—in their legislative or adjudicative decisionmaking;\textsuperscript{78} and
• cannot impose long-term growth management devices, regardless of whether they have a planning basis.\textsuperscript{79}

II. Bargaining Away the Police Power: What Goes Wrong in Non-Plan States

Without a plan to guide or control land use decisionmaking, land use regulations—zoning, subdivision control, health, and design guidelines—are for sale.\textsuperscript{80} Since there is no basis upon which zoning decisions are made, almost any decision will be perceived by a reviewing court as rational.\textsuperscript{81}

This is unfortunate, and ironic, as the rational basis standard is applied by the courts in land use matters to ensure broad deference to the actions of city or county legislative bodies.\textsuperscript{82} A reviewing court will not substitute its judgment for that of the legislature, and the legislature is granted an enviable presumption of validity.\textsuperscript{83} This broad grant of power, without a simultaneous legislative requirement that regulations be in accordance with a plan, leaves cities and towns free to zone as they please, and just as free to bargain that power away.\textsuperscript{84}

Two recent Massachusetts state court holdings highlight the risk of allowing cities and towns to bargain away their regulatory tools without adherence to a plan.\textsuperscript{85} In \textit{Durand v. IDC Bellingham, LLC}, a decision remarkable for the court’s willingness to sanction an overt

\textsuperscript{78} \textit{Rando}, 692 N.E.2d at 550.
\textsuperscript{79} Zuckerman v. Town of Hadley, 813 N.E.2d 843, 849 (Mass. 2004).
\textsuperscript{80} See, e.g., \textit{Durand}, 793 N.E.2d at 363–64, 369; \textit{McLean Hosp.}, 778 N.E.2d at 1023.
\textsuperscript{81} The Massachusetts statute calling for a master plan does not require zoning to be subsequently in accordance with the plan, but rather merely that town officials, prior to making a decision, take land use into consideration. See \textit{Mass. Gen. Laws} ch. 41, § 81D (2002).
\textsuperscript{82} See, e.g., \textit{McLean Hosp.}, 778 N.E.2d at 1022 (holding that if a zoning action is not arbitrary, local judgment on the subject should be sustained).
\textsuperscript{83} See id.
\textsuperscript{85} \textit{See Durand}, 793 N.E.2d at 369; \textit{McLean Hosp.}, 778 N.E.2d at 1023.
trade of zoning for cash, the SJC upheld a rezoning that was directly and indisputably linked to the payment of an $8 million gift.\textsuperscript{86} The court upheld the payment-for-rezoning scheme, citing the rational basis test: “In general, there is no reason to invalidate a legislative act on the basis of an ‘extraneous consideration,’ because we defer to legislative findings and choices without regard to motive. We see no reason to make an exception for legislative acts that are in the nature of zoning enactments . . . .”\textsuperscript{87} Only the dissenting justices seemed concerned about issues of enforceability—what happens if the beneficiary of the rezoning breaches?—and the public policy issues raised where “needy” cities and towns see their zoning powers as for sale to the highest bidder.\textsuperscript{88}

In \textit{McLean Hospital Corp. v. Town of Belmont}, the Appeals Court upheld a rezoning linked to a land owner’s conveyances of surplus parcels to the town and to off-site improvements to be made by the land owner. The court concluded that if the zoning action by itself is a valid exercise of the police powers, such validity is not negated by bargaining, provided that the bargaining is related to the property subject to the rezoning.\textsuperscript{89}

In both cases, then, the courts conclude that a \textit{promise by a petitioner} is different from a \textit{requirement imposed} as a condition precedent by the municipality.\textsuperscript{90} The courts also appear to conclude that if the rezoning would have been permissible without the promise, then the promise did not induce or influence the legislative action.\textsuperscript{91} Finally, while the Appeals Court appears to require some nexus between the rezoning and the proffered—or extracted—promise, the SJC appears to conclude that the rational basis test allows cities and towns to bar-

\textsuperscript{86} 793 N.E.2d at 368–69.
\textsuperscript{87} \textit{Id.} at 369. Three justices filed an opinion concurring in part and dissenting in part, finding that it was a bare “sale of the police power because there is nothing in the record to legitimize the $8 million offer as ‘intended to mitigate the impact of the development upon the town’ . . . .” \textit{Id.} at 371 (Spina, J., concurring in part and dissenting in part) (quoting \textit{Rando}, 692 N.E.2d at 548). They suggest, however, that if the $8 million offer had been directly linked to the impacts caused by the proposed power plant, as opposed to a cash gift of $8 million unconnected to any specific impact, the agreement to rezone in exchange for payment would not have been inappropriate. \textit{Id.} (Spina, J., concurring in part and dissenting in part).
\textsuperscript{88} \textit{Id.} at 371. “Sadly, these circumstances demonstrate government and private interests at their shameful worst, and are most likely to involve the most needy towns.” \textit{Id.}
\textsuperscript{89} \textit{McLean Hosp.}, 778 N.E.2d at 1021 (finding that legitimacy of zoning actions is not lessened by “ancillary agreements not involving consideration extraneous to the property being rezoned”).
\textsuperscript{90} \textit{See Durand}, 793 N.E.2d at 369; \textit{McLean Hosp.}, 778 N.E.2d at 1023.
\textsuperscript{91} \textit{See Durand}, 793 N.E.2d at 369; \textit{McLean Hosp.}, 778 N.E.2d at 1023.
gain freely whether or not the offer or extraction is related to the rezoning.\textsuperscript{92} Both courts send a similar, clear message.\textsuperscript{93}

Of concern is that the courts are approving the end result rather than focusing on the process of bargaining or the risks associated with it. If the end result is permissible—almost always so when the rational basis standard is applied—the process of getting there is secondary.\textsuperscript{94} As discussed in Part III, plan states have adopted a means of providing for the same flexibility witnessed in cases like \textit{Durand} and \textit{McLean Hospital}, but commensurate with the due process protections so clearly lacking in those cases.\textsuperscript{95} It is the development agreement that has successfully bridged the gap between unfettered bargaining and rigid, inflexible zoning.\textsuperscript{96} We believe that development agreements are a valuable and vital tool for overcoming the dangers associated with the former and the problems inherent in the latter.

### III. Development Agreements—Controls and Opportunities in the Bargaining Process

Many states have authorized the use of development agreements mainly for the purpose of giving developers some assurance that a project can be completed once all land use and discretionary approv-

\textsuperscript{92} See \textit{Durand}, 793 N.E.2d at 369; \textit{McLean Hosp.}, 778 N.E.2d at 1023.

\textsuperscript{93} See \textit{Durand}, 793 N.E.2d at 369; \textit{McLean Hosp.}, 778 N.E.2d at 1023.

\textsuperscript{94} Massachusetts leads the nation in “ends versus means” legislation regarding the development of affordable housing as well. Rather than adopt a plan or policy for the creation of below market rate dwelling units, Massachusetts holds onto a 35-year-old statute that permits the avoidance of all locally adopted regulations where a developer sells or rents 25% of the new dwellings below market rates. The remaining 75% of the dwellings are constructed without adherence to local regulations and unencumbered by density, height, bulk or otherwise traditional zoning controls. The statute has, not surprisingly, resulted in the construction of over 30,000 new dwelling units. But the due process costs are extensive. See generally Jonathan Douglas Witten, \textit{The Cost of Developing Affordable Housing: At What Price?}, 30 B.C. ENVT'L AFF. L. REV. 509 (2003); Christopher Baker, Note, \textit{Housing in Crisis: A Call to Reform Massachusetts’s Affordable Housing Law}, 32 B.C. ENVT'L AFF. L. REV. 165 (2005).

\textsuperscript{95} See Witten, \textit{supra} note 94, at 516–20.

als have been obtained. However, as development agreements have come into more frequent use, an increasing number of local government units have begun using them to obtain benefits for the public which ordinarily could not be obtained using the normal land use process. So far, thirteen states have adopted legislation enabling local governments to enter into development agreements with property owners or developers. In addition, some states, such as Texas, allow the use of development agreements in the absence of any such state legislation.

A. Development Agreements—The California Statute

In 1979, the California Legislature enacted a statute establishing a property development agreement procedure. The principal provisions of the legislation governing development agreements are as follows:

- Cities and counties are given express authorization to enter into a development agreement and may adopt procedures to do so by resolution or ordinance.
- The development agreement is enforceable by any party to the agreement, notwithstanding a change in any applicable general or specific plan, zoning, subdivision, or building regulation adopted by the city.

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97 See Inst. for Local Self Gov’t, supra note 96, at 19–21.
98 See id. at 14.
102 Id. § 65,865.
• Unless otherwise provided by the development agreement, the applicable rules, regulations, and policies are those that are in force at the time of the execution of the agreement.  

• A city’s or county’s exercise of its power to enter into a development agreement is a legislative act. It must be approved by ordinance; it must be consistent with the general plan and any specific plan; and is subject to repeal by referendum.  

• There is a ninety-day statute of limitations to challenge the adoption or amendment of a development agreement approved on or after January 1, 1996.  

• A city or county may terminate or modify a development agreement if it finds, on the basis of substantial evidence, that the applicant or successor in interest thereto has not complied in good faith with its terms or conditions.  

B. Contracting Away the Police Power

Not infrequently, those who challenge projects governed by development agreements will argue that such agreements are invalid because the local governmental unit is “contracting away” its police power. The courts have not been persuaded by this argument.

For example, in Santa Margarita Area Residents Together v. San Luis Obispo County Board of Supervisors, an area residents’ association contended that because San Luis Obispo County had entered into a development agreement freezing zoning for a project for a five-year period before the project was ready for construction, the county improperly contracted away its zoning authority. In holding for the county, the court noted that “land use regulation is an established function of local government,” thereby providing the authority for a locality to enter into contracts to carry out that function. The county’s development agreement required that the project be develop-

104 Cal. Gov’t Code § 65,866.  
105 Id. § 65,867.5; see also Native Sun/Lyon Cmty's. v. City of Escondido, 19 Cal. Rptr. 2d 344, 354 (Cal. Ct. App. 1993); Midway Orchards v. County of Butte, 269 Cal. Rptr. 796, 800 (Cal. Ct. App. 1990).  
106 Cal. Gov’t Code § 65,009(c)(4).  
107 Id. § 65,865.1.  
109 Id.  
110 Id.  
111 Id. at 748.
opped in accordance with the county’s general plan; did not permit
construction until the county had approved detailed building plans;
retained the county’s discretionary authority in the future; and al-
lowed a zoning freeze of limited duration only.112 The court found
that the zoning freeze in the county’s development agreement was
not a surrender of the police power but instead “advance[d] the pub-
lic interest by preserving future options.”113

In another case, Stephens v. City of Vista, the plaintiffs purchased
property to develop an apartment complex of approximately 140 to
150 units.114 Several years later, the City of Vista lowered the elevation
of the access street to the property, frustrating the owners’ contem-
plated use; the City subsequently also downzoned the property.115 The
owners sued.116 The owners and the City eventually entered into a set-
tlement agreement providing for approval of a specific plan and zon-
ing that permitted construction of a maximum of 140 units.117 After
re zoning the property, the City denied a site development plan, in
part because it wanted the owners to reduce the density.118 The own-
ers then renewed their lawsuit against the City.119

The City argued that the settlement agreement unlawfully con-
tracted away its police power.120 The court disagreed.121 It first noted
that when the City entered into the settlement agreement, it under-
stood that it was obligated to approve 140 units.122 Further, relying on
Morrison Homes Corp. v. City of Pleasanton,123 the court held that while
generally a city cannot contract away its legislative and governmental
functions, this rule applies only to void a contract that amounts to a
city’s “surrender” of its control of a municipal function.124 Simply con-
tracting for a guaranteed density and exercising its discretion in the
site development process did not constitute surrendering control of
all of its land use authority.125

112 Id. at 748–49.
113 Id.
114 994 F.2d 650, 652 (9th Cir. 1993).
115 Id.
116 Id.
117 Id.
118 Id. at 653.
119 Id.
120 Stephens, 994 F.2d at 654.
121 Id. at 655.
122 Id. at 657.
124 Stephens, 994 F.2d at 655.
125 Id. at 656.
In *City of Glendale v. Superior Court*, the court held that in entering into a fixed-term lease as a lessor, a city had not contracted away its eminent domain power to condemn the lessee’s leasehold interest and take back the property.\(^{126}\) Unlike *Stephens*, where the City agreed to approval of 140 units as part of a settlement,\(^ {127}\) in *City of Glendale* the issue of possible condemnation was not raised in the contract nor in closing negotiations.\(^ {128}\) Accordingly, the court did not find an implied waiver of the eminent domain power.\(^ {129}\)

C. Not Subject to the Nollan/Dolan Heightened Scrutiny Standard

In the landmark takings cases of *Nollan v. California Coastal Commission* \(^ {130}\) and *Dolan v. City of Tigard* \(^ {131}\) the U.S. Supreme Court adopted a heightened scrutiny standard to determine the validity of local agency exactions.\(^ {132}\) However, since development agreements are adopted as a result of negotiations between the local agency and a developer, they are not subject to the *Nollan/Dolan* heightened scrutiny standard.\(^ {133}\)

In *Leroy Land Development v. Tahoe Regional Planning Agency*, a federal appeals court held that a developer who voluntarily enters into an agreement with a public agency cannot subsequently challenge a mitigation obligation of the agreement as a taking.\(^ {134}\) Here, the developer entered into a settlement agreement under which it agreed to certain restrictions on development.\(^ {135}\) After the U.S. Supreme Court decided *Nollan*, the developer sought to challenge the restriction as a taking.\(^ {136}\) The Court of Appeals for the Ninth Circuit rejected the challenge, holding that regardless of whether the restriction would have violated the Fifth Amendment Takings Clause if imposed as a


\(^{127}\) *Stephens*, 994 F.2d at 652.

\(^{128}\) *See City of Glendale*, 23 Cal. Rptr. 2d at 311–12.

\(^{129}\) *Id.*

\(^{130}\) 483 U.S. 825 (1987).

\(^{131}\) 512 U.S. 374 (1994).

\(^{132}\) *Dolan*, 512 U.S. at 374; *Nollan*, 483 U.S. at 837–38.


\(^{134}\) 939 F.2d at 698.

\(^{135}\) *Id.* at 697–98.

\(^{136}\) *Id.* at 698.
condition of development, it could not be found invalid because the developer had voluntarily agreed to the condition:

The threshold issue is whether, assuming arguendo that the mitigation provisions would constitute a taking under Nollan if imposed unilaterally by TRPA [the Tahoe Regional Planning Agency], they can be viewed as a “taking” when consented to as a part of a settlement agreement. We hold that they cannot. The mitigation provisions at issue here were a negotiated condition of Leroy’s settlement agreement with TRPA in which benefits and obligations were incurred by both parties. Such a contractual promise which operates to restrict a property owner’s use of land cannot result in a “taking” because the promise is entered into voluntarily, in good faith and is supported by consideration. Indeed we have found only one case in which an agreement negotiated before Nollan was challenged as a “taking” after Nollan, and it reached the same conclusion we reach. To allow Leroy to challenge the settlement agreement five years after its execution, based on a subsequent change in the law, would inject needless uncertainty and an utter lack of finality to settlement agreements of this kind. We therefore hold that a takings analysis as articulated in Nollan is inapplicable where, as here, parties choose to terminate or avoid litigation by executing a settlement agreement supported by consideration.\(^{137}\)

There is a further problem with attempting to challenge a development agreement fee, especially in California. Under a line of state cases starting with Pfeiffer v. City of La Mesa, acceptance and use of a land use approval waives any right to challenge the condition.\(^{138}\) In response, the California Legislature enacted the pay-under-protest statute, Government Code section 66,020, which allows a developer to protest and challenge a fee or condition without waiving the benefit of the permit.\(^{139}\) However, this provision is part of the Mitigation Fee Act and applies only to development fees as defined in section 66,000.\(^{140}\) Because fees imposed under a development agreement

\(^{137}\) Id. at 698–99 (citations omitted). The court in Meredith v. Talbot County reached the same conclusion. 560 A.2d 599, 604–05 (Md. Ct. Spec. App. 1989).


\(^{139}\) CAL. GOV’T CODE § 66,020 (West 1997).

\(^{140}\) Id. §§ 66,000(b), 66,020.
are expressly excluded from that definition, they are not subject to
the protection of section 66,020.\textsuperscript{141}

In light of \textit{Leroy Land}, more cities and counties are interested in
using development agreements to obtain exactions that might not be
valid were the heightened \textit{Nollan/Dolan} standard applicable, but that
would be valid under \textit{Leroy Land}, because voluntarily entered into by
the developer.

In dealing with derivative benefits and the resultant bargaining,
when a local agency and a property owner or developer engage in a
development agreement, they still must adhere to the goals and poli-
cies of the local agency’s general plan, at least in California, Hawaii,
Idaho, and other states that require consistency of such agreements
with the general plan.\textsuperscript{142} This is yet another factor that differentiates
plan states from non-plan states such as Massachusetts. In a plan state,
the bargaining is constrained and therefore predictable.\textsuperscript{143} In a non-
plan state, the only constraints are those imposed by the rational basis
standard of review.\textsuperscript{144}

\section*{IV. Using the Plan to Minimize Derivative Bargaining
and to Ensure Due Process}

The California Supreme Court’s characterization of the general
plan as the “constitution”\textsuperscript{145} is instructive guidance for non-plan state
legislatures. Without a constitution-like framework within which land
use decisions are made, zoning becomes, as witnessed by the Massa-
chusetts cases described in Parts I.D and II, “nothing more than just a
Gallup poll.”\textsuperscript{146}

With a general plan in place, the development agreement can be
an effective and flexible tool, benefiting public and private sectors
alike. The plan’s guidance establishes what is and what is not within
the ambit of permissible negotiation.\textsuperscript{147} As such, the plan ensures due

\begin{footnotesize}
\textsuperscript{141} Id. § 66,000(b); see id. § 66,020.
\textsuperscript{142} See Callies et al., \textit{supra} note 32, at 103–04.
\textsuperscript{143} See Callies et al., \textit{supra} note 32, at 103; Inst. for Local Self Gov’t, \textit{supra} note
96, at 26.
\textsuperscript{144} See Witten, \textit{supra} note 94, at 514.
\textsuperscript{145} Citizens of Goleta Valley v. Bd. of Supervisors, 801 P.2d 1161, 1171 (Cal. 1990).
\textsuperscript{146} Udell v. Haas, 235 N.E.2d 897, 901 (N.Y. 1968); see Charles M. Haar, \textit{“In Accordance
with a Comprehensive Plan,”} 68 Harv. L. Rev. 1154, 1158 (1955) (expressing concern that
unchecked zoning authority could “operate in an arbitrary and discriminatory fashion”
rather than being directed properly “to the health, safety, welfare, and morals of the com-
munity”).
\textsuperscript{147} See Inst. for Local Self Gov’t, \textit{supra} note 96, at 26.
\end{footnotesize}
process; it necessitates predictable outcomes; and it puts the public on proper notice as to what those outcomes could be. Without the general plan, the bargaining sky is, literally, unlimited.

Finally, much has been made of the term “smart growth” in recent years.\textsuperscript{148} The American Planning Association’s \textit{Growing Smart} project produced a comprehensive treatise designed to assist states, cities, and towns in adopting meaningful planning legislation and planning tools to implement the plans.\textsuperscript{149} The project was a collaborative effort with an unassailable conclusion: smart growth—as well as the use of development agreements to assist in that growth—requires planning for growth.\textsuperscript{150} We argue that planning for growth requires the adoption of general plans to set the framework for such planning.

Land use regulation and the bargaining of any element of that regulation in the absence of planning is inherently arbitrary.\textsuperscript{151} That courts in non-plan states have not yet reached this conclusion is beyond our understanding. We predict, however, that such a day is coming. To avoid the unpleasant consequences accompanying a court’s conclusion that a municipality’s zoning regulation is void, we urge non-plan states to look across their borders to what plan states have accomplished and the protections these states have guaranteed to future generations.


\textsuperscript{149} See generally Am. Planning Ass’n, supra note 148.

\textsuperscript{150} See id. at A-9 (comments from Paul S. Barru, Directorate Member for the Built Environment, stating that an assumption on which the treatise is based is that “Smart Growth means planning for growth”).

\textsuperscript{151} See Witten, supra note 16, at 593.
REFLECTIONS ON COMMUNITY PROCESS IN THE MULTI-LAYERED COMMUNITIES OF A MAJOR URBAN DEVELOPMENT PROJECT

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Abstract: Many legal, political and informal “community processes” were undertaken to shape the future of the land created by the underground rerouting of Boston’s Central Artery. In order to assess whether these processes were valuable, the Essay proposes an approach to determining what constitutes a successful community process in the context of a complicated urban development challenge. First, a typology of community processes is developed, involving both different layers of community and a spectrum of processes from the legal to the political. Next, four criteria are proposed for evaluating the efficacy of community processes: inclusiveness, integrity, influence and implementation. Finally, these evaluation criteria are applied to determine the extent to which the different types of community processes used to shape the Central Artery Project’s open spaces were successful. The Essay concludes that the lessons learned in Boston can be used to shape more effective community processes elsewhere.

Introduction

Over a period of roughly two decades, a number of different legal, political, and informal “community processes” were undertaken to shape the future uses of, and design for parks on, the reclaimed land created by the underground rerouting of Boston’s Central Artery expressway. Hundreds of meetings were held, involving dozens of stakeholder groups and hundreds if not thousands of individuals. To some extent, these meetings and processes ultimately shaped both the

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legal and political determinations that were made about the future use of this highly visible and valuable tract of urban land.

As this lengthy endeavor draws to a close, it is a good time to ask whether these community processes were valuable or successful. In order to address that question, however, one first must determine what constitutes a successful community process in the context of such a complicated urban design and development challenge. As the first step in such an analysis, this Essay proposes a typology of community processes by deconstructing the phrase “community process,” which of course is a combination of the similarly elusive terms “community” and “process.” The Essay then proposes a series of evaluation criteria that, collectively, can help decisionmakers and community participants alike assess the extent to which these different types of community processes can be considered effective and successful.

I. Typology of Community Processes

A. Layers of Community

It is impossible to think rigorously about “community process” without first asking what “community” the process seeks to engage. Most people who have participated in such processes would agree with the premise that the outcome of a community process is strongly shaped by who in the community actually participates in that process. The common wisdom of Boston neighborhood activists is true: who has—or does not have—a “seat at the table” heavily influences, even ultimately determines, what gets decided around that table.

One dictionary definition of “community” is a body of people living in the same place under the same laws.¹ But this is only one kind of “community”—a geographic community, defined in terms of “place.” While relatively straightforward, even a geographic community is far from self-defining. When reaching out to involve community members in a planning process like that for the Central Artery, should the focus be on the smallest geographic unit of community, such as immediate neighbors; a slightly larger geographic community, such as a larger, exogenously defined “neighborhood”; or a broad geographic community, such as the entire city of Boston or even the greater metropolitan area? Another complication is that such geographic communities are not static over time—the real “neighbors”

are not those living next to the Central Artery in the 1990s, but those who will live there ten or twenty or more years from now. The more rapidly the demographics of an area are changing—indeed, new Boston residents represent very different demographics from those of the past—the less likely it is that the “community” of today can properly represent the interests of the “community” of tomorrow.

Further, while a “community” may be defined by geography, there are other types of “community.” Another dictionary definition of “community” simply refers to “society as a whole.” Many “community processes” are in fact more likely to attract communities based on affinity—common interest or expertise or some combination of the two—than on geography. Regular participants in community processes sometimes dub these participants “the usual suspects”—planners, environmentalists, public transportation advocates, and so on. One need only review the sign-in lists for many of the Central Artery meetings held over the years to realize that, in addition to a relatively small number of highly engaged, immediate neighbors, many of the regular attendees belong to a community of affinity rather than one of geography.

So, in reality, there was no single “community” that was the key actor in the “community processes” used to shape the future of the lands above the submerged Central Artery. Instead, there were overlapping and constantly shifting layers of “communities” that participated: traditional geographic communities, from neighborhoods both adjacent to the project and farther afield; communities of common interest, such as green space or pedestrian advocates; and communities of expertise, such as landscape architects. Unfortunately, it is not at all clear that those who designed and ran the various processes recognized that there actually were multiple and multi-layered “communities” seeking to shape the future of the Central Artery open spaces. Not surprisingly, it is difficult to know whether a process has successfully engaged the “right” community or communities if, at the outset, little attention is paid to the issue of exactly whom the decisionmakers are trying to engage.

B. A Spectrum of Processes

Embedded in the “process” half of “community process” are just as many different meanings as are found in “community.” Again, one

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2 Id.
can start with a simple dictionary definition of a process as a “series of actions, changes, or functions bringing about a result.” There are, however, any number of different ways to direct a series of actions toward a particular result, to say nothing of the myriad possibilities for delineating the particular result itself. A well-designed process should address both the “particular result” at which the process is aimed—the purpose or desired outcome of the process—and the “series of actions” that will be undertaken.

1. Process Regimes

The desired outcome of a process often is defined by the decisionmaking structure underlying the process. After all, a “process” does not make a decision; someone makes a decision based on the outcome of a process. So it matters very much who is the ultimate decisionmaker and what set of rules, if any, govern that decisionmaker’s actions. Broadly speaking, the history of the various community processes around the Central Artery can be divided into two phases. The first phase consisted largely of processes operating predominantly under a “legal” regime or framework, while the second phase involved processes occurring more under a “political” one.

The “legal” processes involved identified decisionmakers who had specific decisions to make within the context of well-defined decisionmaking rules set out in federal or state laws and regulations. These processes, for example, included the Federal Highway Administration’s environmental review of the Artery project under the National Environmental Policy Act (NEPA), the parallel environmental review by the Massachusetts Secretary of Environmental Affairs under the Massachusetts Environmental Policy Act (MEPA), and the City of Boston’s zoning process for producing binding land use restrictions. Each of these processes produced a specific, written outcome—a NEPA record of decision, a MEPA Certificate, and a zoning bylaw, respectively. While not every stakeholder was satisfied with these outcomes, there was a general sense that these processes were relatively transparent and produced comprehensible outcomes.

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3 Id. at 1444.
The next phase of Central Artery-related processes suffered from the absence of clearly identified decisionmakers operating according to transparent and understandable decisionmaking standards. These “political” processes ranged from ongoing and relatively formal processes such as the Mayor’s Surface Artery Completion Task Force, to shorter-term, informal processes such as the *Beyond the Big Dig* series of community meetings. But, even for those stakeholders who were insiders, it really never was clear who was in charge of the decision-making or what criteria were being applied. Most importantly, in these political processes it was not even clear whether or how the outcome of the process would actually shape decisions about the parks and open space emerging from under the former Central Artery. Not surprisingly, these political processes have been widely criticized and have repeatedly failed to generate any compelling consensus on the future of the Central Artery open spaces.

2. Process Outreach

Another critical aspect of a “process” is how it is actually conducted: what “series of actions” are taken as part of the process? Processes can be conducted very differently depending on the attitude regarding how people are to “come to” the process. Under one model, the community is responsible for coming to the process. Meetings are advertised and mailing lists are compiled, but the responsibility for successful engagement rests with the community members. Under a very different model, the process comes to the community. The decisionmaker or process-convenor takes far greater responsibility for summoning people to the table. Key stakeholders are identified in advance and specific steps are taken to reach out to those stakeholders and ensure that they participate. Each of these models is, of course, a prototype and many community processes incorporate elements of both, creating a spectrum that stretches from processes where there is almost no outreach—for example, publishing a small-print notice in the classified ads in one local newspaper—to processes built entirely around an aggressive series of community and stakeholder outreach initiatives. Unfortunately, most of the Central Artery community processes were closer to the former than to the latter.

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II. Evaluating the Success of Community Processes

Having proposed a typology of community processes, the next issue concerns the efficacy of such processes. What criteria should be used in evaluating whether a community process was successful? Keeping in mind the key aspects of both “community” and “process” discussed previously, at least four factors should be considered when evaluating the efficacy and success of any given community process. These are the four “I”s: inclusiveness, integrity, influence, and implementation.

The first evaluation criterion is inclusiveness, the extent to which the community process was successful in engaging various stakeholders or communities. The inclusiveness of a community process can be evaluated only if, at the outset of the process, there is a clear identification of specific communities—communities of geography, communities of affinity, or both—that the process is intended to engage. The inclusiveness of the process then can be evaluated by determining the extent to which the process attracted not just participants, but participants from these desired communities. One lesson learned from many of the Central Artery processes is that it is relatively easier to engage nearby geographic communities and highly-motivated affinity communities, such as professional planners and advocates, but harder to consistently engage participants over a broader geographic area, even when the project should be of interest to an entire city or metropolitan area. The tendency to engage only the immediate neighbors and the “usual suspects” is exacerbated when the process—as was the case for many of the Central Artery efforts—falls closer to the end of the outreach spectrum in which the community is expected to “come to the process,” instead of using a process designed to reach out aggressively into the broader community.

The second evaluation criterion is integrity, the extent to which the process adhered to the stated decisionmaking process and criteria. For a community process to have integrity, there must first be a transparent description of the process so that participants know who is supposed to be the decisionmaker, how the process will proceed, and what criteria the decisionmaker will weigh in making the ultimate decision. The various Central Artery-related community processes have demonstrated that “legal” processes tend to have more integrity than “political” processes, in part because the ground rules often are specified clearly in law and regulation and because the availability of judicial review serves as an important check on adherence to those rules. Indeed, it could be said that some of the more “politically”
based community processes were deliberately set up with vague

ground rules that made it impossible even to assess the extent to

which the process was conducted with integrity.

The third evaluation criterion is influence, the extent to which the

community’s participation and engagement did or did not shape the
decisionmaker’s ultimate decision. Clearly, in any given community

process it is possible that some of the affected communities can have
more influence than others. One example from the Central Artery
processes is the immediate geographic community of neighbors, who
had considerable influence when it came to the design of specific
parks—sometimes at the expense of the broader community or com-
munities of expertise, such as landscape architects. One way to think
about influence as a criterion for process success is to determine the
extent to which the process was responsive to those who participated.
In many complicated, multi-layered processes designed to shape
complicated urban development, it may not be realistic for all of the
participants to influence the outcome because the various partici-
pants will themselves be seeking to influence that outcome in
conflicting ways. It is always possible, however, to assess the extent to
which the process succeeded in clearly articulating a meaningful re-
sponse to each of the stakeholder interests and then “aligning” those
interests to the extent possible and desirable.

The fourth and final evaluation criterion is implementation, the
extent to which a community process shapes not just the decision
made at the conclusion of that process but the actual situation “on the
ground.” It is possible, for example, that a community process can
generate a result that demonstrates that the participants successfully
influenced the outcome of that process—but that process might not,
in turn, influence the ultimate development project. A truly success-
ful process should produce indelible, durable results—results that are
actually implemented. Just as the more legalistic processes in the ear-
lier phases of Central Artery planning tended to have more integrity,
they also tended to produce results that actually were implemented.
The durability of a process’s results seems to be related to the under-
lying weight of authority for the process—the stronger the legal basis
for a process, the more likely the result is to be implemented. This is
true even within the spectrum of “legal” processes, with the results of
permitting processes more likely to be carried out than the results of
environmental review processes. At the least-likely-to-succeed end of
the process spectrum are the highly “political” or “advisory” pro-
cesses—such processes frequently fail at the implementation stage be-
cause the “advice” is not taken. In effect, community participants are
“at the table” and their voices are being heard, but the real decision is being made at another table somewhere else.

**Conclusion**

Those who believe in the importance of effective and inclusive community process must be proactive about designing the processes from the outset in order to maximize their likelihood of success. While other observers may conceive of different typologies or evaluation criteria, the lesson is that it is critical to take a more rigorous approach to community process: one that ensures that such processes genuinely engage the broadest range of affected stakeholders and ultimately do influence important public policy and planning decisions. Because many urban areas have the kinds of multi-layered communities of both geography and affinity described here, and because many development review and approval processes involve both “legal” and “political” regime elements such as those that have shaped the Central Artery Project over the past two decades, the lessons learned in Boston can be used to shape more effective and harmonious community processes for future development undertakings in urban areas throughout the nation.
PUBLIC PROJECTS AND CITIZEN PARTICIPATION: THE CHALLENGE OF COORDINATING MEANINGFUL PUBLIC INVOLVEMENT OVER TIME

ROBERT TUCHMANN*

Abstract: Consensus to proceed with Boston’s Big Dig Project was only reached after the Commonwealth agreed to perform a long list of mitigation measures to satisfy the objectives of numerous interest groups. To ensure that those measures would be implemented and to avoid project-stopping litigation, the Central Artery Environmental Oversight Committee was formed. Its work over the last fourteen years is a unique blend of lawyering and leadership. For the redevelopment of the surface above the downtown portions of the Project, the Mayor’s Central Artery Completion Task Force was created to implement neighborhood task forces to work with park and building designers and to coordinate the neighborhood views with the interests of regional park, transit, tourism, and similar groups. The results of the Task Force’s work over the last six years will soon be seen as the parks and civic structures are built.

Introduction

Given the diversity of Symposium attendees, this Essay will focus on issues relevant to students, who find themselves at the beginning of their legal careers, as well as to seasoned practitioners who, in addition to looking forward, also enjoy the luxury of reflecting on past professional experiences. Some of the audience members have, in fact, over the last twelve or fourteen years, personally worked on issues concerning public open space arising from Boston’s Central Artery/Tunnel Project (Big Dig or the Project).

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I. Supervising Mitigation Measures: The Work of the Environmental Oversight Committee

The first question to be asked about Boston’s Big Dig, which was the same inquiry posed fourteen years ago, is how does one perform open-heart surgery on a patient while the patient is playing tennis? Planners faced this very situation in downtown Boston, and a plethora of real estate and environmental law issues surfaced as a result. Real estate clients who owned neighboring buildings expressed deep concern over access issues and the disappearance of business from downtown Boston during the Project’s construction. There were also those who felt planners were spending money in the wrong way, characterized with the familiar mantra: If you build it, they will come. Of course, there can never enough highways built because increased capacity just induces additional usage. In response, some conveyed the belief that all of this money should be invested in public transportation rather than highways. Still others felt the major issue to be addressed was the fact that the cars on these highways, especially when idling, were producing air pollution. The question then becomes: how do we reduce that air pollution and how fast can we do it? In addition, there were others who advocated for new parks and open space in the downtown area, as well as improved amenities. As a result, and like every political process, heads clashed, nasty words were expressed, and those with the necessary skills resorted to the courts and figured out that it was best to carry a big stick and use it.

At this stage, the underlying question then became how do you get the decisionmakers to listen to your position? A key player in this process was Fred Salvucci, who utilized his tremendous intellectual powers and great political skills—as well as his position as Secretary of Transportation and Construction—to reach out and broker deals. Eventually he began to build coalitions for the purpose of buying peace with the various interest groups. The settlements were memorialized in certain commitments that would effectively satisfy the needs of each particular interest group.

These totaled approximately 1200 commitments, and they involved many of the issues previously discussed, including clean air, open space, transit, and traffic. For example, one of the commitments

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focused on the retention of downtown business accessibility, and as a result, planners agreed to maintain the same number of travel lanes on key roads at all times. Most drivers have at one time or another shared in a moment of great frustration, where on a highway you find yourself sitting in traffic for a long time, and then you finally see the big yellow sign indicating the highway has gone from three lanes to two lanes, and you curse wildly and wonder why the planners do not perform the work at night or create temporary roadway capacity. With Boston’s Big Dig, the overriding concept was that the Project would not force drivers to deal with this typical construction dilemma.\textsuperscript{3} Ideally, the highways would have the same number of travel lanes all the time and the construction managers would be given the burden of devising practical solutions. Regardless of whether the managers opted to expand, reduce, or change their work zones, or change their hours, the overriding concern at all times was the notion that the city must live, or to refer back to the earlier analogy, the tennis player must win the match while the endeavor moves forward.

There also existed quite a few issues with respect to traffic, which could be resolved by getting people out of their cars and into public transit. Critics questioned why one of the most densely populated cities in the country was building more highways and why the focus wasn’t on getting people out of their cars and into public transit. In the 1980s, the transit system in Boston was not something to be particularly proud of. People were moving away from public transportation on account of safety concerns, poor reliability, lack of station parking, and geographical impracticality. Out of these concerns arose numerous Big Dig commitments. For instance, planners agreed to develop remote parking lots with increased capacity, including 20,000 parking spaces for park and ride lots serving commuter rail lines. There had to be tremendous improvements to the transit lines themselves. The Blue Line, which runs from Government Center to the airport, and then up to the North Shore, was to be expanded in order to accommodate six-car trains, up from the four-car trains currently in service. In addition, there were commitments to take down and replace the Washington Street and the Arborway surface transit lines, one with an elevated system, the other with surface trolleys.

In addition to these commitments, which had been commemorated in writing, there were other, more simple commitments relating

to urban aesthetics and architecture. View corridors had to be preserved. For instance, views of the Old North Church from particular locations could not be obstructed. Furthermore, the Project planners had to preserve corridors through the neighborhoods. It was also imperative to maintain the Freedom Trail. The overriding question ultimately became how to ensure implementation of these 1200 measures. As a result of legal efforts, such as the Conservation Law Foundation suit, a number of these commitments were written down into a consent decree, and as part of that decree, the Conservation Law Foundation required a periodic report from the planners to ensure the implementation of those commitments designed to satisfy the needs expressed and advanced by the affected interest groups.

My particular group, the Central Artery Environmental Oversight Committee (Committee), was established to respond to and oversee issues concerning open space, traffic, transit, and air quality. Of the 1200 total commitments that were undertaken, the Committee followed about 700 of them. In following these 700 commitments, the Committee rattled the cage of the Massachusetts Turnpike Authority (Authority) and made clear that its purpose was to ensure the timely implementation of all these commitments. Not only was the Committee going to make sure that the commitments were satisfied, but it also required periodic reports on the commitments. This enabled formal documentation of the commitments’ source materials, or in other words, the documents from which the commitments were first created. Additionally, the Committee would be able to identify the parties responsible for implementation and their contact information, as well as compile all available timelines and schedules for the implementation of the commitments.

In the beginning, the Committee received an annual report detailing progress in each of the four relevant subject areas. As things progressed, it reduced that schedule. The most important benefit to come from the Committee’s involvement was the introduction of self-policing by Project staff, because managers working on particular projects became cognizant of the fact that people were actually going to look at these reports, follow their progress, and find their names attached to them. They realized that their participation in projects that either failed to meet predetermined goals or progressed in opposition to the commitments would no longer go unnoticed. Anonymity had been effectively eliminated.

The Committee was created in 1991 by the Secretary of Transportation and Construction and the Secretary of Environmental Affairs. I was appointed Chair about a year later, in 1992, and I have served in
that role from then to the present. What I wanted to mention and stress, particularly for students in the audience, is that this kind of role is one that really fits the legal profession and the concept of lawyering, because what we have here is a situation rife with conflict. The Committee has been assigned to handle people who are quite angry with each other, and it is our responsibility as lawyers to try to talk with them, so that we can accurately distill the essence of their wants and needs. In other words, our job is to allow them to vent their frustration, and then guide them to prioritize their desires. Then our task shifts to hearing from the other side and seeing how the commitments could be modified, how their implementation could be altered, how time schedules would be delayed, and so on. Eventually, using our lawyering skills and capitalizing on our role as a neutral third-party, we try to formulate common threads or common paths that we then can propose, which will ultimately effectuate a win-win situation. That has been our mission over the last fourteen years, to listen to the interested parties and then attempt to resolve apparent conflicts.

An additional goal of the Committee, which traces its roots back to an instruction contained in the very short document creating the Committee, concerns the adoption of measures to substitute for those commitments that no longer are appropriate. For instance, many of the transit mitigation measures, which pertained to the Massachusetts Bay Transportation Authority (MBTA)—Boston’s subway, commuter rail, and bus line operator—were derived from what was on the drawing board at the beginning of development. While these transit mitigation measures may have been relevant in 1989 or 1990, not all of them retain such relevance a decade and a half later. So our group has been instructed to assist in the formulation of substitutes to replace outmoded or inappropriate measures.

Another function of the Committee has been to meet approximately every six weeks to discuss topics relating to measures taken in furtherance of the commitments. The process for these meetings consists of discussing reports submitted to the Committee by the various people and organizations responsible for implementing the commitments. In addition, the Committee discusses critical reports submitted by interested parties or individuals. Once all relevant topics have been fully analyzed and discussed, the Committee presents the information to the entire community. The Committee is the only organization that deals with all of the mitigation measures across the entire Project, and for this reason numerous government officials, including the individuals working on the Project, as well as those regulating them, participate in the process. This dynamic has fostered the establishment of a real
clearinghouse for ideas and a forum by which people can remain informed as to the progress of the Project. As a result of this system, we are able to move forward by getting people to agree to new paths, new approaches, and new processes. Ultimately, what has resulted has been a very high level of compliance with the commitments.

Most of the measures taken in furtherance of the commitments have been completed or are on schedule. However, a number of glaring omissions do still exist. Some of these omissions deal primarily with transit measures and the fact that Massachusetts blithely committed to make $1 billion worth of transit improvements and then failed to adequately fund them. Long-time residents of Massachusetts no doubt are familiar with the manner by which the MBTA used to receive funds. Formerly, the MBTA would operate for a year and then announce to the legislature its budgetary deficit for the preceding year. The legislature would then fund the deficit. In contrast with the previous system, the MBTA now operates under a forward funding program where, like other rational organizations, it is constrained by a budget, which is roughly limited to income derived from one cent of the sales tax plus fare collection. The problem is that it does not have adequate funds under the current budget both to operate the existing transit system and to solve the problems the Commonwealth deemed necessary to be solved in order to build the Project.

II. Mediating Among Interested Parties: The Work of the Central Artery Completion Task Force

The second major problem we had with the Big Dig that I would like to address was how to achieve a greenway park design that would reflect both the abutting communities’ needs, as well as the needs of the regional interests, such as park advocates, tourists, and the national park service, all the while staying within applicable budgetary constraints.

Initially, and especially for lawyers, it may be relevant to understand how this entire system was set up. Originally, the Project was governed in part by section 4(f) of the Federal Highway Act, which states that building a highway on public open space should be avoided but, in the event that such construction is necessary, a very high level of mitigation must be performed. Looking to the Big Dig, the area where the highway crosses the Charles River previously had been des-

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ignated as parkland. In light of this designation, the planners assumed a tremendous obligation, which ultimately translated into an $80 million budget (escalated by inflation) to build the final half-mile of the Charles River greenway, which had been left incomplete for about 100 years. The Committee monitors projects such as this. Despite being significantly behind schedule, under-funded due to a lack of control over the design process and because of the presence of contaminated soil on the Cambridge side, there are signs of hope, as the parks projects appear to be progressing. These parks should be completed by the time the Big Dig is completed, or shortly thereafter.

But in the downtown portion of the Project, there were no prior parklands. Here the issue was how to plan for new surface uses—including parks—on the land which would be created above the subsurface roadway.

The federal government has a role in this process as well. Due to the presence of federal funding for the Big Dig, the federal government has produced what is known as a Record of Decision. The Record of Decision is the enforceable document which addresses the action applicable federal agencies will take in reference to the Project. This Record of Decision also contains an appendix called the joint-development appendix, which states that prior to any reuse, any parcel of land used for or purchased by the Project must go through a joint-development process, which involves the state, the city, and the community. As result of leadership by Jay Wickersham, then head of the state environmental review agency, the Mayor’s Central Artery Completion Task Force (Task Force) was designated to serve as the group that would represent the voice of the community relating to greenway parcels arising out of the demolition of the Central Artery.

Most of the parcels there also abut various residential communities. There is the Bulfinch Triangle, created by a great architect, Charles Bulfinch, in the area adjacent to the front of the former Boston Garden (or FleetCenter). There is also the North End, as well as the Wharf District, which includes both commercial and residential abutters. The Leather District and Chinatown are also distinct geographical locations. Chinatown, in fact, is the densest community in all of Massachusetts. Chinatown also happens to be one of the poorest communities in the city. Taking into account all of these distinct and diverse communities, the question became how to integrate the designers, regulators, and builders with all of these dispersed, interested groups. To complicate matters further, there are interest groups beyond the immediate abutters, such as the Sierra Club, the Conservation Law Foundation, the Boston Natural Areas Network, the Boston
Harbor Alliance, the Boston Greenspace Alliance, Walk Boston, and the Island Alliance (an organization associated with the new Boston Harbor Islands national park area), not to mention a whole host of other park and transportation interests, as well as groups with a focus on urban needs.

So how does one get this diverse body of interest groups into the same room and then get them to comment in a rational manner, so that the park and building designs could actually reflect as much as possible of what everybody wants? To start, the Mayor of Boston created the Mayor’s Central Artery Completion Task Force, comprised of all the people interested in the parks and greenway debate. The Task Force was originally chaired by the Mayor’s Chief of Staff, Jim Rooney, but he shortly left this position to take control of the new convention center. At the urging of citizens, the Mayor decided to appoint a citizen member, myself, as Co-Chair of the Task Force. I share this responsibility with Mark Maloney, the Director of the Boston Redevelopment Authority. We have held meetings every two weeks, or more frequently as needed, to allow for discussions pertaining to various open space design issues. These issues range from planning processes to the actual designs, or even the selection of the designers and developers. Most importantly, we provide the community and the larger interest groups with an opportunity to participate in the making of these decisions.

Did the Task Force accomplish everything it had set out to accomplish? Were all of the community interests satisfied? Absolutely not. In the beginning, it was a common misperception that the size of the greenway would be comparable to the prominence of Central Park in New York City. The idea was to provide space for ball fields and playgrounds where children could play, as well as an amphitheatre for dramatic or musical performances, and numerous other facilities associated with a large-scale park. In reality, however, the open space equates to about the size and shape of several blocks of the Commonwealth Avenue Mall for those of you familiar with the Back Bay area. In other words, the open space is a considerably smaller area than had commonly been envisioned. For this reason, the Task Force had to prioritize. It was an essential first step, then, to get people to understand that they would not get everything they wanted. It is

always hard to get people to understand that they are going to be disappointed. But I believe personally that if you explain to people what’s happening, and they feel that the process by which those decisions will be made is first, rational, and second, provides them an opportunity to be heard, then they will ultimately concur with the conclusions reached. There may still be grumbling, but at least they will feel that they had an opportunity to voice their opinions and test them in a sympathetic marketplace.

The next step, after convening these group meetings with the interested parties, involved the creation of neighborhood task forces. These neighborhood task forces met with the individual park designers on a weekly or monthly basis, and they reported back to the Task Force. The Task Force then made sure that all of the park design standards were uniform, so that we could ensure consistency of the parks from one neighborhood to the next. Ultimately, our goal was to prevent a situation where one neighborhood felt as though it was getting cheated or shortchanged. It was important to ensure equality among the neighborhoods so that, for example, Chinatown residents would not be surprised two years down the line to find out that there was something very luxurious being built in the North End, with no analog existing in their own community. In a particularly important victory for these neighborhood task forces, the Task Force was able to secure a small grant from one of the charities in Boston to help finance translation services, and other assistance, in order that they might be able to participate actively and in an informed manner with the designers. This was especially important in the North End and the Chinatown communities, which did not have the financial resources necessary to provide for such services.

Conclusion

Like the Environmental Oversight Committee, the Mayor’s Task Force represents an ongoing process. As a lawyer, my job in both organizations has consisted primarily in communicating with all of the interested parties, and making clear to them that, while they may or may not see all of their desires come to fruition, they do have a voice, and that voice will be heard. Once I have listened to all of the interested parties, my role then shifts to communicating the collective desires to the relevant planners and convincing them that the wishes of the interested parties are valid and should be accorded appropriate evaluation and consideration. Essentially, I am acting as the middle man, and that is what lawyers often do. My hope then, and I shall
close with this thought, is that each and every one of you is able to serve such a satisfying role in your own career.
PRIORITIZING MULTIPLE USES ON PUBLIC LANDS AFTER BEAR LODGE

Erik B. Bluemel*

Abstract: This Article analyzes the courts’ application of First Amendment jurisprudence to Native American cultural activities on federal land. The author concludes that the courts’ use of existing First Amendment law has been strained, especially with respect to Native American cultural practices on federal land. The Article analyzes Bear Lodge Multiple Use Association v. Babbitt within this context to conclude that First Amendment jurisprudence may not be the most appropriate legal construct for determining whether to allow or protect Native American cultural activities on federal land. Instead, the Article suggests that Native American practices are often best considered cultural, rather than religious, and as such, a First Amendment analysis, which has not been particularly favorable to Native American interests, would not apply. Applying a cultural lens to Native American practices, the Article concludes that federal land managers act well within their prescribed authority when they protect such activities.

Introduction

“Nature is a recurring motif in the rich cultural tapestry that comprises our national identity and heritage.” In an effort to build national cultural identity, the federal government converted many

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Native American lands into parks and monuments; the appeal to national pride in public lands was crucial to establishing Yosemite as a preserve. Congress noted that

the historical and cultural foundations of the Nation should be preserved as a living part of our community life and development . . . . [T]he preservation of this irreplaceable heritage is in the public interest so that its vital legacy of cultural, educational, aesthetic, inspirational, economic, and energy benefits will be maintained and enriched for future generations of Americans.

Remarkable natural features have been described as American antiquities and protected as landmarks of historic interest, or symbols of American culture. Devils Tower National Monument, home to Devils Tower, known as Mato Tipi or Bear Lodge to the Tsitsi peoples, was the first parcel designated as a National Monument under the Antiquities Act of 1906 and was glorified as “such an extraordinary example of the effect of erosion in the higher mountains as to be a natural wonder and an object of historic and great scientific in-

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6 See Bear Lodge Multiple Use Ass’n v. Babbitt, 2 F. Supp. 2d 1448, 1449 n.1 (D. Wyo. 1998), aff’d, 175 F.3d 814 (10th Cir. 1999); see also Lloyd Burton & David Ruppert, Bear’s Lodge or Devils Tower: Intercultural Relations, Legal Pluralism, and the Management of Sacred Sites on Public Lands, 8 CORNELL J.L. & PUB. POL’Y 201, 201 n.1, 206–08 (1999); Howard J. Vogel, The Clash of Stories at Chimney Rock: A Narrative Approach to Cultural Conflict over Native American Sacred Sites on Public Land, 41 SANTA CLARA L. REV. 757, 771 (2001). This Article will refer to Devils Tower National Monument as Bear Lodge National Monument, or simply as Bear Lodge, in recognition of the original name of the butte as Grizzly Bear Lodge—a name that was disregarded by Colonel Dodge, who renamed it Devils Tower. See Nat’l Park Serv., U.S. Dep’t of the Interior, Final Climbing Management Plan/Finding of No Significant Impact (1995), available at http://www.nps.gov/deto/deto_climbing/detotoc.html. The National Park Service is considering renaming the area to more accurately reflect its history, an action which this Article strongly endorses. Id.
Bear Lodge is of great importance not only to American culture, but to Native American culture as well.

Land, generally, is of great cultural significance among many Native American tribes, some of whom, including the Lakota who inhabit the Black Hills where Bear Lodge is located, refer to the land as “The Heart of Everything That Is.” It can be said of many tribes that “land is constitutive of cultural identity.” Often this relationship is forged through stories that are told depicting events occurring at particular sites—stories that help define tribes’ moral code of conduct. Additionally, many public lands are considered sacred to Native American tribes. While some sites are labeled sacred sites, this label has not been attached to all lands of cultural or spiritual significance to Native American tribes. The quality of being sacred can arise from human activity, or it can inhere in the natural condition of the site. As this Article discusses, sacred sites are not necessarily religious sites for First Amendment purposes, but they are sites of great cultural importance. Revitalization and protection of ceremonial rites and cul-

12 Id. at 1302–03; see also Keith H. Basso, Wisdom Sits in Places: Landscape and Language Among the Western Apache 38 (1996); Leslie Marmon Silko, The Indian with a Camera, in A Circle of Nations 7 (John Gattuso ed., 1993).
tural practices is an important means of combating tribal social problems resulting from disassociation with tribes. In fact, it has been noted that “a perception of the land [is] essential to the identity of the [Native American] people.”

Native American cultural use of sacred sites is different in nature from the religious use of, for instance, Christian organizations which have often been granted access to public lands. As a result, “American Indian cultural interests in the public lands deserve special consideration, given their unique associations with the land and its resources, and the political and legal obligations arising from the historic treatment of tribes, their treaties, and their continuing sovereign status.” Nevertheless, current First Amendment jurisprudence treats site-specific Native American cultural needs in the same manner as it treats orthodox Christian religious activities, the vast majority of which can be practiced anywhere.

Today, the federal government owns over 600 million acres of land, with federal land management agencies responsible for regulating activity on over 730 million acres. This vast amount of land now under the control of the federal government must be managed to reconcile various competing public and private uses. This is not an easy task, and it is continually becoming more complicated as more uses are being explored and developed. Unfortunately, often Native American and other uses are viewed as completely incompatible. While this may be the case in certain exceptional circumstances, this Article seeks to disprove the general notion of competitive exclusion by unraveling the misunderstandings of current Native American practices and to avoid over-reliance on First Amendment jurisprudence, which tends toward exclusionary results.

19 Zellmer, supra note 1, at 414.
20 Robert L. Glicksman & George Cameron Coggins, Modern Public Land Law 1 (2d ed. 2001).
While other competing uses exist, the greatest threat to Native American cultural interests on federal public lands currently comes from recreational uses, which have been increasing significantly in both type and quantity in recent years. The National Park Service (NPS) has a history of promoting wide recreational use at the expense of other park resources, causing one author to state that “[m]anaging recreation on public lands is now a primary goal for federal land management agencies like the National Park Service.” Additionally, the Bush administration has put forth an initiative to promote public health through increased visitation and recreational use of national parks. This initiative has been adopted by NPS which now provides free access to national parks for a weekend and promotes increased recreational use of the parks. This promotion of national parks as recreational getaways increases pressure on Native American cultural resources on public lands.

This Article posits that attempts to resolve competing uses of federal public lands through the inappropriate application of First Amendment “protections” to Native American cultural activities can be detrimental to Native American interests and overly restrictive of non-Native American uses. First Amendment jurisprudence dominates the discourse surrounding Native American resource protection, yet First Amendment jurisprudence is not particularly valuable to compel or encourage agency action to protect Native American resources and cultural interests. Nevertheless, courts, scholars, and agencies have limited their analysis of Native American issues to religious considerations, foreclosing another possible route of protection of sacred sites and associated cultural activities: one based upon cultural protections. This Article seeks to dispel the myth that First Amendment protections are the most protective of Native American cultural interests and counsels for greater use of culture- and tribal relation-based protections.

23 See id. at 199.
25 Bonham, supra note 22, at 194.
I. First Amendment Jurisprudence of Cultural Claims

Freedom of religion is protected by two clauses in the First Amendment: the Free Exercise Clause and the Establishment Clause. The Free Exercise Clause seeks to allow each individual the opportunity to practice her religious beliefs, while the Establishment Clause seeks to prevent the coercion of an individual into a particular religious belief.

“The two religion clauses are not mutually exclusive, nor are they in perfect equipoise.” Some scholars argue, rather forcefully, that the gap between the requirement of accommodation in the Free Exercise Clause and the promotion of religion in the Establishment Clause allows for the protection of Native American religious resources. This claim is sound, but is not entirely protective of Native American interests, as “[t]he religion clauses of the First Amendment—protecting free exercise while prohibiting governmental establishment of religion—have not afforded meaningful protection for cultural resources.” This is not unexpected, considering that Native American tribes must litigate their interests in the “courts of the conqueror.” Nevertheless, “[w]hen a Native American sacred site is threatened by federal action, the Native American community has primarily reacted by claiming that such action equals a violation of their First Amendment right to the free exercise of religion.”

28 Walz v. Tax Comm’n, 397 U.S. 664, 669, 673 (1970) (“The limits of permissible state accommodation to religion are by no means co-extensive with the noninterference mandated by the Free Exercise Clause.”); Zellmer, supra note 1, at 475.

29 Zellmer, supra note 1, at 475–76; see also Anastasia P. Winslow, Sacred Standards: Honoring the Establishment Clause in Protecting Native American Sacred Sites, 38 Ariz. L. Rev. 1291, 1318 (1996) (“Until desecrating sacred sites is considered a sufficient burden on religion to give rise to a free exercise of religion claim, preserving these sites in their natural state should not be considered a benefit to religion under the Establishment Clause.”).

30 Zellmer, supra note 1, at 415; see United States v. Means, 858 F.2d 404, 407–08 (8th Cir. 1988) (providing several examples where courts have refused to disturb government land management decisions challenged by Native Americans on Free Exercise grounds).


A. Definition of Religious Activity

Defining religion can be a challenge in any dispute about religious freedom. So long as the issue is addressed politically, it is simply one of the terms of political discourse. But when judicial review is sought under statutes or constitutional provisions that protect religion but not culture or other ethical concerns or group interests, the distinction can become crucial to judicial resolution and can in turn raise difficult questions about equal treatment. The issue has special relevance to indigenous religions, which often have less distinct boundaries from culture than does Christianity.33

Before beginning with a constitutional analysis of the First Amendment, caution must be given to the general applicability of the First Amendment. Most scholars discussing Native American cultural uses of federal public lands do so by reference to First Amendment jurisprudence without significant analysis as to what triggers First Amendment protection. The application of the First Amendment generally requires that practitioners believe in a “Supreme Being”34 or “ultimate concern”35—a being with “sentience beyond the human and capable of acting outside of the observed principles and limits of natural science”—which “makes demands of some kind on its adherents”36 and that practitioners believe that adherence to such demands are extra-temporal “in some meaningful way . . . either by affecting their own eternal existence or by producing a permanent and everlasting significance and place in reality.”37

33 Collins, supra note 14, at 243.
37 Jesse H. Choper, Securing Religious Liberty 77 (1995); see Raymond Cross & Elizabeth Brenneman, Devils Tower at the Crossroads: The National Park Service and the Preservation of Native American Cultural Resources in the 21st Century, 18 PUB. LAND & RESOURCES L. REV. 5, 41 (1997) (noting that the district court’s finding in Bear Lodge that the Sun Dance is a religious activity fails the definition established by Choper). In fact, the Sun Dance is “fundamentally non-commemorative in character and non-salvation directed.” Cross & Brenneman, supra, at 41.
Not all cultural uses are therefore religious uses.\textsuperscript{38} In fact, praying to a supreme being would not necessarily constitute a religious activity. Many Native American uses are not easily analogized to that of the “orthodox belief in God” and therefore may not be considered religious uses.\textsuperscript{39} This is particularly true where Native American beliefs and practices are attached to particular parcels of land.\textsuperscript{40} Additionally, many Native American practices are both cultural and religious in nature, which are difficult to separate for First Amendment analysis purposes.\textsuperscript{41}

Some scholars have noted that the First Amendment was enacted before American society was aware of its heterogeneity of religious beliefs and before Native Americans were incorporated into the American citizenry.\textsuperscript{42} Attempting to anachronistically apply the First Amendment to Native American cultural activities does not come without a price. In fact, attempting to corral primarily cultural activities into religious activities may have severely negative consequences for Native American interests, where cultural uses may receive greater protections and accommodations than religious protections, as will be seen below.

B. Free Exercise Jurisprudence

The Free Exercise Clause is designed to protect individuals from being so restricted by government regulation that the practice of their sincere religious beliefs is unconstitutionally burdened.\textsuperscript{43} Where a regu-

\textsuperscript{38} See Vogel, \textit{supra} note 6, at 774.

Cases involving efforts to exempt religiously grounded conduct from the reach of the law of the state as a matter of religious liberty protected by the First Amendment to the U.S. Constitution are typically framed as individual rights cases. Consequently, courts frequently neglect or give less than full consideration to the deep cultural significance of these cases to the communities . . . .

\textit{Id.}

\textsuperscript{39} See Seeger, 380 U.S. at 165–66. However, it has been implicitly argued that defining Native American use of sacred sites as “cultural” opens the door to qualification of the right to use the property by other competing interests. See Tsosie, \textit{supra} note 11, at 1305. This Article argues that this claim, in fact, is not the case, or is no different than what the outcome would be if framed as a purely religious claim.

\textsuperscript{40} See Zellmer, \textit{supra} note 1, at 477; \textit{infra} Part II.A.

\textsuperscript{41} See Richard Pemberton, Jr., \textquotedblleft I Saw That It Was Holy	extquotedblright: The Black Hills and the Concept of Sacred Land, 3 LAW & INEQ. 297, 298–89 (1985); \textit{see also} David H. Getches et al., \textsc{Cases and Materials on Federal Indian Law} 754–55 (4th ed. 1998).

\textsuperscript{42} See Zellmer, \textit{supra} note 1, at 490–91; \textit{see also} Carter, \textit{supra} note 36, at 133.

lation burdens a particular group directly as its purpose, it must withstand strict scrutiny, which requires a narrowly tailored approach to further a compelling government interest to overcome the discrimination.\(^{44}\) Where, however, the regulation is neutral with respect to religions, and burdens one religion incidentally, rational basis review applies and the government need only show that the regulation was rational.\(^{45}\) However, if a regulation is facially neutral, but is intended to impact religious practices, it will be subject to a more stringent form of review than rational basis review.\(^{46}\) Similarly, strict scrutiny also is applied where exemptions from regulations are granted to qualifying non-religious groups, but not to qualifying religious groups.\(^{47}\)

In the landmark case Employment Division v. Smith, the Court held that even where neutral legislative or regulatory restrictions destroy the central tenets of a religion, rational basis scrutiny should nevertheless be used to evaluate the law.\(^{48}\) This is because “courts must not presume to determine the place of a particular belief in a religion.”\(^{49}\) The idea in Smith was that where a neutral regulation incidentally burdens a religious activity, the regulation need only be scrutinized using a rational basis standard.

After Smith, Congress passed the Religious Freedom Restoration Act (RFRA).\(^{50}\) RFRA applies the strict scrutiny test requiring the least restrictive means to further a compelling government interest wherever “free exercise of religion is substantially burdened.”\(^{51}\) The Act was ren-


\(^{45}\) See Bowen v. Roy, 476 U.S. 693, 707–08 (1986). If the regulation incidentally burdens not only religious beliefs and practices, but also other fundamental rights, strict scrutiny may be required. See, e.g., Employment Div. v. Smith, 494 U.S. 872, 881–82 (1990); Ala. & Coushatta Tribes v. Trs. of Big Sandy Indep. Sch. Dist., 817 F. Supp. 1319, 1332 (E.D. Tex. 1993). This issue may be implicated by limiting the right to association as well as the right to religious practice. See Kevin J. Worthen, One Small Step for Courts, One Giant Leap for Group Rights: Accommodating the Associational Role of “Intimate” Government Entities, 71 N.C. L. REV. 595, 605–09 (1993).


\(^{47}\) See id.

\(^{48}\) See Smith, 494 U.S. at 883, 886–87. The centrality test, however, has not been applied to Western religious tenets, and therefore, Native American religious activities must achieve a higher threshold of importance to receive protections than Western religions. See Brady, supra note 8, at 160; Johnston, supra note 32, at 448–49.

\(^{49}\) Smith, 494 U.S. at 887.


dered inapplicable to the states under the Fourteenth Amendment, but nevertheless remains applicable to federal actions.

While no courts have analyzed Native American religious or cultural claims related to the use of or access to federal public lands under RFRA, the courts have historically found that government regulation of Native American uses of or access to public lands for religious purposes did not violate the Free Exercise Clause. Additionally, according to Justice O’Connor in *Lyng v. Northwest Indian Cemetery Protective Ass’n*, locating Native American religion at a particular site “could easily require de facto beneficial ownership of some rather spacious tracts of public property.” “The decision in *Lyng* effectively marked the end of Native American attempts to employ the Free Exercise Clause to protect Native American religious sites on public lands . . . .” *Lyng*, however, recognized that where vindication of a constitutional right affords no greater remedies than vindication of parallel statutory rights, judicial restraint should counsel against

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53 E.g., O’Bryan v. Bureau of Prisons, 349 F.3d 399, 401 (7th Cir. 2003); Kikumura v. Hurley, 242 F.3d 950, 958 (10th Cir. 2001); Sutton v. Providence St. Joseph Med. Ctr., 192 F.3d 826, 831 (9th Cir. 1999); Adams v. Comm’r, 170 F.3d 173, 175 (3d Cir. 1999); *In re Young*, 141 F.3d 854, 856 (8th Cir. 1998); Alamo v. Clay, 137 F.3d 1366, 1368 (D.C. Cir. 1998).
54 The Religious Land Use and Institutionalized Persons Act of 2000 § 7, 42 U.S.C. § 2000cc (2000), directly follows the substantive standards established under RFRA, but it applies those standards to states under the Spending and Commerce Clause power rather than through the remedial power of the Fourteenth Amendment, §§ 2000cc-1(b)(1), 2000cc-1(b)(2). While it has been called into constitutional question, it has nevertheless survived most challenges thus far. See *Madison v. Riter*, 355 F.3d 310, 322 (4th Cir. 2003); *Charles v. Verhagen*, 348 F.3d 601, 611 (7th Cir. 2003); *Mayweathers v. Newland*, 314 F.3d 1062, 1069–70 (9th Cir. 2002). But see *Cutter v. Wilkinson*, 349 F.3d 257, 260, 263–68 (6th Cir. 2003).
55 Some cases, however, have raised Native American claims regarding the cultural use of eagles. See *United States v. Hardman*, 297 F.3d 1116, 1118–20 (10th Cir. 2002). For other non-Native American cases recently heard, see *Kikumura v. Hurley*, 242 F.3d 950 (10th Cir. 2001), and *Kimbrough v. Cal.*, 2 Fed. Appx. 893 (9th Cir. 2001).
57 *Lyng*, 485 U.S. at 453.
58 Bonham, *supra* note 22, at 165.
deciding the constitutional issue.\textsuperscript{58} As a result, \textit{Lyng} may mean that RFRA claims will preclude ever reaching the constitutional issues in religious cases.

\textbf{C. Establishment Clause Jurisprudence}

On the other hand, the Constitution "affirmatively mandates accommodation, not merely tolerance, of all religions"\textsuperscript{59}—accommodation is especially "crucial in the Native American context, where governmental suppression of minority religious practices, not their accommodation, has been the rule."\textsuperscript{60} The Establishment Clause seeks to ensure that government treats all religions equally, without favoritism. Therefore, where a "governmental action is sufficiently likely to be perceived by adherents of the controlling denomination as an endorsement, and by the nonadherents as a disapproval, of their individual religious choices," the action may violate the Establishment Clause.\textsuperscript{61}

The well-known and long-applied test formulated in the \textit{Lemon v. Kurtzman} case requires three things to avoid running afoul of the Establishment Clause: (1) the action must not be religious in purpose; (2) the action’s effect must primarily affect non-religious interests;\textsuperscript{62} and (3) the action must not excessively entangle the acting government entity with religion.\textsuperscript{63} The issue in Establishment Clause cases when determining a religious purpose is differentiating between the removal of burdens to practicing religions and the conferral of special benefits on religious groups.\textsuperscript{64} This line may be difficult to establish with any precision or clarity.\textsuperscript{65} Protecting Native American religious and cultural interests in public lands through the removal of burdens on such inter-

\textsuperscript{58} See \textit{Lyng}, 485 U.S. at 446.
\textsuperscript{60} Cross & Brenneman, \textit{supra} note 37, at 40.
\textsuperscript{62} Under this prong is the requirement that the action not place an undue burden on non-beneficiaries of the action. Tex. Monthly, Inc. v. Bullock, 489 U.S. 1, 11–15, 18 (1989); Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 334 (1987). Although not clearly defined, an undue burden generally exists when the burdens are grossly disproportionate to the benefit to the religious beneficiaries. \textbf{\textit{Bullock}, 489 U.S. at 15, 19 n.8; see also} \textit{Estate of Thornton v. Caldor, Inc.}, 472 U.S. 703, 709–10 (1985). Determining undue burden and religious benefit while refraining from any evaluation of the religious importance of the particular tenet affected seems impossible to achieve in practice.
\textsuperscript{64} See \textit{Zellmer, supra} note 1, at 499–503.
\textsuperscript{65} \textit{See id.}, at 503.
ests is considered a secular purpose and is not considered to confer any special benefits on Native American religious practitioners. Therefore, the difference is crucial whether the legislation seeks to remove a burden from or confer a benefit upon religious activity, especially since removing a substantial burden from the exercise of religion will likely be upheld regardless of the impact upon non-beneficiaries. Viewing federal ownership of Native American sacred sites as a burden upon Native American cultural or religious practice is one important step toward protecting those cultural uses of federal public lands. Regulation which adversely affects non-religious entities under such circumstances actually serves to remove a burden established upon federal ownership and the designation of the lands as public and available to all citizens.

In determining what interests are primarily affected by a law or regulation, courts must look to the importance of the interests affected as well as the type of interest affected. As a result, while Free Exercise jurisprudence rejects consideration of the importance of religious tenets to the religion, courts have been far more willing to consider such issues in Establishment Clause cases. Additionally, the second prong of the Establishment Clause requires that all similarly situated groups be treated similarly. However, where no other groups are similarly situated, “[t]he proper inquiry is whether Congress has chosen a rational classification to further a legitimate end,” not a strict scrutiny standard. Native American tribes, as unique and semi-autonomous political entities, are not similar to other religious groups. Equal protection considerations can therefore be avoided

66 See id. at 415.
70 Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 338–39 (1987); see Zellmer, supra note 1, at 506–07.
72 See, e.g., Rupert v. U.S. Fish & Wildlife Serv., 957 F.2d 32, 34–35 (1st Cir. 1992); Peyote Way Church of God v. Thornburgh, 922 F.2d 1210, 1216–17 (5th Cir. 1991); Morton v. Mancari, 417 U.S. 535, 551 (1974). Mancari creates objectionable standards by which to determine Native American tribe membership (e.g., blood relations) that have since fallen into disfavor. See Winslow, supra note 29, at 1322. Membership in tribes is now more aptly
when establishing policies favoring Native American tribes due to their unique political status.\footnote{73} Federal Native American law, in fact, is centered on this unique political status.\footnote{74} This unique status is especially keen with respect to Native American cultural practices—and religious practices that are significant to tribal culture—as there is a legitimate government interest in tribal culture, which allows the application of preferential treatment to Native American practices without violating the Establishment Clause.\footnote{75}

Regarding the excessive entanglement prong, it has been widely recognized that “total separation is not possible in an absolute sense. Some relationship between government and religious organizations is inevitable.”\footnote{76} Indeed, forcing such a separation would be “callous indifference” to religion and therefore inappropriate.\footnote{77} One of the difficulties in Establishment Clause cases, then, is determining where the line is drawn between creating a sufficient relationship so the religion can flourish and excessively entangling government activities determined by reference to political status. See id. However, the application of non-religious doctrines is not without its own drawbacks, since regulation harming Native American tribes’ religious practices, if viewed through a non-religious lens, would not require strict scrutiny. See id. at 1323–24.

\footnote{73} See, e.g., Del. Tribal Bus. Comm. v. Weeks, 430 U.S. 73, 84 (1977); Mancari, 417 U.S. at 551; see also Zellmer, supra note 1, at 416–17 (noting that equal protection concerns can be overcome with respect to both federally and non-federally recognized tribes, though the level of scrutiny applicable may vary depending upon the tribe’s particular political relationship with the United States).

\footnote{74} Wallace Coffey & Rebecca Tsosie, Rethinking the Tribal Sovereignty Doctrine: Cultural Sovereignty and the Collective Future of Indian Nations, 12 STAN. L. & POL’Y REV. 191, 192 (2001).


with religious groups. As a result, “the context of a particular case, including historic circumstances, special relationships, the coercive impact of the government action, and the location of the activity at issue is of critical importance.”

Additionally, a compelling government interest exists in maintaining historical and cultural attachments to the land. Actions which enable Native American tribes to maintain such attachments will likely overcome the Establishment Clause hurdle, even if analyzed under a strict scrutiny standard. Where non-Native Americans are completely excluded from visiting a sacred site or where Native American religious practitioners solely control the use of the sacred site either directly or through veto power of otherwise lawful activities, however, the government may have excessively entangled itself with religion. This is almost never the case, for agencies act as mere custodians of Native American cultural resources and to remove barriers to practicing ceremonial rites created by federal ownership of the land.

Despite the opportunity to protect Native American religious uses on federal public lands, the Lemon test has proven a mixed bag when it comes to the protection of Native American religious resources on federal public lands. The foregoing discussion illustrates that each of the three prongs of the Lemon test has been misapplied with relation to Native American religious claims on federal public lands.

Recently, the Lemon test has fallen out of favor, with new tests to determine violations of the Establishment Clause, such as the endorsement and coercion tests, emerging. The endorsement test looks at the groups benefited by the government action, the nature of the action, and the relationship between the religion and government created by the action. Essentially, the endorsement test has collapsed the three Lemon test requirements into a single test that evaluates all three requirements together for their collective effect.

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78 Zellmer, supra note 1, at 497.
80 Bear Lodge Multiple Use Ass’n v. Babbitt, 2 F. Supp. 2d 1448, 1456 (D. Wyo. 1998), aff’d, 175 F.3d 814 (10th Cir. 1999).
evaluates whether government action endorses a particular religious belief,85 “send[ing] a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.”86

The coercion test seeks to identify whether government action coerces support for a religious belief.87 Key components to the coercion test are the context and the characteristics of the affected population. For example, applying the coercion test, the Court found no Establishment Clause violation where the Nebraska state legislature opened with a prayer, since the population was composed of adults “not readily susceptible to religious indoctrination” or pressure,88 but it did find a violation where a public high school graduation was started with a prayer since graduation is an important event in life and students are more susceptible populations.89

Although the endorsement and coercion tests seek to simplify the test used to determine establishment of religion, it is unclear how these tests will treat Native American religious claims. As a result, Native American activists seeking to protect religious activities on federal public lands might be wary of Establishment Clause cases until one test emerges dominant and its contours are better defined. Although the impacts of the emerging tests are uncertain at this point, the affirmative obligations imposed by the Establishment Clause do provide an important avenue by which Native American activists might compel agency action to accommodate their religious practices. However, the following analysis of the Bear Lodge case illustrates the difficulty in relying upon confusing and unsettled First Amendment jurisprudence as a means to protect Native American cultural interests.

89 Lee, 505 U.S. at 595.
II. **Bear Lodge: A Case Stuck in the Past**

A. **Background**

Bear Lodge is where, according to Kiowa legend, seven Native American sisters, escaping the clutches of some hungry bears, jumped onto a small rock.\(^{90}\) The girls, trapped by the bears, prayed to the rock for aid.\(^{91}\) The rock answered their prayers by growing to the sky, where the girls became the stars of the Big Dipper.\(^{92}\) The distinctive columns and lines of the site are attributed to the bears, which clawed at the girls as the rock grew.\(^{93}\) Numerous Native American cultural ceremonial practices are performed in and around Bear Lodge and many tribal stories and moral lessons are taught by reference to the site.\(^{94}\)

As a result, Bear Lodge is protected for its value as a sacred site to northern plains tribes.\(^{95}\) It is located in the Black Hills, an area of high spiritual importance to those tribes.\(^{96}\) The Black Hills were re-

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\(^{90}\) Nat’l Park Serv., U.S. Dep’t of the Interior, *Devils Tower: First Stories*, at http://www.nps.gov/deto/stories.htm (last updated Dec. 22, 2004); see also Bonham, *supra* note 22, at 175; Brady, *supra* note 8, at 165; Burton & Ruppert, *supra* note 6, at 201. Of course, the Kiowa legend is not the only tribal legend associated with the site. See Nat’l Park Serv., *supra* for other legendary stories associated with Bear Lodge.

\(^{91}\) Bonham, *supra* note 22, at 175; Brady, *supra* note 8, at 165; Burton & Ruppert, *supra* note 6, at 201.

\(^{92}\) Bonham, *supra* note 22, at 175; Brady, *supra* note 8, at 165; Burton & Ruppert, *supra* note 6, at 201.

\(^{93}\) Bonham, *supra* note 22, at 175; Brady, *supra* note 8, at 165; Burton & Ruppert, *supra* note 6, at 201.

\(^{94}\) See Bonham, *supra* note 22, at 175–76.

\(^{95}\) See Bear Lodge Multiple Use Ass’n v. Babbitt, 2 F. Supp. 2d 1448, 1449 n.1 (D. Wyo. 1998), *aff’d*, 175 F.3d 814 (10th Cir. 1999); see also Nat’l Park Serv., *supra* note 6, at 62 (indicating that Bear Lodge is eligible for listing on the National Register of Historic Places but that “NPS protects a site that is eligible for the National Register in the same way as if it were actually listed.”); Nat’l Park Serv., U.S. Dep’t of the Interior, Final General Management Plan/Environmental Impact Statement: Devils Tower National Monument 66 (2001) [hereinafter Nat’l Park Serv., GMP], http://www.nps.gov/deto/gmp_final/pdf/final_gmp.pdf (recommending the Sun Dance grounds for listing on the National Register of Historic Places to better protect the grounds and allow for continued ceremonial practices); Burton & Ruppert, *supra* note 6, at 206–08 (discussing its value as a sacred site); George L. San Miguel, Nat’l Park Serv., *How Is Devils Tower a Sacred Site to American Indians?* (1994), at http://www.nps.gov/deto/place.htm (last updated Dec. 22, 2004).

served in the Treaty of Fort Laramie of 1868, but that treaty was abrogated by Congress upon the discovery of gold in 1877. Not too long after the abrogation of the treaty, the Sun Dance, a traditional Sioux ceremony performed at the top of Bear Lodge, was made punishable by withholding rations for up to ten days for a first offense; for subsequent offenses rations were withheld for fifteen to thirty days or violators were imprisoned for up to thirty days.

Bear Lodge is a site important to the ceremonial Sun Dances and is a place where religious leaders go on Vision Quests, quests that involve individual searches for spiritual guidance in their daily lives. The Sun Dance is performed by a few leaders, and Vision Quests are conducted by individuals; both cultural uses require peace, quiet, and serenity. These cultural uses are of vital importance to tribes that practice the Sun Dance and Vision Quests, including the Cheyenne River Sioux tribe: “[B]y going there, we are nurturing ourselves and preserving our culture . . . . Our traditional, cultural and spiritual use of Mato Tipila is vital to the health of our nation and to our self-determination as a Tribe.”

B. Management Plan

Recognizing the importance of Bear Lodge to plains tribes’ cultures, NPS decided to regulate use of the rock tower to protect tribal


97 See Treaty with the Sioux—Brulé, Oglala, Miniconjou, Yanktonai, Hunkpapa, Black-feet, Cuthead, Two Kettle, Sans Arcs, and Santee—and Arapaho, Apr. 29, 1868, art. 2, 15 Stat. 635 (describing the land reserved for the Native Americans which is known as the Black Hills).

98 *Dee Brown, Bury My Heart at Wounded Knee* 273–313 (1970) (recounting the gradual breakdown of relations between Native Americans and the United States government after the discovery of gold on the land).

99 U.S. Dep’t of the Interior, *Regulations of the Indian Office* 106 (1894); see also *Cross & Brenneman, supra* note 37, at 8.

100 *Bear Lodge*, 175 F.3d at 816; see also *San Miguel, supra* note 95.

101 See *Bear Lodge*, 175 F.3d at 816, 819; *Cross & Brenneman, supra* note 37, at 41.


103 Nat’l Park Serv., *GMP, supra* note 95, at 66; see also Nat’l Park Serv., *supra* note 6, at 9 (citing Dakota, Lakota, and Nakota Nations Summit V, Resolution No. 93–11, Kyle, S.D., June 1993).
ceremonies and vision quests.\textsuperscript{104} This regulation was necessary to protect tribal rituals from the adverse effects of ever-increasing recreational and commercial climbing on the rock tower.\textsuperscript{105} In 1973, 312 recreational climbers ascended the tower.\textsuperscript{106} By the mid-1990s, that number had grown to 6000 annually.\textsuperscript{107} The increasing interest in climbing has been phenomenal in recent years. Although the first technical climb of the tower was achieved in 1937,\textsuperscript{108} between 1992 and 1995 the number of climbing routes on the tower increased by sixteen percent, and “[d]uring the 1980s, 117 new routes were established . . . .”\textsuperscript{109} These routes cover approximately fourteen percent of the rock face.\textsuperscript{110} Although climbing has grown in accessibility and popularity in recent years, climbers still only approximate 1.3% of all visitors to the Bear Lodge tower.\textsuperscript{111}

Recreational climbing impairs Native American use of the site by undermining cultural education of tribal children who “see people ‘playing’ on such an important” site.\textsuperscript{112} It also disrupts the peacefulness and quietude necessary for spiritual journeys and other ceremonial practices. Finally, climbing bolts and anchors “seriously impair[] the spiritual quality of the site.”\textsuperscript{113} This diminished spiritual quality has caused the Native American spirits to leave, making the site a less valuable place of worship.\textsuperscript{114} Climbers have also removed sacred prayer bundles, which are important to establish individual relationships between practitioners and spirits.\textsuperscript{115} To complicate matters, however, climbing on Bear Lodge is not merely considered a recrea-

\textsuperscript{104} Nat’l Park Serv., supra note 6, at 24. NPS itself recognized that “[u]ntil very recently, the importance of American Indian cultural values at Devils Tower has been neglected by the NPS.” \textit{Id.}
\textsuperscript{105} \textit{Id.} at 22–24.
\textsuperscript{106} \textit{Id.} at 4.
\textsuperscript{107} \textit{Id.}
\textsuperscript{109} See Nat’l Park Serv., supra note 6, at 4.
\textsuperscript{110} Id. at 6.
\textsuperscript{111} \textit{Id.} at 4 (calculating the average between 1989 and 1994).
\textsuperscript{112} See Brady, supra note 8, at 166.
\textsuperscript{113} Bear Lodge Multiple Use Ass’n v. Babbitt 175 F.3d 814, 818 (10th Cir. 1999).
\textsuperscript{114} See Nat’l Park Serv., supra note 6, at 8.
\textsuperscript{115} See id.; see also Bear Lodge, 175 F.3d at 818; Burton & Ruppert, supra note 6, at 208; Jeffrey R. Hanson & David Moore, \textit{Applied Anthropology at Devils Tower National Monument}, 44 Plains Anthropologist 59–60 (1999).
tional activity, but is expressly recognized as a historical activity and “part of monument culture” dating back one hundred years.\textsuperscript{116}

NPS created a management plan\textsuperscript{117} to attempt to balance the competing interests in the tower by building consensus among the competing users.\textsuperscript{118} It allows for restrictions on climbing where climbing adversely affects the Native American sacred site or cultural practices.\textsuperscript{119} In fact, the management plan was enacted to protect Native American cultural uses of Bear Lodge as a place of “historical, architectural or cultural significance at the community, State or regional level . . . .”\textsuperscript{120} One of the site’s primary values is the cultural significance of the site to Native American tribes\textsuperscript{121} and the management plan states explicitly that “[r]ecreational climbing at Devils Tower will be managed in relation to the tower’s significance as a cultural resource.”\textsuperscript{122}

The climbing plan was incorporated into the park’s revised general management plan.\textsuperscript{123} The revised general management plan notes that “[m]odern recreational use, developments, and climbing on the Tower are sometimes in conflict with American Indian traditional cultural values. High levels of development, visitor use, and

\begin{footnotes}
\item[116] See \textit{Bear Lodge}, 175 F.3d at 818; \textit{Nat’l Park Serv.}, \textit{Management Policies} 2001 § 8.2.2 (2000) [hereinafter \textit{Nat’l Park Serv.}, \textit{Management Policies}] (noting that rock climbing, while a legitimate recreational activity, may not “be appropriate or allowable in all parks; that determination must be made on the basis of park-specific planning”), available at http://www.nps.gov/policy/mp/policies.pdf; Hanson & Moore, supra note 115, at 54; see also \textit{Nat’l Park Serv.}, supra note 6, at 2 (“National Park Service Management Policies recognize rock climbing as a legitimate recreational and historical activity in the park system.”).
\item[117] \textit{Nat’l Park Serv.}, supra note 6, at iii.
\item[119] See \textit{Nat’l Park Serv.}, supra note 6, at iii. The revised NPS Management Policies remove the consumptive use prong and add “unreasonable[e] interfere[nce] with: The atmosphere of peace and tranquility, or the natural soundscape maintained in wilderness and natural, historic, or commemorative locations within the park.” \textit{Nat’l Park Serv.}, \textit{Management Policies}, supra note 116, § 8.2.
\item[120] See \textit{WATCH} (Waterbury Action to Conserve Our Heritage Inc.) v. Harris, 603 F.2d 310, 321 (2d Cir. 1979) (internal quotation marks omitted).
\item[121] See \textit{Bear Lodge}, 175 F.3d at 819.
\item[122] \textit{Nat’l Park Serv.}, supra note 6, at i; see also \textit{Nat’l Park Serv.}, GMP, supra note 95, at 189.
\item[123] See \textit{Nat’l Park Serv.}, GMP, supra note 95, at 1 (“The previous \textit{General Management Plan} for Devils Tower was approved in 1986. . . . That plan did not address current issues related to greatly increased visitation, the degradation of natural systems, changing regional land uses, and conflicts among various user groups.”). “This \textit{General Management Plan} reaffirms the climbing plan.” \textit{Id.} at 4. The revised General Management Plan was issued after \textit{Bear Lodge} was decided.
\end{footnotes}
crowding at the base of the Tower are not consistent with the spiritual nature of the area.”

The final climbing plan calls for a voluntary cessation of recreational climbing during the month of June to be enforced by the climbers themselves, during which time the Sun Dance and other major Native American cultural ceremonial practices are performed. It also prohibits the addition of new bolts or fixed pitons necessary for lead climbing, though it does allow for the replacement of such bolts or pitons as authorized by receipt of a permit. The management plan also calls for a cross-cultural education program about the site, which intends to “lead to a better understanding about climbing and the sacred site issue and the values of American Indians, climbers, and the general public.”

The original plan prohibited the issuance of commercial use licenses for climbing guides in the month of June, but this prohibition was challenged and eventually rescinded. The revised climbing management plan instead provides the option to establish a mandatory closure if the plan is ultimately determined unsuccessful. While the standards set for “success” appeared to be quite high, requiring perhaps complete voluntary compliance, the voluntary clo-

124 Id. at 3.
125 See Nat’l Park Serv., supra note 6, at 22–24. June is the largest climbing month for Bear Lodge, with an average of 1120 climbers each year between 1989 and 1994. Id. at 20. August, May, and July were the months with the next highest average of climbers, with 1095, 1005, and 985, respectively. Id.
126 See id. at 24–25 (noting also that piton climbing has diminished in popularity).
127 Id. at 22.
128 See id.

The reasons for the June closure are not tied directly to religious ceremonies at Devils Tower, however, the summer solstice, which occurs in June, is a very culturally significant time to American Indians. The 30-day June period was selected as a compromise in the modern world. A predictable voluntary closure fixed on a modern calendar month has a better chance to be communicated and understood and to be successful than dates based on a shifting lunar calendar.

Id. at 24. While the language “modern calendar” is supremely offensive, given that modern-day Native American practitioners rely upon lunar calendars, as does a majority of the global populace at least in some respects, the rationale does make sense when attempting to compel action from climbers that do not subscribe to a lunar calendar. Therefore, the selection of the date, while perhaps seeming more restrictive than necessary to achieve compliance, may, in fact, be more likely to succeed than a shifting calendar.

129 See Bear Lodge Multiple Use Ass’n v. Babbitt, 2 F. Supp. 2d 1448, 1450 (D. Wyo. 1998), aff’d, 175 F.3d 814 (10th Cir. 1999).
130 Id.
131 See Nat’l Park Serv., supra note 6, 22–24 (noting that NPS would establish benchmarks for determining what “success” would mean, but also stating that “[t]he voluntary
sure has nevertheless achieved a high level of compliance.\textsuperscript{132} As a result, the General Management Plan, revised in 2001, did not modify the climbing plan.\textsuperscript{133} After the Supreme Court denied certiorari in \textit{Bear Lodge}, NPS decided to leave well enough alone and did not seek to amend the management plan.\textsuperscript{134}

\section*{C. District Court Analysis}

The management plan was challenged under the Establishment Clause.\textsuperscript{135} The plaintiffs, a commercial rock climbing association and its members, made three major claims, charging that NPS had endorsed or established Native American religion through: (1) the coercive effect of the threat of a mandatory ban on climbing during the month of June; (2) an interpretive program that expands the Bear Lodge narrative from one of climbing history to both climbing and Native American history and cultural importance; and (3) the coercive effect of signs discouraging hikers from wandering off the trail out of respect for Native American culture.\textsuperscript{136} The district court dismissed the latter two claims due to lack of standing.\textsuperscript{137}

The court closure will be fully successful when every climber personally chooses not to climb at Devils Tower during June out of respect for American Indian cultural values. This is the ultimate goal of the voluntary June closure."). The climbing management plan, then, does not indicate what level of success would be required to enable the triggering of a mandatory closure—which would be one of a multitude of options NPS could take if the voluntary closure is deemed unsuccessful. \textit{See id.} A survey of climbers indicated that 67\% of climbers would continue climbing the tower knowing that their actions would show disrespect to Native American practices. \textit{Bear Lodge Multiple Use Ass’n v. Babbitt}, 175 F.3d 814, 818–19 (10th Cir. 1999). This survey was apparently mischaracterized by the court, as the question asked whether climbers would stop climbing altogether throughout the entire year, not whether climbers would be willing to forego one month of climbing. \textit{See Br. for Intervenors in Opp’n. to Pet. for Writ of Cert., Bear Lodge Multiple Use Ass’n v. Babbitt, No. 99-1045, 2000 WL 34014041 at *14 n.15 (U.S. 2000).}

\textsuperscript{132} \textit{See Br. for Intervenors in Opp’n. to Pet. for Writ of Cert., Bear Lodge (No. 99-1045), 2000 WL 34014041 at *6 (noting an 85\% decline in recreational climbing in June).}

\textsuperscript{133} \textit{Nat’l Park Serv., GMP, supra note 95, at 27 (noting that “most climbers abide by a voluntary climbing ban during June” with “[c]limbing [being] managed according to a climbing management plan that was approved in 1995.”).}

\textsuperscript{134} \textit{See Bear Lodge Multiple Use Ass’n v. Babbitt, 529 U.S. 1037 (2000) (denying certiorari); Press Release, Nat’l Park Serv., U.S. Dep’t of the Interior, Supreme Court Refuses to Hear Challenge Against Devils Tower National Monument Climbing Management Plan (Mar. 27, 2000) (“There will be no changes to the way climbing is managed at Devils Tower National Monument. The monument will continue to follow the approved climbing management plan.”), http://www.nps.gov/deto/pr00_supreme_court.htm.}

\textsuperscript{135} \textit{See Bear Lodge}, 2 F. Supp. 2d at 1451.

\textsuperscript{136} \textit{See id.}

\textsuperscript{137} \textit{Id.} at 1453.
spent most of its time analyzing whether the voluntary climbing ban was a violation of the Establishment Clause. It found the climbing management plan to be a valid exercise of power and accommodation of Native American religious practices, but the court reached that finding through improper analysis and overly restrictive means.

The district court applied a First Amendment analysis to the climbing ban for no clear reason. Despite the fact that the climbing plan did provide an explanation of why the month of June was selected—as a compromise not directly tied to religious practices, but rather to the effectiveness of cultural education programs—the court claimed that the climbing plan “does not identify any other reason [other than the cultural significance of the month of June to Native American tribes] for the June ‘voluntary closure.’”

The district court noted that it was not convinced that culture and religion were separate for Native American groups, but it failed to recognize the overwhelming and uncontested consideration of cultural rather than religious importance of the site and ceremonial rites noted in the climbing plan itself. It also failed to conduct an analysis of the cultural practices as meeting a definition of “religious activity.”

On the face of the climbing plan, it is difficult to claim outright that the regulation had a religious purpose. Nevertheless, the court stated that it “must look beyond the plain language establishing the climbing ban and examine its purpose and effects in order to determine if it is appropriate accommodation or if it breaches the necessary gap between state and religion fusing the two into one.” Where the purpose of the regulation is secular, only a rational relationship must exist between the regulation and its purposes. The district court recognized the secular purposes, yet analyzed those purposes as if they were religious.

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138 Id. at 1453–57.
139 See id. at 1456–57.
140 See discussion supra note 128.
141 Bear Lodge, 2 F. Supp. 2d, at 1450.
142 Id. at 1456 (“The organizations benefitted . . . are not solely religious organizations, but also represent a common heritage and culture.”).
143 See supra Part II.B.
144 Bear Lodge, 2 F. Supp. 2d at 1456 (failing to consider the definitional religious activity as applied to this case).
145 Id. at 1454.
146 See supra Part I.C.
147 See Bear Lodge, 2 F. Supp. 2d at 1455–56; see also Br. for Intervenors in Opp’n. to Pet. for Writ of Cert., Bear Lodge Multiple Use Ass’n v. Babbitt, No. 99-1045, 2000 WL
The district court recognized that if the case was to operate on a constitutional level, it was about the permissible limits of accommodation—an Establishment Clause claim—rather than determining what accommodation is required—a Free Exercise Clause claim. However, the court nevertheless analyzed the claims raised under Free Exercise, rather than Establishment Clause, jurisprudence. In its analysis, the court relied upon Badoni v. Higginson—a First Amendment case stating in dicta that “[e]xercise of First Amendment freedoms may not be asserted to deprive the public of its normal use of an area,” to require that any accommodation not affect the general public’s use of the park. The dictum in Badoni stated that if a Free Exercise right would restrict all visitor access to a site year-round, protection of such a right might violate the Establishment Clause. The dictum, while of little guidance in non-total closures, seems difficult to maintain under emerging First Amendment jurisprudence, since if visitor access is restricted, no coercion of beliefs could be effected under the coercion test. This application of Free Exercise jurisprudence implies a belief that the limits of allowed accommodation and protection of religion are coterminous. This, however, is not the case, as discussed earlier in this Article. Additionally, the court, constrained by precedent in the Tenth Circuit, applied both the endorsement test established by Justice O’Connor and the Lemon test, which is considered by some authors to be an “unnecessarily rigorous form of scrutiny.”

34014041, at *26–28 (U.S. 2000) (discussing how the purposes and effects of the regulation are secular).

148 See Bear Lodge, 2 F. Supp. 2d at 1455 n.6; supra Part I.B–C.
149 See Cross & Brenneman, supra note 37, at 27; Grimm, supra note 32, at 20–21.
150 638 F.2d 172, 179 (10th Cir. 1980).
151 Bear Lodge, 2 F. Supp. 2d at 1455.
152 Badoni, 638 F.2d at 179.
153 See generally Lee v. Weisman, 505 U.S. 577 (1992); supra Part I.C.
154 See Cross & Brenneman, supra note 37, at 30–31 (discussing the interaction between the courts’ use of Free Exercise and Establishment Clause tests).
155 See supra Part I.
156 See Bauchman v. W. High Sch., 132 F.3d 542, 552 (10th Cir. 1997) (holding that when uncertainty surrounds the scope of the endorsement test and Establishment Clause analysis, they must both be applied in conjunction with the entanglement criterion of the Lemon test).
157 See Bear Lodge, 2 F. Supp. 2d at 1454; supra Part I.C.
158 Zellmer, supra note 1, at 514 (addressing the courts’ use of both the Lemon test and accommodation tests while also imposing a prohibition on other uses of the public land at Bear Lodge).
The district court, while ultimately finding in favor of the climbing management plan, illustrates the problems with reliance on First Amendment jurisprudence generally. Conflation of Free Exercise and Establishment Clause jurisprudence is an easy mistake to make. The opinion also illustrates the dangers in relying on the “courts of the conqueror.”\textsuperscript{159} In an oral statement, Judge Downes “questioned whether the tribes’ effort and time might not be better spent remediing Native American social ills like alcoholism.”\textsuperscript{160} The court apparently failed to comprehend the \textit{amici} claims that loss of cultural identity through cultural appropriation and degradation of sacred sites contributes significantly to such preventable and curable social illnesses.\textsuperscript{161}

The court’s language has been criticized for chilling political action to protect Native American interests, narrowing public land managers’ discretion to act, and incorrectly interpreting First Amendment jurisprudence.\textsuperscript{162} The district court “implicitly characterized the Native Americans’ use of Devils Tower as primarily religious.”\textsuperscript{163} It has been argued that the district court’s “interpretation fails to impose any practical restriction on the definitional reach of that key phrase, religious activity. [The court] does not explain [its] disregard of the federal government’s uncontroverted ethnographic and historical evidence that establishes Native Americans’ long-standing cultural use, and not necessarily religious use, of Devils Tower.”\textsuperscript{164}

The district court opinion did, however, have some saving graces. It recognized that “[t]he organizations benefitted by the voluntary climbing ban, namely Native American tribes, are not solely religious organizations, but also represent a common heritage and culture. As a result, there is much less danger that the Government’s actions will

\textsuperscript{159} See Sager, \textit{supra} note 31, at 750 (quoting Johnson v. McIntosh, 21 U.S. 543, 588 (1823)).
\textsuperscript{160} Bonham, \textit{supra} note 22, at 188 & n.244.
\textsuperscript{161} \textit{Id. see also} Brady, \textit{supra} note 8, at 166.
\textsuperscript{162} Cross & Brenneman, \textit{supra} note 37, at 10.
\textsuperscript{163} \textit{Id. at} 27.

The Defendants attempt to characterize these measures as relating solely to American Indian culture and being wholly separate from any religious practices. The Court is not persuaded that a legitimate distinction can be drawn in this case between the “religious” and “cultural” practices of those American Indians who consider Devils Tower a sacred site.

\textit{Bear Lodge}, 2 F. Supp. 2d at 1450 n.2.
\textsuperscript{164} Cross & Brenneman, \textit{supra} note 37, at 40–41.
inordinately advance solely religious activities.”\footnote{Bear Lodge, 2 F. Supp. 2d at 1456.} Nevertheless, the court stated that “any subsequent effort to resuscitate this ill-conceived [climbing] ban would only serve to impair the Defendants’ credibility with this Court.”\footnote{Id. at 1452.} It is not clear whether the court referred to the particular ban, which was potentially objectionable, or to any type of ban.\footnote{Denying agencies the ability to ban activities wholly is deemed by most courts to be overly restrictive of agency authority. See Br. for Intervenors in Opp’n to Pet. for Writ of Cert., Bear Lodge Multiple Use Ass’n v. Babbitt, No. 99–1045, 2000 WL 34014041 at *23–25 (U.S. 2000) (noting that Arlington National Cemetery allows private religious services to be closed to the general public, citing 32 C.F.R. § 553.22(c)(3), (f), (g) (2003), in addition to cases where NPS allows other private religious services and has the authority to prohibit incompatible uses).} Although the court improperly viewed the ceremonial practices at Bear Lodge as religious, it was not blind to the cultural importance of those practices. However, the court did not acknowledge the unique political status of Native American tribes or the federal government’s obligations toward tribes.

D. Circuit Court Analysis

The Court of Appeals for the Tenth Circuit dismissed all claims due to a lack of standing, finding that the possibility of imposing a mandatory climbing ban was hypothetical and not an injury-in-fact.\footnote{Bear Lodge Multiple Use Ass’n v. Babbitt, 175 F.3d 814, 821–22 (10th Cir. 1999).} This outcome, while correct under existing precedent, does not deny the possibility that a voluntary closure with a less “remote and speculative possibility” of a mandatory closure might coerce compliance, causing injury.\footnote{See id. at 821; see also Br. for Intervenors in Opp’n to Pet. for Writ of Cert., Bear Lodge Multiple Use Ass’n v. Babbitt, No. 99–1045, 2000 WL 34014041, at *13 (U.S. 2000) (noting that the reasonableness of fear may be important to standing, though calling plaintiffs’ fears unreasonable).} This Article posits the view that any scheme voluntary on its face not made mandatory through secondary direct en-
Enforcement mechanisms should establish no actual and concrete injury sufficient to provide standing to complainants. The court evaded the issue of whether a mandatory closure, if implemented, would constitute sufficient harm to create standing, and if so, whether or not the mandatory closure would be a proper exercise of regulatory authority. By evading these questions, the court was able to avoid the First Amendment discussion altogether, finding other grounds to protect Native American cultural interests.

Nevertheless, the court made some errors in how it viewed the Native American cultural activities at Bear Lodge—the same mistake made at the district court level. For instance, the court overly emphasized the religious importance of the tower to the Native Americans. The court referred to creation stories, the Sun Dance, and Vision Quests as religious activities. Those activities would fail to meet standard definitions of religious activities, yet the court took for granted the sincerity of the tribes’ “religious practices.”

Despite this mischaracterization of the Native American cultural practices at Bear Lodge as religious, the court recognized the importance of not over-relying on First Amendment jurisprudence. The court identified numerous statutes, executive orders, park enabling statutes, and NPS regulations which counsel for the protection of Native American cultural interests. The court stated that “NPS must protect the values for which Devils Tower National Monument was established. . . . [O]ne of the primary bases for the Tower’s designation as a National Monument is the prominent role it has played in the cultures of several Native American tribes of the North Plains.”

Although the court provided agencies some protection when deciding to protect Native American interests, the protection is uncertain and highly contextual. It is not clear how far removed the threat of a mandatory closure must be for a voluntary closure to pass muster.

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170 See Bear Lodge, 175 F.3d at 821–22.
171 See id. at 816–17.
172 Id.
173 See discussion supra Part I.
174 Bear Lodge, 175 F.3d at 816–17.
175 See id. at 817–18, 819.
176 Id.
177 Id. at 819.
178 See id. at 817–18.
Culture is not merely comprised of religion. Culture is the “material, spiritual, and artistic expression of a group that defines itself . . . as a [distinct] culture, both according to daily lived experience and according to practice and theory.” Culture is important to the group not merely as a means for the group to express itself, though this is also of great importance as it includes “language, literary and artistic traditions, music, customs, dress, festivals, ceremonies” and other modes of expression, but also has its own intrinsic value.

Courts and scholars tend to analyze culture as coextensive with religion, and vice versa, relying upon Free Exercise and Establishment Clause jurisprudence in the protection of Native American cultural interests. However, this is troublesome when courts and scholars simply assume that cultural activities constitute religious activities, without analyzing whether the activity meets the definition of a religious activity. “Native Americans typically view religion more in terms of culture than in terms of what most Americans consider religion. Notably, no traditional Native American language has one word that could translate to ‘religion.’”

The failure of courts and scholars to distinguish between culture and religion is not harmless. It results in two very important outcomes. First, it redefines cultural activity as religious, negating tribes’ ability to define their own practices. This re-definition of cultural practices by external sources constitutes cultural appropriation and harms tribes’ ability to sustain the vitality of their cultures. For instance, where ceremonial practices are recast solely in terms of religious practices, and religious practices are seen as individualistic in nature, the importance of the ceremonial practice to the community

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182 See generally Bear Lodge, 175 F.3d at 816–17 (discussing Sun Dances and Vision Quests as religious practices).

183 See *id*.

184 Winslow, *supra* note 29, at 1295.

is diminished. Since government has an explicit mandate to support Native American culture, this is intolerable.

A second and more direct outcome also results from characterizing cultural activities as religious activities: the invocation of First Amendment jurisprudence. The Establishment Clause prescribes the upper limits to which the federal government may accommodate religious activities. However, no such limit exists for cultural activities, except as required by the Equal Protection Clause, which is largely surmountable in the unique case of Native American tribes. As a result, characterizing Native American cultural activities as religious may limit the protections available to them.

A more pragmatic concern with characterizing Native American cultural activities as religious is that the First Amendment has not historically been a friend to Native American interests. Native American Free Exercise claims have universally been denied. While RFRA may improve Native Americans’ chances of achieving victory in court, RFRA’s impact is uncertain and limited to religious activities. Therefore, Native American activists choosing to protect cultural interests under RFRA may see some level of cultural appropriation and may still be pursuing a second- or third-best resolution. Additionally, the new Establishment Clause standards mean that “proponents of Native American sacred sites and religious freedom on public lands can never entirely predict with accuracy the type of test a particular court will employ.”

While courts often have mistakenly applied religious masks to cultural activities, some cultural activities are religious in nature. In those cases, however, the courts also mistakenly find those religious activities not to be religious for First Amendment purposes. Despite meeting the definition of religious activities, these activities have not been recognized as religious because courts have failed to understand the site-specific nature of some Native American religions. This site-

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188 Cf. Hooker, supra note 21, at 137 (“American Indians have had to rely on the Free Exercise Clause of the First Amendment to support their claims.”).
189 Bonham, supra note 22, at 166–67.
190 See Bear Lodge Multiple Use Ass’n v. Babbitt, 175 F.3d 814, 816–17 (10th Cir. 1999).
192 Burton & Ruppert, supra note 6, at 204–05.
specificity precludes Native Americans from practicing their religious beliefs on non-sacred lands—a stark contrast to the Judeo-Christian religious beliefs upon which the Free Exercise Clause was founded.\textsuperscript{193} Destruction of sacred sites should be properly analogized to Judeo-Christian holy lands because worship and prayer occur there and destruction of those holy lands, while not literally destroying the opportunity for religious worship, does impose time, place, and manner restrictions on religious practices such that the practices become less meaningful.\textsuperscript{194}

In Free Exercise cases, courts often have noted that Native American religious beliefs would be substantially burdened or even “devastated” by federal undertakings on public lands, but finding in every case that a “compelling” government interest outweighed religious protection.\textsuperscript{195} This illustrates the dilemma faced by Native Americans seeking to protect their cultural practices—despite the allure of constitutional protections, it often is best to seek cultural, rather than religious, protection of Native American sacred sites and cultural activities.

\textit{Bear Lodge} is just a microcosm of the conflicts over uses that might arise on public lands. It does, however, represent the largest growing conflict of management of public lands—the conflict between Native American cultural uses and increasing recreational uses. \textit{Bear Lodge} “will most likely not be the last time a federal court will evaluate a conflict between resource user groups on public lands and balance the interests of Native American religious activities against recreation interests and federal land management agency decisions.”\textsuperscript{196}

In fact, the management plan of Rainbow Bridge National Monument was challenged based on strikingly similar claims.\textsuperscript{197} The

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\item[\textsuperscript{194}] See Judith V. Royster & Michael C. Blumm, \textit{Native American Natural Resources Law: Cases and Materials} 23 (2002).
\item[\textsuperscript{196}] Bonham, \textit{supra} note 22, at 160.
\item[\textsuperscript{197}] Complaint, Natural Arch & Bridge Soc’y v. Nat’l Park Serv., No. 2000CV-0191J (D. Utah 2000) (claiming that NPS, through voluntary pleadings, denied tourist access to portions of the monument); Bonham, \textit{supra} note 22, at 189. Rainbow Bridge, a separate unit in the NPS system, is managed under the Glen Canyon National Recreation Area. Nat’l
\end{itemize}
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Rainbow Bridge, a nearly 300-foot-high arch—the largest natural, freestanding sandstone arch in the world—is sacred to the White Mesa Ute, San Juan Southern Paiute, Kaibab Paiute, Hopi, and Navajo tribes.\textsuperscript{198} While the policy at Rainbow Bridge was discouragement,\textsuperscript{199} after the \textit{Bear Lodge} suit park managers changed the park signs discouraging individuals from walking under the Bridge to more clearly indicate that the request is purely voluntary so as to avoid Establishment Clause challenges.\textsuperscript{200}

The Rainbow Bridge example illustrates that, although \textit{Bear Lodge} had its failings, it nevertheless provided strength and security to federal land managers in regulating recreational behavior. The question remains whether voluntary efforts to protect Native American cultural practices will be sufficiently successful. More important, however, is that \textit{Bear Lodge} does not address the large range of private and public interests which might conflict with Native American cultural uses and does not avoid the pitfalls of applying First Amendment jurisprudence to what are, essentially, cultural claims.


\textsuperscript{199} This discouragement included “erecting barriers, posting signs requesting visitors not to walk under the Bridge, and staffing roaming Park Service rangers to explain the need to not walk under the Bridge.” Bonham, \textit{supra} note 22, at 190 (citing Chris Smith & Elizabeth Manning, \textit{The Sacred and Profane Collide in the West}, HIGH COUNTRY NEWS (Paonia, Colo.), May 26, 1997, http://www.hcn.org/servlets/hcn.Article?article_id=3424).

\textsuperscript{200} Sproul, \textit{supra} note 198, ch. 8; see also Bonham, \textit{supra} note 22, at 192.
SUBSTANTIVE DUE PROCESS SINCE EASTERN ENTERPRISES, WITH NEW DEFENSES BASED ON LACK OF CAUSATIVE NEXUS: THE SUPERFUND EXAMPLE

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Abstract: Eastern Enterprises v. Apfel has renewed the relevance of one type of substantive due process reasoning by implicitly ruling that future statutory obligations to pay compensation are tempered by an analysis of the party’s actions and the alleged harm. Though the legal commentary has focused on Eastern Enterprises’s implications for cases involving takings and retroactive liability, the causative nexus analysis adds another dimension to its importance. This analysis is relevant to Superfund actions, particularly when innocent landowners are involved. Courts should address the causative nexus issue when determining liability to ensure that Superfund does not place unconstitutional burdens on private citizens. After Eastern Enterprises, proper substantive due process analysis requires courts to ask why a Potentially Responsible Party is the appropriate party to pay for a cleanup and whether such a burden is in line with this nation’s traditional notions of fairness.

Introduction

A family with small children buys a home in Minnesota. They are happily settled in a suburban neighborhood when their children begin developing strange illnesses.1 They are dismayed to find that the other children on the street are similarly sick. When it becomes clear that the illnesses cannot be coincidental, the state begins environmental testing and finds elevated levels of dioxins, PCPs, and hydrocarbons, all of which are linked to elevated cancer risk as well as impaired functioning.

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1 This hypothetical is based on an actual Superfund site in Minnesota. See generally MINN. POLLUTION CONTROL AGENCY, JOSLYN MANUFACTURING SITE SUPERFUND AND VIC CLEANUPS (May 2001), http://www.pca.state.mn.us/publications/g-27-03.pdf.
of the heart, liver, and kidneys.\textsuperscript{2} A further investigation discovers that a paper mill had disposed of its wastes on the lands underneath the homes for a period of thirty years.\textsuperscript{3} Suppose that the paper mill is no longer in business and has no assets. State and federal Superfund laws have developed a complex retroactive joint and several liability scheme to address such situations, with limited carve-outs for innocent landowners.\textsuperscript{4} The 1998 U.S. Supreme Court decision of \textit{Eastern Enterprises v. Apfel} potentially protects these types of defendants from liability through its substantive due process protections.\textsuperscript{5}

This Note is an exploration of the potentially renewed relevance of one form of substantive due process analysis, springing from a common line of argument within each of the opinions in the \textit{Eastern Enterprises} decision.\textsuperscript{6} This particular substantive due process inquiry focuses on whether a citizen can defend against a statutory obligation to pay compensation by showing that there was no causative nexus between the citizen’s actions and the harm being compensated.\textsuperscript{7} Specifically, this Note will examine the implications of \textit{Eastern Enterprises}’s substantive due process analysis for innocent landowners held liable under state and federal Superfund laws.

I. THE FEDERAL RESPONSE: THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, CLEANUP, AND LIABILITY ACT

The Ninety-Sixth Congress passed the Comprehensive Environmental Response, Cleanup, and Liability Act (CERCLA) in 1980 after several highly publicized toxic waste sites illustrated the need for a federal law to deal with the growing problem of hazardous waste contamination and its effect on public health.\textsuperscript{8} By passing CERCLA, Congress created a complex scheme to clean toxic sites, administered by the Environmental Protection Agency (EPA).\textsuperscript{9} The major CERCLA provisions assign liability to categories of actors that Congress deemed potentially

\begin{itemize}
\item \textsuperscript{2} Id. at 2.
\item \textsuperscript{3} See id. at 1.
\item \textsuperscript{5} 524 U.S. 498, 547 (1998) (Kennedy, J., concurring).
\item \textsuperscript{6} See id. at 523–24 (O’Connor, J.); id. at 547 (Kennedy, J., concurring); id. at 566–67 (Breyer, J., dissenting).
\item \textsuperscript{7} See opinions cited supra note 6.
\item \textsuperscript{9} 42 U.S.C. §§ 9601–9675.
\end{itemize}
responsible,\textsuperscript{10} create and maintain a “Superfund” through a general tax on polluting industries to clean the most polluted sites,\textsuperscript{11} and authorize EPA to promulgate regulations and remediate toxic sites.\textsuperscript{12}

CERCLA also grants administrative order authority to EPA, enabling it to bring administrative and enforcement actions to ensure remediation.\textsuperscript{13} The administrative order authority is “perhaps [EPA’s] most potent enforcement tool.”\textsuperscript{14} EPA may commence such an action whenever a site “may [present] an imminent and substantial endangerment to public health or . . . the environment” by issuing “such orders as may be necessary to the protect public health and welfare and the environment.”\textsuperscript{15} Though EPA prefers to administer voluntary remediation through settlement agreements, its stated policy indicates that it will take further action if necessary.\textsuperscript{16} If the parties do not comply with the order, EPA may fund its own cleanup or may refer the case for judicial action to compel performance and recover penalties.\textsuperscript{17} Additionally, under the Polluter Pays Principle,\textsuperscript{18} CERCLA authorizes EPA to sue responsible parties for cleanup costs, in order to replenish the Superfund for subsequent cleanups.\textsuperscript{19}

A. Strict Liability

Responsible parties are held strictly liable for remediation costs.\textsuperscript{20} This means that parties are liable for cleanup costs even when they are not negligent. Furthermore, causation is not a factor for CERCLA litigation.\textsuperscript{21} CERCLA imposes joint and several strict liability on four categories of parties, called Potentially Responsible Parties (PRPs): (1) generators of hazardous wastes; (2) transporters of waste to and

\textsuperscript{10} Id. § 9607(a) (2000).
\textsuperscript{12} 42 U.S.C. § 9606.
\textsuperscript{13} Id. § 9606(a).
\textsuperscript{14} Plater, supra note 8, at 927.
\textsuperscript{15} 42 U.S.C. § 9606(a).
\textsuperscript{16} U.S. EPA, OSWER Directive No. 9833.0-1a, at 2 (Mar. 7, 1990), http://www.epa.gov/compliance/resources/policies/cleanup/superfund/cerc106-uao-rpt.pdf. When viable private entities exist and are unwilling to reach a timely settlement to undertake remediation under a consent order or decree—or in some circumstances prior to any settlement discussions—the Agency will typically compel private party response through unilateral orders. Id.
\textsuperscript{17} Id.
\textsuperscript{18} See Plater, supra note 8, at 887.
\textsuperscript{19} 42 U.S.C. § 9607(a) (2000).
\textsuperscript{20} New York v. Shore Realty Corp., 759 F.2d 1032, 1044 (2d Cir. 1985).
\textsuperscript{21} Id.
from disposal sites; (3) current owners and operators of facilities with contamination; and (4) owners and operators of facilities at the time of disposal of the waste.\textsuperscript{22} These parties are responsible for response costs expended by the federal government or a state or, via injunction, can be held responsible for cleaning the site themselves.\textsuperscript{23}

### B. Retroactive Application to Pre-1980 Pollution

The courts have uniformly upheld the liability provisions of CERCLA.\textsuperscript{24} Most of the challenges to date have involved the retroactive application of CERCLA liability, based on the Ninth Amendment prohibition of ex post facto laws as well as the Fifth and Fourteenth Amendments’ guarantees of substantive due process and prohibition of uncompensated takings.\textsuperscript{25} Congress did not explicitly state its intent to apply CERCLA liability retroactively.\textsuperscript{26} Two cases established retroactive liability by interpreting sections 106 and 107 of CERCLA to infer that polluters must pay for cleanup even if the actions were committed before the statute’s passage.\textsuperscript{27}

\textit{State of Ohio ex rel. William J. Brown v. Georgeoff} first established the principle of retroactive application of CERCLA in 1983.\textsuperscript{28} In that case, the State of Ohio attempted to impose CERCLA liability on polluters who dumped regulated chemicals five years before CERCLA’s enactment.\textsuperscript{29} In order to resolve retroactivity in the absence of plain statutory language, the district court relied on legislative history to determine that Congress intended the liability to apply to both prior and future actions.\textsuperscript{30}

After these early decisions establishing retroactivity, a series of cases followed that attempted to attack the constitutionality of the ret-

\begin{itemize}
  \item \textsuperscript{22} 42 U.S.C. § 9607(a).
  \item \textsuperscript{23} Id. §§ 9606(a), 9607(a).
  \item \textsuperscript{24} See, e.g., United States v. Monsanto Co., 858 F.2d 160, 174 (4th Cir. 1988); United States v. Northeastern Pharm. & Chem. Co., 810 F.2d 726, 733–34, 749 (8th Cir. 1986) [NEPACCO].
  \item \textsuperscript{28} See 562 F. Supp. at 1302.
  \item \textsuperscript{29} Id.
  \item \textsuperscript{30} Id. at 1308–09, 1314.
\end{itemize}
roactive application of CERCLA.\textsuperscript{31} Perhaps the most important of these cases from a substantive due process standpoint is \textit{United States v. South Carolina Recycling \& Disposal, Inc.}\textsuperscript{32} In that case, the district court found no constitutional violation because CERCLA was not in fact retroactive.\textsuperscript{33} The court noted that CERCLA is a remedial “statute that attaches liability to present conditions stemming from past acts [and] does not necessarily have retroactive effects that are subject to [substantive] due process limitations.”\textsuperscript{34}

The \textit{South Carolina Recycling} court relied heavily on \textit{Usery v. Turner Elkhorn Mining Co.}, which was the leading case dealing with constitutional law and retroactive statutes.\textsuperscript{35} The \textit{Turner Elkhorn} Court held that economic statutes violate substantive due process if they are irrational and arbitrary.\textsuperscript{36} The \textit{South Carolina Recycling} court found that CERCLA, as applied retroactively, was in line with the reasoning of \textit{Turner Elkhorn} because it was a rational means to accomplishing Congress’s goal.\textsuperscript{37} Further, the court noted that South Carolina Recycling could be held liable because there was a reasonable nexus between the actors and the alleged harm.\textsuperscript{38} In determining whether this nexus existed, the court reasoned: “Congress intended through CERCLA to create a broad remedial statute which allocates to those persons responsible for creating dangerous conditions, and who profited from such activities, the true costs of their enterprise.”\textsuperscript{39} It is therefore evident that the court found it rational for Congress to spread the costs of liabilities from pollution among parties who caused or benefited from that pollution, and therefore that there was no due process violation.\textsuperscript{40}

In \textit{United States v. Northeastern Pharmaceutical \& Chemical Co. (NEPACCO)}, the defendant was found to have disposed of several fifty-five-gallon drums of hazardous wastes on the Denney Farm from 1970 to 1972.\textsuperscript{41} Despite the fact that the acts were committed prior to the passage of CERCLA, the Court of Appeals for the Eighth Circuit held

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\item \textsuperscript{32} See 653 F. Supp. at 996–98.
\item \textsuperscript{33} Id. at 996.
\item \textsuperscript{34} Id.
\item \textsuperscript{35} Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976); see Whalin, supra note 26, at 727.
\item \textsuperscript{36} \textit{Turner Elkhorn}, 428 U.S. at 18.
\item \textsuperscript{37} S.C. Recycling, 653 F. Supp. at 997–98; see \textit{Turner Elkhorn}, 428 U.S. at 18.
\item \textsuperscript{38} See \textit{Turner Elkhorn}, 428 U.S. at 18; S.C. Recycling, 653 F. Supp. at 997–98.
\item \textsuperscript{39} S.C. Recycling, 653 F. Supp. at 998.
\item \textsuperscript{40} Id.
\item \textsuperscript{41} \textit{NEPACCO}, 810 F.2d 726, 729–30 (8th Cir. 1986).
\end{itemize}
that “[c]leaning up inactive and abandoned hazardous waste disposal sites is a legitimate legislative purpose, and Congress acted in a rational manner in imposing liability . . . upon those parties who created and profited from the sites . . . .”  

NEPACCO is important for three major reasons: (1) it reaffirmed that CERCLA was intended to apply retroactively; (2) it supported the reasoning in South Carolina Recycling that substantive due process is not violated in cases when an enterprise is assigned liability because it caused or benefited from an activity; and (3) it held that government cleanup of toxic sites is not a taking at all because no property interest is affected.

These cases are interesting because retroactive statutes are typically met with disfavor. Justice Story noted in his treatise on the Constitution that “[r]etrospective laws are, as a rule, of questionable policy, and contrary to the general principle that legislation . . . ought not to change the character of past transactions carried on upon the faith of then existing law.” The specter of retroactivity has troubled even more recent Supreme Court Justices because such laws “can deprive citizens of legitimate expectations and upset settled transactions.”

The courts have looked to the Ex Post Facto Clause as well as the takings and substantive due process provisions of the Fifth and Fourteenth Amendments to demonstrate the constitutional concerns with retroactive laws. Due to these concerns, the courts seem to hold retroactive statutes to a slightly higher level of scrutiny and validate them only when such statutes are “clearly just and reasonable, and conducive to the general welfare,” yet appear to invalidate them only under the “most egregious of circumstances.”

C. Defenses to CERCLA Litigation

The initial version of CERCLA provided a defense if the release of toxic substances was due to: (1) an act of God; (2) an act of war; or

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42 Id. at 734.
43 Id. at 733–34.
45 2 J. Story, Commentaries on the Constitution § 1398 (1891).
49 E. Enters., 524 U.S. at 550 (Kennedy, J., concurring).
(3) an act or omission of a third party. The third-party defense is a difficult one because the statute requires that the party not be “an employee or agent of the defendant, or . . . one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant . . . .”

In terms of practical availability, the defense has not often been successful because purchase and sale agreements create a contractual relationship, and therefore many “innocent landowners” who purchased contaminated property—but who did not contribute to or have any knowledge of the contamination—would be held liable for massive cleanup costs. This well-settled standard of liability through contractual relationship can cause serious problems for parties who did not contribute to or benefit from pollution on their property.

Partially in response to unintended innocent landowner liability, Congress passed the Superfund Amendments and Reauthorization Act of 1986 (SARA). SARA includes a provision that provides a defense for innocent landowners who had no reason to know that the property was polluted at the time of purchase. The owner must have taken “all appropriate inquiries…into the previous ownership and uses of the facility in accordance with generally accepted good commercial and customary standards and practices.” At a minimum, the statute requires that purchasers complete a title search to determine all prior uses of the property. In addition, many courts now consider “all appropriate inquiry” to include costly environmental site assessments. The result has been an explosion of due diligence and environmental site investigations; however, the innocent landowner de-

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51 Id. § 9607(b)(3).
53 Baker & Baroody, supra note 52, at 116; see Shore Realty, 759 F.2d at 1044, 1049; Jersey City Redevelopment, 655 F. Supp. at 1261.
57 Id. § 9601(35) (B)(iii)(III).
fense is rarely successful when raised in court because the courts hold parties to an extremely high standard. If after reviewing the title history, there is any possibility that a landowner should have known that a commercial or industrial use had occurred on the property, costly site assessments must be conducted. However, merely conducting a thorough environmental assessment does not shield an owner from liability should pollution later be found.

Another potential pitfall for innocent landowners exists in the structure of CERCLA. In light of the retroactive nature of CERCLA, parties can be held responsible for discharges that were not known to be toxic at the time of disposal. This makes it quite possible that even when a landowner conducts an appropriate inquiry, materials or substances on the property that are not currently tested for or known to be toxic could cause future liability for landowners.

D. State Superfund Laws

Following the passage of CERCLA, many states enacted their own Superfund laws to deal with toxic sites that would not make the National Priorities List. Massachusetts was one such state, enacting the Massachusetts Oil and Hazardous Material Release, Prevention, and Response Act in 1983 (Massachusetts Superfund Law). The Massachusetts Superfund Law has been amended several times, most notably in 1986 by referendum, and in 1992 to clarify the liability provisions and delegate authority for cleanups. The law uses CERCLA’s definition of “hazardous substances” and also applies a similar liability scheme. However, the Massachusetts statute goes much further in three regards. First, Massachusetts has a broader liability net by in-

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60 See generally Serafini, 706 F. Supp. at 353 (holding that the standard should be determined based on a series of factors including the expertise of the purchaser and the extent of site assessment).
61 See Baker & Baroody, supra note 52, at 125.
62 See id. at 116–17.
63 See NEPACCO, 810 F.2d 726, 732–33 (4th Cir. 1988).
64 See id.
69 Id. § 2.
70 Id. §§ 5, 13.
Lack of Causative Nexus and Substantive Due Process

cluding—in addition to CERCLA’s four categories of PRPs—“any person who otherwise caused or is legally responsible for a release or threat of release of oil or hazardous material from a vessel or a site . . . .” This catchall provision has effectively captured more “middle-men” due to its open-ended nature.

Second, Massachusetts treats the cleanup costs associated with a contaminated site as a debt owed to the Commonwealth—due at twelve percent interest per year. Because the cleanup costs constitute a debt, a “superlien” is placed on the property and the costs act as a lien on all property rights presently or subsequently owned, thereby holding the original and all subsequent landowners liable for cleanup costs. Finally, the Massachusetts statute allows the government to collect treble damages, making the potential liability astronomical.

Like the federal model, Massachusetts applies retroactive, strict, joint and several liability for cleanup costs. This means that the parties mentioned are liable under the statute even without fault, a premise upheld by the Massachusetts courts:

It is insufficient under section 5(c)(3) . . . to prove due care in transporting the hazardous wastes to the site only. Otherwise, [parties] would not be liable if they proved that they were not negligent. This reading of the third-party defense would undermine the strict liability provisions of c. 21E.

The Massachusetts Superfund Law, like CERCLA, contains limitations to the liability of parties. Like CERCLA, parties are not liable for releases caused by an act of God or war. However, Massachusetts also provides exemptions for bona fide tenants, many government agencies, lenders, and downgradient property owners. In addition, under the Massachusetts Superfund Law, current owners/operators who did not own or operate at the time of release, or did not cause or contribute to the release or threat of release, are only liable up to the

71 Id. § 5(a)(5).
74 Id.
75 Id. § 5(e).
76 See id. § 5.
79 Id. § 5(c)(1), (2).
80 Id. § 5D.
value of the property, essentially limiting the liability to the investment in the property.\footnote{Id. § 5(d).}

II. \textit{Eastern Enterprises}

\textit{Eastern Enterprises} has received a fair amount of attention from the legal community, but most of the focus has been on the issues of defining takings and retroactive statutes in general.\footnote{See generally Karen S. Danahy, \textit{CERCLA Retroactive Liability in the Aftermath of Eastern Enterprises v. Apfel}, 48 \textit{Buff. L. Rev.} 509 (2000) (discussing \textit{Eastern Enterprises}'s implications for retroactive statutes); Whalin, \textit{supra} note 26.} \textit{Eastern Enterprises} implicates a third important proposition, however. The most innovative element of the \textit{Eastern Enterprises} decision may well be its adoption of a causative nexus inquiry which, depending on how the votes are analyzed, is supported by at least a 5–4 vote, and arguably represents an implicit consensus.\footnote{See E. Enters. v. Apfel, 524 U.S. 498, 531 (1998); \textit{id.} at 550 (Kennedy, J., concurring); \textit{id.} at 560 (Breyer, J., dissenting).} It can be argued that under this third proposition from \textit{Eastern Enterprises}—which has not received sufficient academic notice—that when the government compels actions by private parties or attaches liability for alleged harms, a causative nexus must exist between the actors and the harm.\footnote{See opinions cited \textit{supra} note 83.} Although the Justices split as to outcome of the case, on this point it appears that all nine justices followed a substantive due process causative nexus reasoning in their various opinions.\footnote{See opinions cited \textit{supra} note 83.} After analyzing this third theme in the \textit{Eastern Enterprises} opinions, it appears that the lack-of-causative-nexus defense might apply in the setting of innocent property owners’ liability for toxic cleanups.\footnote{See 42 U.S.C. §§ 9601(35)(B) (2000), 9607(B); \textit{Mass. Gen. Laws} ch. 21E, § 5(d).} \textit{Eastern Enterprises} may be rightly or wrongly decided as to its particular outcome, but its substantive due process inquiry is clearly important and useful in framing possible limits for regulatory impositions of financial liability upon innocent third parties.\footnote{See generally John Decker Bristow, Note, \textit{Eastern Enterprises v. Apfel: Is the Court One Step Closer to Unraveling the Takings and Due Process Clauses?}, 77 \textit{N.C. L. Rev.} 1525, 1525–26}

A. Eastern Enterprises: Substantive Due Process and Takings

It is little wonder that there is marked confusion over when and how to undertake a substantive due process inquiry.\footnote{See 42 U.S.C. §§ 9601(35)(B), 9607(B); \textit{Mass. Gen. Laws} ch. 21E, § 5(d).} \textit{Eastern Ente-
prises comes at the end of a long period of inconsistent handling of substantive due process and takings cases. This series of divergent decisions over the last seventy years makes the clarification by the Eastern Enterprises Court that much more significant.

The protection of due process of law is rooted in the Fifth Amendment’s guarantee that “[n]o person shall be . . . deprived of . . . property, without due process of law.” This text was copied exactly into the Fourteenth Amendment to apply due process to state government actions as well. Courts have found that the Due Process Clauses, in addition to providing procedural rights, also include substantive protections. The clause has been interpreted to protect citizens from “arbitrary and irrational” laws and to prevent government actions which shock the conscience, ensuring “fair application of law.” Stated plainly, though legislation comes to the courts with a presumption of constitutionality, the Due Process Clauses protect citizens by ensuring principles of fundamental fairness in the way legislatures enact laws that impose burdens on private actors. Such actions must be rationally related to a government purpose, and the analysis “turn[s] on the legitimacy of Congress’ judgment.” Cases must be seen “in light of a basic purpose: the fair application of law, which purpose hearkens back to the Magna Carta.”

The Supreme Court has been hesitant to invalidate economic legislation on due process grounds, due to a fear of judges substituting their own judgment for the will of legislatures. The Court, however, has ruled that it may invalidate legislation “under the most egre-
gious of circumstances.”

Those circumstances arise when legislatures enact laws that are “fundamentally unfair” because such laws are “basically arbitrary.”

1. The *Lochner*-Era’s Broad Interpretation of Substantive Due Process

In the nineteenth century and early twentieth century, the Court regularly used substantive due process to invalidate legislation. This period of time is known as the *Lochner* Era, named after *Lochner v. New York*. *Lochner* was the first case to hold that government actions were void for lack of substantive due process if they were arbitrary or irrational. Similarly, in *Truax v. Corrigan*, the Supreme Court held that fundamental property rights exist and must be respected by states. Despite the fact that the Court has overruled most of *Lochner*, many appellate courts over the last twenty-five years have slowly returned to invalidating economic legislation on substantive due process grounds.

*Lochner v. New York* was the apex of substantive due process litigation. In *Lochner*, a bakery owner was charged with requiring and permitting an employee to work over sixty hours per week, in violation of the labor laws of the State of New York. The Court was careful to note that the employee was not forced to work over sixty hours, and that the New York statute was an absolute prohibition upon the employer permitting, under any circumstances, more than ten hours’ work to be done in his establishment. The employee may desire to earn the extra money which would arise from his working more than

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100 Id. at 550 (Kennedy, J., concurring); see Planned Parenthood v. Casey, 505 U.S. 833, 953 (1992) (Rehnquist, C.J., dissenting in part).
101 E. Enters., 524 U.S. at 557 (Breyer, J., dissenting).
103 See 198 U.S. 45 (1905).
104 Id. at 56, 63.
105 257 U.S. 314, 328 (1921).
107 Id. at 924–26; see Dolan v. City of Tigard, 512 U.S. 374, 405 (1994) (Stevens, J., dissenting) (explaining that the majority decision resurrects economic substantive due process); Littlefield v. City of Afton, 785 F.2d 596, 604, 607–08 (8th Cir. 1986); Epstein v. Township of Whitehall, 696 F. Supp. 309, 312–14 (E.D. Pa. 1988) (holding that economic laws cannot be arbitrary or irrational).
109 *Lochner*, 198 U.S. at 52.
the prescribed time, but this statute forbids the employer from permitting the employee to earn it.\textsuperscript{110}

The Court continued by establishing that the right to contract for work is a fundamental right protected by the Due Process Clause of the Fourteenth Amendment.\textsuperscript{111} Though the Court recognized that the state had within its police powers the right to prevent certain types of contracts when specific factors—such as general health and safety—were present, it laid a foundation for balancing the power of the state against the rights of individuals.\textsuperscript{112} In \textit{Lochner}, the Court therefore found that it must determine whether there was a reasonable ground for New York to limit the ability of bakers to enter into contracts for more than sixty hours per week.\textsuperscript{113}

After setting the stage for the balancing test, the Court quickly found that there was no “reasonable ground for interfering with the liberty of person or the right of free contract, by determining the hours of labor, in the occupation of a baker.”\textsuperscript{114} Because New York did not have a legitimate reason for limiting the right of the employee, the statute was found to be an unconstitutional violation of the Due Process Clause.\textsuperscript{115}

2. Beyond \textit{Lochner}: The Current State of Due Process

Today, much of \textit{Lochner} has been overruled, and the \textit{Lochner}-era substantive due process cases have been maligned and repudiated by the legal community.\textsuperscript{116} The major reason for the disapproval met by the \textit{Lochner} era is the enormous power claimed by the courts to invalidate legislation.\textsuperscript{117} This sweeping power has been seen by many as the ultimate anathema to democratic legislative power.\textsuperscript{118} Much of this

\textsuperscript{110} \textit{Id.} at 52–53.
\textsuperscript{111} \textit{Id.} at 53.
\textsuperscript{112} \textit{Id.} at 53–54.
\textsuperscript{113} \textit{Id.} at 57.
\textsuperscript{114} \textit{Id.}
\textsuperscript{115} \textit{Lochner}, 198 U.S. at 57–58. The Court stated:

The act must have a more direct relation, as a means to an end, and the end itself must be appropriate and legitimate, before an act can be held to be valid which interferes with the general right of an individual to be free in his person and in his power to contract in relation to his own labor.

\textit{Id.}

\textsuperscript{116} Phillips, \textit{supra} note 102, at 921–23.
\textsuperscript{117} \textit{Id.} at 921–22.
\textsuperscript{118} \textit{Id.} at 922.
criticism is based on the presumption that the *Lochner* Court readily imposed its own ideas of economic and policy goals into its decisions.\(^{119}\) It is claimed that the Court often substituted its own wisdom and desires—by judging for itself which prohibitions and requirements were legitimate and rational—for the judgment of legislatures.\(^{120}\)

In 1937, the Supreme Court ended the *Lochner* era with *West Coast Hotel Co. v. Parrish*.\(^{121}\) Following *West Coast Hotel*, the Court entered a period of levying a very lenient standard for the government to rebut substantive due process challenges. Such legislation seemingly always survived substantive due process inquiries.\(^ {122}\) However, certain important parts of the *Lochner* substantive due process analysis have been retained, and economic substantive due process seems to be making a resurgence.\(^ {123}\) Courts are increasingly deciding economic cases on the basis of substantive due process by determining whether or not the government action is rationally related to a specific purpose.\(^ {124}\) Though these cases are still in the minority when contrasted with the large number of cases in which substantive due process claims are rejected, the courts now recognize that economic legislation must at least be analyzed under the rational basis test and, at a minimum, a challenged law must: (1) aim at achieving a legitimate public purpose; (2) use means reasonably necessary to achieve that purpose; and (3) not be unduly oppressive.\(^ {125}\) Though most of the cases deal with state or municipal government actions against private parties—and therefore are analyzed under the Fourteenth Amendment’s Due Process Clause—there are several cases involving the federal government that show that the Fifth Amendment’s Due Process Clause protects the same interests and requires the same rational basis test.\(^ {126}\)

\(^{119}\) See id. at 923.

\(^{120}\) See id. at 922–23.

\(^{121}\) 300 U.S. 379 (1937).

\(^{122}\) Phillips, supra note 102, at 923–24.

\(^{123}\) See id. at 924–25.

\(^{124}\) See, e.g., Village of Belle Terre v. Boraas, 416 U.S. 1, 15–16 (1974); Littlefield v. City of Afton, 785 F.2d 596, 607–08 (8th Cir. 1986) (holding that an arbitrary or capricious denial of a building permit is a violation of substantive due process).

\(^{125}\) E.g., Guimont v. Clarke, 854 P.2d 1, 14 (Wash. 1993) (holding that substantive due process inquiries are governed by a three-part test).

B. Eastern Enterprises v. Apfel: The Case

1. Background

Eastern Enterprises, a Massachusetts coal company, opposed provisions in the Coal Act of 1974, which required compensation for harms to coal miners’ health by establishing an employee health and retirement benefit fund. The Coal Act was drafted to determine liability for particular employers based on the Commissioner of Social Security’s (Commissioner) assessment of the premium payments according to the following formula:

[T]he Commissioner of Social Security shall . . . assign each coal industry retiree who is an eligible beneficiary to a signatory operator which (or any related person with respect to which) remains in business in the following order:

(1) First, to the signatory operator which—
(A) was a signatory to the 1978 coal wage agreement or any subsequent coal wage agreement, and
(B) was the most recent signatory operator to employ the coal industry retiree in the coal industry for at least 2 years.

(2) Second, if the retiree is not assigned under paragraph (1), to the signatory operator which—
(A) was a signatory to the 1978 coal wage agreement or any subsequent coal wage agreement, and
(B) was the most recent signatory operator to employ the coal industry retiree in the coal industry.

(3) Third, if the retiree is not assigned under paragraph (1) or (2), to the signatory operator which employed the coal industry retiree in the coal industry for a longer period of time than any other signatory operator prior to the effective date of the 1978 coal wage agreement.

This legislation assessed liability to any successor interests of a coal operator, even if these entities no longer produced coal.

With regards to Eastern Enterprises, the Coal Act therefore imposed liability to pay premiums based on the number of the company’s employees. Eastern Enterprises argued that congressional

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129 See id. § 9701(c)(2).
130 See id. § 9704(b)(2).
legislation assessing retroactive liability for retiree benefits was unconstitutional under the Fifth Amendment, and cast its attack on the statute in terms of both regulatory takings\textsuperscript{131} and substantive due process.\textsuperscript{132} The plurality opinion, authored by Justice O’Connor, held that the legislation constituted a takings violation,\textsuperscript{133} while Justice Kennedy’s concurring opinion denied that it was a taking, concluding instead that the legislation was void because it violated substantive due process.\textsuperscript{134} The dissent adopted and applied a substantive due process analysis, but reached a contrary conclusion, finding no violation.\textsuperscript{135}

Eastern Enterprises was established in 1929 as a Massachusetts Business Trust involved in coal mining operations in West Virginia and Pennsylvania.\textsuperscript{136} There is no question that Eastern Enterprises employed a number of miners who subsequently would be granted benefits by the Coal Act in 1992.\textsuperscript{137} In 1950, Eastern Enterprises entered into the National Bituminous Coal Wage Agreement (NBCWA), creating the United Mine Workers of America Welfare and Retirement Fund (“1950 W&R Fund”).\textsuperscript{138} The 1950 W&R Fund provided retirement and health care benefits through premium payments by coal mining companies.\textsuperscript{139} Under the terms of this agreement, the benefits could be revised at any time by the board of trustees, and in the period between 1950 and 1974, the trustees made frequent revisions to ensure the fiscal stability of the fund.\textsuperscript{140} Eastern Enterprises ceased its coal mining operations in 1965,\textsuperscript{141} however, and at that time had no long-term agreement with its workers to provide health benefits.\textsuperscript{142}

In 1974, the political landscape had changed in the coal mining industry generally, and as a result of amendments to the law, a new agreement was forged to provide permanent lifetime benefits to employees and their widows.\textsuperscript{143} This was the first agreement to explicitly include health benefits for retirees.\textsuperscript{144} The new provisions did not,
however, change the fixed-cost allocation or include liability beyond the life of the agreement. ¹⁴⁵ Quickly after its creation, it became evident that the funding of the plans was inadequate due to increases in eligibility and health care costs, ¹⁴⁶ resulting in congressional action to change the laws again in 1992 with the enactment of the Coal Act. ¹⁴⁷

The Coal Act merged the 1974 and 1950 funds, and assigned premium payments according to a formula. ¹⁴⁸ The new formula designated the amounts to any operator that had been bound by previous NBCWA agreements based on the length of service to a particular company. ¹⁴⁹ Congress’s purpose was “to identify persons most responsible for [1950 and 1974 Benefit Plan] liabilities in order to stabilize plan funding and allow for the provision of health care benefits to . . . retirees.” ¹⁵⁰ Because Eastern Enterprises had ceased coal mining operations by 1965, it challenged its liability under the Coal Act. ¹⁵¹

2. Eastern Enterprises and Takings: The Plurality

Writing for the initial plurality of four, Justice O’Connor based her opinion on the theory that the Coal Act violated the Takings Clause. ¹⁵² Justice O’Connor detailed the three factors of “economic” takings cases—that is, those cases in which the government has not actually seized property, but rather assigned a public burden to a private party: (1) the economic impact of the regulation; (2) its interference with investment-backed expectations; and (3) the character of the governmental action. ¹⁵³ Implicitly, however, the initial plurality reflected substantive due process reasoning in what it called a “takings” analysis. ¹⁵⁴ The core of Justice O’Connor’s takings analysis is that the act applied liability to Eastern Enterprises for actions it took decades before any promises were made, and with no active causation

¹⁴⁵ Id.
¹⁴⁶ Id. at 509–10.
¹⁴⁹ Id.
¹⁵⁰ Id.
¹⁵² E. Enters., 524 U.S. at 515.
¹⁵³ Id. at 523, 529.
¹⁵⁴ Id. at 523–24.
¹⁵⁵ See id.
Interestingly, three of the four cases used by the plurality in support of its analysis were actually challenges based on substantive due process, as pointed out by Justice Kennedy in his concurrence.\textsuperscript{156}

The plurality applied the three takings factors and found that the Coal Act was unconstitutional as applied to Eastern Enterprises because it implicated fundamental principles of fairness by imposing “a burden that is substantial in amount, based on the employers’ conduct far in the past, and [conduct] unrelated to . . . any injury they caused.”\textsuperscript{157}

This demonstrates all three prongs of Eastern Enterprises’s importance: (1) takings burdens; (2) retroactivity; and (3) the need for a causal nexus to exist between the injury which Congress is addressing in the legislation and the party being held liable.\textsuperscript{158} The due process inquiry was not undertaken and analyzed by the plurality of four because Justice O’Connor framed her decision as a finding that the Coal Act was an unconstitutional taking.\textsuperscript{159}

3. The Kennedy Concurrence and Substantive Due Process

Justice Kennedy’s opinion forces the analysis of Eastern Enterprises into the realm of substantive due process.\textsuperscript{160} Justice Kennedy agreed with the plurality that severe retroactivity can invalidate a law, but insisted that the question be viewed through a substantive due process lens.\textsuperscript{161} Justice Kennedy took issue with several aspects of the plurality’s reasoning in his concurrence.\textsuperscript{162} First and foremost, Justice Kennedy posited that the Takings Clause of the Fifth Amendment involves actual seizure of property by the government or regulatory restrictions that in essence limit the use or value of the property.\textsuperscript{163} Put simply, the Takings Clause only operates on a real or regulatory “take.”\textsuperscript{164} Justice Kennedy underlined this point by showing that the Coal Act, while creating financial liability for Eastern Enterprises, does not “op-
erate upon or alter an identified property interest, and is not applicable to or measured by a property interest. . . . The law simply imposes an obligation to perform an act, the payment of benefits.”

Because Congress has substantial leeway in how it assigns burdens, a takings analysis requires the Court to apply a complicated and fact-intensive inquiry in order to assess whether or not a taking has occurred. Further, Justice Kennedy noted that the Takings Clause does not typically invalidate legislation; it gives government the option either to cease its action or to provide compensation for the property taken. Justice Kennedy supported this view with precedent:

“As its language indicates, and as the Court has frequently noted, [the Takings Clause] does not prohibit the taking of private property, but instead places a condition on the exercise of that power. This basic understanding of the Amendment makes clear that it is 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.”

In *Eastern Enterprises*, Justice Kennedy deemed it impossible to devise a monetary remedy, but rather he stated that the issue “appears to turn on the legitimacy of Congress’ judgment.” According to Justice Kennedy, the appropriate vehicle for invalidating legislation and addressing notions of fairness, as mentioned above, is the Due Process Clause.

Justice Kennedy continued his opinion with a thorough due process analysis. Most importantly, Justice Kennedy noted that severely retroactive legislation violates due process because such laws “change the legal consequences of transactions long closed . . . [and] destroy the reasonable certainty and security which are the very objects of property ownership.” A significant further aspect of the Kennedy concurrence is its inquiry into the presence or absence of a causative nexus.

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165 Id. (Kennedy, J., concurring).
166 See id. at 542 (Kennedy, J., concurring).
167 Id. at 545 (Kennedy, J., concurring).
168 Id. (Kennedy, J., concurring) (quoting First English Evangelical Church of Glendale v. County of Los Angeles, 482 U.S. 304, 314–15 (1987)) (alterations and omitted citations in original).
169 E. Enters., 524 U.S. at 545 (Kennedy, J., concurring).
170 Id. (Kennedy, J., concurring).
171 Id. at 547–50 (Kennedy, J., concurring).
172 Id. at 548 (Kennedy, J., concurring).
In part, this was a follow-up on the retroactivity discussion. Because Eastern Enterprises left the business of coal operation long before the statute imposed liability upon it, and because it never agreed to any type of long-term benefits, the company was not within the causal nexus of harm necessary in due process jurisprudence. Justice Kennedy explained this point by stating that Eastern Enterprises “was not responsible for their expectation of lifetime health benefits” and therefore, “the Coal Act bears no legitimate relation to the interest which the Government asserts in support of the statute.”

But further, Justice Kennedy’s opinion incorporated the logic of Justice O’Connor’s plurality—that Eastern Enterprises had not caused the injuries—and argued that the issue was more properly considered as a substantive due process analysis. As Justice Kennedy noted, this was the very precept used by the plurality, though they inappropriately labeled it a takings analysis.

4. Support for the Substantive Due Process Approach from the Dissent

Irrespective of the vote count as to outcome, the dissent is notable for its agreement with Justice Kennedy that the issue must be framed in terms of substantive due process. The dissent, authored by Justice Breyer, applied a due process analysis, and agreed with Justice Kennedy that the Takings Clause did not apply. Justice Breyer detailed a brief history of the Court’s use of the Takings Clause in his analysis. First, he noted that the purpose of the Takings Clause was not “preventing arbitrary or unfair government action, but [rather] providing compensation for legitimate government action that takes ‘private property’ to serve the ‘public’ good.” The dissent, therefore, also focused on whether or not a taking occurred in Eastern Enterprises, noting that “[t]he ‘private property’ upon which the Clause tradi-

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173 See id. at 549–50 (Kennedy, J., concurring).
174 Id. at 547–50 (Kennedy, J., concurring).
175 See E. Enters., 524 U.S. at 550 (Kennedy, J., concurring).
176 Id. (Kennedy, J., concurring).
177 Id. at 549 (Kennedy, J., concurring).
178 Id. at 549–50 (Kennedy, J., concurring).
179 Id. (Kennedy, J., concurring).
180 Id. at 554 (Breyer, J., dissenting).
181 E. Enters., 524 U.S. at 554 (Breyer, J., dissenting).
182 Id. at 554–58 (Breyer, J., dissenting).
183 Id. at 554 (Breyer, J., dissenting).
tionally has focused is a specific interest in physical or intellectual property.”

The dissent noted that in one of the cases cited by the plurality, Connolly v. Pension Benefit Guaranty Co., the Court found that in fact no taking had occurred because “the Government does not physically invade or permanently appropriate any . . . assets for its own use.” Like Justice Kennedy, the dissent believed that “there is no need to torture the Takings Clause to fit this case.”

Justice Breyer disagreed that there was a due process violation, in part because he believed that a causal nexus existed between Eastern Enterprises and the coal miners. “The substantive question before us,” he wrote, “is whether or not it is fundamentally unfair to require Eastern to make future payments for health care costs of retired miners and their families, on the basis of Eastern’s past association with these miners.” Justice Breyer emphasized that there was a relationship between Eastern Enterprises and the miners it had employed, as well as a series of “promises” made by Eastern Enterprises to those miners. Clearly, the dissent focused on the nexus that existed between the miners and Eastern Enterprises, and found that under a due process analysis, the nexus was sufficient to render Congress’s actions constitutional. Therefore, it appears that the dissent was willing to say that common law enterprise liability can create a sufficient nexus to pass constitutional muster.

Due to the split in analyses, lower courts have not read Eastern Enterprises to hold any specific rule of law. The takings analysis adopted by the plurality, expanding the takings doctrine to include liabilities, was supported by a minority of Justices. If one counts the votes, however, a majority opinion—composed of Justice Breyer’s dis-

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184 Id. (Breyer, J., dissenting).
185 475 U.S. 211 (1986).
186 Id. at 225.
187 E. Enters., 524 U.S. at 556 (Breyer, J., dissenting).
188 See id. at 559–60 (Breyer, J., dissenting).
189 Id. at 558–59 (Breyer, J., dissenting).
190 Id. at 559–60 (Breyer, J., dissenting).
191 See id. (Breyer, J., dissenting).
192 See id. at 566–67 (Breyer, J., dissenting).
194 See E. Enters., 524 U.S. at 538.
sent and Justice Kennedy’s concurrence—held that substantive due process, and not takings, is the appropriate analysis for government actions against a private party.195

In terms of property rights, the Court placed particular emphasis on “reasonably settled expectations”196 and the “reasonable certainty and security which are the very objects of property ownership.”197 In addition, due process principles require legislators to establish a rationale for why they have chosen to place burdens on private citizens, in order to prevent “the legislative ‘tempt[ation] to use . . . legislation as a means of retribution against unpopular groups or individuals.’”198

In essence, courts must invalidate laws that deprive citizens of property unless a rational, causal nexus exists between the party’s injury and the government’s action.199

Interestingly, the Justices who chose a takings analysis rather than a due process analysis have tended to disfavor invalidating legislation based on due process challenges in the past.200 Frequently, however, these same Justices have been strong protectors of individual property rights.201 Thus, the Justices of the plurality created a paradox—one that could only be resolved by “tortur[ing] the takings clause” to achieve the desired result.202

*Eastern Enterprises* does not provide an explicit test for substantive due process inquiries; rather, it uses the same ambiguous language that permeates substantive due process jurisprudence such as “arbitrary and irrational.”203 However, the *Eastern Enterprises* Court did ask the same questions that have been asked in prior substantive due process cases: did the party cause the harm, and if not, did it enjoy a sufficiently direct benefit from the harm? These questions appropriately frame a substantive due process argument, and without affirmative answers, parties are not within a causative nexus of harm.

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195 See *id.* at 539 (Kennedy, J., concurring); *id.* at 554 (Breyer, J., dissenting).
196 *Id.* at 559 (Breyer, J., dissenting).
197 *Id.* at 548 (Kennedy, J., concurring).
198 *Id.* (Kennedy, J., concurring) (quoting *Landgraf v. USI Film Prods.* 511 U.S. 244, 266 (1994) (first alteration in original)).
199 See *id.* at 559 (Breyer, J., dissenting).
201 See *id*.
202 *E. Enters.*, 524 U.S. at 556 (Breyer, J., dissenting).
203 *Id.* at 547 (Kennedy, J., concurring).
III. How Might an Eastern Enterprises Causative Nexus Substantive Due Process Defense Arise in the Toxic Cleanup Field?

Distilling the element of causative nexus from Eastern Enterprises’s substantive due process inquiry invites several interesting further inquiries in environmental regulatory settings. One prime area for testing the proposition is the field of toxic cleanup liability.

There are three seemingly unfair situations in which innocent landowners can be held liable under CERCLA and state Superfund laws. Eastern Enterprises does not answer whether these cases are valid under the Constitution. The value of Eastern Enterprises, however, lies in the way in which these cases should be analyzed. According to the Court’s reasoning, the appropriate inquiry is whether the party has caused or sufficiently benefited from the pollution.

One problematic example of innocent landowner liability is when a landlord leases property to a tenant who “midnight dumps” chemicals onto the property. Even if the landlord diligently oversees the property, there can be situations in which the landlord will not be able to prevent the tenant from polluting the land and will still be held liable for the cleanup costs. Several cases illustrate this point. In United States v. A & N Cleaners & Launderers, Inc., the court found a landowner strictly liable for any hazardous releases by a tenant or sub-tenant. The A & N Cleaners court did not allow the landlord to use the innocent landowner defense because there was no inquiry into the disposal practices of the tenant. Similarly, in United States v. Monsanto Co., the Court of Appeals for the Fourth Circuit held that the innocent landowner defense is not applicable when there is “willful or negligent blindness on the part of absentee owners.” Both courts were careful to note that their decisions did not require land-

204 See Baker & Baroody, supra note 52, at 119–21.
205 See E. Enters., 524 U.S. at 531; id. at 550 (Kennedy, J., concurring); id. at 560 (Breyer, J., dissenting).
206 Midnight dumping refers to tenants who, unbeknownst to the landlord, discharge pollutants in a manner that is difficult to discover. This might include releasing barrels of oil late at night into effluent streams or tampering with monitoring equipment to hide illegal polluting. Since a contractual relationship exists, the landlord can still be held liable for cleanup under CERCLA.
208 854 F. Supp. at 244.
209 Id.
210 858 F.2d 160, 169 (4th Cir. 1988).
lords to practice specific investigatory methods; however, neither court defined what constitutes non-negligent investigation sufficient to maintain an innocent landowner defense.\textsuperscript{211}

A substantive due process claim would require a different approach to determine whether or not the landlord is within the causative nexus necessary for liability.\textsuperscript{212} In the example above, a court would need to address whether or not the landlord caused the pollution, and if not, whether the landlord directly benefited from the harm.\textsuperscript{213} It appears that in a midnight dumping case, the tenant is the sole polluter; thus, assessment of the landowner’s liability would require an inquiry into any possible benefits that he or she received from allowing the pollution to occur.\textsuperscript{214} Certainly, the landlord profited from leasing the property, but was the profit enhanced due to the pollution? Was the landlord paid extra money to look the other way, or was there some other benefit granted to allow for the pollution? These questions could guide a court in determining whether or not a sufficient nexus exists between the landlord and the liability.\textsuperscript{215}

Another troubling scenario occurs when purchasers do not meet the “all appropriate inquiry” standard needed for the innocent landowner defense.\textsuperscript{216} Suppose, for example, that Mom and Pop Retiree purchase their dream home for $200,000 and begin renovations with what is left of their retirement savings. Prior to purchasing the home, the Retirees conducted a sixty-year title search and saw no indication of any commercial or industrial activity.\textsuperscript{217} Because there did not seem to be a need, they did not conduct an environmental site assessment. However, when they break ground to renovate the house, toxins are found. Mom and Pop call EPA and remediation ensues. EPA is unable to find the responsible parties, however, and thus, it holds the Retirees liable for the entire cleanup cost. While it is likely that EPA would enter into settlement negotiations and greatly reduce this burden, the

\textsuperscript{211} See id.; A & N Cleaners, 854 F. Supp. at 241, 243.
\textsuperscript{212} See E. Enters. v. Apfel, 524 U.S. 498, 531 (1998); id. at 550 (Kennedy, J., concurring); id. at 560 (Breyer, J., dissenting).
\textsuperscript{213} See opinions cited supra note 212.
\textsuperscript{214} See opinions cited supra note 212.
\textsuperscript{215} See opinions cited supra note 212.
\textsuperscript{217} Under CERCLA’s innocent landowner provisions, all-appropriate inquiry requires heightened diligence when indications of commercial or industrial activity are evident in a title search. Id. § 9601(35)(B)(iii).
statute, as currently interpreted, would hold the Retirees responsible for all costs associated with remediation.\footnote{218}{See 42 U.S.C. § 9607(a) (1); New York v. Shore Realty Corp., 759 F.2d 1032, 1044 (2d Cir. 1985); Baker & Baroody, supra note 52, at 115–16.}

Since the property was already polluted when the Retirees took ownership, the court would need to examine whether the Retirees benefited from purchasing contaminated property. Several factors could shape this inquiry, such as whether the Retirees paid a discounted price for the property.\footnote{219}{See AL Tech Specialty. Steel Corp. v. Allegheny Int’l Credit Corp., 104 F.3d 601, 607 n.8 (3d Cir. 1997) (holding that a discounted price could be seen as a benefit created by the pollution and should be a factor in a CERCLA analysis).} If they did not, it would seem that the Retirees were sufficiently outside the causal nexus, and holding them liable for cleanup would be irrational and would shock the conscience.

The third scenario occurs in states such as Massachusetts, which cap rather than excuse liability for innocent landowners up to the value of the land.\footnote{220}{Mass. Gen. Laws ch. 21E, § 5(d) (2002).} Because the innocent landowner defense caps liability only at the value of the land, even when an illegal trespass and dumping occurs on the property, the landowner can be held liable for the entire value of the property.\footnote{221}{See id.} For Example, John and Jane Landowner reside on twenty-five acres in Norfolk, Massachusetts.\footnote{222}{Norfolk, Massachusetts was chosen for this example because it is a community that has industrial and commercial properties in reasonable proximity to large agricultural areas. Norfolk also has many lakes and ponds.} Midnight Dumper, who runs a “recycling” business next door, regularly backs his trailers full of fluorescent bulbs into the pond on the Landowners’ property late at night.\footnote{223}{Fluorescent light bulbs contain high amounts of mercury, a toxic substance. See Hazardous Waste Management System; Modification of the Hazardous Waste Program; Hazardous Waste Lamps, 64 Fed. Reg. 36,466, 36,467 (July 6, 1999) (codified at 40 C.F.R. pts. 260, 261, 264, 265, 268, 271, 273) (discussing fluorescent lamps’ toxicity and adding them to the Resource Conservation and Recovery Act list of universal wastes).} After several years of doing this, Dumper dissolves his business and disappears. When the Landowners see the bulbs in the pond, they call the Department of Environmental Protection, which informs them that, because they are innocent, they will only have to pay the state $650,000, the value of their land.\footnote{224}{See Mass. Gen. Laws ch. 21E, § 5(d).} Even if the Department of Environmental Protection uses its discretion to demand only half of the cleanup costs, the Landowners will be responsible for paying over $300,000 to remediate property that they never polluted.
Eastern Enterprises provides insight into how to address a substantive due process claim in such a scenario.\(^{225}\) Since the Landowners did not pollute the land themselves, a court should inquire whether they benefited from the pollution in any way.\(^{226}\) In this example, short of some sort of collusion between the neighbors, it is very difficult to envision a scenario in which the Landowners could possibly have benefited from this pollution.

**Conclusion**

To determine whether an Eastern Enterprises causative nexus exists between a Superfund defendant and the harm courts first must determine whether the defendant caused the pollution. Beyond actual causation, there may still be a sufficient nexus, particularly in cases where the party held responsible directly benefited from the harm. Each of the Eastern Enterprises opinions focused on whether the causal nexus—the benefit from the harm—was strong enough so as to not “shock the conscience” by attaching liability.

Though the legal commentary has focused extensively on Eastern Enterprises’s importance for cases involving takings and retroactive liability, the causative nexus analysis adds another dimension to its importance. By analyzing the Justices’ opinions, it is clear that when the government assigns liability or compels a private party to act, the courts should undertake a substantive due process analysis. This inquiry would appropriately determine whether the private party is within a sufficiently causal nexus, and therefore can constitutionally be held responsible for the alleged harms.

This line of reasoning is important for state and federal Superfund actions, particularly when innocent landowners are involved. Courts will need to address the causative nexus issue when determining liability in order to ensure that Superfund legislation does not place unconstitutional burdens on private citizens. Just as the Court asked “why Eastern [Enterprises]?”\(^{227}\) when addressing the constitutionality of the Coal Act, substantive due process requires courts to ask why a Potentially Responsible Party is the appropriate party to pay for a cleanup and whether such a burden is in line with this nation’s traditional notions of fairness.

\(^{225}\) See E. Enters. v. Apfel, 524 U.S. 498, 531 (1998); id. at 550 (Kennedy, J., concurring); id. at 560 (Breyer, J., dissenting).

\(^{226}\) See opinions cited supra note 225.

\(^{227}\) E. Enters., 524 U.S. at 559 (Breyer, J., dissenting).
PUBLIC AND PRIVATE PROPERTY RIGHTS: REGULATORY AND PHYSICAL TAKINGS AND THE PUBLIC TRUST DOCTRINE

ZACHARY C. KLEINSASSER*

Abstract: In *Lucas v. South Carolina Coastal Council*, the Supreme Court held that, when a regulation has deprived a landowner of all economically beneficial use, a threshold issue in determining whether compensation is due is whether the landowner’s rights of ownership are confined by the limitations on the use of land which “inhere in the title itself.” For land that may fall within the public trust doctrine, *Lucas*’s threshold determination has significant consequences. Because the public trust doctrine is a “background principle,” buyers and sellers of real property may not be able to claim full title, and should be cognizant of the potential application of the doctrine to their land. Further, state and local regulatory bodies should strategically employ the public trust doctrine in environmental protection regulation. Finally, the public trust doctrine’s role in a takings analysis suggests that property rights are perhaps more communal than generally acknowledged, and reveals that it may make sense to evaluate property rights from a community-based perspective.

*By the law of nature these three things are common to mankind—the air, running water, [and] the sea.*¹

—Justinian Institute

Introduction

Rooted in Roman law, cultivated in medieval England, and refined during more than two centuries of American jurisprudence, the public trust doctrine is a powerful legal principle to which society has frequently turned in order to preserve public uses of property.² By contrast, takings jurisprudence was borne out of the need for private landowners to guard against overreaching public laws and governmental


intrusion; it contemplates the often obscure line between an individual’s “bundle of rights” and the necessity of government regulation.

Differences between the rationales underlying the public trust doctrine and takings jurisprudence highlight a fundamental tension in American property law. On one hand, land is a tool for human use and consumption, an entity that, lying in its natural state, is expendable. It can be bought, sold, and owned. On the other hand, land is not passive, nor is it capable of being parceled by humans. Rather, land is active and composed of functional, interconnected, ecological systems. The former, called the “transformative economy” by Professor Sax and others, supports the notion that title to land endows private use rights; the latter, labeled the “economy of nature,” suggests


4 See Lucas, 505 U.S. at 1027; Hope M. Babcock, Should Lucas v. South Carolina Coastal Council Protect Where the Wild Things Are? Of Beavers, Bob-o-Links, and Other Things That Go Bump in the Night, 85 IOWA L. REV. 849, 855–56, 876–77, 901 (2000). Principally, property consists of a “bundle of rights”: the right to possess, the right to use, the right to exclude, and the right to transfer. Jesse Dukeminier & James Krier, Property 93 (5th ed. 2002). Not all forms of property, however, enjoy the same bundle of rights; in some circumstances, the law restricts or prohibits the enjoyment of certain rights. See Babcock, supra, at 855 n.25.


6 See Sax, supra note 5, at 1442.

7 See id.

8 See id.

9 See id.

10 See id. at 1442–46.
that private land use is burdened by the community’s interest in its use and enjoyment.\textsuperscript{11}

This Note examines the hotly contested marriage of the public trust doctrine and takings—and the tension between their underlying, competing rationales—in the modern takings analysis.\textsuperscript{12} It argues that the public trust doctrine necessarily informs any regulatory and physical takings analysis. Part II examines the history of the public trust doctrine, and Part III reviews the modern takings analysis. Exploring the application of the public trust doctrine in recent takings cases, Parts IV and V demonstrate that the doctrine underlies a modern takings analysis. Part IV focuses on categorical regulatory takings cases, concentrating in particular on how the public trust doctrine embodies a \textit{Lucas}\textsuperscript{13} background principle. Part V illustrates how the doctrine informs the \textit{Penn Central}\textsuperscript{14} balancing test. Part VI concludes by identifying several important lessons that an application of the public trust doctrine to the takings analysis provides: (1) buyers and sellers of real property should be informed about applicable background principles; (2) regulatory bodies should strategically employ the public trust doctrine in environmental protection regulation; and (3) property rights should be conceptualized within a community-based paradigm.

I. THE PUBLIC TRUST DOCTRINE

The public trust doctrine was first formally declared in the fifth century A.D. by the Justinian Institute: “By the law of nature these three things are common to mankind—the air, running water, [and] the sea.”\textsuperscript{15} From its origin in Roman law, the English common law developed the concept of the public trust, under which the Crown owned all navigable waterways and the lands lying beneath them “as

\begin{enumerate}
\item \textit{See also Babcock, supra note 4, at 855–56, 892–94, 901–02} (arguing that “enforcing laws that embody common law communal norms . . . is one way of returning to a view of property in which landowners recognize their obligations toward society as a whole”).
\end{enumerate}
trustee of a public trust for the benefit of the people." 16 With the American Revolution, trust resources previously owned by the Crown passed to the American public in the thirteen states via the equal footing doctrine. 17 Each state was thus vested with the duty to hold public resources in trust for the people of the state. 18 The purpose of the trust was to preserve certain resources in a manner that made them available to the public for use. 19 In England, the Sovereign’s title to land was split into two interests: the jus publicum, the public’s right to use and enjoy trust lands, and the jus privatum, the private property rights that existed in the use and possession of trust lands. 20

In Illinois Central Railroad Co. v. Illinois, the Supreme Court advanced the seminal modern expression of the public trust doctrine, holding that a state legislature’s grant of land to a railroad company was “necessarily revocable.” 21 “The trust,” the Court explained, “cannot be relinquished by a transfer of property.” 22 It continued, “The State can no more abdicate its trust over property in which the whole

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16 Nat’l Audubon Soc’y, 658 P.2d at 718 (internal quotation marks omitted).
17 Phillips Petroleum Co. v. Mississippi, 484 U.S. 469, 472–74 (1988). The equal footing doctrine provides that, within their borders, the original thirteen states and those succeeding them inherited public trust rights equal to those previously held by the Crown. Id. (citing Shively v. Bowlby, 152 U.S. 1, 57 (1894)). The Court in Phillips Petroleum turned to Shively when it articulated the equal footing doctrine:

At common law, the title and the dominion in lands flowed by the tide were in the King for the benefit of the nation. . . . Upon the American Revolution, these rights, charged with a like trust, were vested in the original States within their respective borders, subject to the rights surrendered by the Constitution to the United States.

. . . .

The new States admitted into the Union since the adoption of the Constitution have the same rights as the original States in the tide waters, and in the lands under them, within their respective jurisdictions.

Shively, 152 U.S. at 57.
18 See Phillips Petroleum, 484 U.S. at 474–74; infra Part VI.B.
20 See McQueen v. S.C. Coastal Council, 580 S.E.2d 116, 119 (S.C. 2003); Callies & Breemer, supra note 12, at 339–40. The ancient Roman purpose for the public trust doctrine endures today, creating a legal obligation for governments to protect trust resources. See infra Part VI.B. As Professor Joseph Sax explained, “[o]f all the concepts known to American law, only the public trust doctrine seems to have the breadth and substantive content which might make it useful as a tool of general application for citizens seeking to develop a comprehensive legal approach to resource management problems.” Sax, supra note 2, at 474 (footnote omitted).
21 146 U.S. 387, 455 (1892).
22 Id. at 453.
people are interested, like navigable waters and soils under them . . . than it can abdicate its police powers in the administration of government and the preservation of the peace.”

As Professor Joseph Sax, who reinvigorated the public trust doctrine in the early 1970s, famously explained:

When a state holds a resource which is available for the free use of the general public, a court will look with considerable skepticism on any governmental conduct which is calculated either to reallocate that resource to more restricted uses or to subject public uses to the self-interest of private parties.

Since Illinois Central, courts and state legislatures have slowly expanded the public trust doctrine. While once limited to navigable and tidal waters, the doctrine has crept from beaches and rivers to lakes, tributaries, riparian banks, and now encompasses aquifers, marshes, wetlands, springs, and groundwater. The public trust doctrine also includes non-water natural resources. By the late twentieth century, courts had explicitly included beach access, trees and forests, parks, wildlife, fossil beds, and whole ecosystems under the doctrine’s increasingly broad umbrella.

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23 Id. at 453–54.
24 See Anne C. Dowling, “Un-Locke-ing” a “Just Right” Environmental Regime: Overcoming the Three Bears of International Environmentalism—Sovereignty, Locke, and Compensation, 26 WM. & MARY ENVTL. L. & POL’Y REV. 891, 930 n.160 (2002); see also Fred Shapiro, The Most-Cited Law Review Articles, 73 CAL. L. REV. 1540, 1551, 1553 (1985) (determining that Sax’s public trust article was among the 40 law review articles most often cited by other law review articles over the preceding 40 years).
25 Sax, supra note 2, at 490.
28 See supra note 26; infra notes 29–35 and accompanying text.
30 See, e.g., Sierra Club v. Dep’t of the Interior, 376 F. Supp. 90, 95–96 (D. Cal. 1974) (holding that, in addition to statutory requirements, trust obligation mandated full protection of timber, soil, and streams).
31 See, e.g., Paepcke v. Pub. Bldg. Comm’n, 263 N.E.2d 11, 15–16 (Ill. 1970) (holding that a public park was held “in trust for the uses and purposes specified and for the benefit of the public”).
A central feature of the public trust doctrine is that rules governing the use of natural resources exist in a dynamic relationship with evolving values of the community.\textsuperscript{36} As the New Jersey Supreme Court explained in \textit{Borough of Neptune City v. Borough of Avon-by-the-Sea}, “The public trust doctrine, like all common law principles, should not be considered fixed or static, but should be molded and extended to meet changing conditions and needs of the public it was created to benefit.”\textsuperscript{37} Because the public trust doctrine is infused with communal obligations—and therefore implicates the relationship between the public and the public’s use and enjoyment of its land—it has been

\begin{itemize}
  \item \textsuperscript{36} See, e.g., \textit{Geer v. Connecticut}, 161 U.S. 519, 529 (1896) (holding that wild animals are not the private property of those whose land they occupy, but are instead a sort of common property whose control and regulation are to be exercised “as a trust for the benefit of the people”); \textit{overruled on other grounds by Hughes v. Oklahoma}, 441 U.S. 322 (1979); \textit{see also Caspersen, supra} note 27, at 369, 374–84.
  \item \textsuperscript{37} \textit{See Plater et al., supra} note 5, at 1091–92.
  \item \textsuperscript{38} \textit{See Nat’l Audubon Soc’y v. Superior Court of Alpine County}, 658 P.2d 709, 732 (Cal. 1983) (holding that “[t]he human and environmental uses of Mono Lake—uses protected by the public trust doctrine—deserve to be taken into account”); \textit{Marks v. Whitney}, 491 P.2d 374, 380 (Cal. 1971) (holding that San Francisco Bay should be preserved in its natural state so that the lands “may serve as ecological units for scientific study, as open space, and as environments which provide food and habitat for birds and marine life”); \textit{see also Alison Rieser, \textit{Ecological Preservation as a Public Property Right: An Emerging Doctrine in Search of a Theory}}, 15 \textit{Harv. Envtl. L. Rev.} 393, 405–06 (1991) (arguing that the Supreme Court’s implicit extension of the public trust doctrine beyond water rights in \textit{Illinois Central} and \textit{Phillips Petroleum} suggests that ecological boundaries may be replacing the previous navigability test).
  \item \textsuperscript{39} \textit{See Caspersen, supra} note 27, at 357, 359, 365–69 (noting that wildlife, like air and water, is held in trust by the government for the public’s benefit). The Hawaii Constitution explicitly includes a broad range of public resources: “the State . . . shall conserve and protect Hawaii’s natural beauty and all natural resources, including land, water, air, minerals and energy sources.” \textit{Haw. Const. art. XI, § 1}. Moreover, in requiring an affirmative duty by the state to take the public trust into account in \textit{In re Water Use Permit Applications}, the Hawaii Supreme Court refused to “define the full extent of article XI, section 1’s reference to ‘all public resources,’” ostensibly leaving open the possibility of broader application of the public trust doctrine. \textit{See} 9 P.3d 409, 445 (Haw. 2000).
  \item \textsuperscript{40} \textit{Borough of Neptune City v. Borough of Avon-by-the-Sea}, 294 A.2d 47, 54 (N.J. 1972).
  \item \textsuperscript{41} \textit{Id.; see also In re Water Use Permit Applications}, 9 P.3d 409, 447 (Haw. 2000) (holding that “[t]he public trust, by its very nature, does not remain fixed for all time, but must conform to changing needs and circumstances”). Soft-sand shorelines, for example, demonstrate the need for an ever-evolving public trust doctrine. \textit{Dick & Chandler, supra} note 3, at 695. While shorelines along rocky coasts do not change, many coastal states south of Massachusetts and soft-sand states along the gulf coast and the Pacific Ocean face dramatic erosion and coastal migration of barrier beaches. \textit{Id.} Protecting public trust land in rocky coast states is easier to administer, as these states do not have changing boundaries. \textit{See id.}
\end{itemize}

In soft-sand coastal states, however, it is crucial that public trust lands shift with migrating boundaries. \textit{Id.}
used by many states to buttress environmental protection regulations.\textsuperscript{38} Purporting to act as trustee on behalf of the beneficiary public, legislatures and state agencies have enacted or promulgated myriad restrictions on the use and development of trust land.\textsuperscript{39} As the public trust doctrine has gradually expanded to “meet changing conditions and needs of the public,” so have land use restrictions gradually grown to encompass historically consistent, but nevertheless novel, natural resources.\textsuperscript{40}

\textbf{II. Takings}

The Takings Clause of the Fifth Amendment prevents the government from taking “private property . . . for public use, without just compensation.”\textsuperscript{41} Governments are therefore prohibited from “forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”\textsuperscript{42} Thus, if the government physically appropriates or occupies private property, compensation is required.\textsuperscript{43}

A “taking” need not arise from an actual physical occupation of land by the government, however.\textsuperscript{44} The Supreme Court has held that “if regulation goes too far it will be recognized as a taking.”\textsuperscript{45} Articulating a precise formula for determining when government regulation of private property amounts to a regulatory taking has proven to be an arduous task.\textsuperscript{46} In defining “too far,” however, courts will consider three

\textsuperscript{38} See, e.g., Phillips Petroleum Co. v. Mississippi, 484 U.S. 469, 484 (1988) (holding that “under Mississippi law, the State’s ownership of [tidal waters] could not be lost”); In re Water Use Permit Applications, 9 P.3d at 445 (noting the state constitution’s public trust language); Paul Sarahan, Wetlands Protections Post-Lucas: Implications of the Public Trust Doctrine on Takings Analysis, 13 Va. Envtl. L.J. 537, 562 n.186 (1994) (explaining that states take varied approaches to protecting trust interests); see also Neptune City, 294 A.2d at 54.

\textsuperscript{39} See, e.g., Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 455 (1892) (holding that, because of its duty as trustee, a state may revoke grants of land inconsistent with the public trust); McQueen v. S.C. Coastal Council, 580 S.E.2d 116, 120 (S.C. 2003) (holding that, because of the public trust doctrine, a state agency denial of a permit was not a taking).

\textsuperscript{40} Neptune City, 294 A.2d at 54; see also supra notes 27–35 and accompanying text.

\textsuperscript{41} U.S. Const. amend. V; Esplanade Props., LLC v. City of Seattle, 307 F.3d 978, 983–84 (9th Cir. 2002).


\textsuperscript{43} Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 421 (1982) (finding a taking where a cable television wire was placed on an apartment building).

\textsuperscript{44} Palazzolo v. Rhode Island, 533 U.S. 606, 617 (2001).


factors: (1) the economic impact of the regulation; (2) the regulation’s interference with distinct investment-backed expectations; and (3) the character of the governmental action.\footnote{Penn Cent., 438 U.S. at 124.}

In addition, in \textit{Lucas v. South Carolina Coastal Council}, the Supreme Court created a per se, “categorical” taking: if an “owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking.”\footnote{505 U.S. 1003, 1015, 1019 (1992) (Scalia, J.); see also Palazzolo v. Rhode Island, 533 U.S. 606, 617 (2001).} Thus, where a regulation “denies all economically beneficial or productive use of land,” the multi-factor test is not applied, and a compensable taking has occurred.\footnote{Lucas, 505 U.S. at 1015, 1019. Contra James S. Burling, Private Property Rights and the Environment After Palazzolo, 30 B.C. ENVTL. AFF. L. REV. 1, 33–34 (2002) (explaining that “clear statements in Lucas [illustrate] that property interests must first be identified before a takings analysis is begun”).}

Justice Scalia and the majority in \textit{Lucas}, however, established an important threshold inquiry to such a categorical taking.\footnote{See Lucas, 505 U.S. at 1027, 1029.} The Court explained:

Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner’s estate shows that the proscribed use interests were not part of his title to begin with.

\ldots Any limitation [prohibiting all economically beneficial use of the land] cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State’s law of property and nuisance already place upon land ownership. A law or decree with such an effect must, in other words, do no more than duplicate the result that could have been achieved in the courts—by adjacent landowners (or other uniquely affected persons) under the State’s law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally, or otherwise.\footnote{See id.}
Thus, the _Lucas_ majority held that there are two exceptions to the otherwise inflexible categorical regulatory takings rule. If the regulation prevents a nuisance, or if the regulation is grounded in a state’s background principles of property law, the property owner need not be compensated. Although the Court provided two examples of a nuisance exception, it left the meaning of the “background principles of the State’s law of property” exception open to interpretation. In order to fall under the background principles exception, a state must show “that the proscribed use interests were not part of [the claimant’s] title to begin with.” In other words, if a background principle of state property law “inhere[s] in the title itself,” a landowner never held full title to the property interest alleged to have been taken. After _Palazzolo v. Rhode Island_, background principles that serve as a defense to a regulatory taking may include: nuisance; common law doctrines like custom and the public trust; and, some argue, relatively recent legislative enactments.

The public trust doctrine is unmistakably implicated in both the categorical regulatory takings analysis and the _Penn Central_ balancing test. In a categorical regulatory takings analysis, _Lucas_ requires that background principles of state property law must be considered as a threshold issue. In addition, after _Palazzolo_ and several state court decisions, any _Penn Central_ balancing test must include consideration

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52 Id. at 1015.
53 See id. at 1027; see also Callies & Breemer, _supra_ note 12, at 339–40.
54 _Lucas_, 505 U.S. at 1029–30. In the first example, the Court explained that an owner of a lakebed who is denied a permit to engage in a landfilling operation that would flood others’ land would not be entitled to compensation. _Id._ at 1029. In the second, a government would not be required to compensate an owner of a nuclear generating plant who is forced by regulation to remove his plant when the government learns his land sits on an earthquake fault. _Id._ at 1029–30.
55 See _id._
56 See _id._ at 1027, 1029.
57 See _id._; see also Dowling, _supra_ note 12, at 76.
59 _Lucas_, 505 U.S. at 1029; Dowling, _supra_ note 12, at 90–91 (maintaining that background principles are not limited to common law, but may include regulations that are a “reasonable extension” of nuisance and property law). The scope of background principles is the subject of much debate. See Callies & Breemer, _supra_ note 12, at 340 (arguing that the principles can, “when subject to expansive interpretation, seriously erode the basic _Lucas_ doctrine meant to provide compensation for regulatory takings that deprive an owner of all economically beneficial use of land”).
60 See _infra_ Parts III, IV.
61 See _Lucas_, 505 U.S. at 1027 (“[W]e think [a state] may resist compensation only if the logically antecedent inquiry into the nature of the owner’s estate shows that the proscribed use interests were not part of his title to begin with.”).
of the public trust doctrine when public resources are at issue, as the doctrine may limit the economic impact of regulation or interfere with investment-backed expectations. Finally, courts must focus on whether a landowner in fact owned the property for which she seeks compensation; if a government’s action amounts to a physical occupation or invasion of property, the public trust doctrine plays an important role in determining whether compensation is due.

III. The Public Trust Doctrine and Categorical Regulatory Takings

When a regulation has deprived a landowner of all economically beneficial use, Lucas provides that a threshold issue in determining whether compensation is due is whether the landowner’s rights of ownership are “confined by limitations on the use of land which ‘inhere in the title itself.’” Defining what other than a nuisance constitutes an inherent limitation which precludes compensation—which Lucas called “background principles”—requires the consideration of a range of background principle elements articulated in Lucas and other federal and state court decisions.

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62 See Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978); see also Dick & Chandler, supra note 3, at 685–86 (explaining that background principles may be applied to the Penn Central balancing test); infra Part IV.

63 See supra note 61.


66 See Lucas, 505 U.S. at 1027–30; infra Part III.A.
A. Elements of a Background Principle

Several factors contribute to rendering a legal doctrine or law a “background principle.” First, it must be a state, not federal, law or doctrine. Second, a doctrine or law “cannot be newly legislated or decreed.” That is, a limitation on property must be a “settled rule of law” that is part of the “existing rules or understandings” of state law. Third, in order to be considered a background principle, a restriction must “no more than duplicate the result that could have been achieved in the courts”; such a doctrine or law must be so implicit in state property law that, “at any point,” it is “open to the State” to make it explicit. Fourth, a doctrine or law is not a background principle if it applies to some landowners but not to others. Fifth, some courts may

67 See Palazzolo, 533 U.S. at 629–30. In addition to the background principles of property and nuisance law, Palazzolo establishes that, in appropriate circumstances, statutes and regulations also constitute background principles. See id. In Palazzolo, the Court held that statutes are “transformed into a background principle of the State’s law by mere virtue of the passage of title,” but suggested that state statutes and regulations may be background principles of state law, particularly when they codify the common law. See id. Significantly, Palazzolo’s description of background principles “in terms of those common, shared understandings of permissible limitations derived from a State’s legal tradition” may even mean that legislation extending common law beyond its traditional scope—so long as it is “derived from” common understandings—may be considered background principles. See id.; Dowling, supra note 12, at 67, 76–77, 90–91 (arguing that Lucas describes background principles as “embracing . . . the full range of property law” and Palazzolo “resolves any ambiguity by confirming that background principles may include statutes, regulations, and the full range of common law doctrine in appropriate circumstances”); see also infra Part VI.B.

68 See Lucas, 505 U.S. at 1027–30; infra Part III.A. For a cogent application of similar factors to the characterization of wildlife preservation as a background principle of law, see Houck, supra note 5, at 308–21.

69 See Lucas, 505 U.S. at 1029 (holding that a background principle must be of “the State’s law of property and nuisance”).

70 See id.


72 See Lucas, 505 U.S. at 1030 (quoting Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 577 (1972)).

73 See Lucas, 505 U.S. at 1029; see also Rith Energy, Inc. v. United States, 44 Fed. Cl. 108, 113–15 (1999) (holding that, because a state water quality control statute which codified the public trust doctrine provided a background principle of state law, a denial of a mining permit “represented an exercise of regulatory authority indistinguishable in purpose and result from that to which plaintiff was always subject”).

74 See Lucas, 505 at 1030; see also Palazzolo v. Rhode Island, 533 U.S. 606, 630 (2001) (describing background principles as “those common, shared understandings of permissible limitations derived from a State’s legal tradition”).

75 See Palazzolo, 533 U.S. at 630 (explaining that a “regulation or common-law rule cannot be a background principle for some owners but not for others”).
require that a doctrine or law’s application be relatively static.\textsuperscript{76} If the application of a doctrine or law greatly “vacillates”—and, because of ambiguous application, it appears that courts are creating a doctrine or law rather than describing it—it is less likely to be a background principle.\textsuperscript{77} Finally, and perhaps most importantly, a limitation on property must “inhere in the title itself” in order to qualify as a background principle.\textsuperscript{78} As the \textit{Lucas} Court explained, “the proscribed use interests [cannot be] part of [a landowner’s] title to begin with.”\textsuperscript{79}

\textbf{B. Why the Public Trust Doctrine Is a Background Principle}

An examination of the public trust doctrine in light of the factors that render a law or legal doctrine a “background principle” reveals that the public trust doctrine can, and should, be characterized as a background principle.\textsuperscript{80}

First, the public trust doctrine is a state law doctrine.\textsuperscript{81} The Supreme Court’s earliest recognition of state dominion over public trust resources was in 1894 in \textit{Shively v. Bowlby}.

At common law, the title and the dominion in lands flowed by the tide were in the King for the benefit of the nation. . . . Upon the American Revolution, these rights, charged with a like trust, were vested in the original States within their respective borders, subject to the rights surrendered by the Constitution to the United States.\textsuperscript{82}

Since the states, and not the federal government, received ownership of public trust land upon entry into the Union, the public trust doctrine thus satisfies the first requirement that a background principle must be a state law or doctrine.\textsuperscript{83}

\textsuperscript{76} See Stevens v. City of Cannon Beach, 510 U.S. 1207, 1212 n.4 (1994) (Scalia, J., dissenting from denial of certiorari).

\textsuperscript{77} See id. Justice Scalia argued that “vacillations on the scope of the doctrine of custom . . . . reinforce a sense that the court is creating the doctrine rather than describing it.” See \textit{id}. Presumably, unpredictability of a doctrine limits its applicability as a background principle. See \textit{id.}; see also Callies & Breemer, \textit{supra} note 12, at 377–78.

\textsuperscript{78} See Lucas, 505 U.S. at 1027–30.

\textsuperscript{79} Id.

\textsuperscript{80} See Lucas, 505 U.S. at 1027–30; Houck, \textit{supra} note 5, at 308–21; \textit{infra} notes 81–129 and accompanying text.


\textsuperscript{82} 152 U.S. 1, 57 (1894).

\textsuperscript{83} See Phillips Petroleum, 484 U.S. at 476 (affirming that “longstanding precedents which hold that the States, upon entry into the Union, received ownership of all lands under waters subject to the ebb and flow of the tide”).
Second, the public trust doctrine satisfies the Lucas requirement that background principles be settled rules of law.\textsuperscript{84} Although states may codify it, no state can legislate the public trust doctrine itself.\textsuperscript{85} Indeed, public trust resources preceded statehood.\textsuperscript{86} States acquired public trust land and the accompanying responsibility to it upon their entry into the Union.\textsuperscript{87} The public trust doctrine thus constitutes a permanent duty impressed upon state governments to preserve trust land for the public.\textsuperscript{88}

Despite gradual changes in application of the public trust doctrine, the doctrine itself “cannot be newly legislated or decreed.”\textsuperscript{89} Indeed, the scope of the public trust doctrine is subject to considerable debate.\textsuperscript{90} Many scholars acknowledge the public trust doctrine but maintain that the reach of the doctrine should be fixed.\textsuperscript{91} They argue that sudden shifts in the doctrine’s application cannot inhere in a title because abrupt changes in the doctrine cannot be consistent with settled rules of state law.\textsuperscript{92} Critics of an evolving public trust doctrine are correct that sudden shifts in a doctrine argue against its characterization as a background principle.\textsuperscript{93} But it is inconsistent to recognize the public trust doctrine as a background principle on one hand and then limit its application to a “traditional scope” on the other.\textsuperscript{94} Controlled evolution is inherent in the very definition of the public trust doctrine; the fundamental purpose of the doctrine is to meet the public’s changing circumstances and needs.\textsuperscript{95} Just as what constitutes a nuisance has changed over time, so too has the public

\textsuperscript{84} Lucas, 505 U.S. at 1029.
\textsuperscript{85} See Phillips Petroleum, 484 U.S. at 473–74 (describing how the public trust doctrine was vested in each state upon admission into the United States).
\textsuperscript{86} See id.
\textsuperscript{87} See id.; see also Sarahan, supra note 38, at 559.
\textsuperscript{88} See Babcock, supra note 4, at 891 (“Some courts have interpreted the doctrine as imposing an affirmative obligation on states to preserve trust resources for the benefit of the public.”); see also infra Part VI.B.
\textsuperscript{89} Lucas, 505 U.S. at 1029.
\textsuperscript{90} See, e.g., Callies & Breemer, supra note 12, at 361, 372–75 (arguing that the public trust should be restricted to tidal water and underlying lands).
\textsuperscript{91} See id.
\textsuperscript{92} See id.
\textsuperscript{93} See id.; see also Stevens v. City of Cannon Beach, 510 U.S. 1207, 1212 n.4 (1994) (Scalia, J., dissenting from denial of certiorari).
\textsuperscript{95} See Neptune City, 294 A.2d at 54; see also Marks v. Whitney, 491 P.2d 374, 380 (Cal. 1971) (holding that the public trust doctrine is “sufficiently flexible to encompass changing public needs”).
trust doctrine slowly been “molded and extended” to satisfy the needs “of the public it was created to benefit.”

Careful, predictable expansions of the doctrine, therefore, are not novel legislative decrees, but constitute a firmly embedded exercise of state duty.

Consequently, the public trust doctrine is a “settled rule of law.” Although the reach of the doctrine is disputed, American courts have always recognized that certain resources are preserved for the public, even if the *jus privatum* may be granted to private landowners. As a “settled rule of law,” the public trust doctrine is therefore part of the “existing rules or understandings” of American property law that comprise “background principles.” A government cannot newly decree that which already exists as axiom.

Third, any exercise of the public trust doctrine’s inherent restraint on private actions that jeopardize public trust resources—for example, as a defense to a regulatory taking—“no more than duplicate[s] the result that could have been achieved in the courts.” Indeed, litigants frequently have invoked the public trust doctrine as a cause of action or affirmative defense and prevailed. Put another way, a background principle must be implicit in state property law

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96 *Neptune City*, 294 A.2d. at 54.
97 *See id.*

> It is the settled rule of law in this court that absolute property in, and dominion and sovereignty over, the soils under the tide waters in the original States were reserved to the several States, and that the new States since admitted have the same rights, sovereignty and jurisdiction in that behalf as the original States possess within their respective borders.

*Knight*, 142 U.S. at 183.
99 *See supra* Part I.
100 *Phillips Petroleum*, 484 U.S. at 474 (quoting *Knight*, 142 U.S. at 183).
103 *See supra* notes 89–92 and accompanying text.
104 *See Lucas*, 505 U.S. at 1029.
105 *See, e.g.*, Martin v. Waddell, 41 U.S. (16 Pet.) 367 (1842) (finding for a state in a land ownership case because it succeeded in the ownership of a common fishery as a result of the public trust doctrine); Arnold v. Mundy, 6 N.J.L. 1 (1821) (finding for a state because it could not alienate to a private owner exclusive access to oyster beds); *see also* Sara han, *supra* note 38, at 568–72 (discussing Florida and Wisconsin as examples of states with legislatures using the public trust doctrine to protect critical wetlands and their surrounding natural environment).
such that, “at any point,” it is “open to the State” to make it explicit.\textsuperscript{106} The public trust doctrine exemplifies an implicit limitation on property that a state may make explicit.\textsuperscript{107} When the Rhode Island General Assembly enacted the Coastal Resource Management Act in 1971—the regulation at issue in \textit{Palazzolo}—it was the culmination of over two hundred years of limitations on private interests in tidal waters.\textsuperscript{108} Since state law had traditionally acknowledged public use rights, “it was open to the legislature to make explicit what had formerly been implicit, and to restrict uses that had formerly been liberally permitted but which, due to changing circumstances and new knowledge, it had become necessary to prohibit.”\textsuperscript{109} Because the public trust doctrine has always recognized public rights in trust resources—and has historically provided a legal hook for litigants suing on behalf of the public—the doctrine satisfies the duplication of legal results requirement for background principles.\textsuperscript{110}

Fourth, the public trust doctrine applies to all landowners equally.\textsuperscript{111} The Court in \textit{Palazzolo} was concerned with labeling a regulation as a background principle after its enactment because subsequent owners would be burdened by the newly recognized principle while prior owners would not similarly be burdened.\textsuperscript{112} “[A] regulation that otherwise would be unconstitutional absent compensation,” the Court explained, “is not transformed into a background principle of the State’s law by mere virtue of the passage of title,” because the regulation’s application would cease to be equally shared.\textsuperscript{113} The public trust doctrine steers clear of the \textit{Palazzolo} Court’s concern.\textsuperscript{114} Any owner of the \textit{jus privatum} interest of trust resources is limited by the public’s interest; even though private owners may hold title to trust resources, they hold their title subservient to the trustee-government’s right to act on behalf of the beneficiary-public.\textsuperscript{115} Because the public trust doctrine has always encumbered all landowners equally, it meets

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\textsuperscript{106} \textit{Lucas}, 505 U.S. at 1030.
\textsuperscript{107} See id.
\textsuperscript{109} Id.
\textsuperscript{110} See \textit{Lucas}, 505 U.S. at 1029–30.
\textsuperscript{112} See id.
\textsuperscript{113} See id. at 629–30.
\textsuperscript{114} See id.
\textsuperscript{115} See Sarahan, supra note 38, at 557; supra Part I.
\end{flushright}
the *Palazzolo* requirement that regulations cannot be background principles for some owners but not for others.\(^{116}\)

Fifth, the public trust doctrine is a background principle because it does not “vacillate.”\(^{117}\) Justice Scalia and several commentators have argued that the doctrine of custom should not be considered a background principle because the doctrine’s boundaries fluctuate.\(^{118}\) Dissenting from the Supreme Court’s denial of *certiorari* in *Stevens v. City of Cannon Beach*, Justice Scalia argued that the Oregon Supreme Court should not have accepted custom as a background principle because such “vacillations on the scope of the doctrine of custom . . . reinforce a sense that the court is creating the doctrine rather than describing it.”\(^{119}\) In contrast with Justice Scalia’s objection to “vacillations on the scope” of custom, concerns about pendulum-like interpretations of the public trust doctrine are unlikely given courts’ historically predictable application of the doctrine.\(^{120}\)

Changes in the public trust doctrine have been unambiguous, moving in one direction toward a broader scope.\(^{121}\) The predictable expansion of the doctrine from tidal waters to wetlands, beach access, and forests is widely acknowledged.\(^{122}\) Rarely, if ever, will courts limit the scope of the doctrine; rather, courts have gradually recognized that the public trust doctrine plays a larger role in protecting public trust resources.\(^{123}\) Moreover, a gradual expansion of the doctrine by state legislatures and courts merely reflects the doctrine’s original scope as preserving a broad range of natural resources for the pub-

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\(^{116}\) *See Palazzolo*, 533 U.S. at 630; Sarahan, *supra* note 38, at 557.

\(^{117}\) *See Stevens v. City of Cannon Beach*, 510 U.S. 1207, 1212 n.4 (1994) (Scalia, J., dissenting from denial of *certiorari*); *see also* Callies & Breemer, *supra* note 12, at 377–78; *supra* note 77 and accompanying text.

\(^{118}\) *See Stevens*, 510 U.S. at 1212 n.4; Callies & Breemer, *supra* note 12, at 377–78.

\(^{119}\) *See id.; see also supra* Part I; *infra* notes 121–25 and accompanying text.


\(^{121}\) *See supra* note 121; *supra* notes 26–40 and accompanying text.

\(^{122}\) *See supra* note 121; *supra* notes 26–40 and accompanying text.
lic.124 Because the scope of the public trust doctrine does not vacillate—courts describe the public trust doctrine rather than create it—it qualifies as a background principle.125

For these reasons, the public trust doctrine comports with the basic Lucas characterization of background principles as restrictions that “proscribe[] use interests [that] were not part of [a landowner’s] title to begin with.”126 Because property interests in trust land are derived from settled, predictable state law that “no more than duplicate[s] the result that could have been achieved in the courts”127 and the public trust doctrine has not been “newly legislated or decreed,”128 the doctrine is a background principle that “inhere[s] in the title itself.”129

C. Instances in Which the Public Trust Doctrine Has Been Considered a Background Principle

At least two courts in categorical regulatory takings cases have considered the factors enumerated above and held that the public trust doctrine qualifies as a background principle of state property law.130 Many others have strongly implied that the public trust doctrine is a background principle.131 The takings analysis in each case is informed by the Lucas threshold exception: if, because of the public

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124 See supra note 121; supra notes 26–40 and accompanying text. Because the original expression of the public trust doctrine was so broad—encompassing the “‘air, running water, and [the] sea’”—regulatory decisions codifying the doctrine in less expansive terms can hardly be characterized as drifting from the doctrine’s “historical moorings.” See Nat’l Audubon Soc’y v. Superior Court of Alpine County, 658 P.2d 709, 718 (Cal. 1983) (quoting J. Inst. 2.1.1). Contra Callies & Breemer, supra note 12, at 373.

125 But see Stevens v. City of Cannon Beach, 510 U.S. 1207, 1212 n.4 (1994) (Scalia, J., dissenting from denial of certiorari); Callies & Breemer, supra note 12, at 377–78.


127 Id. at 1027.

128 Id.

129 See id. at 1027–30. Even those critical of the public trust doctrine’s application to a takings analysis agree that the doctrine is a background principle. See Callies & Breemer, supra note 12, at 361 (“With respect to traditional public trust and custom, there is much to be said in favor of their apparent status as ‘background principles.’”).


trust doctrine, a limitation “inhere[s] in the title itself,” the landowner never held full title to the land in the first place.\textsuperscript{132}

The decision of the Court of Appeals for the Ninth Circuit in \textit{Esplanade Properties, LLC v. City of Seattle} is an unambiguous recognition of the public trust doctrine as a background principle.\textsuperscript{133} In \textit{Esplanade}, a development company sued the city of Seattle after the city denied the company’s application to develop shoreline property.\textsuperscript{134} The court first found that the city’s denial of the company’s development permit was a deprivation of all beneficial uses of the company’s property.\textsuperscript{135} It then considered whether the public trust doctrine was a background principle of Washington state law.\textsuperscript{136} The Ninth Circuit noted that the doctrine was a settled rule of state law, declaring that “[i]t is beyond cavil that ‘a public trust doctrine has always existed in Washington.’”\textsuperscript{137} Explaining that the public trust doctrine is partially captured in the state constitution and reflected in the state’s Shoreline Management Act, the court underscored how Washington had substantially made the public trust doctrine explicit.\textsuperscript{138} It thus suggested that the city’s denial based on the public trust doctrine was well supported by precedent, and only duplicated what could have been achieved in state courts via the state constitution, statute, or common law.\textsuperscript{139}

Finally, the court turned to the proposed development’s interference with public recreation and, therefore, the issue of whether the company’s use interests were part of the company’s title to begin with.\textsuperscript{140} Since the development company’s shoreline property was located near a public park, the court found that the company’s proposal to construct concrete pilings, driveways, and houses would have interfered with public uses.\textsuperscript{141} “Esplanade’s development plans,” the Ninth Circuit concluded, “never constituted a legally permissible use.”\textsuperscript{142} Since the public trust doctrine was a background principle, the sec-

\begin{itemize}
\item \textsuperscript{133} 307 F.3d at 985.
\item \textsuperscript{134} \textit{Id.} at 979–80.
\item \textsuperscript{135} See \textit{id.} at 985.
\item \textsuperscript{136} \textit{Id.} at 985–86.
\item \textsuperscript{137} \textit{Id.} at 985 (quoting Orion Corp. v. State, 747 P.2d 1062, 1072 (Wash. 1987)).
\item \textsuperscript{138} See \textit{id.} at 985–86.
\item \textsuperscript{139} See \textit{Esplanade Props.}, 307 F.3d at 985–86.
\item \textsuperscript{140} See \textit{id.} at 987.
\item \textsuperscript{141} \textit{Id.}.
\item \textsuperscript{142} \textit{Id.}.
\end{itemize}
ond Lucas exception to categorical regulatory takings was met, and the “takings doctrine [did] not supply plaintiff with such a right to indemnification.”

Esplanade is also remarkable for its reading of Lucas with respect to the public trust doctrine. Quoting at length from the Lucas discussion of background principles, the Ninth Circuit reasoned that Lucas “effectively recognized the public trust doctrine.” Therefore, not only does Esplanade stand for the proposition that the public trust doctrine is a background principle of state law, but it also strongly suggests that courts may interpret Lucas as a tacit recognition of the public trust doctrine as a background principle.

Similarly, the Supreme Court of South Carolina recognized the public trust doctrine as a background principle of state law. In McQueen v. South Carolina Coastal Council, a landowner purchased two lots located adjacent to manmade saltwater canals in the 1960s. He did not make any improvements to the lots, and by 1991 when the landowner filed an application to build bulkheads on his lots, the majority of both lots had reverted to tidelands or critical saltwater wetlands. The South Carolina Coastal Council denied the landowner a permit to develop the lots. The landowner then alleged a taking.

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143 See supra notes 52–59 and accompanying text.
144 See Esplanade Props., 307 F.3d at 987.
145 See id. at 986–87.
146 See id. The Ninth Circuit is not alone in its reading of Lucas. See Virginia S. Albrecht & Deidre G. Duncan, The Public Trust Doctrine and the Navigational Servitude as “Background Principles,” in Inverse Condemnation and Related Government Liability 405, 405 (A.L.I.-A.B.A. Course of Study, May 3, 2001), available in Westlaw, SF64 ALI-ABA 403; Dowling, supra note 12, at 76–77; Nussbaum, supra note 130, at 520. Many commentators have argued that Lucas itself suggests that the public trust doctrine is a background principle that prevents the government from being required to compensate a landowner for a categorical regulatory taking. Albrecht & Duncan, supra, at 405; Dowling, supra note 12, at 76–77; Nussbaum, supra note 130, at 520. First, the language the Lucas court employs in its summary of a “total taking” inquiry—that “the degree of harm to public lands and resources . . . posed by the claimant’s proposed activities” is required in any categorical analysis—strongly implicates the public trust doctrine. See Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1030 (1992). Second, in addition to explicitly listing nuisance law, Lucas discusses background principles as encompassing the full range of property law. See id. at 1029. Third, the Court notes the navigational servitude—a non-nuisance doctrine that is the federal expression of the public trust doctrine—in proffering examples of background principles that defeat a regulatory taking. See id. at 1028–29.
147 See Esplanade Props., 307 F.3d at 986–87.
149 Id. at 118.
150 Id.
151 Id.
152 Id.
Like in *Esplanade*, the South Carolina Supreme Court first held that the landowner’s lots retained no value and, therefore, that there had been a total deprivation of all economically beneficial use.\(^{153}\) The court then focused on whether background principles of state property law absolved the state from an obligation to compensate the landowner.\(^{154}\) It examined the public trust doctrine, finding that the state “has a long line of cases regarding the public trust doctrine,” and noting that as early as 1884 the court recognized the state’s role as trustee of *jus privatum* and *jus publicum* land.\(^{155}\) The court further stated that the state holds “presumptive title” to public trust land.\(^{156}\) After its suggestion that the public trust doctrine in South Carolina meets the requirements of a background principle\(^{157}\)—because it is not newly legislated but is a settled rule of state law, and the Council’s decision merely duplicates that which could have been achieved in the courts\(^{158}\)—the court concluded that the reversion to tidelands “effected a restriction on [the landowner’s] property rights inherent in the ownership of property bordering tidal water.”\(^{159}\) Because the landowner’s lots were “public trust property subject to control of the State,” it was unnecessary for the state to “compensate [the landowner] for the denial of permits to do what he cannot otherwise do.”\(^{160}\) The court’s citation of *Esplanade*—the only case to explicitly include the public trust doctrine as a background principle—in support of its conclusion reveals the court’s strong affirmation of the doctrine as a background principle of South Carolina property law.\(^{161}\)

In addition to the recognition by *Esplanade* and *McQueen* that the public trust doctrine is a background principle,\(^{162}\) numerous courts have strongly indicated that background principles include the public trust doctrine.\(^{163}\) Although never expressly describing the public trust doctrine as a background principle, in *In re Water Use Permit Applications*, ...
tions, the Hawaii Supreme Court held that the doctrine defeated a regulatory takings objection because the “original limitation of the public trust defeats [the plaintiff’s] claims of absolute entitlement.”\textsuperscript{164} In \textit{In re Water Use Permit Applications}, private citizens sued the state water commission because a public trust-based water regime prohibited them from using groundwater that had at one time been considered private property.\textsuperscript{165} The court looked to the Hawaii state constitution, which enshrines the public trust doctrine.\textsuperscript{166} Recognizing that the public trust doctrine has been firmly embedded as a settled law since the state’s inception, the court held: “[T]he people of this state have elevated the public trust doctrine to the level of a constitutional mandate. . . . We therefore hold that [the constitution] adopt[s] the public trust doctrine as a fundamental principle of constitutional law in Hawai‘i.”\textsuperscript{167} The court further noted the fact that the public trust doctrine was a state property law doctrine that the legislature had merely made explicit:

$$\text{[T]he reserved sovereign prerogatives over the waters of the state precludes the assertion of vested rights to water contrary to public trust purposes. This restriction preceded the formation of property rights in this jurisdiction; in other words, the right to absolute ownership of water exclusive of the public trust never accompanied the “bundle of rights” conferred in the Māhele.}$$\textsuperscript{168}

The Hawaii Supreme Court’s analysis of the public trust doctrine as a predictable, settled rule of state law that has not been newly legislated

\textsuperscript{164} 9 P.3d at 494. The majority so held in an 80-page opinion that required a half-page just for its table of contents. \textit{Id.} at 421.

\textsuperscript{165} See \textit{id.} at 422–23, 426.

\textsuperscript{166} \textsc{Haw. Const.} art. XI, § 1 (“All public natural resources are held in trust by the State for the benefit of the people.”).

\textsuperscript{167} \textit{In re Water Use Permit Applications}, 9 P.3d at 443–44.

\textsuperscript{168} See \textit{id.} at 494. In the 1840s, Hawaii’s King Kamehameha III determined that a land “mahele,” or division, was an important step toward modernizing the traditional system of land tenure. \textit{See State v. Zimring}, 566 P.2d 725, 730 (Haw. 1977). The Great Mahele of 1848 provided that the King would retain all his private lands as individual property and that, of the remaining lands, one-third was to be set aside for the Government, one-third to the chiefs, and one-third for the tenants. \textit{See id.} For a fascinating historical analysis of the Great Mahele of 1848, see the Hawaii Supreme Court’s opinion in \textit{State v. Zimring}, 566 P.2d at 729–31.
essentially affirmed the doctrine as a background principle that inheres in the title of public trust land itself.\textsuperscript{169}

Further, in \textit{Rith Energy, Inc. v. United States}, the U.S. Court of Federal Claims held that a statute codifying the public trust doctrine was a background principle and, therefore, the statute served as a defense to a categorical regulatory taking.\textsuperscript{170} In \textit{Rith Energy}, a holder of leases to a surface coal mine alleged a regulatory taking after the federal government rejected a proposed mining plan due to the plan’s potential adverse effects on soil.\textsuperscript{171} The court first described how the Tennessee Water Quality Control Act of 1977 codified the public trust doctrine.\textsuperscript{172} It then considered whether this codification of the public trust doctrine was a background principle of state law.\textsuperscript{173} The court held that it was.\textsuperscript{174} Focusing on the background principle element that a restriction may no more than duplicate a result that could have been achieved in the courts, the court held that the permit denial “represented an exercise of regulatory authority indistinguishable in purpose and result from that to which plaintiff was always subject under Tennessee nuisance law.”\textsuperscript{175} In recognizing the Act as a background principle, the court effectively held that the public trust doctrine is a background principle of Tennessee property law.\textsuperscript{176}

\textbf{D. Instances in Which the Public Trust Doctrine Has Not Been Considered a Background Principle}

In certain, fact-specific circumstances, courts have held that the public trust doctrine does not qualify as a background principle that may be used as a defense to a regulatory takings claim.\textsuperscript{177} It appears that there are two exceptions to the general rule that the doctrine is a background principle which precludes a taking: (1) when a well set-

\textsuperscript{169} See \textit{In re Water Use Permit Applications}, 9 P.3d at 443–44; Callies & Breemer, \textit{supra} note 12, at 358.


\textsuperscript{171} \textit{Id.} at 110–12; Nussbaum, \textit{supra} note 130, at 519.

\textsuperscript{172} \textit{Rith Energy}, 44 Fed. Cl. at 114 (holding that the Act “recognizes the waters of the state, including its groundwaters, as property of the state, held in public trust, and subject to a right of ‘the people of Tennessee, as beneficiaries of this trust . . . to unpolluted waters’)” (alteration in original) (quoting \textit{TENN. CODE ANN.} § 69-3-102(a) (1998)).

\textsuperscript{173} See \textit{id.} at 113–14.

\textsuperscript{174} \textit{Id.} at 114.

\textsuperscript{175} \textit{Id.} at 115.

\textsuperscript{176} See \textit{id.} at 113–14, 115; Nussbaum, \textit{supra} note 130, at 519–20.

\textsuperscript{177} See Tulare Lake Basin Water Storage Dist. v. United States, 49 Fed. Cl. 313, 324 (2001); \textit{infra} notes 179–93.
tled state regulation is directly contrary to the doctrine; and (2) when a regulation codifying the doctrine limits use of property beyond the doctrine’s widely accepted boundaries.\textsuperscript{178}

In \textit{Tulare Lake Basin Water Storage District v. United States}, for example, California water users claimed that federal water use restrictions under the Endangered Species Act (ESA) effected a taking of their right to the use of water.\textsuperscript{179} Examining whether the public trust doctrine was a background principle of California state property law, the \textit{Tulare} court first emphasized that using or diverting water in an unreasonable manner violated the public trust.\textsuperscript{180} It then explained that the facts of the case with respect to the public trust doctrine as a background principle were unique because the prohibited water use had been specifically authorized in a century-old regime of private water rights.\textsuperscript{181} The ESA, which the government claimed had effectively codified the state’s traditional public trust doctrine, would have provided a result precisely opposite from that which could have been achieved in the courts.\textsuperscript{182} Therefore, the doctrine’s alleged codification in the ESA was not the codification of a background principle.\textsuperscript{183}

By deeming unreasonable a use that had once been considered reasonable, the court reasoned, “we would not be making explicit that which had always been implied under background principles of property law, but would instead be replacing the state’s judgment with our own.”\textsuperscript{184} The \textit{Tulare} court therefore affirmed the notion that water use permits are subject to the public trust doctrine, but awarded compensatory damages because a statute had specifically replaced part of an entrenched regulatory regime.\textsuperscript{185}

Likewise, in \textit{Purdie v. Attorney General}, the Supreme Court of New Hampshire held that a regulation purporting to codify the public trust doctrine, but which was inconsistent with traditional understandings of the doctrine, was not the codification of a background princi-


\textsuperscript{179} \textit{Tulare}, 49 Fed. Cl. at 314. As noted below, the \textit{Tulare} court concluded that the deprivation of water amounted to a physical taking. \textit{Id.} at 318–19; \textit{see infra} Part V. Despite the fact that this section focuses on categorical regulatory takings, a discussion of \textit{Tulare} is included here because of the court’s detailed analysis of whether the public trust doctrine in the specific circumstances qualified as a background principle.

\textsuperscript{180} \textit{Tulare}, 49 Fed. Cl. at 324 (“There is, in the end, no dispute that . . . plaintiffs’ contract rights, [were] subject to the doctrines of reasonable use and public trust . . . .”).

\textsuperscript{181} See \textit{id.} at 314, 321, 324.

\textsuperscript{182} See \textit{id.} at 323.

\textsuperscript{183} See \textit{id.}.

\textsuperscript{184} \textit{Id.}

\textsuperscript{185} \textit{Id.} at 323–24.
There, beachfront property owners sued the state, claiming that a regulation defining the public’s trust rights in coastal shorelands effected an unconstitutional taking. Because the “New Hampshire common law limits public ownership of the shorelands to the mean high water mark,” the court concluded that “the legislature went beyond these common law limits by extending public trust rights to the highest high water mark.” Thus, because the property restriction in this case was not implicit in state property law, the limitation was not a background principle.

Aside from the rare situations in which a statute codifying the public trust doctrine directly replaces traditional understandings of state property law, or a regulation suddenly broadens the scope of the doctrine beyond the public’s changing circumstances or needs, use restrictions consistent with the public trust doctrine “inhere in the title itself.” A codification of the public trust doctrine, therefore, is the explicit recognition of a background principle. Thus, where the public trust doctrine limits landowner rights, a categorical regulatory takings inquiry ends. Because the threshold issue when a regulation totally deprives a landowner of all economically beneficial use is whether a proscribed use was part of the owner’s title to begin with—and because the public trust doctrine encumbers land with limitations which “inhere in the title itself”—no compensation is due if a regulation is a codification of the public trust doctrine.

IV. THE PUBLIC TRUST DOCTRINE AND THE PENN CENTRAL BALANCING TEST

When there has been no physical occupation or deprivation of all economic or beneficial use, the public trust doctrine often plays a critical role in determining whether compensation is due. In cases where there has been no categorical taking, the public trust doctrine informs each factor of the ad-hoc, factual inquiry first articulated in

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187 Id. at 444.
188 Id. at 447.
189 See id.
191 See supra Part III.A–C.
192 See Palazzolo, 533 U.S. at 629; supra Part IIIA–C.
193 See Palazzolo, 533 U.S. at 629; supra Part IIIA–C.
194 See infra notes 198–233 and accompanying text.
Penn Central Transportation Co. v. New York City. 195 Thus, in determining whether a regulation on land use goes “too far,” 196 courts have frequently considered the public trust doctrine in examining the economic impact of the regulation, its interference with distinct investment-backed expectations, and the character of the governmental action. 197

In evaluating the public trust doctrine’s relationship to economic impact, courts generally focus on property rights that accompany a landowner’s title. 198 If the public trust doctrine encumbered the landowner’s title from the beginning, a regulation effectively has little or no economic impact. 199 Similarly, courts examine the property interests actually transferred to a landowner in considering the public trust doctrine’s effect on investment-backed expectations. 200 If a landowner’s proposed use was never permissible because of the public trust doctrine, the court evaluates investment-backed expectations accordingly. 201 Generally, this means that constructive knowledge of a state’s common law property restrictions is a critical factor in evaluating a landowner’s expectations. 202 For this reason, as Patrick Parenteau points out, “it is often difficult to distinguish background principles from investment-backed expectations.” 203 Because a limitation on

197 See infra notes 198–233 and accompanying text.
199 See Karam, 705 A.2d at 1226–29; R.W. Docks & Slips, 628 N.W.2d at 790–91.
200 See Karam, 705 A.2d at 1228–29; R.W. Docks & Slips, 628 N.W.2d at 790–91.
201 See Karam, 705 A.2d at 1228–29; R.W. Docks & Slips, 628 N.W.2d at 790–91.
202 See Sarahan, supra note 38, at 572–73. Sarahan argues that a court considering a property owner’s expectations in a regulatory takings context should look at seven factors:

(1) the historical character of the property and that of the relevant public trust lands at the time of the landowner’s purchase of the property; (2) the state of the property and that of the relevant public trust lands from the time of the landowner’s purchase through the time of the intended development; (3) the historic application of the state’s public trust doctrine; (4) the economic and environmental value of the property; (5) the nature of the intended development; (6) the scientific evidence supporting the restriction on development; and (7) the extent of damage likely to be caused by the development, from both an individual and a cumulative perspective.

Id.

203 Parenteau, supra note 108, at 127.
property must “inhere in the title itself” in order to qualify as a background principle, and because an investment-backed expectation is handicapped by a landowner’s constructive knowledge of inhering restrictions on property use, the two are inextricably linked. Finally, in a Penn Central analysis, courts will weigh the benefits of a regulation’s impact on trust resources in evaluating the character of governmental action. If a restriction protecting a trust resource provides a socially important function, the character of governmental action will weigh against compensation for a regulatory taking.

In *R.W. Docks & Slips v. State*, the Wisconsin Supreme Court evaluated the denial by that state’s Department of Natural Resources (Department) of a marina developer’s dredging permit by examining how the public trust doctrine was implicated in the character of the Department’s action, its economic impact, and the degree to which it interfered with the developer’s investment-backed expectations. Turning first to the character of the Department’s action, the court found that the Department “acted primarily to protect an emergent weedbed on behalf of the public.” The court then held that the “state . . . holds title to the lakebed, and therefore, to the extent that a private property interest is implicated here, it is riparian only and therefore qualified in nature, encumbered by the public trust doctrine.” The character of the governmental action in *R.W. Docks & Slips*—protecting an emergent weedbed held in trust for the public—“weighs against a finding that [the developer] has suffered a compensable regulatory taking.”

The Wisconsin Supreme Court then considered the economic impact of the Department’s permit denial and the extent to which it interfered with the developer’s investment-backed expectations. The court began by explaining that its evaluation of both factors is “strongly influenced by the fact that the development of this private marina on the bed and waters of Lake Superior was encumbered by the public trust doctrine . . . from the get-go.” It then noted that

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205 See Parenteau, supra note 108, at 127.
206 See *R.W. Docks & Slips*, 628 N.W.2d at 790.
207 See id.
208 Id. at 790–91.
209 Id. at 790.
210 Id.
211 Id.
212 See *R.W. Docks & Slips*, 628 N.W.2d at 790–91.
213 Id. at 790.
the developer never “possessed an unfettered ‘right’” to develop;\textsuperscript{214} even though the developer’s plans were frustrated, “those plans were encumbered by the public trust doctrine and contingent upon the periodic issuance of [Department] permits from the beginning.”\textsuperscript{215} Because the weedbed was encumbered by the public trust doctrine before the developer purchased it, the economic impact of the permit denial on the developer was minimized because he should have been on notice that his plans to develop would be limited by the doctrine “in the first place.”\textsuperscript{216} Likewise, even though the developer’s plans may have been proscribed by the permit denial, his investment-backed expectations should not have been disappointed, as the land was encumbered by the public trust doctrine “from the beginning.”\textsuperscript{217} “Under the circumstances of this case,” the court concluded, “the [Department’s] action cannot be said to have ‘gone too far’ to cause the sort of negative economic impact or substantial interference with investment expectations as to amount to a regulatory taking.”\textsuperscript{218}

Similarly, in \textit{Karam v. State}, the court examined whether New Jersey’s denial of a development permit worked a taking of the riparian landowners’ property.\textsuperscript{219} In \textit{Karam}, the court adopted a unique approach to the \textit{Penn Central} balancing test.\textsuperscript{220} It explained that in order to evaluate the regulation’s economic impact and landowner’s investment-backed expectations, it must first define what sticks made up the “bundle of rights” acquired by the owner.\textsuperscript{221} Turning first to the economic impact of the permit denial, the court held that because the tidal land was burdened by use restrictions “in the name of the common good” when the land was conveyed to the landowner, the economic impact weighed against a taking.\textsuperscript{222}

Next, the court found that under the public trust doctrine, “ownership of and domain and sovereignty over lands covered by tide waters . . . belong to the respective states.”\textsuperscript{223} Moreover, it concluded that “the sovereign never waives its right to regulate the use of public

\textsuperscript{214} See id.
\textsuperscript{215} Id. at 791.
\textsuperscript{216} See id. at 790–91.
\textsuperscript{217} See id. at 791.
\textsuperscript{218} R.W. Docks & Slips, 628 N.W.2d at 791.
\textsuperscript{220} See id. at 1225–26.
\textsuperscript{221} See id.
\textsuperscript{222} See id. at 1226–27.
\textsuperscript{223} See id. at 1228 (quoting Ill. Cent. R.R. v. Illinois, 146 U.S. 387, 435 (1892) (alteration in original)).
trust property” and, therefore, the state’s riparian grant to the landowners “did not create an absolute and perpetual right to” develop property. The landowner thus “had notice in advance of [his] investment decision that the governmental regulations . . . had been or would be enacted.” Therefore, the permit denial did not destroy the owner’s reasonable investment-backed expectations.

Likewise, the Washington Supreme Court held that the public trust doctrine informed an inquiry into the reasonability of a developer’s investment-backed expectations. In *Orion Corp. v. State*, the plaintiff purchased tideland acreage for the purpose of creating a residential community. Intending to dredge and fill a bay for his residential community, the developer claimed a regulatory taking when the state passed a tideland law limiting the developer’s use of the tidal wetlands. The court held that the developer purchased his property “subject to the limitations imposed by the public trust.” Because the tidelands were held in public trust, the court found that the developer’s plans for a residential community never constituted a legally permissible use and, therefore, the regulation never interfered with the developer’s reasonable investment-backed expectations.

V. THE PUBLIC TRUST DOCTRINE AND CATEGORICAL PHYSICAL TAKINGS

When a regulatory body’s action amounts to a physical occupation or invasion of property—when a categorical physical taking occurs—the public trust doctrine may also play a role in determining whether compensation is due. If public trust resources are implicated in a categorical physical taking, the analysis appears to mirror

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225 See Karam, 705 A.2d at 1229.
227 See id. at 1228–29.
229 See id. at 1065.
230 See id. at 1065–66, 1067.
231 See id. at 1082.
232 See id. at 1082–83.
233 See id. at 1086; see also Dick & Chandler, supra note 3, at 693–94 (discussing the role of the public trust doctrine in the evaluation of investment-backed expectations in *Orion*).
the categorical regulatory takings analysis. That is, after having concluded that a regulatory body’s action amounts to a physical taking, courts will determine whether a landowner in fact owned the property for which she seeks compensation.

Thus, at least one court has examined the extent to which physical appropriation merely reflects limitations of title inherent in background principles of state law. In *Tulare Lake Basin Water Storage District v. United States*, the U.S. Court of Federal Claims explained that, “[h]aving concluded that a deprivation of water amounts to a physical taking, we turn now to the question of whether plaintiffs in fact owned the property for which they seek to be compensated.” Examining the “background principles of state law” that may have “limit[ed] the scope of [the] plaintiffs’ property right,” the *Tulare* court extensively discussed the public trust doctrine. Although it ultimately determined that a codification of the public trust doctrine was not the codification of a background principle, the court’s analysis lucidly illustrates the potential impact of the public trust doctrine on a physical takings claim. Like in a categorical regulatory analysis, the public trust doctrine serves as a background principle and, therefore, courts must consider the doctrine’s applicability when a landowner claims that a regulatory body’s action amounts to a physical occupation or invasion.

The public trust doctrine may play a particularly important role in the context of wildlife damage to private property. In the wake of reintroduction programs and other wildlife protection initiatives, landowners have brought a variety of physical takings claims.

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235 See Clajon Prod., 854 F. Supp. at 852–53; *Tulare*, 49 Fed. Cl. at 320, 324; see also supra Part III.
236 See *Tulare*, 49 Fed. Cl. at 320.
237 See id.
238 See supra notes 179–85 and accompanying text (discussing takings claim in *Tulare*).
239 *Tulare*, 49 Fed. Cl. at 320 (citing Palm Beach Isles Assocs. v. United States, 231 F.3d 1354, 1357 (Fed. Cir. 2000)). The *Tulare* court described *Palm Beach Isles* as “defining the inquiry in a physical takings case as whether the plaintiff owned the property at the time of the taking.” Id.
240 Id. at 320, 320–24.
241 See id.; supra notes 179–85.
243 See id.; see also supra Part III.
244 See Caspersen, supra note 27, at 385–87.
ever, because wildlife is a trust resource, the presence of wild animals on private land cannot effect a physical taking. First, private landowners have never owned wildlife on their property because wildlife is “a sort of common property.” Thus, a landowner is not deprived of a property interest when she is prohibited from killing wildlife. Second, the presence of wildlife on private land does not effect a taking because wildlife has always enjoyed a natural right to inhabit the land. Unlike the cable wire in *Loretto v. Teleprompter Manhattan CATV Corp.*, the public trust doctrine provides wildlife with an overriding right to occupy private land, particularly when its presence is the result of a rehabilitation effort.

In *Clajon Production Corp. v. Petera*, for example, a federal court in Wyoming applied the public trust doctrine to a claim that a state hunting regulation was a physical taking of property. The landowners in *Clajon* argued that both the wild animals’ presence on their property, as well as the animals’ consumption of the forage on their property, constituted a physical taking. The court reasoned that the success of the landowners’ claim turned on the ownership of the animals.

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246 See, e.g., *Geer v. Connecticut*, 161 U.S. 519, 528–29 (1896) (holding that wild animals are not the private property of those whose land they occupy, but are instead a sort of common property whose control and regulation are to be exercised “as a trust for the benefit of the people”), overruled on other grounds by *Hughes v. Oklahoma*, 441 U.S. 322 (1979).

247 See *Clajon Prod.*, 854 F. Supp. at 852–53 (holding that the presence of animals on private property not a taking because landowners cannot claim a property interest in wildlife); *Caspersen*, supra note 27, at 386–87.

248 Mountain States Legal Found. v. Hodel, 799 F.2d 1423, 1426 (10th Cir. 1986).

249 See *Caspersen*, supra note 27, at 387.

250 See id.

251 458 U.S. 419, 421 (1982). While the Court’s strong language in *Loretto* suggests that a physical occupation of real property is “invariably” a taking, *Loretto* is distinguishable when the public trust doctrine is at issue. See id. at 427. Where the public trust doctrine inheres in a title, a landowner never in fact owned the property for which she seeks compensation. See id.; see also *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1029 (1992). Like its application to a categorical regulatory takings analysis, whether a background principle inhered in a title is a threshold inquiry in a physical takings analysis. *Clajon Prod. Corp. v. Petera*, 854 F. Supp. 843, 852–53 (D. Wyo. 1994); *Tulare Lake Basin Water Storage Dist. v. United States*, 49 Fed. Cl. 313, 320, 324 (2001); *Caspersen*, supra note 27, at 381–87; see supra Part III. If the public trust doctrine places limitations on property ownership from the beginning, compensation for physical occupation may not be required. See *Loretto*, 458 U.S. at 427.

252 See *Caspersen*, supra note 27, at 387.


254 See id. at 852.

255 See id.
noting in particular the Tenth Circuit’s holding that wild animals are “‘common property whose control and regulation are to be exercised as a trust for the benefit of the people.’”256 Finding that “wild animals are owned, in the proprietary sense, by no one,” the Clajon court held that there was no physical invasion attributable to the state.257

VI. LESSONS FROM THE APPLICATION OF THE PUBLIC TRUST DOCTRINE TO MODERN TAKINGS ANALYSIS

Recognizing that the public trust doctrine underlies a modern takings analysis provides several salient lessons about buying and selling property, regulatory strategy, and a community-based approach to conceptualizing property rights.

A. Buyers and Sellers of Property Should Be Informed About Applicable Background Principles

Not only is the traditionally recognized knowledge of a parcel’s metes and bounds vital to property ownership, but a takings analysis cognizant of the public trust doctrine reveals that landowners must also be informed about firmly embedded understandings of state property law.258 Purchasing land without full knowledge of a state’s background principles places landowners in a precarious situation.259

256 See id. at 851 (quoting Mountain States Legal Found. v. Hodel, 799 F.2d 1423, 1426 (10th Cir. 1986) (internal quotation marks omitted)). In Mountain States Legal Foundation, landowners alleged, inter alia, that the federal government’s failure to adequately manage wild horse herds that roam public and private land in southwestern Wyoming was a taking. 799 F.2d at 1424. The court cited numerous cases finding that wildlife damage to private property was not a taking and held that, because of the government’s fiduciary duty to protect wildlife as a trust resource, no compensation was due. Id. at 1428–29, 1431.

257 See Clajon Prod., 854 F. Supp. at 853; see also Barrett v. State, 116 N.E. 99, 100 (N.Y. 1917) (finding that a law reintroducing beavers was not a regulatory taking despite damage to valuable woodland property because the state had acted in its fiduciary capacity as trustee “for the benefit of the public”); cf. Christy v. Hodel, 857 F.2d 1324, 1334 (9th Cir. 1988) (holding that a statute protecting bears was not a physical taking because bears were not “governmental agents”).

258 See Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1027, 1029; Karam v. State, 705 A.2d 1221, 1229 (N.J. Super. Ct. 1998) (holding that “plaintiffs must be held to have had constructive knowledge” of recent environmental protection regulation); Sarahan, supra note 38, at 564 (arguing that noncompensation in public trust cases “is equitable given that the owner purchased the property with, at least, constructive knowledge of the state’s interpretation of the public trust doctrine”).

259 Lucas, 505 U.S. at 1027, 1029; see also supra Part III.A–C (discussing instances in which landowners did not prevail on takings claim because of the public trust doctrine); supra Parts IV, V.
title; if the deed is to land encumbered by the public trust doctrine, for example, landowners can merely claim title to the *jus privatum*.\textsuperscript{260} Moreover, lack of knowledge about property use rights that results in unfounded development expectations may dash the most grandiose development plans.\textsuperscript{261} Regardless of what property use a landowner anticipates enjoying, courts read long-established, predictable state property law principles—like the public trust doctrine—into a title.\textsuperscript{262} The government will prevail on any regulatory or physical takings claim in such a case, in spite of what a landowner thought she owned, and irrespective of her plans to develop it.\textsuperscript{263}

Further, buyers and sellers of land and their attorneys should be intimately familiar with what a state *may potentially* consider to be a background principle of its property law, and how such a principle might restrict a landowner’s title.\textsuperscript{264} Such familiarity is critical in two contexts. First, landowners must be aware of changes in their land that may implicate a background principle that was not previously at issue.\textsuperscript{265} The South Carolina Supreme Court’s poignant words in *McQueen v. South Carolina Coastal Council* serve as a strong incentive for prospective and current landowners to be informed about natural transformation of land that might invite application of the public trust doctrine: “Any taking McQueen suffered is not a taking effected by State regulation but by the forces of nature and McQueen’s own lack of vigilance in protecting his property.”\textsuperscript{266}

Second, landowners should be aware of changes in legislation that may implicate a background principle that, at the time of purchase, may not have been a background principle.\textsuperscript{267} An informed owner of land should keep abreast of environmental trends, and be

\textsuperscript{260} See *Lucas*, 505 U.S. at 1027, 1029–30; *supra* Parts I, III.A–C.
\textsuperscript{261} See, e.g., *Esplanade Props.*, LLC v. City of Seattle, 307 F.3d 978, 987 (9th Cir. 2002) (affirming a denial of an application to construct driveways and houses in a navigable tidelands area); *Orion Corp.* v. State, 747 P.2d 1062, 1066, 1089 (Wash. 1987) (holding that a state law precluding developer from constructing Venetian-style residential community was not a taking).
\textsuperscript{262} See *Lucas*, 505 U.S. at 1027, 1029–30.
\textsuperscript{263} See *Sarahan*, *supra* note 38, at 564; *supra* Parts III, IV, V.
\textsuperscript{264} See *supra* notes 258–63 and accompanying text.
\textsuperscript{265} See *McQueen* v. S.C. Coastal Council, 580 S.E.2d 116, 120 (S.C. 2003) (holding that “reversion to tidelands effected a restriction on [landowner’s] property rights inherent in the ownership of property bordering tidal water”).
\textsuperscript{266} Id.; see also *Nussbaum*, *supra* note 130, at 522–24 (explaining that, at least for land adjacent to tidelands, landowners have “at a minimum, constructive knowledge of both the public trust doctrine and the ‘water’s inherent tendency to change its borders’” (quoting *Sarahan*, *supra* note 38, at 564).
wary of land that is or may be slated for environmental protection.\textsuperscript{268} At least one court has found that developers are responsible for awareness of the “regulatory climate” and, therefore, should be held accountable for failing to anticipate reasonably foreseeable legislation.\textsuperscript{269} Another, in \textit{Karam v. State}, forcefully articulated the responsibility placed on landowners to keep abreast of broad policy change:

> The crucial fact is that since the early 1970’s the regulatory jurisdiction . . . has substantially expanded . . . . The decision to shift public policy from commerce to environmental protection and wildlife preservation was not made by a faceless bureaucrat somewhere within the administrative labyrinth of a nameless office building in Trenton. Instead, it was articulated by our Legislature in carefully crafted enactments and heralded by the Governor with great fanfare. Plaintiffs must be held to have had constructive notice of these developments.\textsuperscript{270}

Both before and after purchase, therefore, the public trust doctrine’s application to takings should strongly encourage landowners to ensure that what courts will consider constructive knowledge is their actual knowledge.\textsuperscript{271} Ignorance of background principles in a takings context is indeed no excuse.\textsuperscript{272}

\textbf{B. State and Local Regulatory Bodies Should Strategically Employ the Public Trust Doctrine in Environmental Protection Regulation}

Recognizing that the public trust doctrine underlies a modern takings analysis reveals certain duties and responsibilities required of state and local regulatory bodies, but, perhaps more importantly, also illustrates that such regulatory bodies are afforded an impregnable environmental protection technique.\textsuperscript{273}

That a takings analysis is informed by the public trust doctrine underscores the fact that state regulatory bodies are required to pro-

\textsuperscript{268} See id.; see also Sarahan, supra note 38, at 565–66 (explaining that the “symbiotic relationship” between wetlands and other waters is becoming increasingly understood).

\textsuperscript{269} See Good v. United States, 189 F.3d 1355, 1361–63 (Fed. Cir. 1999) (holding that the landowner could not have been “oblivious” to “rising environmental awareness [that] translated into ever-tightening land use regulations”); \textit{Karam}, 705 A.2d at 1229.

\textsuperscript{270} 705 A.2d at 1229.

\textsuperscript{271} See Sarahan, supra note 38, at 564.

\textsuperscript{272} See id..

\textsuperscript{273} See infra notes 274–86 and accompanying text.
tect certain resources.\textsuperscript{274} Because states act as trustees for the beneficiary public, they must fulfill their fiduciary duties by acting on behalf of the public when trust resources are jeopardized.\textsuperscript{275} In turn, courts must permit regulatory bodies to take action—by passing laws, enforcing existing environmental regulations, or denying development permits—to protect trust resources.\textsuperscript{276} A takings claim against a regulatory body using its legislative muscle to act as trustee of public resources should therefore fail.\textsuperscript{277}

Thus, in drafting legislation that formally restricts the use of land for environmental protection reasons, state and local regulatory bodies should state that such restrictions are an explicit declaration of the public trust doctrine.\textsuperscript{278} In this way, regulatory bodies can clearly con-

\textsuperscript{274} See In re Steuart Transp. Co., 495 F. Supp. 38, 40 (E.D. Va. 1980) (“Under the public trust doctrine, the State . . . and the United States have the right and the duty to protect and preserve the public’s interest in natural wildlife resources. Such right does not derive from ownership of the resources but from a duty owing to the people.”); State v. Jersey Cent. Power & Light Co., 336 A.2d 750, 759 (N.J. Super. Ct. App. Div. 1975) (“The State has not only the right but also the affirmative fiduciary obligation to ensure that the rights of the public to a viable marine environment are protected . . . .”); Orion Corp. v. State, 747 P.2d 1062, 1072 (Wash. 1987) (holding that the “public trust doctrine emanates from this public authority interest, which requires the state to maintain its dominion in trust for the people”).


\textsuperscript{276} See id.; see also Esplanade Props., LLC v. City of Seattle, 307 F.3d 978, 985 (9th Cir. 2002); McQueen v. S.C. Coastal Council, 580 S.E.2d 116, 119–20 (S.C. 2003).

\textsuperscript{277} See Ill. Cent. R.R., 146 U.S. at 453; Esplanade Props., 307 F.3d at 985; McQueen, 580 S.E.2d at 119–20. While the doctrine’s application to the takings analysis illustrates certain limits on owners of property, its relationship to a modern takings analysis also demonstrates legislative limitations. See Dick & Chandler, supra note 3, at 691. First, where the public trust doctrine inheres in the title of a parcel of land, the parcel cannot be fully owned by a private citizen, but it cannot be owned by a government either. See supra Part I. Second, as trustee, states are restricted in their ability to alienate trust land. See Ill. Cent. R.R., 146 U.S. at 453. Although a state may transfer the jus privitum of trust land, trust land is continually encumbered by the requirement that it be used to benefit the public. See Dick & Chandler, supra note 3, at 691. For instance, in In re Water Use Permit Applications, the Hawaii Supreme Court prohibited a state agency decision from derogating the public trust, holding that its state water commission was bound by an “affirmative duty to take the public trust into account in the planning and allocation of water resources, and to protect public trust uses whenever feasible.” 9 P.3d 409, 453 (Haw. 2000) (quoting Nat’l Audubon Soc’y v. Superior Court of Alpine County, 658 P.2d 709, 728 (Cal. 1983)). Resources held in trust are held for the benefit of the present and future public—not for the benefit of a current governmental body—and therefore a government cannot alienate or derogate any parcel of land encumbered by the public trust doctrine. Ill. Cent. R.R., 146 U.S. at 453.

\textsuperscript{278} See supra notes 273–77 and accompanying text. In Hawaii, for example, a presumption in favor of public use and enjoyment is explicitly written into the state constitution, mandating the state to promote and utilize trust resources “in a manner consistent with their conservation.” See Haw. Const. art. XI, § 1.
vey that they intend to “make the implication of . . . background principles of nuisance and property law explicit.”

Moreover, regulatory bodies can be confident that regulation incrementally expanding the public trust doctrine will not create takings liability. To be sure, regulatory bodies should be careful not to expand the public trust doctrine too quickly or stretch it too far beyond its traditional scope. They should identify the traditional scope of the state’s public trust doctrine and cautiously broaden the doctrine to reflect changing needs and circumstances. However, because Palazzolo defined background principles as “those common, shared understandings of permissible limitations derived from a State’s legal tradition,” regulations protecting land outside the traditional scope of trust resources are likely to be immune from takings because they will be considered background principles. One technique for placing restrictions on previously unrecognized trust resources is to focus on the ecological relationship between the targeted land and traditional public trust resources. Under this approach, explicit regulatory language can mitigate against a taking because a failure to regulate adjacent non-trust land may endanger trust resources.

In addition, because the public trust doctrine plays a role in the Penn Central multi-factor test, even if a regulatory body cannot prevail on a takings claim, it can utilize the doctrine to mitigate damages. Where traditional or potential public trust resources are protected by government restrictions, regulatory bodies faced with a takings challenge should argue that a landowner’s proposed use of land will injure a resource held in trust by the state. Since constructive knowledge of the public trust doctrine is an essential element in evaluating investment-backed expectations, compensation for an owner’s lost opportunity in a successful takings claim should therefore be reduced

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280 See supra Part III.D.
283 See id.; see also Dowling, supra note 12, at 90–91.
284 See Sarahan, supra note 38, at 573.
285 See id.
286 See id. at 576–77.
287 See id.
to the value of investment-backed expectations as limited by the public trust-based use restrictions.289

Finally, the fact that the doctrine underlies a modern takings analysis—coupled with states’ responsibilities to protect trust resources—demonstrates that the majority of modern environmental protection laws, like wetlands protection, can hardly be characterized as overreaching.290 Many environmental protection restrictions could be characterized as codifications of background principles like the public trust doctrine, and thus do no more than that which could have been achieved by courts applying common law principles.291 Further, in describing background principles as limitations “derived from a State’s legal tradition,”292 Palazzolo strongly implies that regulations which reasonably expand existing background principles may themselves be considered background principles.293 Thus, state and local regulatory bodies can be confident in pursuing novel environmental protection of lands held in trust for the public—such as wetlands, forests, and parks—without fear of takings challenges.294 Such legislation merely codifies the public trust doctrine or is a reasonable extension of it.295

C. Property Rights Should Be Conceptualized Within a Community-Based Paradigm

As Hope Babcock explains, “the use of private property has always been constrained by transcendent social or communal obligations.”296 Indeed, the public trust doctrine’s role in a takings analysis suggests that property rights are perhaps more communal than generally acknowledged, and reveals that it may make sense to think about property rights from an interconnected, community-based perspective.297

290 See supra Parts III, IV, V; supra notes 273–77 and accompanying text.
293 See Dowling, supra note 12, at 91.
294 See id.
295 See id.
296 Babcock, supra note 4, at 897.
297 See Babcock, supra note 4, at 898–901. Babcock explains that, in the context of wildlife, the public trust doctrine offers

an antidote to our culture’s loss of a sense of community and to our modern inability to see our society as individuals arrayed in a series of continuous interactions with each other and with our surroundings. . . .
American courts historically have invoked the public trust doctrine and other similar common law doctrines in order to protect shared resources like beaches, rivers, and wildlife in the face of strong private property interests.\textsuperscript{298} Courts applying the public trust doctrine to a modern takings analysis continue this deep-seated property law tradition that a property “right” is more than the power to use and consume a purchased resource; they affirm that property rights encompass a legal relationship between an individual and her community.\textsuperscript{299}

The fact that the public trust doctrine is infused into the takings analysis informs landowners that they are not entitled to compensation if a regulation requires them to cease using property in a way that harms the community.\textsuperscript{300} Land is not simply a commodity valued by its market price, the public trust doctrine reminds landowners; it also is burdened by the duty to conform its uses with the public’s needs and values.\textsuperscript{301} To be sure, many landowners mistakenly believe that they have an inherent right to use purchased property as they choose.\textsuperscript{302} As the doctrine’s application to takings reveals, however, landowners should not expect absolute property use protection.\textsuperscript{303} The public trust doctrine limits the unfettered right of a landowner to use her parcel as she sees fit, and, should the owner claim that a regulation prohibits her from using her parcel as she wishes, precludes the owner from recovery.\textsuperscript{304}

Further, the application of the public trust doctrine to takings reaffirms the notion that property rights continually evolve according to community needs.\textsuperscript{305} Critics of the inclusion of the public trust doctrine as a background principle are concerned that regulatory bodies will justify land use restrictions by expanding the scope of public trust rights.\textsuperscript{306} But the public trust doctrine has never been static.\textsuperscript{307} Rather,

\ldots \emph{Lucas}, oddly enough, with its incorporation of common law into takings jurisprudence, may allow us to regain that sense of neighborliness.

\textit{Id.} at 900–01.

\textsuperscript{298} See supra Part I.

\textsuperscript{299} See Babcock, supra note 4, at 900.

\textsuperscript{300} See id. at 897.

\textsuperscript{301} See id. at 902.

\textsuperscript{302} Id. at 855 n.25.

\textsuperscript{303} See id.

\textsuperscript{304} See id.

\textsuperscript{305} See Borough of Neptune City v. Borough of Avon-by-the-Sea, 294 A.2d 47, 54 (N.J. 1972); see also Marks v. Whitney, 491 P.2d 374, 380 (Cal. 1974) (holding that public trust doctrine is “sufficiently flexible to encompass changing public needs”); supra Part I.

\textsuperscript{306} See Callies & Breemer, supra note 12, at 372–73.

\textsuperscript{307} See supra Part I.
it has continually conformed to changing societal needs and circumstances. While abrupt shifts in the doctrine’s application cannot serve as a defense to a takings claim, cautious expansion of the public trust doctrine is hardly without precedent. It should surprise no landowner in a soft-sand state, for example, that the public trust doctrine may shift with a migrating coastline. That several courts have concluded that the public trust doctrine underlies a modern takings analysis, therefore, indicates a growing recognition of adaptable property rights ultimately subject to public use and enjoyment. Because the public trust doctrine evolves—and is considered both a background principle and a constructive limitation on investment-backed expectations—property rights burdened by the doctrine continually evolve according to the community’s changing needs.

Indeed, the application of the public trust doctrine as a threshold issue in a takings analysis suggests adopting a fundamental shift in our conception of private property rights. Whereas a conventional perspective of private property rights views land as an expendable resource and tool for human use and consumption, the modern takings analysis’s deference to the public trust doctrine indicates a growing acceptance of Professor Sax’s economy of nature. Where the public trust doctrine serves as a background principle or restricts a landowner’s investment-backed expectations, private use rights give way to community needs. The doctrine’s complete defense to a takings claim is an affirmation of ecological and communal interconnectedness; it reflects a perspective that a landowner’s relationship to the land is colored by the land’s relationship to the landowner’s community.

Conclusion

Any evaluation of a regulatory or physical takings claim requires a careful consideration of the public trust doctrine. Property owner-

308 See In re Water Use Permit Applications, 9 P.3d 409, 447 (Haw. 2000).
309 See Dick & Chandler, supra note 3, at 695.
310 See supra Part I.
312 See supra notes 306–13 and accompanying text.
313 See Sax, supra note 5, at 1442.
314 See id. at 1442–43.
315 See supra notes 297–305 and accompanying text.
316 See supra notes 297–305 and accompanying text.
ship in the United States does not provide landowners with a right to lay harm to valuable resources held in trust for the public, nor does it require courts to award landowners compensation when a legislature acts to restrict the use of such resources. State and local regulatory bodies therefore can be confident in promoting environmental protection of a slowly growing list of public trust resources by drafting regulations explicit in their recognition of the public trust doctrine.
CITIZEN RESISTANCE TO CHEMICAL WEAPONS INCINERATION: CAN NEPA GIVE LOCAL COMMUNITIES LEVERAGE OVER MILITARY ARMS DECOMMISSIONING PROGRAMS?

Heather Pierce*

Abstract: Thousands of tons of chemical weapons are currently being stored in eight locations across the United States. Both a congressional act and an international treaty require the U.S. Army to destroy these chemical weapon stockpiles. The Army plans to use on-site incineration to destroy the weapons stored at four of these sites, and it has recently decided to use non-incineration processes to destroy the chemical agents stored at the other four sites. Two recent cases have been filed challenging the Army’s decision to continue pursuing incineration at half of the sites, alleging that the Army has violated the National Environmental Policy Act (NEPA) by failing to complete a supplemental environmental impact statement for the incineration program. This Note discusses why a court considering these issues should find that the Army has violated NEPA, and it also considers whether NEPA will be successful in stopping the Army’s use of incineration.

Introduction

For most people in the United States, the threat of being exposed to a chemical weapon is not an everyday concern. They are not worried about the disastrous effects that these deadly chemical agents could have on their lives.¹ For some, however, the threats posed by chemical weapons are a part of everyday life. In eight locations

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Throughout the United States, there are thousands of tons of chemical weapons. Most of these chemical weapons have been stored at these locations for over thirty-five years. People nearby live in fear of a chemical leak, an accidental detonation, or any number of other frightening scenarios. In 1988, these people faced an additional concern—the Army’s decision to use on-site incineration to destroy the chemical weapons stored in those communities.

Most parties agree that the destruction of the chemical weapons stockpile is both necessary and in the public interest. Moreover, under the Department of Defense Authorization Act of 1986 and the Chemical Weapons Convention, the Army is required to destroy the chemical agents by 2007.

There is disagreement, however, regarding the method that should be used to dispose of the weapons. Opponents of incineration, including environmental groups and those living near the storage sites, argue that an alternative method of disposal should be used because of the effects that incineration will have on the environment.

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4 See id.
8 See generally CWWG Complaint at 20 (arguing that the Army’s proposed use of incineration to destroy the chemical weapons is not in the public’s best interest); Families Concerned Complaint at 143 (same).
and public health.⁹ The Army has argued that on-site incineration is safe and will have only a limited impact on the environment.¹⁰

One tool that opponents have used to challenge the Army’s decision to use on-site incineration is the National Environmental Policy Act (NEPA).¹¹ The first of these challenges came in Chemical Weapons Working Group, Inc. v. United States Department of the Army, where the plaintiffs argued that the Army had violated NEPA by failing to complete a supplemental environmental impact statement (SEIS) that took into account new information regarding the incineration program.¹² In that case, the U.S. District Court for the District of Utah gave deference to the Army’s decision not to complete an SEIS.¹³

Following Chemical Weapons Working Group, the Army has maintained its plan to use on-site incineration at four of the eight locations.¹⁴ However, the Army has recently decided to use nonincineration processes to destroy the stored chemical agents at the other four sites.¹⁵ This decision to use alternative processes, as well as incidents at the Army’s two operational incineration facilities, have led to a new set of cases challenging the Army’s plan to continue pursuing incineration at half of the sites.¹⁶ Plaintiffs are again arguing, this time in the District Court for the District of Columbia, that the Army is violating NEPA by failing to complete an SEIS, as those living near the sites where incineration will be used wonder why alternative processes are not being used in their communities.¹⁷

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⁹ See CWWG Complaint at 11–12 (arguing that the incineration facilities will emit toxic compounds into the environment); see also Greenpeace, Incineration, at http://www.greenpeace.org/international_en/campaigns/intro?campaign_id=3989 (last visited Mar. 30, 2005) (discussing the impacts of incineration).


¹¹ Chem. Weapons Working Group Inc. v. U.S. Dep’t of the Army, 935 F. Supp. 1206, 1208 (D. Utah 1996), aff’d, 111 F.3d 1485 (10th Cir. 1997); CWWG Complaint at 3; Families Concerned Complaint at 153.


¹³ See id. at 1218, 1219.

¹⁴ CWWG Complaint at 3.

¹⁵ Id.

¹⁶ See generally CWWG Complaint; Families Concerned Complaint.

¹⁷ See CWWG Complaint at 3, 4; Families Concerned Complaint at 153. The NEPA claim raised by plaintiffs in Families Concerned, which was filed in Alabama District Court, was later consolidated into the NEPA claim raised in the Chemical Weapons Working Group case, which was filed in the D.C. District Court. See E-mail from Craig Williams, Director, Chemical Weapons Working Group, to author (Apr. 4, 2004, 21:57:36 EST) (on file with author).
This Note will discuss why a court considering the issue should find that the Army has violated NEPA by failing to complete an SEIS for the incineration program. The court should find that an SEIS is required for the incineration program because significant new information has become available, and substantial changes have been made to the project, both of which are relevant to the environmental effects of the program. The court should overturn the Army’s decision not to complete an SEIS because it was arbitrary, capricious, or an abuse of discretion. The court should also find that the NEPA claims currently raised by the plaintiffs are distinguishable from the NEPA claims raised in Chemical Weapons Working Group, which were rejected by the court.

Part I of this Note discusses the chemical weapons dilemma faced by the United States, including a look at the chemical weapons stockpile and the legal mandates for destruction. Part II focuses on NEPA, what requirements it establishes for the destruction process and how courts have applied the statute in the past. Part III discusses the Army’s decision to use incineration to destroy the chemical weapons stockpile, as well as the arguments raised by those opposed to incineration. Part IV discusses the Chemical Weapons Working Group case and, more specifically, how the court responded to the plaintiffs’ NEPA claims. Part V looks at recent developments and the new cases which have been filed challenging the Army’s use of incineration. Part VI considers whether NEPA will be successful in stopping the Army’s use of incineration as a means of destroying the chemical weapons stockpile.

I. The Chemical Weapons Dilemma

Chemical weapons were used most heavily during World War I. During this time, the United States created a stockpile of chemical weapons as protection against other countries that had developed chemical agents. Historically, U.S. policy allowed for the use of these

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22 See id. at 4–5.
weapons for retaliatory and deterrent purposes. In the past two decades, however, this policy has changed. A congressional act, an international treaty, and a presidential declaration all have disavowed further use of chemical weapons. Furthermore, the Army has been directed by Congress and an international convention to destroy the existing chemical weapons stockpile. Faced with these legal mandates, as well as the risks posed by continued storage of the weapons, the Army must confront the dilemma of how to deal with thousands of tons of stored chemical weapons that are no longer needed—or tolerated.

A. The United States Chemical Weapons Stockpile

The U.S. stores its chemical weapons stockpiles in eight communities: Aberdeen, Maryland; Anniston, Alabama; Lexington, Kentucky; Newport, Indiana; Pine Bluff, Arkansas; Pueblo, Colorado; Tooele, Utah; and Umatilla, Oregon. In 1995, there were approximately 30,000 tons of chemical warfare agents spread among these different sites. Although the majority of these weapons would be useless in a military attack due to their age, design, and unpredictability, they have been in storage since 1968, when the production of

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23 See id. at 5.
24 See id.
26 See generally 50 U.S.C. § 1521; CWC, supra note 7.
27 See DeLisi, supra note 3, at 78; Foote, supra note 21, at 5. See generally 50 U.S.C. § 1521; CWC, supra note 7.
28 DeLisi, supra note 3, at 77; Koplow, supra note 10, at 473. Each of these locations has stored the following percentage of the total U.S. stockpile: Tooele, Utah, 42.3%; Pine Bluff, Arkansas, 12%; Umatilla, Oregon, 11.6%; Pueblo, Colorado, 9.9%; Anniston, Alabama, 7.1%; Aberdeen, Maryland, 5%; Newport, Indiana, 3.6%; and Lexington, Kentucky, 1.6%. Major Lawrence E. Rouse, The Disposition of the Current Stockpile of Chemical Munitions and Agents, 121 MIL. L. REV. 17, 18 (1988).
chemical weapons ceased. The destruction of the stockpile will cost an estimated $24 billion.

The weapons that make up the United States’ stockpile are unitary chemical weapons. Most of the chemicals found in the stored weapons are nerve agents, like sarin and VX, and blister agents, like mustard gas.

Even a small amount of a nerve agent can be lethal if it is swallowed, inhaled, or if it touches the eyes or skin. Exposure to nerve agents can lead to shortness of breath, nausea, vomiting, involuntary defecation and urination, seizures, paralysis, coma, and death by asphyxiation. If these chemicals were to enter the environment, they would remain in the air for a few days, possibly being inhaled by those in the vicinity. If the chemicals were to reach the soil or water, they could evaporate into the atmosphere or possibly contaminate the groundwater.

Exposure to blister agents can also have catastrophic effects. Mustard gas, which actually is a liquid, can cause skin burns, blisters, blindness, respiratory disease, and death. In addition, studies have proven that it is a carcinogen, and exposed men can suffer from lower sperm counts. If mustard gas were released into the water or soil,
some of the chemical would evaporate into the air and the rest would remain in the water or soil until broken down, which could take anywhere from a few minutes to a few days.\textsuperscript{41}

Although the chemical weapons stockpile has little military value, almost all of the chemicals have maintained their lethality.\textsuperscript{42} The longer these weapons are stored around the country, the greater the possibility that a leak or accidental detonation will occur.\textsuperscript{43} The weapons are also susceptible to natural disasters, like earthquakes.\textsuperscript{44} There are also concerns about possible terrorist use of the stored chemical agents.\textsuperscript{45} According to a risk analysis completed by the Army while evaluating the use of incineration at the Tooele site, the risk of disaster is one hundred times greater if the weapons are not destroyed.\textsuperscript{46} In addition, continued storage of the chemical agents is costly. The cost of maintaining and securing the stockpile has been estimated at $63.8 million annually.\textsuperscript{47}

\textbf{B. Legal Authority Demanding Destruction}

The Army’s need to destroy the weapons arises not only from the fear of an accident, but also because the Army is legally bound, under both a congressional act\textsuperscript{48} and an international treaty,\textsuperscript{49} to destroy the stockpile. In 1986, Congress passed the Department of Defense Authorization Act requiring the Secretary of Defense to destroy all of the chemical weapons being stored throughout the country.\textsuperscript{50} The deadline for completing this task, first set at September 30, 1994 and later extended to December 31, 2004,\textsuperscript{51} is now 2007.\textsuperscript{52} In order to satisfy

\textsuperscript{41} Id. at 1.
\textsuperscript{42} See Koplow, supra note 10, at 473, 474.
\textsuperscript{43} Chem. Weapons Working Group Inc. v. U.S. Dep’t of the Army, 935 F. Supp. 1206, 1209 (D. Utah 1996), aff’d, 111 F.3d 1485 (10th Cir. 1997); DeLisi, supra note 3, at 78.
\textsuperscript{44} Chem. Weapons Working Group, 935 F. Supp. at 1209; DeLisi, supra note 3, at 78.
\textsuperscript{46} Chem. Weapons Working Group, 935 F. Supp. at 1216; see also Koplow, supra note 10, at 532 (noting that the “no action” alternative to dealing with the chemical weapons stockpile presents both environmental and safety risks).
\textsuperscript{47} Rouse, supra note 28, at 18. This estimate, which was provided in a report prepared by the Chemical Warfare Review Commission in 1985, is probably much higher by now.
\textsuperscript{49} See generally CWC, supra note 7.
\textsuperscript{50} 50 U.S.C. § 1521(a).
\textsuperscript{51} Id. § 1521(b)(5); Chemical Weapons Working Group, 935 F. Supp. at 1209.
the requirements of this Act, the Army must destroy the weapons in a way that provides for “maximum protection for the environment, the general public, and the personnel who are involved in the destruction of the lethal chemical agents and munitions.”

Additional pressure for timely destruction of the weapons comes from the International Convention on Prohibition of the Development, Production, Stockpiling, and Use of Chemical Weapons and on their Destruction (CWC or Chemical Weapons Convention), which was ratified by the United States in 1993. As of November 19, 2004, 167 countries had become parties to the Chemical Weapons Convention. The CWC seeks to ban the use of chemical weapons and requires that signatory nations destroy their existing chemical weapons and the facilities where the weapons were produced. The deadline for completing destruction of the chemical agents is April 29, 2007. If a country experiences problems with its destruction program, it is possible for it to get a five-year extension of the deadline. If the Army fails to meet the requirements of this treaty, the United States could face sanctions for non-compliance.

II. THE NATIONAL ENVIRONMENTAL POLICY ACT

Another legal directive that the Army will have to consider while disposing of the chemical weapons stockpile is the National Environ-

54 See CWC, supra note 7.
56 Id.
58 See id. (noting that the CWC requires all member countries to destroy their chemical weapons within ten years after the CWC entered into force); Org. for the Prohibition of Chem. Weapons, supra note 55 (showing that the CWC entered into force on April 29, 1997).
59 See CWC, supra note 7, Annex on Implementation and Verification, pt. IV(A), paras. 24–28, 1974 U.N.T.S. at 393; Org. for the Prohibition of Chem. Weapons, supra note 7. This five-year extension can be granted if a country experiences “technological, financial, ecological, or other inhibitions beyond its control.” Koplow, supra note 10, at 467–68.
60 See CWC, supra note 7, art. XII, 1974 U.N.T.S. at 349; DeLisi, supra note 3, at 80. These sanctions may include suspension of the party’s privileges and rights under the treaty or collective measures against the party. CWC, supra note 7, art. XII, 1974 U.N.T.S. at 347. In extreme cases, the non-compliance may be brought to the attention of the United Nations. Id.
mental Policy Act (NEPA).\textsuperscript{61} NEPA was enacted in 1969 to ensure that environmental concerns are a part of all major decisions made by federal agencies.\textsuperscript{62} The statute aims to make federal agencies more conscious of the environmental impacts of their decisions by keeping the public informed through the NEPA compliance process.\textsuperscript{63} NEPA does not require agencies to reach any particular conclusions in their decision-making process; the act just seeks to ensure that environmental concerns have been considered.\textsuperscript{64} For instance, even though NEPA requires agencies to identify alternatives which might be better for the environment, it does not require the agencies to chose one of these alternatives.\textsuperscript{65} Therefore, judicial review of agency decisions is limited to looking at whether or not the procedural requirements of NEPA have been followed.\textsuperscript{66}

\section*{A. The EIS and the SEIS}

At the heart of NEPA is the requirement that an environmental impact statement (EIS) be prepared for all major federal actions that significantly affect the quality of the human environment.\textsuperscript{67} This EIS

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\begin{itemize}
\item \textsuperscript{63} See \textit{Catholic Action of Haw.}, 454 U.S. at 143; Koplow, supra note 10, at 485; Sauber, supra note 62, at 805. NEPA requires that the environmental impacts of major federal actions be disclosed to the public as provided by the provisions of the Freedom of Information Act (FOIA). Sauber, supra note 62, at 811, 814.
\item \textsuperscript{64} Weinberger, 745 F.2d at 416.
\item \textsuperscript{65} ZYGMENT J.B. PLATER ET AL., ENVIRONMENTAL LAW AND POLICY: NATURE, LAW AND SOCIETY 510 (3d ed. 2004); see also Koplow, supra note 10, at 485 (noting that agencies are not required by NEPA to choose alternatives that have the least negative environmental consequences).
\item \textsuperscript{66} See Weinberger, 745 F.2d at 416; see also Strycker’s Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223, 227–28 (1980) (holding that if an agency follows the procedural requirements of NEPA in making its decision, the court’s role is limited to making sure that the environmental consequences of the decision have been considered by the agency); Vt. Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 558 (1978) (recognizing that the actual requirements NEPA imposes upon agencies are procedural).
\item \textsuperscript{67} National Environmental Policy Act of 1969 § 102(2)(c), 42 U.S.C. § 4332(2)(C) (2000). “‘[T]o the fullest extent possible,’ all federal agencies shall ‘include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement’ discussing, \textit{inter alia}, the environmental impact of the proposed action and possible alternatives.”
\end{itemize}
must include the environmental impact of the proposed action and alternatives to the proposed action.68

The Council for Environmental Quality (CEQ) has promulgated regulations to implement NEPA.69 These regulations stress the importance of considering alternatives to a proposed project,70 describing the alternatives section as central to the EIS.71 The regulations require that the NEPA process be used as a means of identifying and evaluating reasonable alternatives to a proposed project that may have less negative environmental effects.72 Agencies are directed to “emphasize real environmental issues and alternatives,”73 and to comparatively assess all alternatives objectively.74

According to CEQ regulations, agencies are required to prepare an SEIS whenever there is significant new information or circumstances which are relevant to the environmental effects of a proposed project, or when substantial changes are made to the project which are relevant to its environmental impacts.75 The agency has discretion to decide whether or not an SEIS is required.76 In deciding whether an SEIS is necessary, agencies should apply a rule of reason.77 An SEIS is not required every time new information arises.78 In Marsh v. Oregon Natural Resources Council, the U.S. Supreme Court established the rule that an SEIS is required “[i]f there remains ‘major Federal action[ ]’ to occur, and if the new information is sufficient to show that the remaining action will ‘affect the quality of the human environment’ in a significant manner or to a significant extent not already considered.”79 Agencies are directed to look at whether the environmental consequences of a proposed project, as considered in the original EIS, have

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68 Catholic Action of Haw., 454 U.S. at 142 (alteration in original) (quoting 42 U.S.C. § 4332(2)(C)).
69 Catholic Action of Haw., 454 U.S. at 142.
70 See Purpose Policy and Mandate, 40 C.F.R. § 1500.2(b), (e) (2003).
72 40 C.F.R. § 1500.2(e).
73 Id. § 1500.2(b).
74 40 C.F.R. § 1502.14(a), (b).
75 Id. § 1502.9(c)(1)(1) (ii).
76 Wisconsin v. Weinberger, 745 F.2d 412, 417 (7th Cir. 1984); see also Marsh v. Or. Natural Res. Council, 490 U.S. 360, 377 (1989) (holding that the Court must defer to the “informed discretion” of the agency because analysis of the relevant evidence requires the agency’s expertise).
77 Marsh, 490 U.S. at 373.
78 Id.
79 Id. at 374 (second and third alterations in original).
been affected by the new information.\textsuperscript{80} Even after proposed projects have received approval, agencies are still required to take a “hard look” at the environmental consequences.\textsuperscript{81}

Courts will uphold an agency’s decision of whether or not to complete an SEIS unless it is arbitrary, capricious, or an abuse of discretion.\textsuperscript{82} Under this limited standard of review, the agency’s decision will not be set aside as long as it is based upon consideration of all relevant factors and there has not been a “clear error of judgment.”\textsuperscript{83} The court will defer to the agency’s expertise as long as it is convinced that the agency has made a reasonable decision regarding the significance of the new information.\textsuperscript{84} Even if a court might find other arguments more persuasive, it must defer to the agency’s reasonable discretion.\textsuperscript{85}

In \textit{Marsh}, plaintiffs, nonprofit organizations, brought suit against the Army Corps of Engineers (the Corps) alleging that the Corps had violated NEPA by failing to prepare an additional SEIS prior to construction of a dam.\textsuperscript{86} The plaintiff’s claim relied on two documents showing that the effects of the dam on water quality would be greater than previously contemplated by the Corps.\textsuperscript{87} The Court deferred to the Corps’s decision that the new information did not require an SEIS.\textsuperscript{88} The Court found that the Corps had taken a hard look at the two documents and determined that the information was not significant enough to require an SEIS.\textsuperscript{89} The Court held that the Corps’s decision not to complete an SEIS was not arbitrary, capricious, or an abuse of discretion because it was based upon a reasonable evaluation of the relevant information.\textsuperscript{90}

\textsuperscript{80} See \textit{Weinberger}, 745 F.2d at 418.
\textsuperscript{81} \textit{Marsh}, 490 U.S. at 374.
\textsuperscript{84} \textit{Id.}
\textsuperscript{85} \textit{Id.}
\textsuperscript{86} See \textit{id.} at 363. In that case, the Corps had already completed a final SEIS, but plaintiffs argued that the new information required an additional SEIS. See \textit{id.} at 365.
\textsuperscript{87} See \textit{id.} at 369. Plaintiffs argued that the Corps had violated NEPA by failing to prepare a second SEIS to take into account these documents, which were prepared after the Corps had completed its SEIS in 1980. \textit{Id.} at 368.
\textsuperscript{88} See \textit{id.} at 385.
\textsuperscript{89} \textit{Marsh}, 490 U.S. at 385.
\textsuperscript{90} \textit{Id.}
B. NEPA and the Military

The judiciary has previously dealt with how NEPA applies to actions taken by the military.91 Military actions can greatly impact the environment, triggering the requirements of NEPA.92 There can be a conflict, however, between the requirement that the EIS be made available to the public and concerns of national security.93 In Weinberger v. Catholic Action of Hawaii/Peace Education Project, the U.S. Supreme Court held that, while the military has to make environmental concerns a part of its decisionmaking process, matters of national security may be exempt from disclosure under the Freedom of Information Act (FOIA).94 The Court held that Congress’s decision to make public disclosure under NEPA subject to FOIA expressed its intention that the military’s need to protect national security overrides the public’s right to be informed.95 Although courts have been willing to protect classified information from being publicly disclosed, they have not created a general military exception to NEPA.96

III. The Decision to Incinerate

Prompted by the dangers of continued storage and the legal pressure to destroy the weapons, the Army had to decide how to dispose of the stockpile.97 Under the CWC, each member country is free to decide which method it will use to destroy its chemical agents, with the stipulation that it destroy the weapons in a manner that will not harm

91 See generally Weinberger v. Catholic Action of Haw./Peace Educ. Project, 454 U.S. 139 (1981) (considering whether an EIS had to be prepared before the Navy could proceed with building an ammunition and weapons storage facility that was capable of storing nuclear weapons); Wisconsin v. Weinberger, 745 F.2d 412 (7th Cir. 1984) (considering whether the Navy had to prepare an SEIS for a low frequency submarine communications system that it planned to reactivate and expand).
92 Sauber, supra note 62, at 806.
93 See Catholic Action of Haw., 454 U.S. at 141, 142–43; Sauber, supra note 62, at 806.
94 454 U.S. at 143, 144–45, 146. The Court held that matters classified in the interest of national defense are exempt from disclosure under FOIA and therefore are also exempt from NEPA’s mandate of public disclosure. See id. at 144–45. The Court did find, however, that the Navy could be required to prepare an EIS, even if solely for internal purposes. Id. at 146.
95 See id. at 145.
96 See Amy Sheridan, National Security Exemptions in Federal Pollution Laws, 19 WM. & MARY ENVTL. L. & POL’Y REV. 287, 298 (1995) (noting that although an EIS might be exempt from disclosure for national security reasons, no agency is exempt from preparing an EIS under any circumstances); Sauber, supra note 62, at 820, 832; see also Catholic Action of Haw., 454 U.S. at 146.
97 See supra Part I.
people or the environment.\textsuperscript{98} For instance, the CWC prohibits the use of land burial, open pit burning, and sea dumping as means of disposal.\textsuperscript{99} Each of these environmentally unsafe disposal methods has been used by the United States Army in the past.\textsuperscript{100} Once these practices were discontinued,\textsuperscript{101} the Army had to evaluate new disposal technologies to determine how to safely dispose of the chemical weapons stockpile.

\textbf{A. The Army’s Decision to Incinerate the Weapons}

The Army began experimenting with incineration as a means of destroying chemical weapons in the 1970s.\textsuperscript{102} In 1979, the Chemical Weapons Munitions Disposal System (CAMDS) was built in Tooele, Utah to assess the incineration process.\textsuperscript{103} Pursuant to NEPA, in 1986 the Army circulated a Draft Programmatic Environmental Impact Statement (DPEIS) assessing the environmental impact of destroying the chemical agents as compared with continued storage.\textsuperscript{104} A Final Programmatic Environmental Impact Statement (FPEIS) was completed in 1988.\textsuperscript{105} The FPEIS assessed alternative means for destroying the weapons stockpile, including destruction by nuclear explosion and

\textsuperscript{99} OPCW, \textit{Environmental Concerns}, \textit{supra} note 98.
\textsuperscript{100} DeLisi, \textit{supra} note 3, at 85; Koplow, \textit{supra} note 10, at 514–15; Rouse, \textit{supra} note 28, at 34.
\textsuperscript{101} DeLisi, \textit{supra} note 3, at 85.
\textsuperscript{102} See id. (discussing the Army’s incineration program at Rocky Mountain Arsenal, Colorado beginning in 1972).
\textsuperscript{104} Chem. Weapons Working Group, 935 F. Supp. at 1210. The DPEIS looked at four possibilities: (1) continued storage, (2) using one national disposal facility to destroy the chemicals, (3) using two regional disposal facilities, or (4) using on-site disposal at each of the eight storage locations. Rouse, \textit{supra} note 28, at 43. Continued storage was not a realistic alternative because of the possible safety and environmental problems and also because Congress had already passed the Department of Defense Authorization Act requiring that the weapons be destroyed. See id. at 49. The use of a single national disposal center was rejected due to the increased health, safety, and environmental risks of transporting the chemicals. See id. at 49–53. The use of regional disposal facilities was also rejected for similar concerns about the health and environmental risks of transporting the chemicals. See id. at 53–57. The DEIS selected on-site disposal as the preferred method for destroying the chemical weapons. \textit{Id}. at 57.
\textsuperscript{105} Chem. Weapons Working Group, 935 F. Supp. at 1210.
the use of chemical processes like neutralization.\textsuperscript{106} Each of the proposed alternatives was rejected by the Army as unproven or unreasonable.\textsuperscript{107} The Army decided to use on-site incineration to destroy the chemical weapons stored at each of the eight locations.\textsuperscript{108} It concluded that the environmental impacts of on-site incineration were “quite limited in scope and significance.”\textsuperscript{109} This decision was made public in February 1988 when the Army issued its Record of Decision.\textsuperscript{110}

Although the DPEIS and FPEIS applied to all eight storage sites, the Army expressed its intention to prepare site-specific environmental impact statements for each of the locations.\textsuperscript{111} In 1989, a Draft Environmental Impact Statement (DEIS), followed by a Final Environmental Impact Statement (FEIS) and Record of Decision, expressed the Army’s decision to use on-site incineration at the storage site in Tooele, Utah.\textsuperscript{112} The Army prepared to construct the first full-blown incineration plant in the continental United States.\textsuperscript{113}

Beginning in 1988, the Johnston Atoll Chemical Agent Disposal System (JACADS) was used to evaluate the incineration process.\textsuperscript{114} JACADS was a fully operational incineration facility that was built to serve as an archetype for the incineration plants that the Army planned to build in the future.\textsuperscript{115} Using information gathered from the operation of JACADS, the Army constructed the Tooele Chemical Disposal Facility (TOCDF) in Tooele, Utah in 1993.\textsuperscript{116}

\textsuperscript{106} CWWG Complaint at 15.
\textsuperscript{107} Chem. Weapons Working Group, 935 F. Supp. at 1210. For example, the chemical neutralization process was rejected because it took too long, was unsuccessful in completely destroying the chemical agents, created hazardous waste, and any benefits achieved were potentially reversible. Koplow, \textit{supra} note 10, at 516; see Rouse, \textit{supra} note 28, at 35–36.
\textsuperscript{109} Koplow, \textit{supra} note 10, at 518 (quoting \textsc{Program Manager for Chemical Demilitarization, Chemical Stockpile Disposal Program Final Programmatic Environmental Impact Statement} 4-1 (1988)).
\textsuperscript{111} Chem. Weapons Working Group, 935 F. Supp. at 1210.
\textsuperscript{112} \textit{Id.}
\textsuperscript{113} DeLisi, \textit{supra} note 3, at 87.
\textsuperscript{114} See \textit{id.} at 86.
\textsuperscript{115} Chem. Weapons Working Group, 935 F. Supp. at 1210.
\textsuperscript{116} See \textit{id.} at 1211.
B. Opposition to Incineration

The Army’s decision to use on-site incineration to dispose of the chemical weapons stockpile was met with opposition from the beginning.\textsuperscript{117} Today, opponents continue to argue for the use of an alternative method of disposal, claiming that incineration will negatively affect human health and the environment.\textsuperscript{118} For instance, incinerators create toxic waste, like dioxins, which are released into the environment and can have harmful effects on human health.\textsuperscript{119} In addition, the use of incinerators can cause heavy metals and unburned toxic chemicals to be released into the environment.\textsuperscript{120} Opponents argue that exposure to these toxic wastes will create problems that communities will deal with for years.\textsuperscript{121}

IV. Citizens Protest Incineration: Chemical Weapons Working Group, Inc. v. United States Department of the Army

On May 10, 1996, before incineration at TOCDF began, the Chemical Weapons Working Group, the Sierra Club, and the Vietnam Veterans of America Foundation,\textsuperscript{122} filed suit against the United States Army.\textsuperscript{123} On June 12, 1996, the plaintiffs filed a motion seeking injunctive relief to prevent the defendants from conducting test burns at the site.\textsuperscript{124} Among the plaintiffs’ claims was that the Army had violated NEPA by neglecting to complete an SEIS taking into account substantial new information that had become available regarding the incineration program.\textsuperscript{125} Specifically, the plaintiffs argued that the Army had failed to consider evidence of various dangerous incidents alleged to have occurred at JACADS, arguing that TOCDF was at risk for similar incidents.\textsuperscript{126} The plaintiffs also argued that the defendants

\textsuperscript{117} Id. at 1206. See generally CWWG Complaint; Families Concerned Complaint.
\textsuperscript{119} See Chem. Weapons Working Group, 935 F. Supp. at 1213 (acknowledging that the incinerators at TOCDF will create and release dioxins ); Greenpeace, \textit{supra} note 9 (stating that dioxins can lead to a wide range of health problems, including cancer).
\textsuperscript{120} Greenpeace, \textit{supra} note 9.
\textsuperscript{121} See Crowe, \textit{supra} note 118, at 3.
\textsuperscript{122} Chem. Weapons Working Group, Inc. v. U.S. Dep’t of the Army, 111 F.3d 1485, 1487 (10th Cir. 1997).
\textsuperscript{123} Chem. Weapons Working Group, 935 F. Supp. at 1208.
\textsuperscript{124} Id. at 1208–09.
\textsuperscript{125} Id. at 1208.
\textsuperscript{126} Id. at 1212.
had violated NEPA by not properly assessing risks associated with the dioxins which would be released from the incinerator.\textsuperscript{127} Moreover, the plaintiffs contended that the Army had violated NEPA by failing to consider recent developments in alternative technologies.\textsuperscript{128}

On July 13, 1996, one month after the plaintiffs’ motion was filed, the Army issued a Record of Environmental Consideration (REC) stating that no significant new information had appeared since it had decided to use on-site incineration at Tooele, and therefore an SEIS was not required.\textsuperscript{129} Even though the Army acknowledged that some problems had arisen in the operation of JACADS, it concluded that these flaws did not indicate that operation of TOCDF would have any significant environmental impacts that were not accounted for in the Tooele FEIS.\textsuperscript{130} While the Army admitted that there had been three releases of chemical agents into the atmosphere from JACADS, it confirmed that changes had been made at TOCDF to address these problems.\textsuperscript{131} In addition, the Army acknowledged that an employee at the JACADS facility had been injured by a nerve agent spill, but argued that the injury resulted from a failure to follow standard procedure, as opposed to a failure in equipment, design, or operation.\textsuperscript{132} In response to the plaintiffs’ arguments regarding the release of dioxins, the Army argued that the risks associated with the release of dioxins are uncertain.\textsuperscript{133} The Army also submitted evidence to counter the plaintiffs’ contention that alternative technologies were available, arguing that these alternatives were immature and would take years to implement at the Tooele storage site.\textsuperscript{134}

When evaluating the plaintiffs’ likelihood of success on their claim that the Army had violated NEPA by failing to complete an SEIS, the court emphasized the deference owed to the Army’s REC.\textsuperscript{135} The court noted that its role in the case would be limited to considering whether the Army’s decision was reasonable based on the Army’s

\textsuperscript{127} Id. at 1213.
\textsuperscript{128} See id. at 1214. The Army did prepare an REC, in which it claimed to have completed an updated review of the use of incineration at TOCDF, including expected impacts and alternatives. CWWG Complaint at 16. The REC, however, considered only two alternatives: on-site incineration and no action. Id.
\textsuperscript{129} Chem. Weapons Working Group, 935 F. Supp. at 1210.
\textsuperscript{130} Id. at 1211.
\textsuperscript{131} Id. at 1212.
\textsuperscript{132} See id.
\textsuperscript{133} See id. at 1213.
\textsuperscript{134} See id. at 1214.
“evaluation of the significance—or lack of significance—of the new information.”\textsuperscript{136}

Under this limited standard of review, the court held that the Army’s decision had to be upheld because it was not arbitrary or capricious.\textsuperscript{137} The court concluded that the evidence of the alleged incidents at JACADS was not new information that would require the preparation of an SEIS because these problems were anticipated and measures had been taken by the Army to correct them at TOCDF.\textsuperscript{138} Similarly, the court held that recent information regarding the risks posed by dioxins, as well as information about alternative technologies, did not require an SEIS because the significance of the information was uncertain and the Army had the discretion to decide whether the information was substantial enough to require an SEIS.\textsuperscript{139}

After concluding that the plaintiffs were unlikely to win on the merits of this claim, the court denied the plaintiffs’ motion for a preliminary injunction.\textsuperscript{140} This decision was affirmed by the Court of Appeals for the Tenth Circuit.\textsuperscript{141}

On August 22, 1996, trial incineration of chemical agents commenced at TOCDF.\textsuperscript{142} At this time, TOCDF was operating in a “shake-down” period, which was intended to identify possible problems with the facility’s operation.\textsuperscript{143} On January 11, 1997, the plaintiffs initiated a second motion for preliminary injunction to prevent further incineration at TOCDF.\textsuperscript{144} The plaintiffs argued that new evidence, which had become available since their first motion for an injunction was denied, required the defendants to prepare an SEIS.\textsuperscript{145}

During the shakedown period, TOCDF experienced some operational problems.\textsuperscript{146} The plaintiffs used this as evidence that TOCDF was being operated in a “trial-and-error” manner, which was not how the project was contemplated when the EIS was prepared.\textsuperscript{147} The

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{136} \textit{Id.} (quoting Marsh v. Or. Natural Res. Council, 490 U.S. 360, 378 (1989)).
\item \textsuperscript{137} \textit{See id.} at 1218–19.
\item \textsuperscript{138} \textit{Id.} at 1218.
\item \textsuperscript{139} \textit{See id.} at 1218–19.
\item \textsuperscript{140} \textit{See id.} at 1220.
\item \textsuperscript{141} \textit{See Chem. Weapons Working Group, Inc. v. U.S. Dep’t of the Army, 111 F.3d 1485, 1489 (10th Cir. 1997).}
\item \textsuperscript{142} \textit{Chem. Weapons Working Group, Inc. v. U.S. Dep’t of the Army, 963 F. Supp 1083, 1086 (D. Utah 1997).}
\item \textsuperscript{143} \textit{Id.}
\item \textsuperscript{144} \textit{See id.} at 1085.
\item \textsuperscript{145} \textit{Id.}
\item \textsuperscript{146} \textit{See id.} at 1086.
\item \textsuperscript{147} \textit{See id.} at 1086–87.
\end{enumerate}
\end{footnotesize}
plaintiffs also presented evidence that the health risks resulting from the toxic chemicals being emitted from the smokestacks were “both more real and quantitatively greater than previously disclosed.”

Accordingly, the plaintiffs again argued that the Army had violated NEPA by not preparing an SEIS.

The court once again denied the plaintiffs’ motion for injunctive relief. The court held that the evidence presented by the plaintiffs concerning operational problems at TOCDF and evidence regarding emissions from the smokestacks was not new information, since it was either previously considered or had been remedied. Similar to its holding on the plaintiffs’ first motion for injunctive relief, the court found that the plaintiffs’ claim raised a factual issue that was within the Army’s discretion. In considering the plaintiffs’ likelihood of success on the merits, the court again applied a narrow standard of review, deferring to the Army’s judgment in not preparing an SEIS.

These two motions for preliminary injunctive relief were the only times that the court would consider the merits of the plaintiffs’ NEPA claim. When the case went to trial in June 1999, the court determined that the plaintiffs’ NEPA claim was barred by the six-year statute of limitations. When the suit was filed in 1996, it was already too late for the plaintiffs to challenge both the FP EIS and the site-specific FEIS for Tooele, which were completed in 1988 and 1989 respectively.

V. RECENT DEVELOPMENTS AND NEW CHALLENGES TO THE ARMY’S PLAN TO INCINERATE

A. The Shortcomings of Incineration

By early 2001, construction of additional incineration facilities in Alabama, Arkansas, and Oregon was completed. Even during the

149 See id. at 1085.
150 Id. at 1098.
151 See id.
152 See id.
153 See id.
154 Chem. Weapons Working Group, Inc. v. U.S. Dep’t of the Army, No. 2:96-CV-425C, 2000 WL 1258380, at *11 (D. Utah 2000). Since challenges to NEPA decisions are brought under the Administrative Procedure Act (APA), the six-year statute of limitations which applies to APA claims is applicable to the plaintiffs’ NEPA claim. Id.
155 See id.
156 E-mail from Craig Williams, Director, Chemical Weapons Working Group, to author (Apr. 4, 2004, 21:57:36 EST) (on file with author). Construction of the incinerators began
trial burn phases, these facilities have been plagued with problems, including unplanned shutdowns, mechanical problems, trial burn failure, and agent migration. In addition, the Army’s operation of TOCDF has continued to face problems and opposition. In July 2002, workers were exposed to nerve agent, causing the facility to shut down for eight months. The plant resumed operation on March 28, 2003, but in the next thirty-eight days, it was shutdown three more times, for a total of eleven days. There have also been issues with the operation of JACADS, where there was a release of nerve agent in August 2002. Furthermore, opponents argue that the incineration program has not been nearly as efficient or cost-effective as originally planned. Operation of JACADS, which was anticipated to last five years, has lasted almost eleven years. TOCDF was predicted to take six months to incinerate one class of weapons. Instead, it took over four years.

B. The Army’s Decision to Use Other Disposal Methods

While the Army is still pursuing the use of incineration to dispose of the chemical weapons stored at four of the sites, it has decided to use nonincineration processes at the other four. While no SEIS has in 1997 when each of the sites received a RCRA permit. Id. As of the fall of 2004, the Alabama facility was in the agent trial burn phase, the Oregon facility was awaiting the permits necessary to begin agent trial burns, and the Arkansas facility was in the surrogate trial burn phase. Id.

157 Id.
160 Press Release, supra note 158; Press Release, supra note 159.
161 See Press Release, supra note 158.
162 See Press Release, supra note 159.
163 See Press Release, supra note 158.
164 Id.
165 Id.
166 Id.
167 CWWG Complaint at 3. The Army still plans to use incineration in Alabama, Arkansas, Oregon, and Utah. Id.
168 See id. at 3. The Army has decided to use non-incineration processes in Colorado, Indiana, Kentucky, and Maryland. Id. Craig Williams, Director of Chemical Weapons Working Group, explains that this decision is based on the fact that these are the four sites where the grassroots opposition to incineration has had the most political influence. Email from Craig Williams, Director, Chemical Weapons Working Group, to author (Apr. 8, 2004, 13:11:11 EST) (on file with author). In 1992, this political power led Congress to
been created to consider alternatives for the sites set to use incineration, a site-specific SEIS was prepared for each of the other sites, prompting the Army to choose alternative technologies at these sites.\(^{169}\) For instance, the FEIS for the Pueblo, Colorado site, which was published in March 2002, considered four different alternatives and selected chemical neutralization followed by biodegradation as the disposal method to be used.\(^{170}\) Similarly, an FEIS for the Richmond, Kentucky site was published in December 2002, which considered five different alternative technologies and led to the Army’s decision to use chemical neutralization followed by supercritical water oxidation.\(^{171}\)

The Army’s decision to use nonincineration processes at these four sites shows that there are alternative technologies that could be used to dispose of the chemical agents.\(^{172}\) As of June 2002, there were four alternative technologies that could be used instead of incineration at any of the eight storage sites: (1) neutralization and biological treatment; (2) neutralization and supercritical water oxidation; (3) neutralization, supercritical water oxidation, and gas phase chemical reduction; and (4) Silver II electrochemical oxidation.\(^{173}\) These disposal technologies were proven successful by the Assembled Chemical Weapons Assessment (ACWA) program, a federal program developed to require the Army to explore alternative methods of disposal for storage sites which contained less than five percent of the U.S. stockpile, which included Indiana, Kentucky, and Maryland. \(\text{Id.}\)

In 1996, the Army stated that neutralization could be used to dispose of the chemical agents in Indiana and Maryland. \(\text{Id.}\) The Army claimed that neutralization could not be used in Kentucky because that site (like Alabama, Arkansas, Colorado, Oregon, and Utah) contained assembled chemical weapons, as opposed to just chemical agents. \(\text{Id.}\) In 1996, Congress directed the Army to identify at least two alternative disposal technologies that could be used to dispose of assembled chemical weapons. \(\text{Id.}\) This law prohibited spending money on an incineration program in Colorado and Kentucky. \(\text{Id.}\) The remaining states, Alabama, Arkansas, Oregon, and Utah, declined to join in the moratorium on incineration. \(\text{Id.}\)

This led to the division of the storage sites between those where incineration would still be pursued and those where the Army was directed to look for alternatives. \(\text{Id.}\) Mr. Williams noted that the Army continued to fight for incineration, even at the Colorado and Kentucky sites, but that these sites managed to win the fight due to the “political unity in opposition” to the incineration program. \(\text{Id.}\)

\(^{169}\) See CWWG Complaint at 16, 17. The Army did complete a site-specific EIS for each of the sites, but these did not consider any alternatives to incineration. \(\text{Id.}\) at 16. Following this, no site-specific SEIS was ever prepared for Alabama, Arkansas, Oregon, and Utah, while a site-specific SEIS has been prepared for each of the other four sites. \(\text{Id.}\) at 16, 17.

\(^{170}\) \(\text{Id.}\) at 17.

\(^{171}\) \(\text{Id.}\) at 18.

\(^{172}\) See \(\text{id.}\) at 3, 17, 18.

\(^{173}\) See Crowe, supra note 118, at 24.
to identify nonincineration processes for the disposal of chemical agents.\textsuperscript{174} No site-specific SEIS addressing these alternative technologies has been prepared for Alabama, Arkansas, Oregon, or Utah.\textsuperscript{175}

C. Recent Litigation

In response to these recent developments, two new suits have been filed in an effort to stop further incineration of chemical agents.\textsuperscript{176} The first lawsuit, \textit{Families Concerned About Nerve Gas Incineration v. United States Department of the Army}, was filed in November 2002 in the District Court for the Northern District of Alabama.\textsuperscript{177} The plaintiffs’ goal in initiating this suit was to prevent incineration at the Anniston Chemical Disposal Facility (ANCDF) and to force the Army to use an alternative method of disposal.\textsuperscript{178} In March 2003, a second lawsuit, \textit{Chemical Weapons Working Group, Inc. v. U.S. Department of Defense}, was filed in the District Court for the District of Columbia.\textsuperscript{179} Plaintiffs seek to enjoin the defendants from further operation of the incineration facility at TOCDF and to prevent full-blown incineration from beginning at the Alabama, Arkansas, and Oregon sites.\textsuperscript{180}

Among the plaintiffs’ claims is that the Army has violated NEPA by failing to prepare an SEIS for the incineration program.\textsuperscript{181} The plaintiffs argue that the Army was required to prepare both a SPEIS, which assessed the incineration program’s effects on human health and the environment and the alternative technologies that are avail-

\textsuperscript{174} \textit{Id.} The success of the ACWA Program in identifying viable alternative technologies prompted the Army to complete an SEIS for four of the sites. CWWG Complaint at 17.

\textsuperscript{175} See CWWG Complaint at 16, 27. In addition, the Final EIS for the ACWA Program decided to take no action at the Alabama and Arkansas sites and did not assess the use of non-incineration technologies at the Oregon or Utah sites. \textit{Id.} at 18.

\textsuperscript{176} See generally \textit{id.}; Families Concerned Complaint at 143.

\textsuperscript{177} \textit{Families Concerned}, No. CV-02-BE-2822-E, at 1; Families Concerned Complaint at 13. While the defendants filed a motion to dismiss some of the plaintiffs’ claims, they did not move to dismiss the NEPA claim against them. \textit{Families Concerned}, No. CV-02-BE-2822-E, at 24. Therefore, the plaintiffs’ claim that the Army had violated NEPA by failing to complete an SEIS has not been dismissed. See \textit{id.} The plaintiffs’ NEPA claims have since been consolidated into the NEPA claim raised in \textit{Chemical Weapons Working Group, Inc. v. U.S. Department of Defense}, filed in the District of Columbia. E-mail from Craig Williams, Director, Chemical Weapons Working Group, Inc., to author (Apr. 4, 2004, 21:57:36 EST) (on file with author).

\textsuperscript{178} See Press Release, \textit{supra} note 159.

\textsuperscript{179} CWWG Complaint at 1, 41.

\textsuperscript{180} See \textit{id.} at 4.

\textsuperscript{181} CWWG Complaint at 20, 22; Families Concerned Complaint at 153.
able, as well as a site-specific SEIS for the Alabama, Arkansas, Oregon, and Utah sites.  

Plaintiffs argue that the Army’s decision to use alternative technologies at four of the eight storage sites demonstrates the Army’s belief that reasonable alternatives to incineration exist. These new technologies were not evaluated when the defendants completed their FPEIS in 1988, nor have they been considered in a site-specific SEIS for Alabama, Arkansas, Oregon, or Utah. In addition, the plaintiffs argue that new information regarding problems at TOCDF and JACADS requires the defendants to prepare an SEIS. These incidents were not addressed during the original NEPA process and the Army has failed to address them through an SEIS. Without taking these incidents or information about new alternative technologies into account, the Army could not adequately assess the impact that incineration will have on human health and the environment or the comparative risks of incineration alternatives.

VI. WILL NEPA BE ABLE TO STOP THE INCINERATION?

In order to be successful on their NEPA claims, the plaintiffs in the recently filed cases will first have to establish that the EIS requirement of NEPA applies to the Army’s destruction of the chemical weapons stockpile. Next, they will have to convince the court that the new information regarding alternative technologies and incidents at the operational incinerators and the changes that have been made to the incineration program are significant and substantial enough to trigger the requirement that an SEIS be completed. The plaintiffs will have to demonstrate that the Army’s decision not to complete an SPEIS or site-specific SEIS for Alabama, Arkansas, Oregon, and Utah should be overturned because it is arbitrary, capricious, or an abuse of

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182 See CWWG Complaint at 20–21, 29–30.
183 See id. at 24, 27 (arguing that it is undisputed that viable alternative technologies exist and that the Army is assessing and using these technologies at other sites).
184 See id. at 16, 24.
185 See id. at 23–26; Families Concerned Complaint at 173–83.
186 See CWWG Complaint at 25–26; Families Concerned Complaint at 173–83.
187 See CWWG Complaint at 20–21, 29–30; Families Concerned Complaint at 153.
189 See Environmental Impact Statement, 40 C.F.R. § 1502.9(c) (1) (i), (ii) (2003).
discretion. Finally, the plaintiffs will have to overcome the precedent established in *Chemical Weapons Working Group*, in which the court deferred to the Army’s decision not to complete an SEIS, and convince the court that the holding in that case does not foreclose the possibility of a different conclusion in the two cases that have recently been filed.

A. *The Applicability of NEPA*

The Army’s planned incineration of the chemical weapons stockpile falls under the EIS requirement of NEPA because it is a major federal action that will significantly affect the quality of the human environment. The federal government has committed, and continues to commit, substantial resources to the incineration activities which will take place in Alabama, Arkansas, Oregon and Utah, making these activities major federal actions. In addition, the incineration that will occur at these sites will significantly affect the quality of the environment. It is known that the use of incinerators causes dioxins, heavy metals, and unburned toxic chemicals to be released into the environment. Due to these effects on the quality of the human environment, NEPA requires that an EIS be prepared for the incineration program. The EIS must include the environmental impacts of incineration, as well as alternative technologies that could be used instead of incineration.

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192 See CWWG Complaint at 21; Families Concerned Complaint at 153–63; DeLisi, *supra* note 3, at 81–82.
193 CWWG Complaint at 21; Families Concerned Complaint at 153; *see also Chem. Weapons Working Group*, 935 F. Supp. at 1217 (finding that the daily operation of TOCDF constitutes a major federal action, triggering the SEIS requirements of NEPA).
194 CWWG Complaint at 21; Families Concerned Complaint at 163.
195 *Chem. Weapons Working Group*, 935 F. Supp. at 1213 (noting that dioxins will be created and released into the environment by the TOCDF incinerators); See CWWG Complaint at 22 (arguing that the incineration facilities will actually create toxic chemicals, as well as releasing dioxins, PCBs, and unburned chemical agents into the environment); Families Concerned Complaint at 163; Greenpeace, *supra* note 9 (discussing how incinerators lead to the release of heavy metals, unburned toxic chemicals, and new chemicals that are formed during the incineration process).
197 See *id.*
There is currently no general exemption for military actions which would take the Army’s incineration program outside the reach of NEPA. In Weinberger v. Catholic Action of Hawaii/Peace Education Project, the U.S. Supreme Court acknowledged that classified material is exempt from the public disclosure requirement of NEPA. The Court also held that, even in situations where an EIS would be exempt from public disclosure requirements, NEPA would still require the agency to make environmental considerations a part of their decisionmaking process. The Court suggested that an EIS would be required even if prepared only for internal use. Since military actions are subject to the EIS requirements imposed by NEPA, with only the limited exception that they can be exempted from public disclosure, the Army is required to comply with the requirements of NEPA while undertaking the incineration program. In addition, the Army has not argued that the information surrounding the chemical weapons stockpile is classified, so it would not even be exempt from the public disclosure requirement.

In 1988, the Army completed an EIS for the incineration program, arguably conceding that NEPA applied to the project. In addition, in the Chemical Weapons Working Group case, the court also acknowledged that the Army was bound to meet the requirements of NEPA. Thus, in the two recent cases, the court should find that the Army is obligated to satisfy the requirements of NEPA in completing the incineration program.

B. The SEIS Requirement

After it completed an EIS for the incineration program, the Army was under a duty to supplement that EIS if significant new information arose or substantial changes were made to the project that were relevant to its environmental effects. In each of the cases challenging the Army’s use of incineration, plaintiffs have argued that the Army has

198 See Saber, supra note 62 at 820, 832; Sheridan, supra note 96, at 298.
200 Id. at 146.
201 Id.
202 See id.
203 See id. at 142–43.
205 See id. at 1217.
neglected its duty to complete an SEIS. They have contended that there is significant new information regarding both alternative technologies and also problems at the Army’s existing incineration facilities. In addition, the Army’s decision to use nonincineration processes at four of the storage sites is a substantial change to the incineration program which should also be considered in an SEIS. The plaintiffs must convince the court that the new information which has arisen, and the changes which have been made to the project, are so significant and substantial that the Army is required to complete an SEIS before it can proceed.

Under the SEIS requirements established in the CEQ regulations and the test applied by the U.S. Supreme Court in *Marsh v. Oregon National Resources Council*, the court should find that the Army was required to prepare an SEIS for the incineration program. Applying the regulations promulgated by the CEQ, the court should find that the Army was required to prepare an SEIS for the incineration program because there is significant new information which is relevant to the environmental effects of the project, as well as substantial changes made to the project which are relevant to its environmental impacts. The court should find that new information concerning alternative technologies requires preparation of an SEIS because the Army’s decision to use nonincineration processes at four of the sites shows that there are reasonable alternatives to the incineration program. An SEIS should be used to evaluate the environmental effects of using these alternatives at the remaining sites. The court should also find that the new information regarding chemical releases which have occurred at JACADS and TOCDF—as well as information which suggests that the incineration program has been neither as efficient nor as cost-effective as planned—is significant information that is relevant to the environmental effects of the incineration program, thereby requiring that an SEIS be prepared to consider this

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208 CWWG Complaint at 24, 25–26; Families Concerned Complaint at 173–83.
209 CWWG Complaint at 17.
210 See 40 C.F.R. § 1502.9(c)(1)(i), (ii).
211 See *supra* Part II.A.
212 See 40 C.F.R. § 1502.9(c)(1)(i), (ii).
213 CWWG Complaint at 24, 27.
214 *Id.*
new information. Moreover, the requirement that an SEIS be completed has also been generated by changes in the incineration program, which are arguably substantial and relevant to the project’s environmental impacts. The court should find that the Army’s decision to use nonincineration processes at four of the sites, as opposed to using on-site incineration at all eight sites as originally planned, is a substantial change to the project, the environmental effects of which must be assessed in an SEIS.

The CEQ regulations further support a finding that the information regarding alternative technologies is significant enough to trigger the SEIS requirement by describing the alternatives section as central to the EIS requirement. Under these regulations, the Army is required to use the NEPA compliance process to identify and assess reasonable alternatives to the incineration program that may have less negative environmental effects. By failing to consider the environmental effects of alternative processes, the Army is ignoring the CEQ’s mandate that agencies emphasize alternatives and assess each alternative objectively. Since the CEQ has made it clear that the evaluation of alternatives is a major component of the EIS requirement, the failure to address alternative technologies through the completion of an SEIS could be seen by the court as a serious violation of the duties imposed upon the Army by NEPA. Since the Army has already chosen to use alternative technologies at half of the sites, demonstrating that there are reasonable alternatives which may have less negative environmental effects, the court could find that the Army is violating the policy of NEPA by failing to use the NEPA process to evaluate the use of these alternatives at all eight sites.

The conclusion that the Army is violating NEPA by not preparing an SEIS could also be reached under the test established in Marsh v. Oregon Natural Resources Council. In that case, the U.S. Supreme Court held that an SEIS must be prepared when new information shows that a major federal action that remains to occur will affect the quality of the environment.

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215 Id. at 25–26; Families Concerned Complaint at 173–83; Press Release, supra note 158.
216 CWWG Complaint at 17.
219 See Purpose, Policy, and Mandate, 40 C.F.R. § 1500.2(e) (2003).
220 See id. 1500.2(h), 1502.14(a).
222 See id. § 1500.2(e).
human environment in a significant manner or extent not already considered.\textsuperscript{224} Applying this test, the court should determine that major federal action is still needed, since the incineration program is not yet completed.\textsuperscript{225} The court should conclude that an SEIS is required for the remaining action because the new information regarding alternative technologies and problems at the existing incinerators is sufficient to show that the completion of the incineration program will affect the quality of the human environment in a significant manner or to an extent that was not considered in the original EIS.\textsuperscript{226} Since the Army completed a site-specific SEIS for half of the sites, which led it to choose nonincineration processes at these sites, the court should find that the Army has failed to apply a rule of reason in deciding whether an SEIS is necessary for the other four sites, as well as for the incineration program as a whole.\textsuperscript{227} The court should conclude that the Army has not taken a “hard look” at the environmental consequences of the incineration program in relation to the new information that has arisen since the project was originally approved.\textsuperscript{228}

The Army, on the other hand, could argue that it is not required to prepare an SEIS for the four sites set to use incineration or for the incineration program as a whole. The Army could argue that an SEIS is not required under the CEQ regulations because the new information regarding alternative technologies and problems at the operational incinerators is neither significant nor relevant to the environmental effects of the incineration program.\textsuperscript{229} The court could find that, under the Court’s holding in \textit{Marsh}, an SEIS is not required every time new information becomes available, and that the Army has the discretion to decide whether or not an SEIS is necessary.\textsuperscript{230} Like the Court in \textit{Marsh}, the court here could conclude that the Army did take a hard look at the environmental consequences of the project in relation to the new information.\textsuperscript{231} Unlike the Court in \textit{Marsh}, however, it may be hard for the court to defer to the Army’s decision that an SEIS is not necessary since it has already completed a site-specific SEIS for four of the sites.\textsuperscript{232} By doing this, the Army has arguably ac-

\textsuperscript{224} \textit{Id.}
\textsuperscript{225} See \textit{id.}
\textsuperscript{226} See \textit{id.}
\textsuperscript{227} See \textit{id.} at 373.
\textsuperscript{228} See \textit{id.} at 374.
\textsuperscript{229} See \textit{Environmental Impact Statement, 40 C.F.R. § 1502.9(c)(1)(i), (ii) (2003)}.
\textsuperscript{230} See \textit{Marsh}, 490 U.S. at 373, 377.
\textsuperscript{231} See \textit{id.} at 385.
\textsuperscript{232} See \textit{id.}; \textit{CWWG Complaint at 17}. 
knowledged that there is new information that requires the completion of an SEIS.\textsuperscript{233} The court should consider the Army’s decision to complete a site-specific SEIS for four of the sites in deciding whether the new information and changes which have been made to the incineration program require the preparation of an SEIS.\textsuperscript{234}

\textbf{C. Arbitrary, Capricious or an Abuse of Discretion}

The biggest hurdle that the plaintiffs will face is convincing the court that the Army’s decision not to complete an SEIS is arbitrary, capricious, or an abuse of discretion.\textsuperscript{235} Even if the plaintiffs convince the court that new information and changes made to the project merit an SEIS, they must still convince the court to overturn the Army’s decision.\textsuperscript{236} In general, it is up to the agency’s discretion whether to complete an SEIS, and the court will uphold this decision unless it is arbitrary, capricious, or an abuse of discretion.\textsuperscript{237}

Plaintiffs can convince the court that the Army’s decision is arbitrary, capricious, or an abuse of discretion by showing that the decision was not based upon consideration of all relevant factors, constituting a clear error of judgment.\textsuperscript{238} The court should find that, since there is new information about dangerous incidents that have occurred at the operational incinerators, and since the Army has chosen to use nonincineration processes at four of the sites, it is a clear error of judgment for the Army not to complete an SEIS.\textsuperscript{239} Even if the court found that the Army’s decision not to complete an SEIS was based upon consideration of all the relevant new information, the court should not be convinced that the Army made a reasonable decision regarding the significance of this new information.\textsuperscript{240} The court should not defer to the Army’s expertise because it is unreasonable for the Army not to complete a site-specific SEIS that considers alternative technologies for four of the sites when it has actually already

\begin{itemize*}
\item \textsuperscript{233} See CWWG Complaint at 17.
\item \textsuperscript{234} See id.
\item \textsuperscript{236} See \textit{Marsh}, 490 U.S. at 377; \textit{Weinberger}, 745 F.2d at 417; \textit{Greenpeace}, 748 F. Supp. at 765.
\item \textsuperscript{237} See \textit{Marsh}, 490 U.S. at 377; \textit{Weinberger}, 745 F.2d at 417; \textit{Greenpeace}, 748 F. Supp. at 765.
\item \textsuperscript{238} See \textit{Marsh}, 490 U.S. at 378.
\item \textsuperscript{239} See CWWG Complaint at 17, 24, 26; Families Concerned Complaint at 173–83.
\item \textsuperscript{240} See \textit{Marsh}, 490 U.S. at 378.
\end{itemize*}
selected a nonincineration process for the other four sites.\textsuperscript{241} Since the alternatives section has been described as central to the EIS requirement, the court should find that the Army failed to exercise reasonable discretion by not considering these viable alternatives for the whole incineration program.\textsuperscript{242}

The Army could argue that its decision not to complete an SEIS is not arbitrary, capricious, or an abuse of discretion because it was based upon consideration of all the relevant new information and was not a clear error in judgment.\textsuperscript{243} Under \textit{Marsh}, the court must defer to the reasonable discretion of the Army, even if the court finds the plaintiff’s arguments more persuasive.\textsuperscript{244} The Army could argue that it has made a reasonable decision regarding the significance of the new information regarding alternative technologies and incidents at the operational incinerators.\textsuperscript{245}

The Army could also argue that its decision not to complete an SEIS is similar to the decision of the Army Corps of Engineers in \textit{Marsh}.\textsuperscript{246} In that case, the Court deferred to the Corps’s decision that new information did not require an SEIS, holding that this decision was not arbitrary, capricious, or an abuse of discretion because the Corps had reasonably evaluated the relevant documents and there was not a clear error of judgment.\textsuperscript{247} Like the Court in \textit{Marsh}, the court here could find that the Army has evaluated the relevant new information regarding alternative technologies and incidents at TOCDF and JACADS.\textsuperscript{248}

Unlike in \textit{Marsh}, however, the court should find that the Army’s decision not to complete an SEIS was arbitrary, capricious, and an abuse of discretion because it was a clear error of judgment.\textsuperscript{249} In \textit{Marsh}, the Court held that it was not a clear error of judgment for the Corps to decide not to complete an SEIS which took into account two new documents which showed that the environmental effects of the

\textsuperscript{241} See id.; CWWG Complaint at 17.
\textsuperscript{243} See \textit{Marsh}, 490 U.S. at 378.
\textsuperscript{244} See id.
\textsuperscript{245} See id.
\textsuperscript{246} See id. at 385 (holding that the Corps met the requirements of NEPA when it decided that an SEIS was not necessary).
\textsuperscript{247} See id.
\textsuperscript{248} See id.
\textsuperscript{249} See \textit{Marsh}, 490 U.S. at 378.
Here, in addition to new information regarding the environmental effects of the incineration program, there is new information about alternative technologies, as well as a decision by the Army to use non-incineration processes at half of the sites. The court should find that the Army made a clear error of judgment since its decision that the new information was not significant enough to merit an SEIS for four of the sites is unreasonable given that the Army has already completed an SEIS for the remaining sites and has chosen non-incineration processes to be used at these sites.

D. Overcoming the Precedent Established in Chemical Weapons Working Group

Finally, the plaintiffs will have to convince the court that their NEPA claims are distinguishable from the claims raised in Chemical Weapons Working Group, Inc. v. United States Department of the Army, which were rejected by the court. In that case, plaintiffs relied on incidents that had occurred at JACADS, new information concerning dioxins, and recent developments in alternative technologies, in order to argue that the Army was violating NEPA by not completing an SEIS for the incineration program. Similarly, in the two new cases, plaintiffs claim that an SEIS should be prepared because of new information about problems at the operational incinerators and alternative technologies.

In reaching a decision on the plaintiffs’ NEPA claims, it will be fairly easy for the court to rely upon the holding in the previous Chemical Weapons Working Group case in dealing with the plaintiffs’ claims concerning incidents which have occurred at JACADS and TOCDF. In Chemical Weapons Working Group, the court rejected the plaintiffs’ claim that incidents which had occurred at JACADS required an SEIS, holding that the information was not new since it had been anticipated and measures had been taken to correct the prob-

250 See id. at 369, 385.
251 See CWWG Complaint at 17, 25–26; Families Concerned Complaint at 173–83.
252 See CWWG Complaint at 16, 17.
254 See id. at 1212, 1213, 1214.
255 See CWWG Complaint at 25–26; Families Concerned Complaint at 173–83.
lems at TOCDF. In the recent cases, the court could apply the same reasoning and reject the plaintiffs’ claim that incidents which have occurred at JACADS and TOCDF require that an SEIS be completed. The court could once again defer to the judgment of the Army and find that the information regarding the issues which have arisen is not new information which requires an SEIS because the problems were anticipated by the Army. The court could also find that the problems will be remedied at the incineration facilities which the Army will operate in the future.

The court should, however, distinguish the recent cases from the Chemical Weapons Working Group case when handling the plaintiffs’ claim that an SEIS is required due to new information that has become available regarding alternative technologies. In Chemical Weapons Working Group, the court rejected the plaintiffs’ claim that information regarding alternative technologies required an SEIS, deferring to the Army’s conclusion that alternative technologies were too immature and would take years to implement. In the recent cases, the fact that the Army has chosen to use alternative technologies at four of the storage sites shows that there are viable alternatives which can be used instead of incineration. Even applying a limited standard of review, and deferring to the discretion of the Army, the court should not dismiss the plaintiffs’ argument that an SEIS is required to evaluate the use of alternative technologies at the sites that are set to use incineration.

In the previous Chemical Weapons Working Group case, the court held that the Army had the discretion to make the final decision as to whether new information was substantial enough to require an SEIS. By completing a site-specific SEIS and choosing to use alternative technologies at four sites, the Army arguably acknowledges that the information about alternative technologies is substantial enough to merit completion of an SEIS.

257 Id.
258 See id.; CWWG Complaint at 25–26; Families Concerned Complaint at 173–83.
260 See id.
261 See id. at 1219.
262 See id. at 1214, 1219.
263 See CWWG Complaint at 17.
264 Chem. Weapons Working Group, 935 F. Supp. at 1219; See CWWG Complaint at 20, 29; Families Concerned Complaint at 153.
266 See CWWG Complaint at 17.
**E. Will NEPA Be Able to Stop the Incineration?**

The court should find that the Army has violated NEPA by failing to complete an SEIS for the incineration program, as well as a site-specific SEIS for Alabama, Arkansas, Oregon, and Utah. The court should grant the relief sought by the plaintiffs and enjoin the Army from any activities taken in furtherance of the incineration program until an SEIS is completed.

Even if the court agrees with the plaintiffs, however, NEPA may be unsuccessful in permanently stopping the incineration of chemical weapons. NEPA may require the defendants to prepare an SEIS for the incineration program, but it does not require them to reach any specific decision about how to proceed with destroying the weapons. Even though NEPA may require the Army to complete an SEIS that identifies alternative technologies, the Army is not required to choose any particular alternative, even if one is better for the environment. Ultimately, the court’s role in these cases will be limited to looking at whether or not the Army has followed the procedural requirements established by NEPA. Once it is determined that the Army has fully complied with NEPA and that environmental concerns have played a part in the decisionmaking process, NEPA does not require that the Army choose an alternative means of disposal.

On the other hand, requiring the Army to complete an SEIS for the incineration program will ensure that environmental concerns play a part in its decision to continue pursuing the use of incineration at four of the sites. If it is required to prepare an SEIS that will be disclosed to the public, the Army may become more conscious of the environmental impacts of its decision. The completion of an SEIS will raise public awareness of the environmental consequences of the incineration program. If the SEIS discloses that there actually are alternative technologies that would involve fewer negative environ-

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267 See Wisconsin v. Weinberger, 745 F.2d 412, 416 (7th Cir. 1984).
268 See id.; Koplow, supra note 10, at 485.
272 See id.
mental consequences, the Army may be persuaded to choose one of those alternatives rather than face public criticism.

**Conclusion**

The Army’s decision to use incineration to dispose of the U.S. chemical weapons stockpile has proven to be very controversial. It is clear that the chemical weapons must be destroyed, but opponents argue that an alternative method should be used because of the dangers that incineration poses to human health and the environment. A balance needs to be struck between the Army’s need to destroy the weapons and the concerns of those living near the sites. This balance will only be achieved with the help of the judiciary. Opponents to incineration have turned to the courts, asking that the incineration be halted because the Army has allegedly violated NEPA.

The court in these cases should find that the Army has violated NEPA by failing to prepare an SEIS for the incineration program as a whole and for the four sites that are still set to use incineration. The court should find that an SEIS was required to take into account new information regarding alternative technologies and problems at the operational incinerators, as well as changes that have been made to the incineration program. The court should not defer to the Army’s decision that an SEIS was not necessary because this decision was arbitrary, capricious, and an abuse of discretion. In addition, the claims raised by the plaintiffs in these two recent cases are distinguishable from the claims raised in *Chemical Weapons Working Group* and therefore should not be dismissed by relying on this precedent.

Even if the plaintiffs are successful in these two cases, NEPA will not require that the Army choose an alternative method of disposal. By completing an SEIS, however, the Army would be required to look at the environmental impacts of its decision and to inform the public about alternative technologies that may be better for the environment. The hope is that the Army will use the SEIS process to identify the method of disposal that will have the least negative environmental impacts while remaining viable in all other respects. If it fails to do so, the SEIS will provide communities with the information that they need in order to hold the Army accountable. If the Army chooses not to select the most environmentally safe disposal method, it is important that the public uses the information contained in the SEIS to pressure the Army to change its decision. Otherwise, the people living in the four communities set to use incineration will bear the consequences of disposing of a national burden.