

STANDING ON ITS LAST LEGS: BENNETT V. SPEAR AND THE PAST AND FUTURE OF STANDING IN ENVIRONMENTAL CASES

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No man is an Iland, intire of itselſe; every man is a peece of the Continent, a part of the maine; if a Clod bee washed away by the Sea, Europe is the leſſe, as well as if a Promontorie were, as well as if a Mannor of thy friends or of thine owne were; any man's death diminishes me, because I am involved in Mankinde; And therefore never ſend to know for whom the bell tolls; it tolls for thee.^[1]

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I. INTRODUCTION

The law of "standing" in environmental disputes appears to be resting on its last legs, and well it should be. Arguably, standing's fate has been sealed since its conception in the 1970s.^[2] Now, approximately a quarter of a century later, standing is on the verge of collapsing onto its weak intellectual foundation. The standing doctrine is that part of the "law of judicial jurisdiction" that "determines whom a court may hear make arguments about the legality of an official decision."^[3] Almost twenty years ago, Joseph Vining viewed standing with "a sense of intellectual crisis."^[4] In the years since, that intellectual crisis has grown. The Supreme Court's recent decision in *Bennett v. Spear*^[5] reflects one aspect of how this crisis has become too unwieldy. As such, the *Bennett* decision either marks a turning point in the treatment of standing in environmental cases or, in conjunction with other looming issues, highlights the need for the Court to reconsider the prudential and constitutional aspects of the doctrine of standing. Anything less will leave the law of standing in environmental cases in disarray.

The law of standing consists of both constitutional and prudential components.^[6] In order to satisfy the constitutional requirement for standing under Article III of the United States Constitution, which limits federal courts to deciding "cases" or "controversies," a party must suffer an "injury in fact" from a governmental action, and that injury must be fairly traceable to the challenged action and redressible by a favorable decision.^[7] To suffer an injury in fact, the plaintiff must be among those injured by the action.^[8] The prudential aspect of standing is somewhat a misnomer because it reflects the Court's interpretation or "gloss" on section 10 of the Administrative Procedure Act (APA),^[9] which allows parties who are "adversely affected or aggrieved by [Federal] agency action within the meaning of a relevant statute" to seek judicial review.^[10] The Court developed the "zone of interests" test to serve as a guide for determining when, "in view of Congress' evident intent to make agency action presumptively reviewable, a particular plaintiff should be heard to complain of a particular agency decision."^[11] This zone of interests test requires that "a plaintiff's grievance must arguably fall within the zone of interests protected or regulated by the statutory provision or constitutional guarantee invoked in the suit."^[12]

This article argues that the Supreme Court's standing decisions, employing the above requirements in environmental disputes, have been flawed. Those flaws have led to considerable confusion and disagreement among the lower federal courts on how to apply the rules of standing, primarily in cases involving the National Environmental Policy Act of 1969 (NEPA)^[13] and the Endangered Species Act (ESA).^[14] The article concludes that those flaws are so serious and fundamental that the law of standing in environmental cases can only be rescued if the original principles are revisited.^[15] Going back to original principles entails reexamining the justification for both the zone of interests test and the requirements for Article III standing. Neither the zone of interests test nor the Court's current articulation of the Article III standing requirements can appropriately or even logically define the group of litigants

entitled to bring lawsuits claiming violations of the ESA or NEPA. While the Court's recent decision in *Bennett v. Spear* may signal a limited future, if any, for the zone of interests test in many environmental cases, a similar fate should await the Article III standing requirements as they are presently applied. The need for litigants, particularly environmental organizations, to show that they or one of their members is personally injured can no longer serve as a viable and intellectually honest requirement for environmental cases, at least for those cases brought under NEPA or the ESA.

II. CITIZEN ACCESS TO THE COURTS

Not until the 1960s did litigants begin to view the courts as possibly objective arbiters in environmental disputes. During those years, a doctrinal shift began to take place that recognized the role of citizens and courts in the administration of governmental programs.^[16] This development in administrative law was seen by many as a victory in the effort to cast aside the private or common law model that had dominated for so many years.^[17] Previously, in both private or public disputes, courts generally applied the private law model that required that the plaintiff establish a "legal interest," which effectively limited standing to those with an economic interest:

At both private and public law, the question was not whether the litigant was harmed or whether the governmental or non-governmental defendant acted unlawfully, but whether the government breached some duty owed to the litigant. If the litigant had no common-law interest at stake—if it was not the "object" of the regulation—courts saw no legal duty suitable for legal redress.^[18]

However, once beneficiaries of regulatory programs began to convince courts of their right to seek judicial review of agency decisions on a par with those being regulated (such as the objects of the regulation), the private law model of a "legal interest" appeared problematic. Citizens who benefited by having an effective regulatory program could solicit help from the judiciary to control allegedly aberrant administrative behavior but could not claim a violation of any legal interest or express duty owed to them specifically.^[19] In 1970, therefore, the Supreme Court abandoned requiring a legal interest for cases brought under the APA.^[20] In *Association of Data Processing Service Organizations v. Camp*^[21] and *Barlow v. Collins*,^[22] the Court broadened the class of those entitled to seek judicial review under the APA to include a party with an injury in fact that is "arguably within the zone of interest" protected by the statutory or constitutional provision at issue.^[23] These decisions offered the potential for increased citizen access to the courts, viewed by many as an important mechanism for avoiding what has been called "regulatory capture."^[24] Dan Tarlock observed that in the environmental area, "Professor Sax provided the most coherent justification for creative lawyers," in that Sax "attempted to reconcile environmental law precepts with New Deal administrative law and separation of powers principles."^[25] Joseph Sax explained that citizen participation and judicial involvement are consistent with our tripartite constitutional system and serve as an important check on how agencies evaluate and respond to environmental issues.^[26]

This doctrinal shift occurred as the courthouse doors began to open for environmental disputes. Parties who had once attempted to use devices such as *qui tam* lawsuits to abate pollution^[27] now focused on other statutory programs, such as the environmental impact statement (EIS) requirement under NEPA^[28] and the United States Army Corps of Engineers' permitting program under the Refuse Act^[29] to control discharges of pollution into our nation's waterways, a program soon overtaken by the 1972 Clean Water Act (CWA).^[30] In the same year as the first Earth Day, Congress in the 1970 Clean Air Act (CAA) authorized citizen suits,^[31] a now accepted component of environmental legislation.^[32] These and other developments gave environmental advocates hope that environmental concerns would become part of the "public law."^[33]

The early 1970s, therefore, offered considerable promise for environmental groups to supervise possibly captive regulatory agencies by taking their concerns to court. NEPA provided the groups with a legally identifiable opportunity to question federal agency decisions and, if necessary, to litigate.^[34] Coupled with the APA, NEPA offered the promise of a federal judicial forum unencumbered by old private law model

requirements.^[35] Additionally, precedent existed for the argument that parties interested in protecting the environment had a cognizable interest sufficient to allow them to maintain a lawsuit.^[36] As early as 1943, Judge Jerome Frank interpreted language allowing "aggrieved" persons to seek judicial review as embracing a private attorney general theory.^[37] Less than twenty years later, Judge Bazelon echoed a similar theme when the Environmental Defense Fund challenged a federal agency action under the Federal Insecticide, Fungicide, and Rodenticide Act,^[38] with the injury described as the Sbiological harm to man and to other living things resulting from the Secretary's failure to take action which would restrict the use of DDT in the environment."^[39] Citing a variety of earlier cases, Judge Bazelon wrote that "[c]onsumers of regulated products and services have standing to protect the public interest in the proper administration of a regulatory system enacted for their benefit. The interest asserted in such a challenge to administrative action need not be economic."^[40] In the same year that Judge Bazelon handed down *Hardin*, Kenneth Culp Davis, the leading commentator on administrative law, argued that the law of standing had just been liberalized by four Supreme Court decisions from 1968 to 1970.^[41] Davis added that in doing so, the Court had left the law of standing in "turmoil."^[42]

III. AN EMERGING BARRIER TO THE COURTHOUSE

A. *Sierra Club v. Morton*

Against this background, the Sierra Club waged its challenge to the Forest Service's proposed activities in the Mineral King Valley of California and in the process launched the modern law of environmental standing. In *Sierra Club v. Morton*,^[43] a plurality^[44] of the Court established three principles that would guide the law of standing in environmental cases for the next twenty-five years.^[45] First, the Court held that the type of injury to support standing could be non-economic, that is, harm to the aesthetics and ecology of an area are sufficient interests to constitute a cognizable injury.^[46] Second, the Court rejected the "notion that an injury that is widely shared is *ipso facto* not an injury sufficient to provide the basis for judicial review."^[47] Finally, and most importantly, the Court limited the first two principles with a requirement that the plaintiff provide sufficient "allegations of individualized injury."^[48]

Nestled between the Sequoia National Park and the Sequoia National Forest, Mineral King Valley offered great promise for commercial and recreational development.^[49] This scenic valley located within the Sierra Nevada Mountains in California was the site of an old mining village, and when Congress established the national park in 1890, it excluded the mining area, which became part of the national forest.^[50] By the 1960s, many considered Mineral King as possibly becoming one of the country's premier skiing areas, and the United States Forest Service sought bids for the development of a recreational facility at Mineral King.^[51] Walt Disney was the successful bidder, and over the next few years Disney developed plans for a resort on a grand scale, exceeding previous expectations.^[52] The Disney plan ultimately contemplated accommodations for 3,310 visitors, parking for approximately the same number of vehicles, twenty-two ski lifts, an ability to handle at one time 20,000 skiers, a restaurant capacity of over 2,000 people, and an expected visitation rate of over one million people per year.^[53] This master plan included construction of a new highway to accommodate visitors, as well as installation of a transmission line to carry electric power to the resort.^[54] Construction of the highway and transmission line required the approval of the National Park Service (Park Service), whose property had to be crossed to gain effective access to the valley.^[55] Less than a year after the Park Service reluctantly agreed to support a permit for crossing its land, and shortly before a scheduled meeting between the Park Service and the California Highway Department, the Sierra Club filed suit for injunctive relief.^[56] In its complaint, the Sierra Club argued that the authorization for Disney to develop a resort violated Mineral King's status as a game refuge and that the Park Service lacked the statutory authority to grant a permit to construct roads through park property.^[57]

The Sierra Club obtained a preliminary injunction from the district court, but when the case proceeded to the Ninth Circuit, the Sierra Club's standing became the primary issue.^[58] The Sierra Club relied upon the notion that it had standing because the Sierra Club was acting as a private attorney general, a concept for which adequate precedent had been developed.^[59] Indeed, Judge Moore of the Second Circuit relied on

this argument when he concluded that "the public interest in environmental resources—an interest created by statutes affecting the issuance of this permit [under the Rivers and Harbors Act]—is a legally protected interest affording these plaintiffs, as responsible representatives of the public, standing to obtain judicial review of agency action alleged to be in contravention of that public interest."^[60] However, Judge Trask of the Ninth Circuit was not receptive to this public organization standing theory. Judge Trask distinguished the cases the district court relied upon when it allowed public organization standing,^[61] as well as other recent standing cases,^[62] and concluded that the Sierra Club lacked standing because the Sierra Club did not allege that either it or its members had a sufficient interest such that the Club or its members were "aggrieved" or "'adversely affected' within the meaning of the rules of standing."^[63]

A plurality of the Supreme Court sided with Judge Trask, although the opinion failed to articulate any justification for what has since become the requirement for an "individualized injury." The Court began its analysis by asking whether the Sierra Club alleged facts entitling the case to judicial review.^[64] Next, the Court examined whether the Sierra Club alleged facts to show that it had a sufficient stake in an otherwise justiciable controversy.^[65] Quoting from *Baker v. Carr*,^[66] a case decided before the Court "liberalized" the law of standing, the Court converted "sufficient stake" into a "personal stake in the outcome of the controversy."^[67] In doing so, the Court overlooked its own statement that the requirement for a "personal stake" only applies when the party does not rely on any specific statute authorizing judicial review.^[68] Here, the Court correctly described the Sierra Club as relying on section 10 of the APA.^[69] The Court recognized that section 10 granted the Sierra Club the right to judicial review if the organization is, *inter alia*, "adversely affected or aggrieved by agency action within the meaning of a relevant statute."^[70] The appropriate question then became whether the Sierra Club was "adversely affected or aggrieved," a test the Court concluded requires a showing of "injury in fact."^[71] The Court adopted the injury in fact requirement from two cases, *Association of Data Processing Service Organizations, Inc. v. Camp*^[72] and *Barlow v. Collins*.^[73] However, the Court did not, in either of those cases, "address itself to the question, which has arisen with increasing frequency in federal courts in recent years, as to what must be alleged by persons who claim injury of a noneconomic nature to interests that are widely shared."^[74] The Court closed this purported gap by holding that noneconomic injuries can satisfy the "injury in fact" requirement as follows:

We do not question that [the type of harm identified by the Sierra Club] may amount to an "injury in fact" sufficient to lay the basis for standing under § 10 of the APA. Aesthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society, and the fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process.^[75]

Without any further support, the Court added that the injury in fact test requires more than an injury to a "cognizable interest."^[76] Justice Stewart required "the party seeking review *be himself* among the injured."^[77] The additional requirement of personalized injury contradicts the Court's assertion that a "personal stake" in the outcome is not necessary where Congress has authorized judicial review, as with the APA.^[78] In effect, under the APA, the Court superimposed the same test that would apply if Congress had not authorized judicial review.^[79]

Next, the Court responded to the Sierra Club's challenge to the personalized injury requirement, concluding with an unsupported assertion that "the party seeking review must *himself* have suffered an injury."^[80] The Court rejected the argument that the Sierra Club should be able to bring a "public action" as if it were acting as a "private attorney general," but the Court's reasoning appears circular.^[81] The Court interpreted prior decisions^[82] as only allowing parties with a statutory right to seek review to argue for the public interest.^[83] However, in *Sierra Club*, the Court shifted its focus back to the recognition that, while noneconomic injuries are sufficient to bring a person within the meaning of "the statutory language,"^[84] the party seeking review must herself be among the injured.^[85] The Court does not provide an explanation for this holding, nor will one find the answer in the remaining four paragraphs of Justice Stewart's plurality opinion.^[86] Justice Stewart's part of the opinion is devoted to the policy argument that any other

construction of the APA would allow parties with a special interest in a matter to litigate, implicitly voicing the concern that the courts would be flooded without any effective barrier to the courthouse.^[87] The personal injury requirement, therefore, "serve[s] as at least a rough attempt to put the decision as to whether review will be sought in the hands of those who have a *direct stake* in the outcome."^[88]

Justices Douglas, Brennan, and Blackmun dissented.^[89] In particular, Justice Douglas championed Christopher Stone's^[90] view that inanimate objects adversely affected by governmental action, such as the trees or Mineral King Valley, should be able to sue in their own right through a representative guardian, such as the Sierra Club.^[91] Justice Douglas argued that "[c]ontemporary public concern for protecting nature's ecological equilibrium should lead to the conferral of standing upon environmental objects to sue for their own preservation."^[92] Justice Blackmun, overtly concerned with the possible loss of the Mineral King Valley to development, offered two alternatives in his dissent.^[93] He stated that he would either allow the Sierra Club to amend its complaint to satisfy the standing requirement and then reinstate the district court judgment granting a preliminary injunction, or he would allow organizations such as the Sierra Club to maintain the lawsuit, due to its well-recognized interest in environmental issues.^[94] Justice Brennan joined in agreeing with Justice Blackmun's second alternative.^[95]

After *Sierra Club*, environmental advocates viewed standing merely as a technical hurdle.^[96] This outlook was particularly true in *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*,^[97] where the Court held that law students and other environmental groups challenging a rate increase by the Interstate Commerce Commission (ICC) had standing to pursue their claim.^[98] The students alleged that the proposed rate increase for the railroads threatened to discourage the use of recycled materials, which in turn would promote the use of new raw materials that compete with recycled materials or scrap.^[99] The students further alleged that the increased need for raw materials would lead to increased mining, timber harvesting, and other resource extracting activities.^[100] As a result, the students claimed, the ICC was required to comply with NEPA before it could allow the increase to take effect.^[101] The Court, in another opinion by Justice Stewart, held that the students had standing because they used the forests, streams, mountains, and other resources that might be impacted by the nonuse of recycled materials occasioned by the rate increase.^[102] In a fairly dramatic passage, Justice Stewart distinguished this case from *Sierra Club* as follows:

Unlike the specific and geographically limited federal action of which the petitioner complained in *Sierra Club*, the challenged agency action in this case is applicable to substantially all of the Nation's railroads, and thus allegedly has an adverse environmental impact on all the natural resources of the country. Rather than a limited group of persons who used a picturesque valley in California, all persons who utilize the scenic resources of the country, and indeed all who breathe its air, could claim harm similar to that alleged by the environmental groups here. But we have already made it clear that standing is not to be denied simply because many people suffer the same injury. Indeed some of the cases on which we relied in *Sierra Club* demonstrated the patent fact persons across the Nation could be adversely affected by major governmental actions. *See, e.g.*, *Environmental Defense Fund v. Hardin*, 138 U.S.App.D.C. 391, 428 F.2d 1093, 1097 (interests of consumers affected by decision of Secretary of Agriculture refusing to suspend registration of certain pesticides containing DDT); *Reade v. Ewing*, 2 Cir., 205 F.2d 630, 631-632 (interests of consumers of oleomargarine in fair labeling of product regulated by Federal Security Administration). To deny standing to persons who are in fact injured simply because many others are also injured, would mean that the most injurious and Government actions could be questioned by nobody. We cannot accept that conclusion.^[103]

The injury in fact requirement, Stewart added, served to distinguish litigants with a "direct stake in the outcome" from those with a "mere interest in the problem."^[104] Justice Stewart acknowledged that the plaintiffs' alleged injury required following a fairly attenuated chain of causation, which at the pleading stage of the lawsuit was sufficient to withstand defendant's motion to dismiss, and which the defendants could have challenged in a summary judgment motion.^[105]

B. Twenty Years Later: The Early 1990s

The law of standing in environmental cases has since become dominated by two of Justice Antonin Scalia's opinions in the 1990s: *Lujan v. National Wildlife Federation*^{[10]6} and *Lujan v. Defenders of Wildlife*.^[107] In the first case, the National Wildlife Federation (NWF) sued the Department of the Interior over its management of public lands.^[108] In particular, NWF complained that the Department was not complying with the requirements of the Federal Land Planning and Management Act (FLPMA)^[109] and NEPA when the agency reviewed the status of its lands that had been withdrawn from disposal or mineral leasing or location.^[110] After prevailing before the D.C. Circuit twice, the first time on a 12(b)(6) motion and the second on a summary judgment motion, NWF's five years of litigation came to a halt in 1990.^[111]

The principal question in *National Wildlife Federation* was whether NWF had standing to seek review under the APA.^[112] Initially, NWF sought to justify its standing on the basis of affidavits by two of its members, Peggy Kay Peterson and Richard Erman.^[113] According to Justice Scalia, the only issue was "whether the facts alleged in the affidavits showed that those interests of *Peterson and Erman* were actually affected."^[114] Peterson claimed recreational and aesthetic enjoyment of lands in the vicinity of South Pass-Green Mountain, Wyoming, while Erman claimed use of land "in the vicinity of Grand Canyon National Park, the Arizona Strip (Kanab Plateau), and the Kaibab National Forest."^[115] The Court accepted that the Peterson and Erman affidavits sought review of "agency actions" within the meaning of the APA but determined that the "actions" identified were two public land orders covering only a small portion of the acres embraced within the lawsuit.^[116] The Court interpreted the affidavits as merely alleging that Peterson and Erman used lands within the vicinity of some unspecified portion of the lands that would be affected by the land orders.^[117] The majority held that more was needed to avoid a summary judgment motion.^[118] According to the Court, one cannot avoid a Rule 56 motion with "averments which state only that one of respondent's members uses unspecified portions of an immense tract of territory, on some portions of which mining activity has occurred or probably will occur by virtue of the governmental action."^[119] The Court rejected NWF's reliance on *SCRAP*, distinguishing that case as involving a motion to dismiss (when the plaintiff's averments are assumed to be true and are interpreted most favorably to the plaintiff) rather than a Rule 56 motion.^[120] Further, the Court observed that *SCRAP*'s "expansive expression of what would suffice for section 702 review under its particular facts has never since been emulated by this Court."^[121]

After concluding that the Peterson and Erman affidavits were insufficient to support standing, the Court addressed whether four additional affidavits supplied by the NWF would suffice.^[122] After reviewing these affidavits, Justice Scalia found it difficult to discern the "final agency action" under review.^[123] He described the land withdrawal program as an amalgamation of many discrete actions, possibly as many as 1250 separate decisions, which he determined had to be reviewed individually.^[124] According to Justice Scalia, NWF was seeking a form of systematic improvement in how the agency was administering its program.^[125] However, there was no specific agency action that included all the separate classification terminations and withdrawal revocations.^[126] "[R]espondent," he added, "cannot seek *wholesale* improvement of this program by court decree, rather than in the offices of the Department or the halls of Congress, where programmatic improvements are normally made."^[127]

Unfortunately, this opinion obscures NWF's concern with the Department of the Interior's administration of public lands. When Interior Secretary James Watt took office under President Reagan, he brought with him a philosophy that focused on disposing of the public domain by privatizing as much of our natural resources and public lands as possible.^[128] The land withdrawal review program, although provided for under FLPMA, was one element of Watt's strategy: the termination of the withdrawals might allow mineral leasing to occur and open land to mineral location under the 1872 Mining Law.^[129] Justice Scalia's focus on the need to identify specific classification or withdrawal termination decisions overlooks how lands might become leased for oil and gas activities and also become subject to the operation of the Mining Law. For example, Justice Scalia suggests that the plaintiff might not become harmed until a mining claimant seeks a permit to conduct operations causing a cumulative surface disturbance of at least five acres.^[130] By that time, however, it is too late to halt mining activities. Under the Mining Law, once a withdrawal is

terminated and lands are open to location, a mining claimant, who satisfies all the requirements under the Mining Law for location and discovery, effectively appropriates the mineral estate for private use and obtains a property right in the mining claim.^[131] Where and when the mining claims might be located is unknown until a mining claimant actually stakes her claim and establishes a discovery, at which point any other use of the land might be foreclosed absent the government purchasing the claim.^[132] Whether or not a permit might be needed before mining occurs is irrelevant; by the time of the permit application, the public land already may have become appropriated. NWF sought to avoid this situation.^[133]

Justice Scalia's suggestion that the appropriate recourse is to go before Congress or the Department of the Interior is somewhat misdirected. Going to the Department offered little promise to NWF since it was challenging the legality of the Department's actions for violating the laws that Congress had already adopted.^[134] No further Congressional action was necessary, and only the courts could force the Department to comply with the law. Moreover, NWF's challenge was consistent with how the Department of the Interior and other agencies treated programmatic decisions: environmental groups sought review of the federal coal leasing program in the 1970s,^[135] parties challenged grazing policy on a programmatic basis,^[136] and the ability to challenge broad-based land use plans, such as one involving approximately 700,000 acres, and other programmatic decisions were not foreclosed.^[137]

For all its problems, *National Wildlife Federation* had more to do with deciding whether and when an action is subject to judicial review than with who can sue.^[138] Justice Scalia's next opinion, in *Defenders of Wildlife*, not only addressed who can sue, but also outlined the minimum constitutional requirements for standing.^[139] In *Defenders of Wildlife*, various environmental groups challenged a rule promulgated by the Secretary of the Department of the Interior and the Secretary of the Department of Commerce implementing section 7 of the ESA.^[140] Pursuant to section 7(a)(2) of the ESA, all federal agencies, in consultation with the appropriate Secretary (or her delegated agencies, the United States Fish and Wildlife Service (USFWS) or the National Marine Fisheries Service (NMFS)), are required to insure that any federal action authorized, funded, or carried out by them "is not likely to jeopardize the continued existence of an endangered or threatened species or result in the destruction or adverse modification of [critical] habitat."^[141] In 1986, the USFWS and NMFS adopted a regulation implementing this proscription but limited the section 7 requirement to federal activities in the United States, an interpretation different from that contained in an earlier regulation.^[142] In order to establish standing on behalf of its members, Defenders of Wildlife (Defenders) submitted affidavits from two of its members, Joyce Kelly and Amy Skilbred.^[143] In Ms. Kelly's affidavit, she averred that she had traveled to Egypt to observe the endangered Nile crocodile and intended to do so again.^[144] She claimed that the United States' participation in the rehabilitation of the Aswan High Dam on the Nile River threatened the continued existence of the endangered Nile crocodile and thus threatened her ability to observe the species in the future.^[145] In the other affidavit, Ms. Skilbred indicated that she had traveled to Sri Lanka and observed the habitat of the endangered Asian elephant and leopard at the current site of the Agency for International Development funded Mahaweli project.^[146] She intended to travel there again to observe the species themselves, but the Mahaweli project threatened the continued existence of the species and her chance to observe them.^[147] She subsequently admitted she had no specific plans to travel back to Sri Lanka.^[148]

Justice Scalia held that, even if these two international projects threatened the continued existence of the endangered species, the Kelly and Skilbred affidavits were insufficient to support Article III standing.^[149] He reached this conclusion after outlining the following requirements that a party must satisfy to establish standing:

1. The plaintiff must have suffered an injury in fact, an invasion of a legally-protected interest that is
 - (a) concrete, and
 - (b) particularized, which means in a

- (i) personal, and
 - (ii) individual way, and which is
 - (c) actual or imminent, not conjectural or hypothetical; and
2. There is a causal connection between the injury and the conduct complained of (i.e., the injury must be fairly traceable to the challenged actions of the defendant); and finally, that
 3. It must be likely and not just speculative that the injury will be redressed by a favorable decision of the court.[\[150\]](#)

Justice Scalia distinguished between those who are the objects of governmental action or inaction and those who are beneficiaries of the regulatory program, and indicating that when a litigant is not the object of governmental action or inaction it will be "substantially more difficult" to establish standing.[\[151\]](#)

In *Defenders of Wildlife*, Justice Scalia accepted that the desire to observe an animal species is a "Scognizable" interest for purposes of standing, but he added that *Sierra Club* requires more: the party seeking review must herself be among the injured.[\[152\]](#) Therefore, Defenders had to show through specific facts that the listed species were actually being threatened and that one of Defenders' members would be "directly" affected.[\[153\]](#) According to Justice Scalia, Defenders failed to meet this requirement because neither Ms. Kelly nor Ms. Skilbred had specific plans to return to the affected area and, therefore, were not faced with "imminent injury."[\[154\]](#) Mere professions of intent to return are simply not enough; rather, there must be "concrete plans" or, at the very least, specifics.[\[155\]](#)

Justice Scalia dismissed Defenders' argument that standing could be premised upon an *ecosystem nexus*, *animal nexus*, or *vocational nexus* theory.[\[156\]](#) He described the *ecosystem nexus* theory as claiming that "any person who uses *any part* of a 'contiguous ecosystem' adversely affected by a funded activity has standing even if the activity is located a great distance away."[\[157\]](#) He described the *animal nexus* theory as asserting that "anyone who has an interest in studying or seeing the endangered animals anywhere on the globe has standing."[\[158\]](#) Finally, a *vocational nexus* would grant standing to anyone with a professional interest in the species.[\[159\]](#) Justice Scalia rejected the *ecosystem nexus* theory with a reference to his opinion in *National Wildlife Federation*, reasoning that there was no showing of any perceptible effect on the plaintiffs.[\[160\]](#) The other two theories he dismissed as too illusory, commenting that it is "pure speculation and fantasy, to say that anyone who observes or works with an endangered species, anywhere in the world, is appreciably harmed by a single project affecting some portion of that species with which he has no more specific connection."[\[161\]](#)

After concluding that the affidavits failed to establish an injury in fact, Justice Scalia added that the Defenders could not satisfy the redressibility element of standing.[\[162\]](#) Only Justices Rehnquist, Thomas, and White[\[163\]](#) joined this part of his opinion. The four Justices proffered that an invalidation of the rule, the relief Defenders sought against USFWS and NMFS, would not necessarily prevent the injury being complained of, that is, the harm from the overseas projects caused by parties not before the Court.[\[164\]](#) The injury would not necessarily be prevented because the four Justices treated the rule as nonbinding and the agencies funding the overseas projects were free to proceed.[\[165\]](#)

Justice Scalia ended his opinion with a response to Defenders' argument that the organization could press its complaint under the citizen suit provision of the ESA, which authorizes "any person" to commence a lawsuit to enjoin a violation of the Act (in this case, the failure to engage in consultation under section 7(a)(2)).[\[166\]](#) Defenders argued that the failure to consult was a procedural violation, which all persons are authorized to enforce under the citizen suit provision.[\[167\]](#) Justice Scalia rejected this theory, referring to the argument as a "procedural rights" argument that would confer "upon all persons . . . an abstract, self-contained, noninstrumental 'right' to have the Executive observe the procedures required by law."[\[168\]](#) He reasoned that the asserted violation of a procedural right must be accompanied by a showing of an injury to a concrete interest.[\[169\]](#) Otherwise, the citizen suit provision might confer standing on a party where there

is no case or controversy, thus conflicting with Article III, and possibly intruding into the Executive's constitutional function to ensure the laws are faithfully executed.[\[170\]](#)

Most observers agree that Justice Scalia's opinion in *Defenders of Wildlife* is easily questioned.[\[171\]](#) His insistence on requiring "imminence" as a part of the injury in fact inquiry appears misplaced. Remember, *Defenders* was challenging a rulemaking: an action that would have decided environmental consequences some time in the future, and would most assuredly affect those persons interested in protecting, observing, or researching endangered and threatened species.[\[172\]](#) Justice Scalia would layer such a rulemaking challenge with the additional requirement that a litigant establish some degree of imminence in the asserted injury to their interest.[\[173\]](#) Justices Kennedy and Souter would have avoided this issue by merely requiring that the two affiants purchase airline tickets to the Middle East, or at least have some concrete plans to do so.[\[174\]](#) Justice Stevens, in his concurring opinion, would have defined imminence as the likelihood of the occurrence of environmental harm, regardless of when the individuals would likely visit the site.[\[175\]](#)

Upon closer examination, any independent requirement for imminence would be inappropriate.[\[176\]](#) Justice Scalia would have imminence relate to the litigant's asserted interest or injury from the alleged governmental violation.[\[177\]](#) In this case, that could mean that the allegedly invalid regulation impacted the *Defenders'* or its members' *opportunity or ability* to observe and study certain species and their habitat, or their *actual observation and study* of the species and their habitat. So, how would the imminence requirement apply? In the first scenario, when plaintiffs are "injured" depends upon the timing of when the *ability or opportunity* to observe and study the species and habitat is adversely affected, *i.e.*, when and if the governmental action is likely to occur and cause the effect plaintiffs oppose. Under these circumstances, any imminence requirement would apply to the substantive governmental decision. Yet, that is what Justice Scalia refused to accept.[\[178\]](#) Justice Stevens, on the other hand, embraced such an application, but a showing of environmental harm caused by the agency's substantive decision goes to the merits of the case and seems premature in a rulemaking challenge.[\[179\]](#) Furthermore, Justice Scalia implicitly rejected such a showing.[\[180\]](#) This suggests that Justice Scalia's analysis would have the imminence requirement presume the environmental harm and, instead, relate to the effect on a plaintiff's asserted interest. However, in this respect, Justice Scalia refused to accept the *ability or opportunity* to observe and study the species and habitat as the asserted interest and, instead, focused on the *actual observation and study* of the species and habitat.[\[181\]](#) In short, he treated imminence as part of a required showing for geographical nexus.[\[182\]](#) This posture is consistent with his statement that in a claim involving procedural rights, the plaintiff must nonetheless have a concrete interest, either a legal interest (e.g., a cash bounty or a private tort)[\[183\]](#) or a geographical nexus to or use of the affected area.[\[184\]](#) This is not so much imminence as it is simply translating the concrete injury requirement into a geographical nexus or actual use requirement. Reduced to its essentials, Justice Scalia's analysis reflects a decided bias towards only conferring standing upon those persons asserting easily perceptible harm that occurs when one lives near or actually uses an allegedly affected area. This bias is further evidenced by his dismissal of the three nexus theories proposed by the *Defenders*.

Justice Scalia's rejection of these theories is suspect. His response to the *ecosystem nexus* theory proceeds from a simple misunderstanding of the basis of the *Defenders'* argument. As his reliance on *National Wildlife Federation* demonstrates, Justice Scalia treated the "ecosystem" as a geographically identifiable area, rather than accepting that the species of this world are inextricably linked and the loss of any species, anywhere, affects us all. *Ecosystem nexus* has nothing to do with the location of a species. In responding to Justice Blackmun, however, Justice Scalia acknowledged that geographic remoteness might be overcome by sufficient facts "showing that the impact upon animals in those distant places will in some fashion be reflected here."[\[185\]](#) Yet such a showing would be illogical. First, Congress already recognized this point when it passed the ESA.[\[186\]](#) Second, *Defenders of Wildlife* involved a rulemaking challenge, which, if *Defenders* prevailed, would require an inquiry into the effect of the particular projects on the listed species. To require litigants to *establish* such a fact for standing would threaten to overtake the merits of the case. Just how Justice Scalia envisions *Defenders* would establish that the loss of the species (a loss he conceded for purposes of the inquiry)[\[187\]](#) affects people in this country, absent further support from biologists, is

uncertain, particularly when this type of inquiry is irrelevant to the litigation and is of a nature ill-suited for a court to address.^[188] Similar problems exist with his dismissal of the *animal* and *vocational nexus* theories. Must the ornithologist demonstrate the impact on her work from the possible loss of the California condor? Must one whose avocation is to observe and study all reptiles wait until the world is down to its last group of Nile crocodiles to demonstrate harm to her interests? Such an approach would most assuredly be ineffective and contrary to the philosophy animating the passage of the ESA.^[189]

Furthermore, Justice Scalia's redressibility analysis, joined in by only three other Justices, appears conceptually and factually flawed. To say that the plaintiffs' asserted personal *injury* must be redressible ignores the principal issue in the case: the rule challenge. An additional requirement of redressibility when a plaintiff alleges an injury in fact under any standard involves unnecessary speculation into what will or will not occur if the government observes the law, particularly in this case as illustrated by the dispute among the Justices. Justices Stevens, Blackmun, and O'Connor all agreed that an invalidation of the rule would in all likelihood have prevented the harm to the identified species caused by the projects in Sri Lanka and Egypt.^[190] Redressibility relates to whether a court can award the relief sought and whether that relief demonstrates that the parties truly are adverse to one another.^[191] Here, Defenders sought invalidation of the rule, clearly within a court's power to award. The relief assuredly would benefit the plaintiffs, because it would protect their *interest* in ensuring that the government does not contribute to the extinction of species.

Lastly, the majority's suggestion that citizen suit provisions are subject to Article III limitations and could become unconstitutional is simply hyperbole. As David Sive explains, "the suggestion that citizen-suit provisions may be held unconstitutional need not be taken seriously."^[192] A court would be more likely to deny standing to particular plaintiffs before taking the next step of holding an act of Congress unconstitutional. Also, the Court's suggestion overlooks the fact that we are not governed solely by judge-made law. Congress has a role in establishing legal interests as well. If Congress intended to create a legal interest, then a party who shares that interest clearly has standing to protect the interest. The legal interest can be the "right" to challenge agency violations of environmental statutes. Cass Sunstein suggests that Congress could establish a legal interest in the substantive outcome or create a cash bounty at the end of a victorious lawsuit.^[193]

IV. STRUCTURAL FAULT IN THE BARRIER

Such gimmicks might be premature, however. The confluence of three developments may doom the current law of standing for most environmental disputes. The first development is the Court's recent decision in *Bennett v. Spear*,^[194] and the second development is the likely effect of that decision on the application of the zone of interests test in cases under NEPA. Third, courts are currently unsuccessfully struggling with the articulation of a coherent approach for applying the language and requirements of *Defenders of Wildlife* to cases under NEPA. Taken together, these developments demonstrate that a wholesale review of the current law of standing is, if not fast approaching, at least warranted.

A. *Bennett v. Spear*

The dispute in *Bennett* illustrates the confusion surrounding the application of the zone of interests test in general, and more specifically in the context of litigation under the ESA.^[195] The Eighth Circuit and the D.C. Circuit had not applied the test to restrict actions under the ESA.^[196] While the Ninth Circuit applied the test to conclude that parties with solely economic interests could not sue to enforce the ESA, the court did so blindly.^[197] Even the chief lawyer for the Department of the Interior, Solicitor John D. Leshy, indicated before the Court decided *Bennett* that the Clinton Administration "believe(s) that under current law plaintiffs with economic interests can obtain review of the Secretary's actions under the Endangered Species Act equivalent to the review available to environmental plaintiffs."^[198] He added that "plaintiffs who allege injury to economic interests should be able to obtain judicial review of governmental action concerning protected species if they structure their lawsuits appropriately."^[199] Consequently, the Supreme Court's decision in *Bennett*, reversing the Ninth Circuit decision, seemed almost pre-ordained.

In *Bennett*, ranchers and irrigators sought to use the ESA to challenge the USFWS's administration of the Act.^[200] In 1988, the USFWS listed the Lost River sucker (*Deltistes luxatus*) and the short nose sucker (*Chasmistes brevirostris*) as endangered species^[201] pursuant to the ESA.^[202] These species can be found in various reservoirs in Oregon, including reservoirs that form part of the Bureau of Reclamation's (Bureau) Klamath Project, one of the earliest federal reclamation projects.^[203] After the species were listed, the Bureau entered into formal consultation with the USFWS under section 7 of the ESA on the effect of the proposed long-term operation of the project.^[204] At the conclusion of the consultation, the USFWS issued a biological opinion that the proposed operation of the project was likely to jeopardize the continued existence of the two species unless the Bureau adopted the reasonable and prudent alternative suggested by the USFWS.^[205] The alternative required maintaining a certain amount of water in the reservoirs, thereby reducing the amount of water that the reservoirs could deliver to the various water users.^[206] Two irrigation districts and two individuals initiated the lawsuit to challenge the restrictions on the withdrawal of irrigation water from the reservoirs.^[207] They claimed that the restrictions violated sections 7 and 4 of the ESA as well as provisions of the APA.^[208]

Both the district court and the Ninth Circuit held that the irrigation districts and ranchers lacked standing to prosecute the case.^[209] The Ninth Circuit concluded that the plaintiffs' interests were not within the zone of interests protected by the ESA.^[210] In its decision, the court indicated that the zone of interests test applied to cases litigated under the ESA, including cases premised upon a procedural injury.^[211] The court further rejected the citizen suit provision of the ESA as evidence of Congress' intent to allow any person to sue if they otherwise satisfy the requirements for Article III. standing.^[212] The court applied the zone of interests test and concluded that "only plaintiffs who allege an interest in the *preservation of* endangered species fall within the zone of interests protected by the ESA."^[213]

Before the Supreme Court, the United States challenged the petitioners' standing by trying to shift the argument away from the zone of interests test.^[214] The United States argued that the petitioners had failed to satisfy the requirements for Article III standing and that even if the petitioners had Article III standing, their claims were not cognizable under either the APA or the ESA.^[215] The United States did not argue that the petitioners lacked standing because they failed to satisfy the zone of interests test.^[216] Initially, the government sought to persuade the Court that the petitioners failed to satisfy any of the three requirements for Article III standing.^[217] The United States asserted that the petitioners could not show an injury in fact, because, while the aggregate amount of water from the Klamath Project might be reduced, the petitioners neither alleged "that *they* have received, or can be expected to receive, less water than would otherwise have been allocated to them."^[218] Furthermore, the United States argued that the injury was not "fairly traceable" to the USFWS's issuance of the biological opinion, because the biological opinion is not a final agency action and thus, is not binding.^[219] Rather, the United States alleged that the agency's ultimate decision accepting or deviating from the biological opinion would be the cause of any possible injury: "[I]f petitioners have suffered injury, the proximate cause of their harm is an (as yet unidentified) decision by the Bureau regarding the volume of water allocated to petitioners, not the biological opinion itself."^[220] Next, the government argued that petitioners failed to satisfy the redressibility requirement of Article III.^[221] With an argument reminiscent of that raised in *Defenders of Wildlife*, the United States claimed that "in the absence of any challenge to a final decision by the [Bureau of Reclamation], it is purely speculative whether a judicial order running against the Service would enable petitioners to obtain additional water."^[222] Interestingly, a majority of the *Defenders of Wildlife* Court did not endorse a similarly constructed redressibility analysis.^[223]

In its second argument, the United States presented various reasons why petitioners could not pursue their claims under the ESA or APA, even if they satisfied Article III standing.^[224] The government's primary argument tried to establish that review under the APA was unavailable because there was no final agency action.^[225] Beginning with the premise that the APA only authorizes review of final agency actions and then reasserting its view that a biological opinion is not such an action, the United States essentially argued that the case was not ripe for review.^[226] The United States argued that the petitioners should have waited and brought their lawsuit after the Bureau of Reclamation acted on the biological opinion.^[227] Lastly, the United States argued that the petitioners' claims could not be brought under the ESA citizen suit provision

either.[\[228\]](#) The citizen suit provision only applies to the failure of the Secretary to perform a nondiscretionary duty, and the United States contended that none of the three claims brought by petitioners fell within that category.[\[229\]](#)

The Court began its analysis by inquiring whether the plaintiffs lacked standing under both the ESA and the APA, initially focusing on the ESA. After describing the history of the zone of interests test, the Court added that:

[T]he breadth of the zone of interests varies according to the provisions of law at issue, so that what comes within the zone of interests of a statute for purposes of obtaining judicial review of administrative action under the "generous review provisions" of the APA may not do so for other purposes[\[230\]](#)

In the context of a suit brought under the ESA, the Court concluded that the ESA's citizen suit provision, with its broad language allowing "any person" to sue, negates the zone of interests test.[\[231\]](#) The Court indicated that:

[Such a broad reading of] "any person" . . . is greatly augmented by two interrelated considerations: that the overall subject matter of this legislation is the environment (a matter in which it is common to think all persons have an interest) and that the obvious purpose of the particular provision in question is to encourage enforcement by so-called "private attorneys general"—evidenced by its elimination of the usual amount-in-controversy and diversity-of-citizenship requirements, its provision for recovery of the costs of litigation (including even expert witness fees), and its reservation to the Government of a right of first refusal to pursue the action initially and a right to intervene later.[\[232\]](#)

The Court held that the any person language of section 11(g) of the ESA encompasses *all* lawsuits authorized by the terms of section 11(g).[\[233\]](#)

After rejecting the Ninth Circuit's application of the zone of interests test for claims under the citizen suit provision of the ESA, the Court responded to the government's other arguments. First, the Court dismissed the United States' claim that, in order to satisfy the Article III injury in fact requirement, the petitioners must show that they will receive less water.[\[234\]](#) The Court reasoned that at the pleading stage sufficient facts were alleged to show that petitioners might be adversely affected by the reduction of available water.[\[235\]](#) Next, the Court rejected the argument that the petitioners had not satisfied the second or third requirements for Article III standing.[\[236\]](#) The petitioners' injury, even though it might ultimately occur as a result of the actions of the Bureau of Reclamation, is nevertheless "fairly traceable" to the issuance of the biological opinion because the causation requirement "does not exclude injury produced by determinative or coercive effect upon the action of someone else."[\[237\]](#) The Court concluded that the biological opinion would have such a determinative or coercive effect on the Bureau of Reclamation.[\[238\]](#) According to the Court, the redressibility element is satisfied because the Bureau of Reclamation would not impose the water level restrictions if the biological opinion is set aside.[\[239\]](#)

However, because only one of petitioners' claims fell within the type of suit that could be brought under the ESA's citizen suit provision,[\[240\]](#) the Court then addressed whether petitioners could bring those other claims under the APA.[\[241\]](#) The Court concluded that petitioners had standing to assert their APA claim.[\[242\]](#) Relying heavily on *Data Processing*, the Court chastised the Ninth Circuit for not recognizing that the zone of interests test requires looking to the "particular provision of law upon which the plaintiff relies" and not to the "overall purpose of the Act in question (here, species preservation)."[\[243\]](#) The ESA's requirement that the Service rely on the "best scientific and commercial data available" reflects a broad scope of interests and considerations, which necessarily include the type of economic concerns animating the petitioners' lawsuit:

The obvious purpose of the requirement . . . is to ensure that the ESA not be implemented haphazardly, on the basis of speculation or surmise. While this no doubt serves to advance the

ESA's overall goal of species preservation, we think it readily apparent that another objective (if not indeed the primary one) is to avoid needless economic dislocation produced by agency officials zealously but unintelligently pursuing their environmental objectives.[\[244\]](#)

Lastly, and in what can only be described as an unfortunate hindrance to the USFWS' administration of the Act, the Court held that the APA suit can proceed.[\[245\]](#) The Court reasoned that the biological opinion has "direct and appreciable legal consequences" and, therefore, is a final agency action under the APA.[\[246\]](#) It would appear from Solicitor Leshy's letter,[\[247\]](#) as well as from the brief of the United States,[\[248\]](#) that this aspect of the Court's decision was unexpected, because most scholars and attorneys familiar with the ESA had always thought otherwise.[\[249\]](#)

B. The Trail Behind Bennett

Bennett v. Spear is only the start of an escalating problem in applying the present requirements for standing. To begin with, the zone of interests test has been lost in a terminal sea of inconsistency. How or whether it applies to challenges under the ESA is only the first manifestation of the problem. Over the horizon lurks the haphazard manner in which the test has been applied in NEPA lawsuits. In addition, the effort to interpret footnote 7 of *Defenders of Wildlife* and allow standing for procedural violations has generated considerable confusion, especially in suits filed under NEPA. Richard J. Pierce appropriately noted that "[i]f the majority opinion in *Defenders* has rejected standing based on such procedural injuries [that if the agency had followed the appropriate procedure, the outcome might have been different], the field of administrative law will have lost most of its content."[\[250\]](#) Further, he observed that the majority opinion recognized standing for procedural violations, but only "so long as the procedures in question are designed to protect some threatened concrete interest of [a party] that is the ultimate basis of [the party's] standing."[\[251\]](#) For most environmental disputes involving an agency's alleged procedural violation, this qualifier, coupled with the zone of interests test, seems to mandate a re examination of the requirements for standing.

One initial and unfortunate problem with focusing on procedural injuries as the basis for standing is the difficulty of distinguishing between "informational" and "procedural" standing.[\[252\]](#) "Informational" standing was initially premised on an organization's inability to disseminate information to its members as a result of an agency's failure to follow certain procedures to gather information, principally under NEPA.[\[253\]](#) This approach, however, is intellectually unsatisfying, because neither the APA nor NEPA mentions a third party's opportunity to disseminate information.[\[254\]](#) These statutes instead address a third party's right to receive information and supply information to the federal agency.[\[255\]](#) An organization may truly be "interested" in disseminating information and actions that diminish that organization's ability to disseminate information most assuredly injure the organization. However, that interest or injury is not one that Congress likely contemplated, at least not under the APA, NEPA, or most environmental statutes. So how, then, should courts treat standing to raise a NEPA claim?

1. NEPA and Its Zone of Interests

Some courts begin by suggesting that litigants must first satisfy the zone of interests test for prudential standing. The Ninth Circuit, for example, has indicated that a plaintiff who asserts purely economic interests does not have standing to challenge a violation of NEPA.[\[25\]](#)⁶ *In City of Klamath Falls, Oregon v. Babbitt*,[\[257\]](#) a district court observed that the Ninth Circuit's decision in *Plenert* supported applying the zone of interests test to exclude a party whose interests are solely economic.[\[258\]](#) The district court ultimately avoided the issue by concluding that the plaintiff, a municipality, necessarily represented a variety of interests and also had provided some environmental justification for its litigation.[\[259\]](#) Another district court superimposed the language and requirements of the zone of interests test set forth in *Clarke v. Securities Industry Ass'n*[\[260\]](#) and concluded that a NEPA plaintiff must:

- (a) allege a non-pretextual environmental injury; (b) show that its claim is more than "marginally related" to, and not "inconsistent with," the purposes that underlie NEPA; and (c)

be a "reliable private attorney general to litigate the issues of the public interest in the present case" in that [the plaintiff's] interests in the litigation must not be "more likely to frustrate than to further statutory objectives."[\[261\]](#)

This court then rejected the plaintiff's injury as too marginally related to the purposes of NEPA, and concluded that the plaintiff's economic interests were in extreme conflict with litigation in the "public interest" to warrant the plaintiff becoming a "reliable private attorney general."[\[262\]](#) The D.C. Circuit, on the other hand, has indicated that economic interests will not "blight" an assertion of qualifying environmental and aesthetic interests.[\[263\]](#) Usually, the issue is not so thoroughly explored. In *Catron County v. U.S. Fish & Wildlife Service*,[\[264\]](#) the County alleged that the USFWS was required to prepare an EIS before it could designate critical habitat for listed species under the ESA.[\[265\]](#) The County's motive was undoubtedly economic, but it alleged with an attenuated fact pattern that the designation of the habitat would "prevent the diversion and impoundment of water by the County, thereby causing flood damage to county-owned property."[\[266\]](#) The Tenth Circuit held that the County's concern with protecting its property fell within the zone of interests protected by NEPA, although the court never articulated the "interests" that it believed were protected.[\[267\]](#)

In *Douglas County v. Babbitt*,[\[268\]](#) which also involved a challenge to a critical habitat designation, the Ninth Circuit similarly held that a county had standing to allege a procedural injury.[\[269\]](#) The court began by stating that, before excluding the County's interests from the zone of interests to be protected by NEPA, it would have to find that those interests were so inconsistent with the purposes of NEPA that it would be unreasonable to assume that Congress intended to allow the challenge.[\[270\]](#) After the court listed the County's injuries (the interests for purposes of the zone of interests test), the court suggested that the primary issue was whether the County had standing based upon a procedural injury that resulted from the failure of the USFWS to prepare an environmental document pursuant to NEPA.[\[271\]](#) The court concluded that the County did have standing.[\[272\]](#)

In both *Douglas County* and *Catron County*, the NEPA claim survived a challenge to the plaintiff's standing, but the difference in how the two courts treated the NEPA claim illustrates the ambiguity surrounding the application of the zone of interests test to such disputes. The *Douglas County* court applied the test, but did so as part of its discussion of finding a procedural injury.[\[273\]](#) Almost in passing, the court concluded that the County's lands might be affected by the management of the adjacent federal lands, with such an interest falling "within NEPA's zone of concern for the environment."[\[274\]](#) The court in *Catron County* also applied the zone of interests test, but never addressed a procedural injury.[\[275\]](#) The court merely described the plaintiff's injuries as perceptible and environmental and said that these injuries "fall well within the zone of interests protected by NEPA."[\[276\]](#) Although the difference in how the two courts treated the zone of interests test may be explained by the difference between each plaintiff's facts and arguments, if precedent for the law of standing is to develop with such thin threads it should soon fray.

2. Article III Standing Requirements and Procedural Interests Under NEPA

If the zone of interests test is satisfied, the critical issue becomes how to apply the Article III standing requirements to typical environmental claims under NEPA involving a federal agency's alleged failure to follow prescribed procedures. In *Douglas County*, the court described the requirements for standing based upon a procedural injury, but its analysis seems to ignore the fundamental concept of a procedural injury under NEPA.[\[277\]](#) The court did not discuss how such an injury falls within the zone of interests protected by NEPA while also satisfying Article III. The court initially expressed doubt whether, under *Defenders of Wildlife*, the "procedural right" must be conferred by statute or whether it arises because of a threat to a concrete interest.[\[278\]](#) The court decided that the right must be conferred by statute.[\[279\]](#) This did not pose a problem because under NEPA the County had a right to comment on proposed major federal actions that significantly affect the quality of the human environment.[\[280\]](#) However, the Court stated that the procedural injury still had to affect a "concrete" interest within the zone of interests of NEPA.[\[281\]](#) The court concluded that the County's interest in protecting its lands from the consequences of designating adjacent land as critical habitat under the ESA was sufficient to "describe concrete, plausible interests,

within NEPA's zone of concern for the environment, which underlie the County's asserted procedural interests."[\[282\]](#)

In *Florida Audubon Society v. Treasury Department*,[\[283\]](#) the D.C. Circuit offered another approach to cases involving an alleged procedural violation. The case involved a challenge by various conservation groups to a tax credit for the use of an alternative fuel additive, ethyl tertiary butyl ether (ETBE).[\[284\]](#) The groups claimed that the Secretary of the Treasury was required to comply with NEPA before promulgating a rule providing the tax credit.[\[285\]](#) The court began its analysis by treating the case as one involving procedural rights of the type addressed in footnotes 7 and 8 in *Defenders of Wildlife*.[\[286\]](#) According to the court, "a procedural-rights plaintiff must show not only that the defendant's acts omitted some procedural requirement, but also that it is substantially probable that the procedural breach will cause the essential injury to the plaintiff's own interest."[\[287\]](#) The plaintiffs, therefore, had to show "a particularized environmental interest of theirs that will suffer demonstrably increased risk, and whether the tax credit promulgated by the defendant is substantially likely to cause that demonstrable increase in risk to their particularized interest."[\[288\]](#) The court recognized that this might be a difficult standard to meet where the plaintiff cannot show a geographical nexus to or actual use of an area, but believed that this standard was required by such opinions as *Defenders of Wildlife* and even *Sierra Club*.[\[289\]](#)

In *Florida Audubon Society*, the court determined that the plaintiffs could not satisfy this requirement.[\[290\]](#) The court focused on whether the plaintiffs had shown a particularized interest or specific environmental risk to themselves, stating that the "plaintiff must show that he is not simply injured as is everyone else, lest the injury be too general for court action, and suited instead for political redress."[\[291\]](#) Stated another way, the court appears to require some showing of serious environmental harm to an identifiable area as well as a geographical nexus to or actual use of the affected area by the plaintiffs. The plaintiffs sought to satisfy this standard by arguing that the tax credit would cause more ETBE production, which would lead to increased ethanol production, thus prompting more production of corn and sugar.[\[292\]](#) The plaintiffs further argued that the increased agricultural production of corn and sugar would result in additional agricultural pollution, which would affect various wildlife areas in Minnesota, Michigan, and Florida that the plaintiffs or its members used and enjoyed.[\[293\]](#) The court refused to accept this argument, reasoning that the plaintiffs had failed to show that any particular farmers near the wildlife areas would actually respond to the tax credit, even though plaintiffs had demonstrated a general risk of environmental harm that would occur from increased agricultural production.[\[294\]](#) Consequently, a majority of the court concluded that the plaintiffs "have not demonstrated such a geographical nexus to any asserted environmental injury," and thus had no standing to sue.[\[295\]](#)

After holding that plaintiffs failed to satisfy the injury in fact requirement, the court issued, in effect, an alternative holding on causation.[\[296\]](#) Apparently uncomfortable with the articulation of this requirement in the past,[\[297\]](#) the court explained that in a NEPA case causation must relate to the alleged environmental injury itself:

As in all cases, standing in an EIS suit requires adequate proof of causation. The conceptual difficulty with this requirement, in this type of case, is that an adequate causal chain must contain at least two links: one connecting the omitted EIS to some substantive government decision that may have been wrongly decided because of the lack of an EIS and one connecting that substantive decision to the plaintiff's particularized injury.[\[298\]](#)

The court noted that this causal link between the asserted injury to a particularized interest and the substantive governmental action is required by *Defenders of Wildlife*.[\[299\]](#) Any past decisions inconsistent with this view were then overruled.[\[300\]](#) Here, the court found insufficient evidence to support the various links in the plaintiff's asserted chain of causation,[\[301\]](#) including even a congressional prophesy.[\[302\]](#)

The dissenters, Judges Rogers, Edwards, Wald, and Tatel, argued that the majority had misapplied the doctrine of standing to such a degree that it threatened to deny standing to anyone challenging actions with diffuse impacts.[\[303\]](#) These judges would have followed the circuit court's decision in *Los Angeles v.*

NHTSA,^[304] where the court articulated two requirements for standing in cases involving claims under NEPA.^[305] First, the procedural error, such as the failure to prepare an EIS, must create a risk that serious environmental harms will be overlooked, and second, the plaintiff must have a "sufficient geographical nexus to the site of the challenged project that he may be expected to suffer whatever environmental consequences the project may have."^[306] The dissenting judges in *Florida Audubon Society* considered the second requirement as the equivalent of the concrete interest test in *Defenders of Wildlife*.^[307] They believed that the plaintiffs "demonstrated concrete and particularized injury by establishing that they have a 'geographical nexus' to the threatened environmental injury."^[308] These judges argued that the plaintiffs had established a *heightened risk* of environmental injury that would affect their particularized interests and, therefore, it would require too much of plaintiffs to pinpoint precisely how they would be affected.^[309]

In *Committee to Save the Rio Hondo v. Department of Agriculture*,^[310] the Tenth Circuit disagreed with aspects of the D.C. Circuit's analysis in *Florida Audubon Society*.^[311] In *Rio Hondo*, the Forest Service approved an amendment to its master plan for the Carson National Forest in New Mexico.^[312] The amendment would have authorized changing Taos Ski Valley's special use permit for ski activities during the winter, located within the national forest, to include summertime operations.^[313] The Committee to Save the Rio Hondo (the Committee) believed that summertime activities would adversely affect the surrounding land and nearby water.^[314] Consequently, the Committee contended that the Forest Service's decision violated NEPA and asserted that the plan amendment and authorization for summertime activities required the preparation of an EIS.^[315] The Committee submitted two affidavits from individuals with a demonstrated geographical nexus to the area: both used the nearby water and one used the land in and around the ski area.^[316] Both affidavits stated that summertime use would not only affect the quality of the nearby waters by increasing the amount of sewage discharge and non-point source pollution, but would also disturb the recreational and aesthetic value of the surrounding land as a consequence of increased development and mechanization.^[317] After concluding that the Committee had satisfied the zone of interests test for prudential standing, the court examined whether the Committee had satisfied constitutional standing under Article III.^[318] The court separated its analysis into the three inquiries identified in *Defenders of Wildlife*: (1) Injury in Fact,^[319] which was broken into (a) Increased Risk of Environmental Harm^[320] and (b) Concrete Interests;^[321] (2) Causation;^[322] and (3) Redressibility.^[323]

The court's discussion of whether the Committee's members suffered an injury in fact was the most elaborate. The court began by describing the injury resulting from a violation of NEPA in the following summary:

An agency's failure to follow the National Environmental Policy Act's prescribed procedures creates a risk that serious environmental consequences of the agency action will not be brought to the agency decisionmaker's attention. The injury of an increased risk of harm due to an agency's uninformed decision is precisely the type of injury the National Environmental Policy Act was designed to prevent. Thus, under the National Environmental Policy Act, an injury of alleged increased environmental risks due to an agency's uninformed decisionmaking may be the foundation for injury in fact under Article III.^[324]

Next, the court explained that *Defenders of Wildlife* requires a showing that the increased risk of environmental harm affects the litigant's concrete and particularized interest: "To fully establish injury in fact, a plaintiff must be able to show that a separate injury to its concrete, particularized interests flows from the agency's procedural failure."^[325] The plaintiff can show this type of injury by establishing a "geographical nexus" to or actual use of a site that might suffer environmental harm as a consequence of the agency's action.^[326] The court noted that *Defenders of Wildlife* required that the environmental harm be perceptible and that it must be actual, threatened or imminent.^[327] The court concluded that these requirements were met in *Rio Hondo*.^[328] In examining the increased risk of environmental harm, the court summarized the harm that would follow from the Forest Service's decision to allow summertime use of the ski area.^[329] The court implicitly suggested that this harm would be a product of an allegedly

uninformed decision occasioned by failure to comply with NEPA.^[330] The Committee members established their concrete interest because they had a clearly identified geographical nexus to the area and actually used the area.^[331]

Lastly, the *Rio Hondo* court addressed the causation and redressibility requirements.^[332] The court observed that in order to establish causation for a NEPA claim, a litigant must establish that the increased risk of environmental harm to its concrete interests is fairly traceable to the alleged NEPA violation.^[333] Here, the court departed from the D.C. Circuit's decision in *Florida Audubon Society*.^[334] The *Rio Hondo* court stated that the D.C. Circuit's requirement that "there is a substantial probability that the substantive agency action created a demonstrable risk, or caused a demonstrable increase in an existing risk, of injury to the particularized interests of the plaintiff . . . appears to confuse the issue of the likelihood of the harm, which is better addressed in the injury in fact prong of the analysis, with its cause."^[335] Instead, the increased risk of environmental harm determines whether the plaintiff has suffered an injury in fact.^[336] The court acknowledged that the increased risk of harm from the agency's decision is not a result of the decision itself but rather from "*uninformed* decisionmaking."^[337] Therefore, the goal of NEPA would be subverted if plaintiffs were required to establish with a "substantial probability" that the environmental injury will actually occur: "[T]hose examinations are left to an environmental impact statement."^[338] The court then noted that plaintiffs can satisfy the redressibility requirement of standing if the injury would be redressed by a favorable decision requiring the Forest Service to comply with NEPA.^[339] This is why the court added that it is immaterial whether (and thus not required to be shown that) the Forest Service's decision would be any different if the plaintiff prevailed.^[340]

In a similar case, the First Circuit in *Dubois v. United States Department of Agriculture*^[341] held that a party had standing to challenge a Forest Service decision involving a ski resort.^[342] Dubois argued that the Forest Service had not complied with NEPA, the CWA, and an Executive order before the Service decided to authorize the expansion of a skiing facility.^[343] The court described Dubois as:

located squarely within the geographical area allegedly directly affected by the proposed project, who visits the area regularly, who drinks the water which will allegedly be tainted by pollutants, and who will allegedly be deprived of his environmental, aesthetic and scientific interests in ways directly tied to the project he challenges.^[344]

Although the court noted, citing *SCRAP*, that the injury may be shared by many, it followed by citing *Warth v. Seldin* with the caveat that the injury "may not be common to everyone."^[345] The court also recited the now typical litany that (1) the injury must be personal to the plaintiff (concrete and particularized); (2) it must be actual or imminent, not conjectural or hypothetical; (3) it must be distinct and palpable; (4) it may be "small" as long as it is "direct"; and (5) it must be fairly traceable to the allegedly unlawful conduct and likely to be redressed.^[346] The court concluded that Dubois had standing because he had a geographical nexus to the area and used the water and lands that would be affected by the Forest Service's action.^[347] In a fairly conclusory statement, the court added that his injuries were "'likely to be redressed' by the relief he has requested in the complaint: *inter alia*, an injunction against the project's proceeding."^[348] The First Circuit's analysis, therefore, avoided, or arguably overlooked, focusing on whether Dubois had standing due to a procedural violation as outlined in footnote 7 of *Defenders of Wildlife*.^[349]

V. CEMENTING THE FAULTS: A SIMPLE RECOGNITION OF THE MODERN PARADIGM

The law of standing appears ready to come full circle, back to the fundamental issue that confronted the Court in the early 1970s. In *Data Processing*, the Court cast aside the notion of requiring a "legal interest," a relic of the old private or common law model, and acknowledged that a party with a noneconomic injury could have standing to pursue a claim.^[350] In doing so, the Court indicated that the party must have an injury in fact and fall within the zone of interests of the relevant statute.^[351] The Court did not separate its constitutional inquiry from any prudential inquiry, nor did it articulate the nature and breadth of the APA's language that the party must be "adversely affected or aggrieved within the meaning of the relevant statute,"^[352] as Kenneth Culp Davis would have liked.^[353] Two years later, in *Sierra Club*, the Court

confirmed that aesthetic and ecological injuries were injuries in fact for purposes of obtaining standing to sue, but added that to establish an injury in fact the party must show that she is herself personally injured.^[354] The Court rejected the argument of the Sierra Club and others that they could, in effect, sue as private attorneys general.^[355] In various cases over the next eighteen years,^[356] the Court refined its Article III injury in fact requirement by adding what Cass Sunstein notes might be viewed as "natural and entirely unobjectionable corollaries" of the injury in fact requirement if applied correctly.^[357] Why Justice Scalia's opinion in *National Wildlife Federation* and, more particularly, in *Defenders of Wildlife*, marked a critical juncture in the law has less to do with a formulation of "new" requirements than with their application, or misapplication, to disputes under environmental statutes such as the ESA or NEPA. Since *Defenders of Wildlife*, the lower courts have struggled with applying the various constitutional and prudential standing doctrines in the frequent cases involving a violation of a procedural requirement under the ESA or NEPA.

This struggle demonstrates that the zone of interests test and the Court's articulated requirements for satisfying Article III standing do not apply in the modern era of environmental law. The zone of interests test is ill-equipped to serve as a useful guide for limiting access to the courts in environmental cases where Congress has sanctioned citizen participation, whether in the form of the APA or NEPA, through specific provisions providing procedural rights, as in the FPA,^[358] or by providing a citizen suit provision, as in *Bennett*. The differences among the opinions can be attributed to the lack of any common understanding that claims under NEPA necessarily engulf a zone of interests test. *Bennett* luckily signals such a recognition.

If we accept the *Bennett* Court's admonition that the zone of interests test applies to the particular provision of the law being violated, and not to Congress' overall objectives in the legislation, then courts will no longer have to struggle with deciding when economic interests do not justify granting standing because they are in too much conflict with environmental interests. This is the dilemma presented by the district court's opinion in *City of Los Angeles v. Glickman*.^[359] While it has become commonplace for courts to assert that NEPA was designed to protect the environment,^[360] those same courts fail to rely upon the Court's interpretation of NEPA as simply a *procedural* statute designed to ensure an informed agency decision.^[361] Therefore, the goal of NEPA cannot be divorced from the process. This process is not to ensure a correct or particular substantive agency decision, but rather to make sure that the federal agency has before it all the necessary facts to render an informed decision. This means that those who believe that certain environmental impacts will flow from the decision should be treated in a similar fashion as those who might disagree with the agency's decision or want to provide the agency with their side of the story. Whether they are concerned with the environment in the same manner as an environmental organization is irrelevant; each has an equal right to participate in the NEPA process. Often, the juxtaposition of two opposing perspectives can result in a more informed agency decision. Courts, therefore, should be cautious about invoking the hortatory language of NEPA, unless they are willing to afford that language significance and alter the current understanding of NEPA as a procedural statute.^[362] Courts should recognize that all claims under NEPA are procedural and that the zone of interests test does not apply in NEPA cases, or its application, for the most part, will be *pro forma*.^[363]

After prudential standing, the next inquiry is how to address Article III standing. The need to show an injury in fact by establishing some direct or personal stake in the outcome of the litigation must be viewed at best as an attempt to ensure that mere interlopers do not abuse the judicial process, or at worst, as an ill-conceived creation to avoid a perceived assault on the courthouse. When the Court expressed this requirement in *Sierra Club*, it did so without much analysis, simply stating that it was so.^[364] What the Court failed to realize, and what has since become abundantly clear, is that any inquiry into the existence of an injury in fact entails a normative judgment.^[365] Such an inquiry involves a court's subjective determination of whether it will recognize an interest as worthy of protection. No doubt the plaintiffs and their members in *Sierra Club*, *National Wildlife Federation*, and *Defenders of Wildlife* all feared some "harm" would follow from the alleged governmental violation, so much so that they devoted considerable time and effort in pursuing their cases for many years. However, the harm or injury in each instance apparently was too elusive for the Court to accept; it is not that the injury did not exist.

The problem with defining an injury in fact and determining whether it is of a type that a court will recognize as sufficient to confer standing is evident in how courts treat disputes under NEPA. All such cases are predicated upon a concern that the federal agency may have overlooked certain environmental consequences when the agency decided to act. The plaintiff typically alleges some procedural error, such as the failure to prepare an EIS or to take the requisite "hard look"[\[366\]](#) at the environmental consequences of its action. There is no uniformity in how courts treat such claims. In *Babbitt*, the court purported to treat the case as involving a procedural right,[\[367\]](#) while under similar circumstances in *Catron County*, the court did not address any procedural right because the County had established that the agency's decision posed a threat to its legally protected property interest.[\[368\]](#) In both *Florida Audubon Society* and *Rio Hondo*, the courts treated the NEPA claim as one involving a procedural injury.[\[369\]](#) The Ninth Circuit has also typically treated NEPA claims the same way, reasoning that the injury is the risk that environmental consequences might be overlooked.[\[370\]](#) In some instances, whether the case becomes one of procedural rights or not appears to depend on whether the alleged injury is characterized as resulting from the agency's substantive decision or from the agency's failure to observe NEPA.[\[371\]](#) In most of these cases, the injury the courts look to is the injury which may result from the agency's substantive decision.[\[372\]](#) At first glance, this seems to make sense because a procedural violation does not *per se* have identifiable impacts on the physical environment.

This means that a plaintiff alleging a procedural violation must in most, if not all, instances show some likelihood that the agency's substantive decision will have an identifiable impact on the physical environment, as well as establish some geographical nexus to or actual use of the affected area.[\[373\]](#) Upon further reflection, any such inquiry into the risk of adverse environmental effects appears inconsistent with the notion of distinguishing between procedural and other violations of the law for purposes of standing. This becomes evident in *Florida Audubon Society*, where the court reviewed in considerable detail whether the alleged environmental harm was likely to occur as a result of the ETBE tax credit.[\[374\]](#) The environmental effects were precisely those the litigants thought sufficient to warrant the NEPA claim.[\[375\]](#) Similarly, following the lead of its court of appeals, the district court in *California Forestry Ass'n v. Thomas*[\[376\]](#) examined whether the Forest Service's adoption of Interim Guidelines to protect the spotted owl's habitat in certain national forests in California actually would have the type of adverse environmental impact asserted by the timber industry.[\[377\]](#) Although the court concluded that the guidelines would not have the asserted effect, the court denied standing because the plaintiff's injuries were not redressible.[\[378\]](#) However, in another case, the D.C. Circuit concluded that a showing of a relatively modest increase in risk is sufficient to establish injury in fact for standing purposes where the alleged environmental harm would be serious.[\[379\]](#) These decisions, *Florida Audubon Society* in particular, reflect the inherent result of trying to marry a procedural violation with a requirement for a concrete injury, that is, a geographical nexus or actual use test. To the extent that an injury in fact requires showing a personal stake in the outcome of the case, which essentially has come to mean some geographical nexus to or actual use of an area affected by the agency's substantive decision,[\[380\]](#) the tension between decisions like *Florida Audubon Society* and *Rio Hondo* and between procedural injury and the substantive decision seems inevitable.

One facet of focusing on an increased risk of environmental harm in a procedural injury case is the timing of that risk, or whether the injury must be immediate or imminent. The Court in *Defenders of Wildlife* generated such an inquiry when it held that the harm to plaintiff's members was not an actual or imminent injury.[\[381\]](#) The Court did not consider the environmental injury itself but found that the environmental injury was not personalized to the plaintiff's members because the affidavits were insufficient to show that the members actually used or had a geographical nexus to the sites in the Middle East.[\[382\]](#) Nevertheless, some courts now infer from *Defenders of Wildlife* a requirement for some sort of immediacy to the environmental injury. For example, this requirement has become particularly troubling in challenges to land use plans adopted by the Forest Service. In general, these plans establish the standards and guidelines for making site specific decisions in national forests, not unlike a comprehensive zoning map.[\[383\]](#) Because these plans do not have immediately identifiable discernable effects on the environment, standing to challenge them has become a controversial issue.[\[384\]](#) While most courts follow the better reasoned view that standing is available,[\[385\]](#) the Eighth Circuit denied standing to the Sierra Club's challenge to

such a plan because of a failure to establish a threat of imminent environmental harm.^[386] The court believed that *Defenders of Wildlife* justified this conclusion.^[387] The Eleventh Circuit, on the other hand, observed that such an analysis confuses ripeness and standing doctrines, finding "the framework of the ripeness doctrine more useful when evaluating injuries that have not yet occurred."^[388]

Considering all this, what is the purpose of treating a claim as alleging a procedural violation for purposes of Article III standing? In *Defenders of Wildlife*, the Court attempted to answer this question by suggesting relaxed standards for the causation and redressibility requirements.^[389] Logically, neither of these requirements should apply. If, as we have seen, the cause of a plaintiff's harm is from the agency's substantive decision, then it is not clear how the requirements for causation and redressibility would apply when a plaintiff is alleging a procedural violation, as under NEPA. It is entirely guesswork whether the alleged injury from the substantive agency decision would have been avoided had the agency followed the correct procedures. Thus, in order to avoid stating that the requirements cannot be applied, commonly courts will refer to the increased risk of environmental harm as a result of a procedurally flawed decision, although it is uncertain that the risk of the injury will decrease if the agency is forced to follow the correct procedures.^[390] In *Rio Hondo*, for instance, the court concluded that the plaintiffs had demonstrated an increased risk of environmental harm to the Ski Area as a result of the agency's substantive, albeit uninformed, decision.^[391] The court then addressed causation and redressibility by concluding that causation is satisfied if the increased risk is traceable to the alleged procedural error.^[392] Specifically, the procedural error must relate in some way to the agency's *substantive* decision.^[393] Otherwise, the alleged violation would not risk affecting the plaintiff's interests that are adversely impacted by the agency decision.^[394] This would typically not be a problem in the context of NEPA because the entire NEPA process is designed to inform and influence the ultimate decision, thus affecting the plaintiff's substantive interests automatically.^[395] This is what the majority in *Florida Audubon Society* said it was doing, and what the court in *Rio Hondo* criticized. The problem with this analysis is the same as with *Florida Audubon Society* in general: A court is required to prematurely examine the merits of the case when the court is simply deciding whether the plaintiff is an appropriate party to bring the case. Some courts avoid this difficulty by stating that the relaxed requirements are satisfied,^[396] while others shift the focus of the injury from the agency's substantive decision to the procedural error which can be redressed by a court order.^[397] Still other courts respond almost unintelligibly.^[398] Perhaps the most accurate response was delivered by Judge Norma Holloway Johnson, who observed that the "chance" that the plaintiff's asserted injury might be averted is sufficient.^[399]

This haphazard approach to resolving standing in environmental cases can be remedied only if courts revisit the fundamental basis for the present standing requirements. Courts must recognize that the private law model for litigation cannot function in the modern era of public interest in environmental disputes. The various environmental law programs, whether through the APA alone or through citizen suit provisions, were premised on public participation in environmental and natural resource protection, a national goal for the citizenry.^[400] That meant that citizens *each* have a "right" to participate and to challenge violations of the law, either substantively or procedurally. Environmental laws are a product of the recognition that the *Silent Spring*^[401] may fall upon all citizens as a result of actions not immediately or perceptibly harmful and that citizens can no longer look at environmental issues through a myopic lens. Americans must look at our environment as an ecosystem that affects us all. To say that *all* Americans are not personally *injured* when the opportunity to observe the nearly extinct Amur (or Siberian) tiger (*Panthera tigris altaica*) is lost or the opportunity to save a species that may contribute toward finding a cure for a disease that affects *all* persons is risked denies the fundamental tenet of modern environmental law. As one court observed, "[b]oth altruism and self interest lead people to protect endangered species. The decline of one of our fellow travelers on this planet is tragic in itself. It may also be a tocsin which tells us that we are doing something very wrong."^[402] Further, not all harms occur in any particular place to satisfy a "geographical nexus" test, and not all harms are immediately perceptible.^[403] When the present debate over standing first began, Joseph Sax noted that:

The Mineral King decision suggests that environmental controversies are really nothing more than struggles between developers and birdwatchers. The Court majority seems oblivious to

the central message of the current environmental literature—that the issues to engage our serious attention are risks of long-term, large scale, practically irreversible disruptions of ecosystems. By denying to persons who wish to assert those issues the right to come into court, and granting standing only to one who has a stake in his own present use and enjoyment, the Court reveals how little it appreciated the real meaning of the test case it had before it.[\[404\]](#)

Perhaps now, almost a quarter of a century later, when the standing requirements, at least under NEPA and the ESA, are precarious, the time is right to accept Sax's cue. Courts, therefore, should follow what the Supreme Court said in *Bennett v. Spear*: The environment is a matter in which we all have an interest, a point essentially made by Justice Stewart in *SCRAP*.[\[405\]](#) Courts should accept the holding in *Sierra Club v. Morton* that standing is not defeated simply because an interest may be widely shared.[\[406\]](#) Also, to say that citizens are not *all personally* injured when federal public lands and natural resources are impacted by federal agency decisions ignores that public lands and resources are not just for citizens of the surrounding communities or users of those lands and resources. Public lands are held for the public at large,[\[407\]](#) for the benefit of us all. In some cases, public lands generate public revenues for programs that we depend upon, and in other cases the revenue is generated so that citizens and future generations might have the *opportunity* to visit them.[\[408\]](#) Parties who pursue their claims under modern environmental laws are not asserting "generalized grievances," the concern underlying the standing doctrine.[\[409\]](#) Instead, these parties are asserting *concrete* and *particularized* claims involving specifically alleged violations of the law that are of the type a court is well suited to decide. Moreover, fiction would be elevated over substance to suggest that there is no "case or controversy" under Article III when the party to the litigation is not seeking an advisory opinion but rather some form of particularized "relief."[\[410\]](#)

To be sure, when litigants seek to vindicate "individual rights" or "constitutional guarantees," the need for some individualized showing of injury is wholly appropriate. It is fair to say that under the Constitution no general constitutional or individual right exists to ensure that all governmental activities are constitutionally permissible.[\[411\]](#) Otherwise, there would be no present barrier limiting lawsuits alleging a host of constitutional violations. Cass Sunstein explains that the Supreme Court initially developed the doctrine of standing precisely to deal with this problem.[\[412\]](#) However, to say that no implied constitutional right exists to ensure observance with the Constitution fails to suggest that Congress cannot statutorily confer upon private citizens such rights to ensure that the laws it passes are followed. When Justice Scalia wrote that "there is absolutely no basis for making the Article III inquiry turn on the source of the asserted right,"[\[413\]](#) he missed the point. The basis for the asserted right is indeed critical. That basis arises in constitutional cases and under a private litigation model when the litigant can demonstrate a sufficient stake in the outcome. In the public litigation model, the basis for the asserted right arises because Congress has adopted modern environmental law programs and conferred upon the citizenry the right to participate in many of those programs. As William Fletcher wrote almost ten years ago, "Congress should have essentially unlimited power to define the class of persons entitled to enforce that [statutory] duty, for congressional power to create the duty should include the power to define those who have standing to enforce it."[\[414\]](#) When and if the courts become overburdened by those claiming to be adversely affected or aggrieved, Congress should bear the duty to curb any abuses that might occur rather than for the courts to craft doctrines with a speculative eye toward what might follow.

VI. CONCLUSION

The past quarter of a century has illustrated that the law of standing cannot last in its current form. The prudential and constitutional requirements for standing were developed during an era in which the field of administrative law underwent a transformation from the old to a new paradigm. This new paradigm recognized the need for increased citizen involvement and access to the courts. The Court in *Sierra Club v. Morton* was reluctant to fully endorse the new model of citizen and judicial involvement. That model would have recognized that decisions affecting the environment and natural resources impact all citizens and that the courthouse doors should swing wide to ensure that agencies observe the environmental laws when taking action. Now that the fruit of that reluctance has been witnessed, including an inability to

construct a coherent approach to applying the standing requirements to cases under statutes such as NEPA and the ESA, it is only fitting to suggest that the current law of standing is on its last legs.

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[1] *Sierra Club v. Morton*, 405 U.S. 727, 760 n.2 (1972) (Blackmun, J., dissenting) (quoting JOHN DONNE, DEVOTIONS XVII). [Return to text.](#)

[2] *See* Joseph L. Sax, *Standing to Sue: A Critical Review of the Mineral King Decision*, 13 NAT. RESOURCES J. 76, 82 (1973) (observing, shortly after the Court adopted its current approach, that the "user equals standing" test was doomed to fail). [Return to text.](#)

[3] JOSEPH VINING, LEGAL IDENTITY: THE COMING OF AGE OF PUBLIC LAW 1 (1978). [Return to text.](#)

[4] *Id.* [Return to text.](#)

[5] 117 S. Ct. 1154 (1997), *rev'g* *Bennett v. Plenert*, 63 F.3d 915 (9th Cir. 1995). [Return to text.](#)

[6] *See id.* at 1161. [Return to text.](#)

[7] *See Bennett*, 117 S. Ct. at 1161; *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-71 (1992); *see also infra* note 150 and accompanying text. [Return to text.](#)

[8] *See Defenders of Wildlife*, 504 U.S. at 561-62. [Return to text.](#)

[9] Administrative Procedure Act, 5 U.S.C. § 702 (1994). [Return to text.](#)

[10] *Id.* [Return to text.](#)

[11] *Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 399 (1987). [Return to text.](#)

[12] *Bennett*, 117 S. Ct. at 1161. That the zone of interests test reflects the Court's interpretation of section 10 of the APA is not necessarily consistent with the Court's other statements that the test applies to constitutional guarantees and that it serves to ensure a proper role for the judiciary in a democratic society. *See id.* Although the *Clarke* Court arguably suggested limiting the test to instances where it appropriately applied (in cases under the APA), *see* 479 U.S. at 400 n.16, the Court in *Bennett* exhibited no such tendency. [Return to text.](#)

[13] National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-47 (1994). [Return to text.](#)

[14] Endangered Species Act, 16 U.S.C. §§ 1531-44 (1994). [Return to text.](#)

[15] Two of the more recent and better articles discussing standing are David Sive, *Environmental Standing*, NAT. RESOURCES & ENV'T, Fall 1995, at 49, and Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163 (1992); *see also* Beth Brennan & Matt Clifford, *Standing, Ripeness, and Forest Plan Appeals*, 17 PUB. LAND & RESOURCES L. REV. 125 (1996); Martha Colhoun & Timothy S. Hamill, *Environmental Standing in the Ninth Circuit: Wading Through the Quagmire*, 15 PUB. LAND L. REV. 249 (1994); Susan L. Gordon, *Recent Developments, The*

Ninth Circuit Standing Requirements for Environmental Organizations, 13 J. ENERGY NAT. RESOURCES & ENVTL. L. 264 (1993); George K. Pash, Note, *NEPA: As Procedure It Stands, As Procedure It Falls: Standing and Substantive Review in Idaho Conservation League v. Mumma*, 29 WILLAMETTE L. REV. 365 (1993); Jonathan Poisner, Comment, *Environmental Values and Judicial Review After Lujan: Two Critiques of the Separation of Powers Theory of Standing*, 18 ECOLOGY L.Q. 335 (1991); Karin P. Sheldon, *Lujan v. Defenders of Wildlife: The Supreme Court's Slash and Burn Approach to Environmental Standing*, 23 Env'tl. L. Rep. (Env'tl. L. Inst.) 10,031 (1993). For older articles, see Raoul Berger, *Standing to Sue in Public Actions: Is it a Constitutional Requirement?*, 78 YALE L.J. 816 (1969); Lea Brilmayer, *The Jurisprudence of Article III: Perspectives on the "Case or Controversy" Requirement*, 93 HARV. L. REV. 297 (1979); William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221 (1988); Louis L. Jaffe, *Standing Again*, 84 HARV. L. REV. 633 (1971); Louis L. Jaffe, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U. PA. L. REV. 1033 (1968); Henry P. Monaghan, *Third Party Standing*, 84 COLUM. L. REV. 277 (1984); Gene R. Nichol, Jr., *Rethinking Standing*, 72 CAL. L. REV. 68 (1984); Michael A. Perino, Comment, *Justice Scalia: Standing, Environmental Law, and the Supreme Court*, 15 B.C. ENVTL. AFF. L. REV. 135 (1987); Bruce Teicher, Note, *Informational Injuries as a Basis for Standing*, 79 COLUM. L. REV. 366 (1979); Mark V. Tushnet, *The New Law of Standing: A Plea for Abandonment*, 62 CORNELL L. REV. 663 (1977); Stephen L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371 (1988). [Return to text.](#)

[16] See generally Sunstein, *supra* note 15, at 183-85. [Return to text.](#)

[17] See Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1434-40 (1988). Sunstein traces the development of the law of standing, describing its fairly recent origins and how the emergence of the New Deal regulatory state influenced its development. [Return to text.](#)

[18] *Id.* at 1435 (footnote omitted). [Return to text.](#)

[19] See *id.* at 1441-44. Kenneth Culp Davis, Louis L. Jaffe and others debated the appropriate limits for standing in public actions, and Cass Sunstein and William Fletcher each have traced this debate. See Fletcher, *supra* note 15; Sunstein, *supra* note 15; Sunstein, *supra* note 17; cf. Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976) (a later influential article discussing public law litigation). [Return to text.](#)

[20] See Administrative Procedure Act, 5 U.S.C. §§ 551-559 (1994). [Return to text.](#)

[21] 397 U.S. 150 (1970).

22> 397 U.S. 159 (1970). [Return to text.](#)

[23] *Data Processing*, 397 U.S. at 152-54; see *Barlow*, 397 U.S. at 164; see also *infra* notes 41, 72-74 and accompanying text. The *Data Processing* and *Barlow* decisions abandoned the old "legal interest" test, which "represented not simply an incremental development, but a shift in the axioms of legal thinking." VINING, *supra* note 3, at 39. [Return to text.](#)

[24] Martin M. Shapiro, *Prudence and Rationality Under the Constitution*, in THE CONSTITUTION AND THE REGULATION OF SOCIETY 213, 220 (Gary C. Bryner & Dennis L. Thompson eds., 1988). "Beginning in the mid-fifties and rapidly accelerating in the sixties and seventies . . . Congress and the courts came to fear that agency experts were being 'captured' by special-interest groups and turning out rules that favored those special interests over the public interest." *Id.* For instance, Justice Douglas opined that federal agencies "are notoriously under the control of powerful interests who manipulate them through advisory committees, or friendly working relations, or who have that natural affinity with the agency" that develops over time. *Sierra Club v. Morton*, 405 U.S. 727, 745 (1972) (Douglas, J., dissenting). According to Professor Sunstein, however, the concern over regulatory capture "should not be overdrawn." Sunstein, *supra* note 15, at 184. Sunstein observed that "[t]he empirical literature did not establish a systematic risk of administrative abdication, and it did not demonstrate that regulated industries are always in a better

position to influence government than beneficiaries." *Id.* See generally WILLIAM L. CARY, POLITICS AND THE REGULATORY AGENCIES (1967); LOUIS M. KOHLMEIER, JR., THE REGULATORS: WATCHDOG AGENCIES AND THE PUBLIC INTEREST (1969); JERRY L. MASHAW, DUE PROCESS IN THE ADMINISTRATIVE STATE (1985). [Return to text.](#)

[25] A. Dan Tarlock, *Environmental Law, But Not Environmental Protection*, in NATURAL RESOURCES POLICY AND LAW: TRENDS AND DIRECTIONS 162, 170-71 (Lawrence J. MacDonnell & Sarah F. Bates eds., 1993) (citing JOSEPH SAX, DEFENDING THE ENVIRONMENT: A STRATEGY FOR CITIZEN ACTION (1971)). [Return to text.](#)

[26] *See id.* [Return to text.](#)

[27] Courts generally rejected *qui tam* lawsuits, similar to public attorney general actions, seeking injunctive relief and criminal penalties for violations of section 13 of the Rivers and Harbors Act. See Rivers and Harbors Appropriations Act of 1899, 33 U.S.C. §§ 401-418 (1994). This Act prohibits the discharge of refuse into navigable waters and tributaries, as well as the deposit of material on the banks of navigable waters, when navigation may be impeded or obstructed. See Refuse Act of 1899, 33 U.S.C. § 407 (1994). See, e.g., Gerbing v. I.T.T. Rayonier, Inc., 332 F. Supp. 309 (M.D. Fla. 1971); Lavagnino v. Porto-Mix Concrete, Inc., 330 F. Supp. 323 (D. Colo. 1971); Bass Angler Sportsman Soc'y v. United States Steel Corp., 324 F. Supp. 412 (D.C. 1971); United States v. St. Regis Paper Co., 328 F. Supp. 660, 665 (W.D. Wis. 1971) (awarding then Chairman of the Subcommittee on Conservation and Natural Resources "informer fees"); Guthrie v. Alabama By-Products Co., 328 F. Supp. 1140, 1146-47 (N.D. Ala. 1971), *aff'd*, 456 F.2d 1294 (5th Cir. 1972); Reuss v. Moss-American, Inc., 323 F. Supp. 848 (E.D. Wis. 1971).

Congress raised the possibility of private citizens bringing *qui tam* actions in a pamphlet published in 1970, entitled *Our Waters and Wetlands: How the Corps of Engineers Can Help Prevent Their Destruction and Pollution*, H.R. Rep. No. 91-917. See United States v. Florida-Vanderbilt Dev. Corp., 326 F. Supp. 289, 290 (S.D. Fla. 1971) (discussing congressional report); see also United States v. Northwest Paper Co., 327 F. Supp. 87, 89 (D. Minn. 1971) (citing to "Congressional Committee Print of 'Qui Tam Actions and the 1899 Refuse Act: Citizen Lawsuits Against Polluters of the Nation's Waterways,' House Committee on Government Operations, Sub committee on Conservation of Natural Resources," 91st Cong., 2d Sess. (1970)); Environmental Defense Fund, Inc. v. Corps of Engineers of U.S. Army, 325 F. Supp. 728, 736 (E.D. Ark 1971), *aff'd*, 470 F.2d 289 (8th Cir. 1972). See generally William H. Rodgers, Jr., *Industrial Water Pollution and the Refuse Act: A Second Chance for Water Quality*, 119 U. PA. L. REV. 761 (1971). The opportunity for private parties to sue under the Rivers and Harbors Act of 1899 finally became settled in litigation that began in 1971 with *Sierra Club v. Morton*, 400 F. Supp. 610 (N.D. Calif. 1975), when the Supreme Court treated the issue as one involving private rights of action and then rejected it. See *California v. Sierra Club*, 451 U.S. 287 (1981). For a history of *qui tam* actions in general, see Evan Caminker, *The Constitutionality of Qui Tam Actions*, 99 YALE L.J. 341 (1989). [Return to text.](#)

[28] 42 U.S.C. §§ 4321-4347. See generally Dinah Bear, *The National Environmental Policy Act: Its Origins and Evolutions*, NAT. RESOURCES & ENV'T, Fall 1995, at 3. For a complete discussion of NEPA and the EIS requirement, see Paul S. Weiland, *Amending the National Environmental Policy Act: Federal Environmental Protection in the 21st Century*, 12 J. LAND USE & ENVTL. LAW 275 (1997). [Return to text.](#)

[29] 33 U.S.C. § 407. [Return to text.](#)

[30] Federal Water Pollution Control Act (Clean Water Act), 33 U.S.C. §§ 1251-1387 (1994). See generally Sam Kalen, *Commerce to Conservation: The Call for a National Water Policy and the Evolution of Federal Jurisdiction over Wetlands*, 69 N.D. L. REV. 873, 883-86 (1993) (discussing the permitting program); Rodgers, *supra* note 27; James T. B. Tripp & Richard M. Hall, *Federal Enforcement Under the Refuse Act of 1899*, 35 ALB. L. REV. 60 (1970). [Return to text.](#)

[31] Clean Air Amendments of 1970 § 304, Pub. L. No. 91-604, 84 Stat. 1676, 1706 (1970) (codified as amended at 42 U.S.C. § 7604) (1994)). See Sive, *supra* note 15, at 51 (describing the events leading to

inclusion of the citizen suit provision in the Clean Air Act). "The statutory scheme may be traced to an idea originally proposed by Professor Sax and first embodied in the Michigan Environmental Protection Act of 1970." Grant P. Thompson, *The Role of the Courts, in* FEDERAL ENVIRONMENTAL LAW 192, 230 (Erica L. Dolgin & Thomas G. P. Guilbert eds., 1974). For a discussion of early experience under the Michigan statute, see Joseph L. Sax & Roger L. Conner, *Michigan's Environmental Protection Act of 1970: A Progress Report*, 70 MICH. L. REV. 1004 (1972). [Return to text.](#)

[32] *See, e.g.*, 42 U.S.C. § 6972 (citizen suit provision of the Solid Waste Disposal Act); 42 U.S.C. § 9659(a) (citizen suit provision of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980); 42 U.S.C. § 11046 (citizen suit provision of the Emergency Planning and Community Right-to-Know Act of 1986); 42 U.S.C. § 300j-8 (citizen suit provision of the Safe Drinking Water Act); 33 U.S.C. § 1365 (citizen suit provision of the CWA); 30 U.S.C. § 1270 (citizen suit provision of the Surface Mining Control and Reclamation Act of 1977); 16 U.S.C. § 1540(g) (citizen suit provision of the ESA). *See generally* Harold Feld, *Saving the Citizen Suit: The Effect of Lujan v. Defenders of Wildlife and the Role of Citizen Suits in Environmental Enforcement*, 19 COLUM. J. ENVTL. L. 141, 146-48 (1994) (discussing the legislative history of citizen suit provisions). [Return to text.](#)

[33] Of course, all this occurred just as the modern environmental movement began to grow. *See generally* ROBERT GOTTLIEB, *FORCING THE SPRING: THE TRANSFORMATION OF THE AMERICAN ENVIRONMENTAL MOVEMENT* 117-61 (1993); KIRKPATRICK SALE, *THE GREEN REVOLUTION: THE AMERICAN ENVIRONMENTAL MOVEMENT 1962-1992* (1993); Robert Cameron Mitchell, *From Conservation to Environmental Movement: The Development of the Modern Environmental Lobbies, in* GOVERNMENT AND ENVIRONMENTAL POLITICS: ESSAYS ON HISTORICAL DEVELOPMENT SINCE WORLD WAR TWO 81 (Michael J. Lacey ed., 1989). [Return to text.](#)

[34] *See generally* CONGRESSIONAL QUARTERLY INC., *THE BATTLE FOR NATURAL RESOURCES* 56 (1983). [Return to text.](#)

[35] *See, e.g.*, Virginia F. Coleman, *Possible Repercussions of the National Environmental Policy Act of 1969 on the Private Law Governing Pollution Abatement Suits*, 3 NAT. RESOURCES LAW. 647 (1970); Eva H. Hanks & John L. Hanks, *An Environmental Bill of Rights: The Citizen Suit and the National Environmental Policy Act of 1969*, 24 RUTGERS L. REV. 230 (1970). More recently, Nicholas Yost described how NEPA ought to be construed to include a substantive mandate and how two of the first cases involving NEPA suggested such an approach. *See* Nicholas C. Yost, *NEPA's Promise—Partially Fulfilled*, 20 ENVTL. L. 533, 536-37 (1990) (discussing *Zabel v. Tabb*, 430 F.2d 199 (5th Cir. 1970) and *Calvert Cliffs' Coordinating Comm., Inc. v. United States Atomic Energy Comm'n*, 449 F.2d 1109 (D.C. Cir. 1971)). As David Sive explains, standing during the first 20 years after NEPA was not perceived as a serious obstacle, as long as plaintiffs could demonstrate harm from an identifiable governmental action affecting a limited geographic area and the harm had some environmental component. *See* Sive, *supra* note 15, at 53-54; *see also infra* note 96. [Return to text.](#)

[36] In a 1965 case, a coalition of local groups and members challenged the Federal Power Commission's (FPC, now the Federal Energy Regulatory Commission) decision to license a pumped storage hydroelectric project on the top of Storm King Mountain, a scenic area on the northern entrance to the Hudson River Gorge. *See* *Scenic Hudson Preservation Conference v. Federal Power Comm'n*, 354 F.2d 608, 611 (2d Cir. 1965). One of the principal questions in *Scenic Hudson* was whether, under the Federal Power Act (FPA), 16 U.S.C. §§ 791-828c, the Commission should have considered the environmental impact of the project as well as whether gas turbines might serve as an alternative power source to a pumped storage project. *See* *Scenic Hudson*, 354 F.2d at 613. Section 313(b) of the FPA authorized judicial review for any party to a proceeding before the FPC who is aggrieved by an order of the Commission. *See* 16 U.S.C. § 825l(b). The Second Circuit held that the plaintiffs had standing because they were aggrieved by an order of the FPC and that the FPC should have engaged in a more thorough review. *See* *Scenic Hudson*, 354 F.2d at 616. The court also observed that the plaintiffs had an economic interest because of a transmission line for the proposed project, as well as the proposed flooding of one of the plaintiff members' railways. *See id.* The

Scenic Hudson decision was supported by decisions from the seventh and ninth circuit. See *Namekagon Hydro Co. v. Federal Power Comm'n*, 216 F.2d 509 (7th Cir. 1954); *State of Washington Dep't of Game v. Federal Power Comm'n*, 207 F.2d 391, 395 n.11 (9th Cir. 1953).

Many of the early high profile environmental disputes involved the construction of dams or hydroelectric projects along United States waterways. As one observer notes, "[t]hose dams were now seen by many as illegitimate concrete intrusions into wilderness areas that had their own integrity, their own beauty, and their own rights." SALE, *supra* note 33, at 18. Indeed, the Storm King litigation spurred the growth of one of the premier environmental litigation groups, the Environmental Defense Fund. See *id.* at 21; see also Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189, 1298-1301 (1986) (describing the significance of *Scenic Hudson*). An earlier unsuccessful effort to stop the construction of the Hetch Hetchy dam in Yosemite was described as "the greatest cause célèbre in the early history of the national park movement in the United States." ALFRED RUNTE, NATIONAL PARKS: THE AMERICAN EXPERIENCE 79 (2d ed. 1987). Yet, the subsequent battle to block the Echo Park dam in Dinosaur National Monument was successful. See JON M. COSCO, ECHO PARK: STRUGGLE FOR PRESERVATION (1995); see also JOHN D. ECHEVERRIA ET AL., RIVERS AT RISK: THE CONCERNED CITIZEN'S GUIDE TO HYDROPOWER (1989) (instructing citizens and communities on how to preserve free-flowing rivers from hydropower development). However, the effort to stop the Glen Canyon Dam in court was dismissed due to a lack of standing. See *National Parks Ass'n v. Udall*, Civ. No. 3904-62 (U.S. Dist. Ct. 1962); see also COSCO, *supra* at 98-99. [Return to text.](#)

[37] *Associated Indus. of New York State, Inc. v. Ickes*, 134 F.2d 694, 708-10 (2d Cir. 1943), *vacated as moot*, 320 U.S. 707 (1943). [Return to text.](#)

[38] 7 U.S.C. § 135-135k (1964). [Return to text.](#)

[39] *Environmental Defense Fund, Inc. v. Hardin*, 428 F.2d 1093, 1096 (D.C. Cir. 1970). [Return to text.](#)

[40] *Id.* at 1097; see also *Environmental Defense Fund, Inc. v. Corps of Engineers of U.S. Army*, 325 F. Supp. 728, 734 (E.D. Ark. 1971), *aff'd*, 470 F.2d 289 (8th Cir. 1972); *Road River League, Town of Bedford v. Boyd*, 270 F. Supp. 650, 660-61 (S.D.N.Y. 1967) (discussing and adopting the reasoning in *Scenic Hudson*). [Return to text.](#)

[41] See Kenneth Culp Davis, *The Liberalized Law of Standing*, 37 U. CHI. L. REV. 450, 450 (1970). The four cases were *Barlow v. Collins*, 397 U.S. 159 (1970); *Association of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150 (1970); *Flast v. Cohen*, 392 U.S. 83 (1968); and *Hardin v. Kentucky Util. Co.*, 390 U.S. 1 (1968). According to Davis, *Data Processing* and *Barlow*:

superseded a large batch of law that was built on such doctrine as that of the [*Kansas City Power & Light Co. v. McKay*, 225 F.2d 924 (D.C. Cir. 1954)] case that something in the nature of a "legal right" or "legal interest" was necessary for standing. That shift is a great accomplishment and it deserves strong emphasis, for federal law of standing now has a new and better orientation.

Davis, *supra*, at 457. The problem with the Court's opinions, according to Davis, is that they added the additional requirement that the litigant show that the interest asserted is "arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Id.* (quoting *Sierra Club v. Morton*, 405 U.S. 727, 733 (1972)). Davis opposed adding this requirement and suggested that the better reasoned view was expressed in *Scanwell Lab., Inc. v. Shaffer*, 424 F.2d 859 (D.C. Cir. 1970); see Davis, *supra*, at 467-68. In *Scanwell*, the court reviewed the development of standing in public actions, referring to Davis extensively, and concluded that the legal interest test for standing must be abandoned. See *Scanwell*, 424 F.2d at 865-73. The court found unsupported the fear that expanding standing would open the Pandora's box of litigation and offered the following observation:

Of course it is true that the grant of standing must be carefully controlled by the exercise of

judicial discretion in order that completely frivolous lawsuits will be averted. There must be a practical separation of the meritorious sheep from the capricious goats—a recognition that *cucullus non facit monachum*. However, responsible federal judges will be able to discern a case in which there is injury in fact, a sufficient adversary interest to constitute a case or controversy under Article III, and an otherwise reviewable subject matter to prevent the dockets from becoming overcrowded.

Scanwell, 424 F.2d at 872. [Return to text.](#)

[42] *See* Davis, *supra* note 41, at 450. [Return to text.](#)

[43] 405 U.S. 727 (1972). [Return to text.](#)

[44] Only three other Justices joined Justice Stewart's opinion. Justices Powell and Rehnquist did not participate in the consideration or decision of the case, and Justices Douglas, Brennan and Blackmun dissented. [Return to text.](#)

[45] The Court specifically declined to comment on the application of the zone of interests test to the facts of the case. *See* *Sierra Club*, 405 U.S. at 733 n.5. [Return to text.](#)

[46] *See id.* at 734-36. [Return to text.](#)

[47] *Id.* at 738 (emphasis added). [Return to text.](#)

[48] *Id.* at 736. For a critique of *Sierra Club*, see generally Sax, *supra* note 2. [Return to text.](#)

[49] Most of the factual discussion is taken from Note, *Mineral King Valley: Who Shall Watch the Watchmen?*, 9 PUB. LAND & RESOURCES L. DIG. 173 (1971), reprinted from 25 RUTGERS L. REV. 103 (1970) [hereinafter *Mineral King Valley*]. Justice Douglas referred to this Note in his dissenting opinion. *See* *Sierra Club*, 405 U.S. at 743 n.5 (Douglas, J., dissenting). *See also* JOSEPH L. SAX, MOUNTAINS WITHOUT HANDRAILS: REFLECTIONS ON THE NATIONAL PARKS 67-70 (1980) (discussing the reasons for the Sierra Club's lawsuit). [Return to text.](#)

[50] Although part of the national forest, the Mineral King Valley was designated as a game refuge. *See* 16 U.S.C. § 45f. [Return to text.](#)

[51] The Forest Service had solicited bids in the 1940s, but to no avail. Responding to inquiries by Walt Disney Productions, the Forest Service again solicited bids in 1965. *Mineral King Valley*, *supra* note 49, at 178. [Return to text.](#)

[52] *See id.* at 180-81. [Return to text.](#)

[53] *See id.* [Return to text.](#)

[54] *See id.* at 182. [Return to text.](#)

[55] *See id.* [Return to text.](#)

[56] *See id.* at 190. [Return to text.](#)

[57] *See* *Sierra Club v. Hickel*, 433 F.2d 24 (9th Cir. 1970), *aff'd sub nom.*, *Sierra Club v. Morton*, 405 U.S. 727 (1972). [Return to text.](#)

[58] *See* *Sierra Club*, 433 F.2d at 28. [Return to text.](#)

[59] *See supra* notes 37-42 and accompanying text; *see also infra* note 80. The Sierra Club alleged that it

was a non-profit organization, with approximately 78,000 members nationally, of whom 27,000 resided in the San Francisco Bay area, and that the organization had a special interest in the protection of the national parks and forests. *See Sierra Club*, 433 F.2d at 29. This interest would be "vitally affected by the acts . . . described and [it] would be aggrieved by" the challenged federal actions. *Id.* [Return to text.](#)

[60] *Citizens Committee for the Hudson Valley v. Volpe*, 425 F.2d 97, 105 (2d Cir. 1970). David Sive, one of the leading experts on the law of standing and a champion of modern environmental law, represented the plaintiffs in this case. *See Sive, supra* note 15, at 52. *See generally* David Sive, *Some Thoughts of an Environmental Lawyer in the Wilderness of Administrative Law*, 70 COLUM. L. REV. 612 (1970) (reviewing administrative rulings in the field of environmental law). [Return to text.](#)

[61] *See Sierra Club*, 433 F.2d at 30. In addition to *Scenic Hudson*, Judge Trask distinguished *Office of Communication of United Church of Christ v. FCC*, 359 F.2d 994 (D.C. Cir. 1966); *Powelton Civic Home Owners Ass'n v. Department of Hous. and Urban Dev.*, 284 F. Supp. 809 (E.D. Pa. 1968); and *Road Review League v. Boyd*, 270 F. Supp. 650 (S.D.N.Y. 1967). *See Sierra Club*, 433 F.2d at 30. [Return to text.](#)

[62] Although he distinguished Judge Moore's case by noting that there the litigants were users of the affected area, Judge Trask nevertheless opposed broadly applying the private attorney general theory. The private attorney general concept, according to Judge Trask, is limited to instances where Congress has authorized parties to bring suit to prevent unlawful actions. *See Sierra Club*, 433 F.2d at 33 n.9. Of course, in *Hudson Valley*, like the *Sierra Club*, the parties sought review under the APA. *See Hudson Valley*, 425 F.2d at 100. Elsewhere in his opinion, Judge Trask indicated that the APA did not itself provide a right to review, "absent judicially articulated notions of 'legal wrong' of adversely affected or aggrieved . . . within the meaning of any relevant statute." *Sierra Club*, 433 F.2d at 32 (quoting Judge Burger's concurring opinion in *National Ass'n of Sec. Dealers, Inc. v. SEC*, 420 F.2d 83, 101 (D.C. Cir. 1969), *rev'd*, 401 U.S. 617 (1971)). Earlier, in *United Church of Christ*, Judge (later Chief Justice) Burger had considered whether a public consumer seeking to intervene in a proceeding before the Federal Communications Commission had standing. *See United Church of Christ*, 359 F.2d at 997. There, Judge Burger rejected limiting standing only to those with an economic interest and allowed the consuming public the opportunity to participate during the agency's decision making process, emphasizing the need for and role of public participation. *See id.* at 999-1000. This opinion should be compared to Burger's concurring opinion and the majority opinion in *National Ass'n of Securities Dealers, Inc.*, 420 F.2d 83 (D.C. Cir. 1969), which together illustrate the influence of Louis Jaffe and the debate over how to explain and at the same time limit standing in a public litigation model. [Return to text.](#)

[63] *Sierra Club*, 433 F.2d at 32. Here, Judge Trask quoted from Black's Law Dictionary that an aggrieved person is one that has suffered a loss or injury. *See id.* at 32 n.8. In a concurring opinion, Judge Hamley stated that he would have granted the *Sierra Club* standing. *See id.* at 38 (Hamley, J., concurring). Judges Hamley and Trask had this same difference of opinion over standing a year later. *See Alameda Conservation Ass'n v. California*, 437 F.2d 1087 (9th Cir. 1971). In fact, in *Alameda Conservation Ass'n*, a majority of the court granted standing to a wider class of plaintiffs than Judge Trask would have. Judge Trask expressed concern over expanding the realm of parties entitled to bring lawsuits. *See id.* at 1090-93. In *Environmental Defense Fund, Inc. v. United States Army Corps of Engineers*, 325 F. Supp. 728 (E.D. Ark. 1971), *aff'd*, 470 F.2d 289 (8th Cir. 1972), the court opted to follow the concurrences in *Alameda Conservation Ass'n* rather than Judge Trask's opinion, reasoning that the underlying rationale of *Data Processing* suggests that organizational plaintiffs with an interest in protecting the environment have standing. *See id.* For a critique of the Ninth Circuit's decision in *Sierra Club*, see *Mineral King Valley, supra* note 49, at 198-200; Recent Development, *Conservation Group Refused Standing to Contest Agency Action Which Would Affect National Park—Sierra Club v. Hickel*, 46 N.Y.U. L. REV. 177 (1971). [Return to text.](#)

[64] *See Sierra Club v. Morton*, 405 U.S. 727, 731 (1972). [Return to text.](#)

[65] *See id.* [Return to text.](#)

[66] 369 U.S. 186 (1962). [Return to text.](#)

[67] *Sierra Club*, 405 U.S. at 732. In *Baker*, the Court began its analysis by noting that a federal or state statute could not be invalidated except when adjudicating the "legal rights of litigants in actual controversies." *Baker*, 369 U.S. at 204. The Court then phrased the question as "[h]ave the appellants alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions?" *Id.* The Court concluded that voters had standing to challenge an apportionment scheme that affected them: "They are asserting 'a plain, direct, and adequate interest in maintaining the effectiveness of their votes,'" not merely a claim of "the right possessed by every citizen 'to require that the government be administered according to the law.'" *Id.* at 208 (citations omitted). The Court, therefore, refers to the "personal stake in the outcome of the controversy" as a way of ensuring that parties are truly adversarial. *See* *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 38 n.16 (1976) (repeating the concept from *Baker*); *Roe v. Wade*, 410 U.S. 113, 123 (1973) (referring similarly to the necessary degree of contentiousness); *Association of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 151-52 (1970) (quoting *Flast v. Cohen*, 392 U.S. 83 (1968)); *see also* *Laird v. Tatum*, 408 U.S. 1, 13 n.7 (1972) (quoting *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 166 (1972)). [Return to text.](#)

[68] *See Sierra Club*, 405 U.S. at 732. [Return to text.](#)

[69] *See id.* [Return to text.](#)

[70] 5 U.S.C. § 702. [Return to text.](#)

[71] *Sierra Club*, 405 U.S. at 734. [Return to text.](#)

[72] 397 U.S. 150 (1970). [Return to text.](#)

[73] 397 U.S. 159 (1970). Justice Stewart explained that the injury in fact requirement replaced the old "legal wrong" or "legal interest" test articulated in some older decisions under the APA. *See Sierra Club*, 405 U.S. at 733; *supra* notes 23 and 41. Cass Sunstein opined that the Court basically invented the injury in fact test in *Data Processing* and *Barlow*, positing that the test comes from Kenneth Culp Davis' interpretation of the APA. *See* Sunstein, *supra* note 15, at 185-86. According to Sunstein, Davis misread the APA, overlooking that the "adversely affected or aggrieved" clause is modified by "within the meaning of a relevant statute." *Id.* at 186. Sunstein argues that this part of section 10(a) of the APA was designed to allow:

People [to] bring suit if they could show that 'a relevant statute'—a statute other than the APA—granted them standing by providing that people 'adversely affected or aggrieved' were entitled to bring suit. In this way, the APA recognized that Congress had allowed people to have causes of action, and hence standing, even if their interests were not entitled to consideration by the relevant agency. Such people could act as "private attorney general" The APA thus provided for congressional authorization of actions by people lacking legal injuries.

Id. at 182. William Fletcher, on the other hand, explains that section 10(a) of the APA was designed to incorporate existing law and be flexible enough to account for subsequent developments, such as those presented by NEPA. *See* Fletcher, *supra* note 15, at 255-57. *See also* VINING, *supra* note 3, at 40. The Court had "long since rejected that interpretation, however, which would have made the judicial review provision of the APA no more than a restatement of pre-existing law." *Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 883 (1990). [Return to text.](#)

[74] *Sierra Club*, 405 U.S. at 734. In *Data Processing*, however, the Court already had endorsed *Scenic Hudson's* acceptance of noneconomic injury. *See* *Association of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 154 (1970). [Return to text.](#)

[75] *Sierra Club*, 405 U.S. at 734. [Return to text.](#)

[76] *See id.* at 734-35. [Return to text.](#)

[77] *Id.* at 735 (emphasis added). [Return to text.](#)

[78] *See id.* [Return to text.](#)

[79] This analysis further confuses Article III standing with what is required under the APA. *See* Sunstein, *supra* note 15, at 186 (noting that similar reasoning in *Data Processing* failed to address the relationship between Article III and the injury in fact test). [Return to text.](#)

[80] *Sierra Club*, 405 U.S. at 738 (emphasis added). *Amici* explained, as the Court apparently knew, that the Sierra Club had members who would have satisfied the personalized injury requirement, but the organization refused to rely on those members and instead chose to press the ideological argument against requiring the need for such a showing. *See id.* at 735 n.8. *See also infra* note 89. The Sierra Club sought to confirm what other judges recognized:

[Organizations such as the Sierra Club are] non-profit organizations composed of members who have a sincere and vital common interest in protecting those environmental values which they deem to be most important to this, and future, generations of American citizens. It is true that they have no direct private and personal economic interest in the . . . [areas being affected]; but these organizations wish to represent what they deem to be the "public" interest in this river and environs. Each of the organizations has demonstrated its interest in such matters as that represented by this lawsuit.

Environmental Defense Fund, Inc. v. U.S. Army Corps of Engineers, 325 F. Supp. 728, 734 (E.D. Ark. 1971), *aff'd*, 470 F.2d 289 (8th Cir. 1972). Ironically, the court in *Environmental Defense Fund* found it more difficult to decide whether a particular citizen who lived near and used the affected area had standing. *See Environmental Defense Fund*, 325 F. Supp. at 736. [Return to text.](#)

[81] *See Sierra Club*, 405 U.S. at 726. [Return to text.](#)

[82] *See Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4 (1942); *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470 (1940). [Return to text.](#)

[83] *See Sierra Club*, 405 U.S. at 736-38. [Return to text.](#)

[84] *See id.* at 738 n.13. No statute is specified, but the Court cites to several lower court cases where parties with noneconomic interests challenged various agency decisions. *See id.* Two of the cases were *Environmental Defense Fund, Inc. v. Hardin*, 428 F.2d 1093 (D.C. Cir. 1970), and *Scenic Hudson Preservation Conf. v. FPC*, 354 F.2d 608 (2d Cir. 1965). *See Sierra Club*, 405 U.S. at 738 n.13. [Return to text.](#)

[85] *See Sierra Club*, 405 U.S. at 738. [Return to text.](#)

[86] The Court acknowledges instances where organizations alleging an organizational interest were granted standing, but dismisses those cases by observing that they also involved at least one party or one member of the organization who suffered an individualized injury. *See id.* at 739 n.14. [Return to text.](#)

[87] *See id.* 739-41. [Return to text.](#)

[88] *Id.* at 740 (emphasis added). [Return to text.](#)

[89] Justices Douglas and Blackmun "felt so strongly about their dissents" that they read "them from the

bench when the decision was announced." ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE AND POLICY 723 (2d ed. 1996). Justice Brennan attempted to have the case dismissed on the grounds that *certiorari* had been improvidently granted, but Justice Stewart modified his opinion to allow the Sierra Club to amend its complaint in order to maintain its challenge to proposed activity at Mineral King. *See id.* (citing to Robert V. Percival, *Environmental Law in the Supreme Court: Highlights From the Marshall Papers*, 23 ENVTL. L. REP. 10606, 10620 (1993)). *See* Sierra Club v. Morton, 348 F. Supp. 219 (N.D. Cal. 1972) (allowing plaintiff to amend complaint to allege injury in fact and also to add NEPA count). The lawsuit continued until 1977, when it was finally dismissed without prejudice; the following year Congress made Mineral King part of the Sequoia National Park. *See* PERCIVAL, *supra* at 724. [Return to text.](#)

[90] *See* Christopher Stone, *Should Trees Have Standing?—Toward Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450 (1972). [Return to text.](#)

[91] *See* *Sierra Club*, 405 U.S. at 741-42. [Return to text.](#)

[92] *Id.* Justice Douglas was not clear in articulating who could serve as the representative for the inanimate object. He suggested that "those people who have so frequented the place as to know its values and wonders will be able to speak for the entire ecological community." *Id.* at 752. Unfortunately, it may be somewhat unrealistic to assume that those who frequent a place are a homogenous group with similar values and motives. Skiers, for instance, may have different interests than hikers. Who can speak for the inanimate object, therefore, entails a normative judgment, one that presumes knowledge of the interests of the inanimate object. To the extent that Justice Douglas would limit representatives to those who use and know the place, isn't he simply suggesting a similar inquiry as that required by the majority of the Court, albeit for a different reason? Would Justice Douglas' inquiry require examining the motives of the asserted representative of the inanimate object? Would all organizations speak with a similar voice? Whether or not inanimate objects may sue in their own right may not alleviate the issue of who can bring the lawsuit. *Cf.* Hawksbill Sea Turtle v. Federal Emergency Management Agency, No. 96-7662, 1997 U.S. App. LEXIS 26096, at *11 n.2 (3d Cir. Sept. 22, 1997) (discussing whether animals should have standing). [Return to text.](#)

[93] *See* *Sierra Club*, 405 U.S. at 756-58. [Return to text.](#)

[94] *See id.* at 757-58. [Return to text.](#)

[95] *See id.* at 755. [Return to text.](#)

[96] Courts generally found standing without requiring any detailed showing of personalized injury. *See, e.g.,* National Resources Defense Council, Inc. v. EPA, 507 F.2d 905, 910 (9th Cir. 1974); *Sierra Club v. Mason*, 351 F. Supp. 419, 422-24 (D. Conn. 1972); *Citizens For Clean Air, Inc. v. U.S. Army Corps of Eng'rs*, 349 F. Supp. 696, 704-06 (S.D.N.Y. 1972). In many of the early cases, standing was not raised as an issue where the litigants lived in the vicinity of the challenged activity. *See, e.g.,* *Sierra Club v. Volpe*, 351 F. Supp. 1002 (N.D. Cal. 1972). *See generally* FREDERICK R. ANDERSON, NEPA IN THE COURTS: A LEGAL ANALYSIS OF THE NATIONAL ENVIRONMENTAL POLICY ACT 26-44 (1973) (discussing cases before and immediately after *Sierra Club*); George Cameron Coggins, *Preparing an Environmental Lawsuit: Part II: Doctrinal Barriers and Pre-trial Preparation*, 58 IOWA L. REV. 487, 488-92 (1973) (discussing the law of standing in environmental cases and the effect of *Sierra Club*). [Return to text.](#)

[97] 412 U.S. 669 (1973). [Return to text.](#)

[98] *See id.* at 689-90. [Return to text.](#)

[99] *See id.* at 676. [Return to text.](#)

[100] *See id.* [Return to text.](#)

[101] *See id.* at 679. [Return to text.](#)

[102] *See id.* at 689. [Return to text.](#)

[103] *Id.* at 687-88. [Return to text.](#)

[104] *Id.* at 689 n.14. [Return to text.](#)

[105] *See id.* at 688-89. The following year, in *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208 (1974), Justice Stewart reaffirmed his view that standing will not be "found wanting because an injury has been suffered by many," and distinguished the case from *SCRAP* "because none of the respondents has alleged the sort of direct, palpable injury required for standing under Art. III." *Id.* at 229 (Stewart, J., concurring).

106> 497 U.S. 871 (1990). [Return to text.](#)

[107] 504 U.S. 555 (1992). [Return to text.](#)

[108] *See National Wildlife Fed'n*, 497 U.S. at 875. [Return to text.](#)

[109] Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701-1782 (1994). [Return to text.](#)

[110] *See National Wildlife Fed'n*, 497 U.S. at 875. [Return to text.](#)

[111] *See id.* at 879-82. [Return to text.](#)

[112] The Court held that the plaintiffs easily satisfied the zone of interests test for their claims under NEPA and FLPMA. However, Justice Scalia offered the following example of how the test might apply to preclude standing:

[T]he failure of an agency to comply with a statutory provision requiring "on the record" hearings would assuredly have an adverse effect upon the company that has the contract to record and transcribe the agency's proceedings; but since the provision was obviously enacted to protect the interests of the parties to the proceedings and not those of the reporters, that company would not be "adversely affected within the meaning" of the relevant statute.

National Wildlife Fed'n, 497 U.S. at 883. Justice Scalia's example, however simple it might appear, is not so absolute. Suppose, for example, an agency that is required to hold hearings "on the record" adopts a regulation, pursuant to its generic rulemaking authority, requiring all reporting companies to provide parties to such on the record hearings a copy of the transcript in a particular format at a cost of one dollar per one hundred megabytes. It is unlikely that a court would deny that company standing to challenge the regulation, aside from whether the company had any basis for such a challenge. [Return to text.](#)

[113] *See id.* at 885. [Return to text.](#)

[114] *Id.* at 896. [Return to text.](#)

[115] *Id.* [Return to text.](#)

[116] *See id.* at 887-88. [Return to text.](#)

[117] *See id.* [Return to text.](#)

[118] *See id.* at 888-89. [Return to text.](#)

[119] *Id.* at 889. [Return to text.](#)

[120] *See id.* [Return to text.](#)

[121] *Id.* [Return to text.](#)

[122] *See id.* at 890. [Return to text.](#)

[123] *See id.* [Return to text.](#)

[124] *See id.* at 892-93. Justice Scalia acknowledged the inherent problem with such a view:

The case-by-case approach that this requires is understandably frustrating to an organization such as respondent, which has as its objective across-the-board protection of our Nation's wildlife and the streams and forests that support it. But this is the traditional, and remains the normal, mode of operation of the courts.

Id. at 894. [Return to text.](#)

[125] Throughout this part of the opinion, Justice Scalia referred to the need for final agency actions that are "ripe" for review; suggesting that the concern here has more to do with "ripeness" than standing. *See id.* at 890-94. [Return to text.](#)

[126] *See id.* [Return to text.](#)

[127] *Id.* at 891. [Return to text.](#)

[128] *See generally* George Cameron Coggins & Doris K. Nagel, *"Nothing Beside Remains": The Legacy of James G. Watt's Tenure as Secretary of the Interior on Federal Land Law and Policy*, 17 B.C. ENVTL. AFF. L. REV. 473 (1990); George Cameron Coggins, *The Public Interest in Public Land Law: A Commentary on the Policies of Secretary Watt*, 4 PUB. LAND L. REV. 1 (1983). [Return to text.](#)

[129] *See generally* JOHN D. LESHY, *THE MINING LAW: A STUDY IN PERPETUAL MOTION* (1987); CHARLES F. WILKINSON, *CROSSING THE NEXT MERIDIAN: LAND, WATER, AND THE FUTURE OF THE WEST* 28-74 (1992). A "surge" of applications for oil and gas activities followed Secretary Watt's decision to open up wilderness areas; a decision which was accompanied by a considerable outcry. *See* Rowe Findley, *Our National Forests: Problems in Paradise*, NAT'L GEOGRAPHIC, Sept. 1982, at 306, 310-11. [Return to text.](#)

[130] *See National Wildlife Fed'n*, 497 U.S. at 892 n.3. [Return to text.](#)

[131] *See Best v. Humboldt Placer Mining Co.*, 371 U.S. 334, 336 (1963); *Union Oil Co. v. Smith*, 249 U.S. 337, 348-49 (1919); *Hafen v. United States*, 30 Fed. Ct. 470, 473 (1994). *See generally* Michael Graf, *Application of Takings Law to the Regulation of Unpatented Mining Claims*, 24 ECOLOGY L.Q. 57, 65-66 (1997); Barton H. Thompson, Jr., *Resource Use and the Emerging Law of "Takings": A Realistic Appraisal*, 42 ROCKY MTN. MIN. L. INST. 2-1 (1996). [Return to text.](#)

[132] *See* Bob Ekey, *The New World Agreement: A Call for Reform of the 1872 Mining Law*, 18 PUB. LAND & NAT. RESOURCES L. REV. 151 (1997) (discussing the purchase of the New World Mine site near Yellowstone National Park). *See generally* William J. Lockhart, *External Threats to Our National Parks: An Argument for Substantive Protection*, 16 STAN. ENVTL. L.J. 3, 7 (1997). [Return to text.](#)

[133] *See National Wildlife Fed'n*, 497 U.S. at 893. [Return to text.](#)

[134] *See id.* at 891. [Return to text.](#)

[135] See *Kleppe v. Sierra Club*, 427 U.S. 390 (1976); *NRDC v. Hughes*, 437 F. Supp. 981 (D.C.D.C. 1977), *amended*, 454 F. Supp. 148 (D.C.D.C. 1978). See generally Sam Kalen, *Where Do We Go From Here?: The Federal Coal Leasing Amendments Act—Past, Present, and Future*, 98 W. VA. L. REV. 1023 (1996); Hon. Leo M. Krulitz, Solicitor, *Management of Federal Coal Reserves*, 24 ROCKY MTN. MIN. L. INST. 139 (1978). [Return to text.](#)

[136] See *NRDC v. Morton*, 388 F. Supp. 829 (D.C.D.C. 1974), *aff'd*, 527 F.2d 1386 (D.C. Cir. 1976). In *NRDC v. Hodel*, NRDC challenged a programmatic amendment to the regulations governing grazing on the public lands which would "have permitted selected ranchers to graze livestock on the public lands in the manner that those ranchers deem appropriate." 618 F. Supp. 848, 852 (D.C. Cal. 1985). The court dismissed any concern over the group's standing because they were "users of the public lands." *Id.* at 854. [Return to text.](#)

[137] See *NRDC v. Hodel*, 624 F. Supp. 1045 (D. Nev. 1985), *aff'd*, 819 F.2d 927 (9th Cir. 1987) (reviewing adoption of a Management Framework Plan). In *Conservation Law Foundation v. Harper*, 587 F. Supp. 357 (D. Mass. 1984), various environmental groups challenged, in part, the Property Review Board's failure to comply with NEPA when implementing the programmatic policy of the Board on the disposal of federal land. See *id.* The court accepted the programmatic policy as an "action" subject to review and noted that the regulations under NEPA specifically define "major federal actions" to include programs that may involve a group of concerted or connected actions. See *id.* at 364. In *Sierra Club v. Watt*, 608 F. Supp. 305 (D.C. Cal. 1985), the plaintiffs challenged the Department of the Interior's order removing from its wilderness inventory (and thus from heightened environmental protection) over one million acres of public land. See *id.* The court granted standing, reasoning that the Sierra Club members' aesthetic and recreational use of the public lands satisfied the personal injury requirement. See *id.* at 315. Addressing the government's argument on causation and redressibility, the court concluded that the Secretary's decision would have definite effects that could be remedied immediately through an injunction. See *id.* at 316. See also *National Wildlife Fed'n v. Morton*, 393 F. Supp. 1286, 1289-91 (D.D.C. 1975) (holding that NWF had standing to challenge the Bureau of Land Management's regulation of off-road vehicles on several hundred million acres of land). [Return to text.](#)

[138] Identifying a precise geographic area or areas affected by the agency action generally has not been a problem for litigants. See, e.g., *Alaska Ctr. for the Env't v. Browner*, 20 F.3d 981, 985 (9th Cir. 1994) (holding that to establish injury in fact, plaintiffs need not establish that they used all the waters that would be affected, but rather only a representative sample). See also *Resources Ltd. v. Robertson*, 35 F.3d 1300, 1303 (9th Cir. 1994) (holding that failure to identify precise area of use not required); *Sierra Club v. Hankinson*, 939 F. Supp. 865 (N.D. Ga. 1996) (standing not raised in challenge under the CWA concerning the adoption of total maximum daily loads throughout the state). Cf. *Conservation Law Found. v. Reilly*, 950 F.2d 38, 43 (1st Cir. 1991) (holding that nationwide injunction not appropriate when plaintiffs only had standing to challenge decisions in which they had a geographical nexus). For a discussion of standing in *Alaska Center*, see Carl E. Bruch, Note, *Where the Twain Shall Meet: Standing and Remedy in Alaska Center for the Environment v. Browner*, 6 DUKE ENVTL. L. & POL'Y F. 157, 177-82 (1996). [Return to text.](#)

[139] See *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). [Return to text.](#)

[140] See *id.* at 558. [Return to text.](#)

[141] 16 U.S.C. § 1536(a)(2). [Return to text.](#)

[142] See *Defenders of Wildlife*, 504 U.S. at 558-59 (discussing 51 C.F.R. 402.01 (1991)). [Return to text.](#)

[143] See *id.* at 563 [Return to text.](#)

[144] See *id.* [Return to text.](#)

[145] *See id.* [Return to text.](#)

[146] *See id.* at 563-64. [Return to text.](#)

[147] *See id.* [Return to text.](#)

[148] *See id.* [Return to text.](#)

[149] *See id.* at 564. [Return to text.](#)

[150] *See id.* at 560-61. A three part inquiry already had been used. *See* *Foundation on Econ. Trends v. Lyng*, 943 F.2d 79, 82 (D.C. Cir. 1991) (citing *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464 (1982)). *See also* *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976); *Warth v. Seldin*, 422 U.S. 490 (1975); *Linda R.S. v. Richard D.*, 410 U.S. 614 (1973). In *Allen v. Wright*, 468 U.S. 737 (1984), the Court observed that the fairly traceable and redressibility requirements for standing represent aspects of a single causation requirement, and that if any difference exists, "it is that the former examines the causal connection between the assertedly unlawful conduct and the alleged injury, whereas the latter examines the causal connection between the alleged injury and the judicial relief requested." *Id.* at 753 n.19, 759 n.24 (discussing *Simon*). [Return to text.](#)

[151] *See Defenders of Wildlife*, 504 U.S. at 562. Earlier, the Court indicated that the "indirectness" of an asserted injury makes it more difficult to satisfy the causation and redressibility requirements. *See Allen*, 468 U.S. at 757-58; *Simon*, 426 U.S. at 44-45; *Warth*, 422 U.S. at 505. Prior to the decision in *Warth*, these requirements had been implicitly addressed in *Linda R.S.*, 410 U.S. at 617-18. *See Winter*, *supra* note 15, at 1373 n.9 ("The causation/ redressability requirement first appeared in *Linda R.S.* . . . and was constitutionalized in *Warth* . . ."). *See also infra* note 190.

Justice Scalia, however, appears to have extended that precedent to all situations and not just to instances where these requirements were surrogates for determining whether a litigant was asserting "generalized grievances." Cass Sunstein explained that Justice Scalia had a penchant for treating the objects of regulation differently than the beneficiaries of regulation. *See Sunstein*, *supra* note 15, at 195-97. According to Sunstein, this distinction is rooted in the common law model of litigation and should have become a "conceptual anachronism" after the New Deal and the rise of modern administrative law. *See id.* at 186-88. Justice Scalia's earlier law review article presaged his concern with any broad standing doctrine. *See Antonin Scalia, The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881 (1983). [Return to text.](#)

[152] *See Defenders of Wildlife*, 504 U.S. at 562-63. [Return to text.](#)

[153] *See id.* at 563. However, Justice Scalia indicated in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), that these facts would have been sufficient to overcome a motion to dismiss at the pleading stage. *See id.* at 1012 n.3. [Return to text.](#)

[154] *See Defenders of Wildlife*, 504 U.S. at 564. Justice Scalia invoked *Los Angeles v. Lyons*, 461 U.S. 95 (1983), for this imminent injury requirement. *See Defenders of Wildlife*, 504 U.S. at 560, 564. The decision in *Lyons* involved an entirely different situation: the plaintiff initially sought preliminary injunctive relief against the allegedly unconstitutional practice of police bar-arm chokeholds. *See Lyons*, 461 U.S. at 97. When the case came before the Court five years later, the plaintiff was no longer seeking preliminary injunctive relief. *See id.* at 101. The plaintiff indicated that he was no longer under any threat of injury and that the illegal actions would continue against him. *See id.* He urged the Court either to dismiss the writ of certiorari as improvidently granted or to have the preliminary injunction vacated. *See id.* The Court nevertheless transformed the issue from one of mootness into one of standing and concluded that there was no case or controversy because the plaintiff could not show any immediate threat of direct injury. *See id.* at 100-11. At best, therefore, *Lyons* merely requires some likelihood that the allegedly illegal act that causes the injury is likely to occur before a court can award injunctive relief. The need for some imminence

requirement arguably made sense because the injury was the illegal act itself. This situation is entirely different than the circumstance in *Defenders of Wildlife*, where the action being challenged is occurring. Steven Winter examined the *Lyons* decision in detail to illustrate the "incoherences" of standing law. *See* Winter, *supra* note 15, at 1374-75. [Return to text.](#)

[155] *See Defenders of Wildlife*, 504 U.S. at 564. [Return to text.](#)

[156] *See id.* at 565. [Return to text.](#)

[157] *Id.* [Return to text.](#)

[158] *Id.* at 566. [Return to text.](#)

[159] *See id.* [Return to text.](#)

[160] *See id.* at 565-66. [Return to text.](#)

[161] *Id.* at 567. [Return to text.](#)

[162] *See id.* at 568-71. [Return to text.](#)

[163] Justice White has since required from the Supreme Court. [Return to text.](#)

[164] *See id.* at 571. [Return to text.](#)

[165] *See id.* 568-71. Justice Scalia further noted that redressibility was unlikely because even if the agencies participating in the overseas projects declined to participate, the projects might proceed anyway. *See id.* at 571. This outlook was refuted in Justice Blackmun's dissent. *See id.* at 599-601 (Blackmun, J., dissenting). *Cf.* *Earth Island Inst. v. Christopher*, 913 F. Supp. 559, 570 (CIT 1995) (noting, after examining the factual circumstances, that the court's ruling would affect third parties). [Return to text.](#)

[166] *See Defenders of Wildlife*, 504 U.S. at 571-78. [Return to text.](#)

[167] *See id.* at 572. [Return to text.](#)

[168] *Id.* at 573. [Return to text.](#)

[169] *See id.* at 572-73. Although Justice Scalia agreed that procedural rights may be "special," he was only willing to relax the "normal standards for redressibility and immediacy." *Id.* at 572 n.7. This led him to conclude as follows:

Thus, under our case law, one living adjacent to the site for proposed construction of a federally licensed dam has standing to challenge the licensing agency's failure to prepare an environmental impact statement, even though he cannot establish with any certainty that the statement will cause the license to be withheld or altered, and even though the dam will not be completed for many years What respondents' "procedural rights" argument seeks, however, is quite different from this: standing for persons who have no concrete interests affected—persons who live (and propose to live) at the other end of the country from the dam.

Id. Justice Scalia added that a procedural right can only be enforced when there is a nexus between the procedural violation and some concrete interest of the plaintiff. *See id.* at 573 n.8. [Return to text.](#)

[170] *See id.* at 574-78. Justices Kennedy and Souter concurred in all but the redressibility discussion of Justice Scalia's opinion. *See id.* at 579-81 (Kennedy, J., and Souter, J., concurring). In their concurrence, the two Justices left open the possibility that one of the *nexus* theories might apply in the appropriate case. *See id.* at 579. While they recognized that modern litigation is not the same as the old common law (or

private law) paradigm, they agreed that a showing of concrete injury is necessary to ensure the lawsuit is truly adversarial. *See id.* at 579-81. Although Justice Stevens would have found against the Defenders on the merits, he rejected the majority's treatment of standing and concluded that the Defenders did have standing. *See id.* at 581-89 (Stevens, J., concurring). Lastly, Justices Blackmun and O'Connor also disagreed with the majority's treatment of standing and dissented. *See id.* at 589-606 (Blackmun, J., and O'Connor, J., dissenting). [Return to text.](#)

[171] *See, e.g.,* Gene R. Nichol, Jr., *Justice Scalia, Standing, and Public Law Litigation*, 42 DUKE L.J. 1141 (1993); Richard J. Pierce, Jr., *Lujan v. Defenders of Wildlife: Standing as a Judicially Imposed Limit on Legislative Power*, 42 DUKE L.J. 1170 (1993); Sunstein, *supra* note 15. *But see* Marshall J. Breger, *Defending Defenders: Remarks on Nichol and Pierce*, 42 DUKE L.J. 1202 (1993); John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 DUKE L.J. 1219 (1993). [Return to text.](#)

[172] *See Defenders of Wildlife*, 504 U.S. at 564. [Return to text.](#)

[173] *See id.* [Return to text.](#)

[174] *See id.* at 579 (Kennedy, J., and Souter, J., concurring). Without a doubt, the airline tickets would be far less costly than having to litigate the standing issue. [Return to text.](#)

[175] *See id.* at 583 (Stevens, J., concurring). [Return to text.](#)

[176] *See supra* note 154. [Return to text.](#)

[177] *See Defenders of Wildlife*, 504 U.S. at 564, 565 n.2. [Return to text.](#)

[178] *See id.* at 564. [Return to text.](#)

[179] *See id.* at 583-84 (Stevens, J., concurring). [Return to text.](#)

[180] *See id.* at 564, 572 n.7. [Return to text.](#)

[181] *See id.* at 567. [Return to text.](#)

[182] Justice Scalia began his analysis by stating that the claimed injury is the increased rate of extinction of endangered and threatened species caused by defendant's allegedly invalid rule. *See id.* at 562. He then questioned whether the plaintiff's members would be "directly" affected by this increased rate of extinction, reasoning that the lost opportunity to observe and study those species is not enough to produce a direct effect. *See id.* at 563-64. In effect, he redefined the alleged injury as one involving an alleged use of the affected area. *See id.* *But cf.* Sunstein, *supra* note 15, at 204-05 (suggesting that, because of the wording of the ESA, the plaintiff should have characterized the injury as one of a diminished opportunity). [Return to text.](#)

[183] *See Defenders of Wildlife*, 504 U.S. at 572-73. [Return to text.](#)

[184] For instance, the person living near the proposed site of a federally licensed dam or the whale watchers in *Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221 (1986), would have standing, according to Justice Scalia, because of their geographic relationship to the affected area. *See Defenders of Wildlife*, 504 U.S. at 572 n.7, 573 n.8. [Return to text.](#)

[185] *Defenders of Wildlife*, 504 U.S. at 567 n.3. [Return to text.](#)

[186] *See* 16 U.S.C. §§ 1531(a), 1531(b), 1537; Carlo A. Balistrieri, *CITES: The ESA and International Trade*, NAT. RESOURCES & ENV'T, Summer 1993, at 33 (discussing the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)). [Return to text.](#)

[187] See *Defenders of Wildlife*, 504 U.S. at 564. [Return to text.](#)

[188] This type of inquiry is better suited to the situation in which a federal agency with technical expertise makes an informed scientific judgment and a court is called upon to review that judgment. [Return to text.](#)

[189] See *infra* note 401 (discussing somewhat similar interests). [Return to text.](#)

[190] See *Defenders of Wildlife*, 504 U.S. at 584-85, 595-601. [Return to text.](#)

[191] Redressibility, an aspect of the causation requirement, appears to have originated primarily as an outgrowth of the nexus requirement articulated in cases such as *Flast v. Cohen*, 392 U.S. 83, 102-03 (1968), and *United States v. Richardson*, 418 U.S. 166, 174-76 (1974). Redressibility further served as a prudential mechanism for limiting when litigants could seek to assert the rights of third parties. See *Valley Forge Christian College v. Americans United for Separation of Church & State*, 454 U.S. 464, 474 (1984) (referring to "prudential principles" for asserting rights of third parties); *Duke Power Co. v. Carolina Env'tl. Study Group, Inc.*, 438 U.S. 59, 80-81 (1978). See also *supra* notes 149-50. In *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976), the Court applied a causation/redressibility requirement and concluded that the plaintiffs lacked standing because it would be wholly speculative whether the Court's relief would even affect the plaintiffs' asserted interest. See *id.* at 42-43. The plaintiffs challenged a Treasury Department revenue ruling that allegedly discouraged hospitals from treating indigents. See *id.* at 43. The Court stated that it was too uncertain whether third party hospitals, not parties to the litigation, would necessarily treat indigents but for that revenue ruling. See *id.* Regardless of the efficacy of the *Simon* opinion, it is a different situation from that in *Defenders of Wildlife*, where the plaintiff's asserted interest would be remedied by judicial relief. [Return to text.](#)

[192] Sive, *supra* note 15, at 56. In their concurrence, Justices Kennedy and Souter suggested possible ways for Congress to remedy an otherwise broad grant of standing. See *Defenders of Wildlife*, 504 U.S. at 579-81 (Kennedy, J., and Souter, J., concurring). What is interesting about the treatment of the citizen suit provision is how the issue was treated in the past. Until *Defenders of Wildlife*, according to Richard Pierce, "the Court deferred to congressional intent with respect to standing where it was able to discern that intent." Pierce, *supra* note 171, at 1179. In *Sierra Club*, the Court specifically noted that Congress could confer standing to sue as long as the suit was not a friendly suit and did not seek an advisory opinion or ask to resolve a political question. See *Sierra Club*, 405 U.S. at 732 n.3. In the same year it decided *Sierra Club*, the Court found standing solely on the basis of a statutory right to sue in a case where standing may not have existed absent the statute. See *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 212 (1972). See also *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 n.3 (1973) ("But Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute."); *Warth v. Seldin*, 422 U.S. 490, 501 (1975) (indicating that Congress could confer standing if the plaintiff alleged a "distinct and palpable injury to himself"); *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 41 n.22 (1976) (discussing footnote in *Linda R.S.* and the statement in *Warth*). Other courts have accepted Congress' ability to confer standing absent any indication that the parties are not adversarial. In *Animal Welfare Institute v. Krepes*, 561 F.2d 1002 (D.C. Cir. 1977), for example, the court indicated that, while Congress cannot authorize judicial review in the absence of a case or controversy, it can create legal rights. See *id.* at 1005-06. The court thus implied that by conferring standing, Congress essentially creates the legal right to ensure against a violation of the statute at issue. [Return to text.](#)

[193] See Sunstein, *supra* note 15, at 223-24. See also Feld, *supra* note 32, at 164 (proffering a similar solution). [Return to text.](#)

[194] 117 S. Ct. 1154 (1997). [Return to text.](#)

[195] The Ninth Circuit's decision in *Bennett v. Plenert*, 63 F.3d 915 (9th Cir. 1995), has been described as "representative of the widespread confusion over the concept of standing, the role of 'prudential' concerns in the standing analysis, and more specifically, the meaning and use of the zone of interests test." Kathleen C. Becker, *Bennett v. Plenert: Environmental Citizen Suits and the Zone of Interests Test*, 26 ENVTL. L.

1071, 1072 (1996) (citations omitted). *See also* Sheldon K. Rennie, Note, *Bennett v. Plenert: Using the Zone-of-Interests Test to Limit Standing Under the Endangered Species Act*, 7 VILL. ENVTL. L.J. 375 (1996). [Return to text.](#)

[196] *See* *Defenders of Wildlife v. Hodel*, 851 F.2d 1035 (8th Cir. 1988), *rev'd on other grounds sub nom. Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992); *Mausolf v. Babbitt*, 913 F. Supp. 1334 (D. Minn. 1996), *rev'd*, 85 F.3d 1295 (8th Cir. 1996). In *Mausolf*, the court held that intervenors must satisfy Article III standing to litigate in federal court. *See Mausolf*, 85 F.3d at 1301-02. In doing so, the court implicitly accepted the district court decision on the standing of snowmobilers to bring a lawsuit under the ESA, albeit quoting from the part of the decision that suggested that the snowmobilers also alleged an environmental harm in not being able to observe wolves in their natural habitat. *See id.* In *Mountain States Legal Found. v. Glickman*, 92 F.3d 1228 (D.C. Cir. 1996), the D.C. Circuit disagreed with the Ninth Circuit's decision in *Plenert*, concluding that economic interests play an important and constraining role in the implementation of the ESA. *See id.* at 1237; *see also* Robert I. Levy, Note, *Mountain States Legal Foundation v. Glickman: Environmental Standing Continues Its Trek As a Moving Target*, 10 TUL. ENVTL. L.J. 123 (1996). In *Idaho v. ICC*, 35 F.3d 585 (D.C. Cir. 1994), where the plaintiff's objective was to avoid the economic impact from an abandoned railroad line, the court's application of the zone of interests test was so expansive that the inquiry seemed almost meaningless. *See id.* at 590-92. As the petitioners argued in *Bennett*, Brief for Petitioners, *Bennett v. Spear*, 117 S. Ct. 1154 (1997) (No. 95-813) [hereinafter *Petitioners' Brief*], economic interests brought the lawsuit in *Babbitt v. Sweet Home Chapter of Communities*, 515 U.S. 687 (1995), and the Court never questioned standing in that case. *See* *Petitioner's Brief* at 25. [Return to text.](#)

[197] In *Pacific Northwest Generating Co-op. v. Brown*, 38 F.3d 1058 (9th Cir. 1994), the Ninth Circuit observed that it was uncertain whether the zone of interests test applied to suits involving the ESA. *See id.* at 1065. However, assuming that the test did apply, the court proceeded to find standing in groups with an economic interest. *See id.* Prior to the Court's opinion in *Bennett*, Judge Reinhardt issued an opinion involving a challenge under the ESA brought by interests he described as "not Good Samaritans," without ever questioning standing in his written opinion. *See Ramsey v. Kantor*, 96 F.3d 434, 440 (9th Cir. 1996); *see also* *Aluminum Co. of Am. v. Bonneville Power Admin.*, 56 F.3d 1075 (9th Cir. 1995) (disregarding the question of whether the petitioners' economic interests established standing for their challenge, in part, under NEPA and the ESA, and dismissing the case as moot instead). The Ninth Circuit's application of the zone of interests test ignored other provisions of the ESA. For instance, under the ESA, any "interested person" may petition the USFWS to list, delist, or reclassify the status of a species. *See* 16 U.S.C. § 1533(b)(3)(A). Standing has not been an issue when environmental groups have sued the USFWS/NMFS for failure to list a particular species or designate a critical habitat. *See Environmental Def. Ctr. v. Babbitt*, 73 F.3d 867 (9th Cir. 1995); *Defenders of Wildlife v. Babbitt*, No. 96-160 (D.C.D.C. March 27, 1997); *Carlton v. Babbitt*, 900 F. Supp. 526 (D.D.C. 1995) (reclassification of grizzly bear). Standing also has not been a significant problem when parties have tried to challenge a proposed listing by those not interested in protecting the species. *See Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392 (9th Cir. 1995); *Alabama-Tombigbee Rivers Coalition v. Department of Interior*, 26 F.3d 1103 (11th Cir. 1994) (violation of Federal Advisory Committee Act); *City of Las Vegas v. Lujan*, 891 F.2d 927 (D.C. Cir. 1989) (challenge to emergency listing of desert tortoise); *Endangered Species Comm'n of Bldg. Ind. Ass'n v. Babbitt*, 852 F. Supp. 32 (D.D.C. 1994). *But cf.* *Coalition of Ariz./N.M. Counties for Stable Econ. Growth v. Babbitt*, No. CIV 94-1058-M, 1997 U.S. Dist. LEXIS 4212 (D.N.M. Mar. 11, 1997) (denying standing to parties with an asserted economic interest in emergency listing of desert tortoise for failure to establish a sufficient interest in the listing). *Cf.* *Coalition of Ariz./N.M. Counties for a Stable Econ. Growth v. Babbitt*, 100 F.3d 837 (10th Cir. 1996) (discussing ongoing challenge to the listing of the Mexican Spotted Owl). [Return to text.](#)

[198] Letter from John D. Lesly, Solicitor, Department of the Interior, to Hon. Don Young, Chairman, Committee on Resources, House of Representatives (Mar. 11, 1997). [Return to text.](#)

[199] *Id.* [Return to text.](#)

[200] *See Bennett*, 117 S. Ct. at 1158-59. [Return to text.](#)

[201] *See* Endangered and Threatened Wildlife and Plants; Determination of Endangered Status for the Shortnose Sucker and Lost River Sucker, 53 Fed. Reg. 27,130 (1988) (codified at 50 C.F.R. pt. 17). [Return to text.](#)

[202] 16 U.S.C. § 1533. [Return to text.](#)

[203] *See Bennett*, 117 S. Ct. at 1159. [Return to text.](#)

[204] *See id.* [Return to text.](#)

[205] *See id.* at 1165. The biological opinion also included an incidental take statement, authorizing a certain level of otherwise prohibited "taking" of the species. *See id.* [Return to text.](#)

[206] *See id.* at 1159. [Return to text.](#)

[207] *See id.* at 1160. [Return to text.](#)

[208] The districts and members argued that the USFWS violated section 7 of the ESA by not using the "best scientific and commercial data available," and that the use of restrictions on the withdrawal of water implicitly operated as a designation of critical habitat, and as such violated the requirements for designating critical habitat under section 4. *See id.* at 1159-60, 1165-66, 1168. [Return to text.](#)

[209] *See id.* at 1160. [Return to text.](#)

[210] *See Bennett v. Plenert*, 63 F.3d 915, 917-19 (9th Cir. 1995). [Return to text.](#)

[211] *See id.* at 917-18. [Return to text.](#)

[212] *See id.* at 919. [Return to text.](#)

[213] *Id.* at 919 (emphasis added). Following the same analysis that it applied in NEPA cases, the court looked to the overall purpose of the ESA. *See id.* at 920. [Return to text.](#)

[214] Petitioners generally argued that the zone of interests test could be satisfied either by persons whose interests are *protected* by the Act or by those whose interests are *regulated* by the Act. *See* Petitioners' Brief at 29-41, *Bennett* (No. 95-813). Petitioners further argued that even if one looked only at those to be protected by the Act, the ESA includes within its ambit economic-based considerations. *See id.* [Return to text.](#)

[215] Brief for Respondents at 17-50, *Bennett v. Spear*, 117 S. Ct. 1154 (1997) (No. 95-813) [hereinafter *Respondent's Brief*]. [Return to text.](#)

[216] In a curious footnote, the United States left unresolved how it would treat the zone of interests test:

In our view, the difficult "zone of interests" questions under the ESA citizen suit provision involve situations very far removed from the present one. Suppose, for example, that the owner of land adjacent to government property complained that logging on the federal land caused dust and noise and thereby hindered his enjoyment of his own land. He might contend in addition that the logging jeopardized the continued existence of an endangered bird species. The property owner might expressly disavow any personal interest in the fate of the bird but argue that he was nonetheless entitled to invoke the ESA citizen suit provision, on the ground that he had suffered injury in fact from the same government conduct that was alleged to violate the ESA. That allegation would surely satisfy Article III; the question is whether the

fortuitous relationship between the landowner's injury and the values protected by the ESA would trigger the application of prudential standing requirements.

Id. at 48 n.32. This comment does not address prudential standing requirements for an APA claim challenging an action under the ESA. [Return to text.](#)

[217] *See id.* at 17-29. [Return to text.](#)

[218] *Id.* at 19 (emphasis added). [Return to text.](#)

[219] *See id.* at 22 n.10 ("The Services have consistently recognized that the action agency retains legal authority to accept or reject the recommendations contained in a biological opinion."); *see also infra* note 249 and accompanying text. [Return to text.](#)

[220] *Respondent's Brief* at 22, *Bennett* (No. 95-813). Review of a biological opinion is available, argued the United States, "only after the Bureau has acted, and only within the context of a challenge to specific actions taken by the Bureau in reliance on that opinion." *Id.* at 25. [Return to text.](#)

[221] *See id.* at 26. [Return to text.](#)

[222] *Id.* at 27. The Justice Department distinguished petitioners' claims from those of a party alleging a procedural injury by explaining that here the injury, if any, would be caused by a third party (the Bureau) not before the Court. *See id.* at 27-28. The Department added that in the *Defenders of Wildlife* footnote seven hypothetical, the plaintiff could show injury caused by the construction of the dam, which could be remedied (at least temporarily) by a court order requiring the preparation of an environmental impact statement (EIS). *See id.* at 29 n.15. This explanation, however, avoids defining the "harm" in a case involving a procedural injury. Petitioners had stated that "each of the claims asserted by [them] is in the nature of a procedural right." Reply Brief for Petitioners at 8, *Bennett v. Spear*, 117 S. Ct. 1154 (1997) (No. 95-813). They argued that the Secretary failed in several respects to provide sufficient consideration to various issues and that reduced standards for redressibility exist when raising a procedural right. *See id.* [Return to text.](#)

[223] One of the Justices joining in that part of the opinion, Justice White, is no longer on the Court. More importantly, the present Administration's Justice Department presumably believes in a more liberal law of standing. [Return to text.](#)

[224] *See Respondent's Brief* at 30-35, *Bennett* (No. 95-813). [Return to text.](#)

[225] *See id.* [Return to text.](#)

[226] *See id.* at 34 (noting that in some cases final agency action and ripeness are not necessarily the same). [Return to text.](#)

[227] The government observed that "plaintiffs may obtain vacatur of an action agency's decision by showing that it was based on a biological opinion that failed to satisfy the arbitrary-and-capricious standard of review." *Id.* at 47 n.31. The United States added that a lawsuit against the Bureau challenging the Bureau's allocation decision would fall within the zone of interests test. *See id.* at 49 n. 34. [Return to text.](#)

[228] *See id.* at 35-38. [Return to text.](#)

[229] Petitioners argued that their claims fell within sections 11(g)(1)(A) and 11(g)(1)(C) of the ESA, 16 U.S.C. § 1540, the former section authorizing citizen suits for a "violation" of the Act, and the latter authorizing citizen suits for the failure to perform a nondiscretionary duty. *See Petitioners' Brief* at 19, *Bennett* (No. 95-813). The United States countered that section 11(g)(1)(A) does not apply to agency actions unless there is an alleged violation of one of the proscriptions of the Act and that 11(g)(1)(C)

applies to agency actions, but only when the agency is under a nondiscretionary duty to act and fails to do so. *See* Respondents' Brief at 34-46, *Bennett* (No. 95-813). Absent an alleged violation of the Act, such as an agency's decision to allow an activity that is likely to jeopardize an endangered species, or the failure of an agency to undertake a nondiscretionary duty required by the ESA, the only avenue for relief is through the APA. *See id.* [Return to text.](#)

[230] *Bennett v. Spear*, 117 S. Ct. at 1154, 1161 (1997) (citations omitted). [Return to text.](#)

[231] *See id.* at 1162. The Court's analysis tracked the petitioners' argument. *See* Petitioner's Brief at 19-20, *Bennett* (No. 95-813). Perhaps to avoid essentially abrogating the zone of interests test for other citizen suit provisions, the Court noted that the language of section 11(g) of the ESA appears broader than the language Congress used in other citizen suit provisions, such as in the CWA. *See Bennett* at 1162. [Return to text.](#)

[232] *Id.* at 1162. These considerations seem remarkably similar to the arguments presented by environmental advocates and rejected by the Court 25 years ago. [Return to text.](#)

[233] *See id.* at 1163. [Return to text.](#)

[234] *See id.* at 1163-64. [Return to text.](#)

[235] *See id.* [Return to text.](#)

[236] *See id.* at 1164-65. [Return to text.](#)

[237] *Id.* at 1164 (quoting from the Respondents' Brief about the practical significance of biological opinions and stating that while they may not be binding on the federal agency action, they appear to have a "determinative effect."). *Cf.* *Swan View Coalition, Inc. v. Turner*, 824 F. Supp. 923, 932 (D. Mont. 1992) (examining the same issue in a different manner). [Return to text.](#)

[238] *See id.* at 1164-65. Since *Bennett*, environmental plaintiffs have successfully argued that they could seek review of a biological opinion that would allow an incidental taking of listed species. *See Southwest Center for Biological Diversity v. Babbitt*, CIV 97-0786-PHX, at 12 (D. Ariz. filed Aug. 25, 1997). [Return to text.](#)

[239] *See id.* at 1165. This judgment is perhaps conclusory because the Bureau of Reclamation could still choose to adopt water level restrictions, even in the absence of any "determinative or coercive" threat. *See generally* Reed D. Benson, *Whose Water Is It? Private Rights and Public Authority over Reclamation Project Water*, 16 VA. ENVTL L.J. 363 (1997); Michael R. Moore et al., *Water Allocation in the American West: Endangered Fish Versus Irrigated Agriculture*, 36 NAT. RESOURCES J. 319 (1996); Richard W. Wahl, *Redividing the Waters: The Reclamation Act of 1902*, 10 NAT. RESOURCES & ENV'T 31 (1995). The Bureau could do so simply as part of a general conservation measure or pursuant to a conservation program under section 7(a)(1) of the ESA. *See* 16 U.S.C. § 1536(a). *See generally* J.B. Ruhl, *Section 7(a)(1) of the "New" Endangered Species Act: Rediscovering and Redefining the Untapped Power of Federal Agencies' Duty to Conserve Species*, 25 ENVTL. L. 1107 (1995). Indeed, the Department of the Interior has suggested that the Department can manage and operate the Klamath Project in a manner designed to protect tribal rights. *See* Letter from David Nawi et al., Regional Solicitor of Pacific Southwest Region, to Regional Director of Region 1, U.S. Fish and Wildlife Service, et al. (Jan. 9, 1997) (on file with author). Since the decision in *Bennett*, irrigators have sued the Department of the Interior over its management of the project, aside from the ESA and the biological opinion. Thus, the Court's sleight of hand in dealing with redressibility illustrates a fundamental problem with applying the requirement to cases involving a procedural violation. *See infra* notes 386-99 and accompanying text. [Return to text.](#)

[240] Petitioners' claim that the USFWS' biological opinion implicitly designated critical habitat without following the procedures for such a designation fell within the ambit of section 11(g)(C), but the

petitioners' other claims involved what the Court termed "maladministration" and could not be brought under any clause of section 11(g). *See Bennett*, 117 S. Ct. at 1166-67. This part of the Court's holding effectively overrules the same aspect of *Swan View Coalition* where the district court had allowed a citizen suit challenging the adequacy of a biological opinion, or maladministration. *See Swan View Coalition*, 824 F. Supp. at 929. *Cf. Battaglia v. Browner*, 963 F. Supp. 689 (E.D. Ill. 1997) (applying similar reasoning to citizen suit provision of the Comprehensive Environmental Response, Compensation, and Liability Act). [Return to text.](#)

[241] *See Bennett*, 117 S. Ct. at 1167-69. [Return to text.](#)

[242] *See id.* [Return to text.](#)

[243] *Id.* at 1167. The Court emphasized that in *Data Processing* it "did not require that the plaintiffs' suit vindicate the overall purpose of the Bank Service Corporation Act of 1962, but found it sufficient that their commercial interest was sought to be protected by the anti-competition limitation contained in section 4 of the Act—the specific provision which they alleged had been violated." *Id.* Not only did Justice Scalia's comment ignore that *Data Processing* was not a model of clarity, but he also overlooked the contrary suggestion expressed by the Court in *Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 401 (1987). Citing to *Clarke*, for instance, the Tenth Circuit observed that "[a] court must look at both the specific purpose of the statute and the more general purposes of the act in which the statute is contained." *Mount Evans Co. v. Madigan*, 14 F.3d 1444, 1452 (10th Cir. 1994). Opinions involving NEPA claims also have invariably looked to the objectives of NEPA, not to the specific statutory requirement for the preparation of an EIS under 42 U.S.C. § 4332(c). *E.g.*, *City of Los Angeles v. Glickman*, 950 F. Supp. 1005, 1012-14 (C.D. Cal. 1996). *See also* 6 JACOB A. STEIN ET AL., ADMINISTRATIVE LAW § 50.03, at 50-64 (1997) (stating that courts have looked to the statute as a whole to discern the zone of interests to be protected). [Return to text.](#)

[244] *Bennett*, 117 S. Ct. at 1168. The Court added that the ESA contemplates consideration of economic consequences in the section 7 consultation process. *See id.* The reasoning here may be somewhat superficial, because in *TVA v. Hill*, 437 U.S. 153 (1978), the Court clearly indicated that economic consequences were irrelevant in the consideration of whether a particular action is likely to jeopardize the continued existence of a threatened or endangered species or result in adverse modification or destruction of critical habitat. *See id.* The Court's citation to section 7(h) as evidence that the ESA is concerned with economic consequences demonstrates a less than thorough analysis. Section 7(h) of 16 U.S.C. § 1536(h) is what has been called the "God Committee" provision of the Act, and is neither reflective of the purposes of the Act nor has it proved all that useful. *See generally* Oliver A. Houck, *The Endangered Species Act and Its Implementation by the U.S. Departments of Interior and Commerce*, 64 U. COLO. L. REV. 277, 329-44 (1993); Jared des Rosiers, Note, *The Exemption Process Under the ESA: How the "God Squad" Works and Why*, 66 NOTRE DAME L. REV. 825 (1991). [Return to text.](#)

[245] *See Bennett*, 117 S. Ct. at 1168. [Return to text.](#)

[246] According to the Court, "the Biological Opinion and accompanying Incidental Take Statement alter the legal regime to which the action agency is subject, authorizing it to take the endangered species if (but only if) it complies with the prescribed conditions." *Id.* Oddly enough, this description comes from the Petitioner's Brief and is otherwise wholly unsupported. [Return to text.](#)

[247] *See supra* note 198 and accompanying text. [Return to text.](#)

[248] *See* Respondents' Brief at 15-16, *Bennett* (No. 95-813). [Return to text.](#)

[249] Prior to the Court's decision, biological opinions generally had not been treated as final agency actions because they were not considered binding. One of the Department of Justice's leading experts on the ESA opined that biological opinions are not binding on the action agency. *See* James C. Kilbourne, *The Endangered Species Act Under the Microscope: A Closeup Look From a Litigator's Perspective*, 21 ENVTL. L. 499, 543-44 (1991). *See also* 43 Fed. Reg. 871 (1978) ("[T]he ultimate responsibility for

determining agency action in light of section 7 still rests with the particular Federal agency that was engaged in consultation."'). Since *Bennett*, U.S. District Court Judge Marsh has allowed parties to challenge a biological opinion directly. See *American Rivers v. National Marine Fisheries Serv.*, No. 96-384-MA, 1997 U.S. Dist. LEXIS 5337 (D. Or. Apr. 3, 1997). See also *IDFG v. National Marine Fisheries Serv.*, 850 F. Supp. 886 (D. Or. 1994), *vacated as moot*, 56 F.3d 1071 (9th Cir. 1995); *Swan View Coalition, Inc. v. Turner*, 824 F. Supp. 923 (D. Mont. 1992). [Return to text.](#)

[250] *Pierce*, *supra* note 171, at 1185. [Return to text.](#)

[251] See *id.* (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573 n.8 (1992)). *Pierce* suggested that this part of the majority opinion appears "well-reasoned" and means that "a person cannot obtain judicial review of an agency action based *only* on injury to a 'procedural right.'" *Pierce*, *supra* note 171, at 1185. [Return to text.](#)

[252] See, e.g., *Sive*, *supra* note 15. [Return to text.](#)

[253] See *Foundation on Econ. Trends v. Lyng*, 943 F.2d 79, 83 (D.C. Cir. 1991). In *Lyng*, the court observed that this type of standing was first raised by a footnote in *Scientists' Inst. for Pub. Info., Inc. ("SIPI") v. Atomic Energy Comm'n*, 481 F.2d 1079, 1086-87 n.29 (D.C. Cir. 1973), where the D.C. Circuit noted "that the plaintiff organization might have standing because it distributed scientific information to the public, an activity adversely affected by the agency's failure to provide an impact statement." *Lyng*, 943 F.2d at 83. The *Lyng* court then traced some of the post-*SIPI* cases and concluded that it has "never sustained an organization's standing in a NEPA case solely on the basis of 'informational injury,' that is, damage to the organization's interest in disseminating the environmental data an impact statement could be expected to contain." *Id.* at 84. The court warned that allowing such informational standing would eliminate any standing requirement in NEPA cases and concluded that the plaintiffs in *Lyng* lacked standing. See *id.* The *Lyng* court's reasoning is reminiscent of the *National Wildlife Federation* decision where the Court held that there was no identifiable federal agency action, an issue different from that of standing. See *National Wildlife Fed'n*, 497 U.S. at 890. In a separate opinion, Judge Buckley wrote that the majority in *Lyng* inappropriately confused the issue of standing with the substantive claim under NEPA. See *Lyng*, 943 F.2d at 87 (Buckley, J., dissenting in part and concurring in part). Relying on *Competitive Enter. Inst. v. NHTSA*, 901 F.2d 107 (D.C. Cir. 1990), Judge Buckley would have held that the plaintiffs had standing to assert informational injury. See *id.* See also *Oregon Natural Desert Ass'n v. Green*, 953 F. Supp. 1133, 1141 (D. Or. 1997) (discussing right to be apprised of environmental effects); *Colorado Env'tl. Coalition v. Lujan*, 803 F. Supp. 364, 367 (D. Colo. 1992) (accepting informational injury as valid interest supporting standing). See generally Randall S. Abate & Michael J. Myers, *Broadening the Scope of Environmental Standing: Procedural and Informational Injury-in-Fact After Lujan v. Defenders of Wildlife*, 12 J. ENVTL. L. 345 (1994) (arguing for a recognition of informational injury); Christopher T. Burt, Comment, *Procedural Injury Standing After Lujan v. Defenders of Wildlife*, 62 U. CHI. L. REV. 275, 290-93 (1994) (questioning informational injury); Brian J. Gatchel, *Informational and Procedural Standing After Lujan v. Defenders of Wildlife*, 11 J. LAND USE & ENVTL. L. 75 (1995) (favoring informational injury); Lawrence Gerschwer, Note, *Informational Standing Under NEPA: Justiciability and the Environmental Decisionmaking Process*, 93 COLUM. L. REV. 996 (1993). [Return to text.](#)

[254] Distinguishing between procedural and informational injury is not necessarily productive. For example, Randall S. Abate and Michael J. Myers posit that "the main difference between the two harms exists in who is prevented from protecting the rights of the public: in procedural injury, the government; in informational injury, the public itself." Abate & Myers, *supra* note 253, at 385. The problem with this approach is that talking about the "public itself" is unrealistic. The "public" via Congress has entrusted to administrative agencies the authority to act in accordance with certain procedures and in the public interest. To say, then, that the public itself is injured when it does not receive information is most certainly accurate, but to presume that the existence of such harm translates into a cognizable interest that may be asserted by any person or organization *asserting an interest in facilitating that dissemination* is to draw lines without ends. This is quite different than where a restraint is placed on an organization's ability to disseminate

information. *See Cox Broad. Corp. v. Cohn*, 420 U.S. 469 (1975). One author suggests that the parameters of informational standing can be bounded by the requirement for a geographical nexus to or actual use of an affected area. *See Gatchel*, *supra* note 253, at 85 n.73. However, the application of this requirement would eviscerate the need to invoke informational standing in the first place. If the focus shifts from an interest in disseminating information toward an interest in receiving information, then it seems more precise to talk about the agency's failure to provide the public with information that is required to be supplied under statutes such as NEPA, the APA, or the Freedom of Information Act; in other words, a procedural violation.

In *National Wildlife Federation*, although Justice Scalia declined to address the deprivation of information as an asserted injury, his passing remarks are instructive. *See National Wildlife Federation*, 497 U.S. at 899. He characterized the injury as one involving the failure to provide information to organizations such as NWF, and suggested that such an injury would require showing that Congress contemplated that "providing information to organizations such as respondent was one of the objectives of the statutes allegedly violated." *Id.* For a discussion of informational standing under other federal statutes, see Abate & Myers, *supra* note 253, at 351-58. *See also* Animal Legal Defense Fund v. Yeutter, 760 F. Supp. 923 (D.D.C. 1991) (informational standing under the Animal Welfare Act), *vacated sub nom.* Animal Defense Fund, Inc. v. Espy, 23 F.3d 496 (D.C. Cir. 1994) (rejecting informational standing). *Cf.* Fund for Animals v. Babbitt, 89 F.3d 128, 134 (2nd Cir. 1996) (suggesting an implied informational injury). For a discussion of *Yeutter*, see GARY L. FRANCIONE, ANIMALS, PROPERTY, AND THE LAW 79-84 (1995). The Emergency Planning and Community Right-to-Know Act, 42 U.S.C. §§ 11001-11050 (1994), is perhaps the best example of an environmental program premised on the dissemination of information. *See generally* Abate & Myers, *supra* note 253, at 374-76. Informational injury also might exist for violations of the Federal Election Campaign Act. *Compare* Akins v. FEC, 101 F.3d 731 (D.C. Cir. 1996) (*en banc*) (granting standing), *with* Common Cause v. FEC, 108 F.3d 413 (D.C. Cir. 1997) (denying standing). [Return to text.](#)

[255] In *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332 (1989), the Court stated that one of the purposes of NEPA's action forcing procedures is to guarantee "that the relevant information will be made available to the larger audience that may also play a role both in the decisionmaking process and the implementation of that decision." *Id.* at 349. *See also* Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 371 (1989) (stating that NEPA goals are primarily accomplished by allowing governmental and public attention to be focused on the environmental effects of the proposed agency action). Two of the primary purposes of the APA are to ensure that the public is kept informed of federal agency activities and to provide for public participation in the administrative process. *See* UNITED STATES DEPARTMENT OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 9 (1947). [Return to text.](#)

[256] *See* Douglas County v. Babbitt, 48 F.3d 1495, 1499 (9th Cir. 1995) (quoting Nevada Land Ass'n v. U.S. Forest Serv., 8 F.3d 713, 716 (9th Cir. 1993)). [Return to text.](#)

[257] 947 F. Supp. 1 (D.D.C. 1996). [Return to text.](#)

[258] *See id.* at 5. [Return to text.](#)

[259] *See id.* [Return to text.](#)

[260] 479 U.S. 388 (1987). [Return to text.](#)

[261] Los Angeles v. Department of Agric., 950 F. Supp. 1005, 1012 (C.D. Cal. 1996) (citations omitted); *see also* County of St. Louis v. Thomas, 967 F. Supp. 370, 377 (D. Minn. 1997) (denying standing to plaintiffs to raise NEPA claim for economic losses). Courts occasionally allow parties with economic interests to present a NEPA challenge when some other party in the litigation raises a NEPA issue as well. *See* Association of Pub. Agency Customers, Inc. v. Bonneville Power Admin., No. 95-70862, 1997 U.S. App. LEXIS 26278, *74 n.9 (9th Cir. Sept. 24, 1997). [Return to text.](#)

[262] *See id.* at 1013. [Return to text.](#)

[263] *Mountain States Legal Found. v. Glickman*, 92 F.3d 1228, 1236 (D.C. Cir. 1996). Early on, the Eighth Circuit similarly stated that "[i]ndividuals motivated in part by protection of their own pecuniary interests can challenge administrative action under NEPA provided that their environmental concerns are not so insignificant that they ought to be disregarded altogether." *Robinson v. Knebel*, 550 F.2d 422, 425 (8th Cir. 1977) (citations omitted). [Return to text.](#)

[264] 75 F.3d 1429 (10th Cir. 1996). [Return to text.](#)

[265] *See id.* at 1433. [Return to text.](#)

[266] *Id.* [Return to text.](#)

[267] *See id.* at 1439. On the merits, the court held that the USFWS was required to comply with NEPA before designating a critical habitat under ESA. *See id.* In *Coalition of Ariz./N.M. Counties for Stable Econ. Growth v. Babbitt*, No. 95-1285-M, slip op. at 8 (D.N.M. March 4, 1997), the court held that parties challenging the critical habitat designation for the Mexican Spotted Owl had standing to raise a NEPA claim. *See id.* at 8. The court noted that it was "disinclined" to explore the plaintiffs' motives and that the issues raised were not merely economic. *See id.* The court added that the parties had standing to raise procedural interests as well. *See id.* at 9. [Return to text.](#)

[268] 48 F.3d 1495 (9th Cir. 1995). [Return to text.](#)

[269] *See id.* at 1501. However, on the merits of the claim the court reached a contrary result from that in *Catron County*. *See id.* at 1507. [Return to text.](#)

[270] *See id.* at 1502. [Return to text.](#)

[271] *See id.* at 1500. [Return to text.](#)

[272] *See id.* at 1500-01. [Return to text.](#)

[273] *See id.* at 1500. [Return to text.](#)

[274] *Id.* at 1501. [Return to text.](#)

[275] *See Catron County*, 75 F.3d at 1433. [Return to text.](#)

[276] *Id.* [Return to text.](#)

[277] *See Douglas County*, 48 F.3d at 1500. [Return to text.](#)

[278] *See id.* at 1500 n.4. [Return to text.](#)

[279] *See id.* [Return to text.](#)

[280] *See id.* at 1501. *See also* *City of Davis v. Coleman*, 521 F.2d 661, 672 (9th Cir. 1975) (employing similar reasoning). [Return to text.](#)

[281] *See Douglas County*, 48 F.3d at 1501. [Return to text.](#)

[282] *Id.* The court further indicated that the "causation" component of standing was satisfied because it is "reasonably probable" that the County would be affected by the critical habitat designation, *see id.* at n.6, and that redressibility is not important when alleging a procedural injury. *See id.* at 1501. However, this analysis seems flawed. Causation applies to the alleged procedural violation (the failure to prepare an

environmental document under NEPA), not to the substantive decision (the designation of the critical habitat). Otherwise, the case would not involve a procedural injury. Redressibility, aside from the merits of such an inquiry in the first place, is not merely unimportant as the court suggests. *See id.* Redressibility can be satisfied in a procedural injury case, as here, when the failure to prepare an environmental document can be redressed easily by a court order. *See Catron County v. U.S. Fish & Wildlife Serv.*, 75 F.3d 1429, 1433 (10th Cir. 1996). For a general discussion of *Douglas County*, see Erika Johnson, Note, *Douglas County v. Babbitt and the New Displacement Exemption: NEPA Loses More Ground*, 17 PUB. L. & RESOURCES L. REV. 177 (1996). [Return to text.](#)

[283] 94 F.3d 658 (D.C. Cir. 1996) (en banc). [Return to text.](#)

[284] *See id.* at 662. [Return to text.](#)

[285] *See id.* [Return to text.](#)

[286] *See id.* at 663. A panel of the D.C. Circuit would have found standing. *See Florida Audubon Soc'y v. Bentsen*, 54 F.3d 873 (D.C. Cir. 1995), *reh'g en banc granted*, *Florida Audubon Soc'y v. Bentsen*, 64 F.3d 712 (D.C. Cir. 1995). In *Florida Audubon Society v. Treasury Department*, the Treasury Department asserted that such rules are categorically excluded from NEPA compliance. *See Florida Audubon Soc'y*, 94 F.3d at 662. [Return to text.](#)

[287] *Florida Audubon Soc'y*, 94 F.3d at 664-65. [Return to text.](#)

[288] *Id.* at 665. [Return to text.](#)

[289] *See id.* at 665-66. [Return to text.](#)

[290] *See id.* at 666. [Return to text.](#)

[291] *Id.* at 667 n.4. [Return to text.](#)

[292] *See id.* at 667. [Return to text.](#)

[293] *See id.* [Return to text.](#)

[294] *See id.* at 667-68. [Return to text.](#)

[295] *Id.* at 668. *Cf.* *People for the Ethical Treatment of Animals v. HHS*, 917 F.2d 15, 17 (9th Cir. 1990) (holding that there had been no showing of harm to the area where a geographical nexus arguably existed). [Return to text.](#)

[296] *See Florida Audubon Soc'y*, 94 F.3d at 668. [Return to text.](#)

[297] The inquiry into causation was unnecessary in light of the court's holding that the plaintiffs already lacked standing to sue. The discussion, therefore, appears contrived to overrule *Los Angeles v. NHTSA*, 912 F.2d 478 (D.C. Cir. 1990). *See infra* notes 300, 303-04 and accompanying text. [Return to text.](#)

[298] *Florida Audubon Soc'y*, 94 F.3d at 668. [Return to text.](#)

[299] *See id.* at 669. The court added, "Not to require that a plaintiff show that its particularized injury resulted from the government action at issue would effectively void the particularized injury requirement." *Id.* But, as argued later, the answer is not to impose such an illogical standard that essentially requires an inquiry into the merits of the case. Rather the recourse is to abandon the ill-conceived causation requirement in the first place. [Return to text.](#)

[300] *See id.* [Return to text.](#)

[301] *See id.* at 671. [Return to text.](#)

[302] The court stated that it does "not defer to the views of . . . Congress or its individual members in determining whether a particular rule will cause injury to a particular plaintiff or as proof of any causal chain necessary for standing." *Id.* at 670. The majority added that, after *Defenders of Wildlife*, the decision in *SCRAP* must be considered an "outlier." *See id.* at 672. *See also* Louisiana Env'tl. Action Network v. Browner, 87 F.3d 1379, 1383 (D.C. Cir. 1996) (making the same observation). Nevertheless, other courts still invoke *SCRAP* as support that an "identifiable trifle" is enough of an injury. *See, e.g.,* Pilgrim Pub. Interest Lobby v. Dow Chem. Co., No. 95-CV-73286-DT, 1996 WL 903839, at *2 (E.D. Mich. Sept. 25, 1996); *see also* Sierra Club, Lone Star Chapter v. Cedar Point Oil Co., 73 F.3d 546, 557 (5th Cir. 1996) (holding that in a CWA case, an "identifiable trifle" is sufficient for Article III standing). In cases brought under the citizen suit provision of the CWA, establishing causation may only require a showing that the defendant discharged pollutants of a type that would cause or contribute toward the alleged injury. *See, e.g.,* Natural Resources Def. Council, Inc. v. Watkins, 954 F.2d 974, 980 (4th Cir. 1992). In *Friends of the Earth v. Crown Cent. Petroleum Corp.*, 95 F.3d 358 (5th Cir. 1996), however, the court distinguished *Cedar Point* and denied standing to an organization whose members did not use the directly affected waters, but instead used a water body "located three tributaries and 18 miles 'downstream' from" the emitting facility. *See id.* at 361. The Fifth Circuit held that the plaintiffs had to proffer at least some credible evidence that the members' injuries were fairly traceable to the facility's discharges, other than relying on a truism that water flows downstream. *See id.* at 361-62. [Return to text.](#)

[303] *See Florida Audubon Soc'y*, 94 F.3d at 673, 675. In a concurring opinion, Judge Buckley also agreed that the majority had inappropriately adopted new criteria for standing, which "will erode the effectiveness of one of the most important environmental measures of the past generation." *Id.* at 672 (Buckley, J., concurring). [Return to text.](#)

[304] 912 F.2d 478 (D.C. Cir. 1990). [Return to text.](#)

[305] *See id.* at 492. [Return to text.](#)

[306] *Florida Audubon Soc'y*, 94 F.3d at 674 (quoting *City of Los Angeles*, 912 F.2d at 492 (further quoting *City of Davis v. Coleman*, 521 F.2d 661, 671 (9th Cir. 1975))). [Return to text.](#)

[307] *See Florida Audubon Soc'y*, 94 F.3d at 674; *see also supra* note 150 and accompanying text. [Return to text.](#)

[308] *See Florida Audubon Soc'y*, 94 F.3d at 677 (Rogers, J., dissenting). [Return to text.](#)

[309] *See id.* at 679. The dissenters also responded to the causation argument by reviewing the considerable evidence suggesting that the ETBE tax credit would stimulate ethanol production and its accompanying effects. *See id.* at 680-84. Of course, anyone who has followed the political debate over ethanol would realize that the plaintiffs' claims were not without some significance. Needless to say, the entire discussion appears mired in the merits of whether an EIS should have been prepared and the question of the likely environmental consequences of the tax credit. *See id.* Finally, the dissenters indicated that redressibility would be easily solved because the court could order the preparation of an EIS. *See id.* at 684. [Return to text.](#)

[310] 102 F.3d 445 (10th Cir. 1996). [Return to text.](#)

[311] *See id.* at 451-52. [Return to text.](#)

[312] *See id.* at 446. [Return to text.](#)

[313] *See id.* [Return to text.](#)

[314] *See id.* at 446-47. [Return to text.](#)

[315] *See id.* The Forest Service adopted the master plan for the Carson National Forest in 1981 and at that time prepared an EIS. *See id.* at 446. For the amendment to the plan, however, the Forest Service only prepared an environmental assessment (EA), which the Committee alleged was insufficient. *See id.* at 446-47. The Committee argued that the approval of the amended master plan required either an EIS or, if the decision reflected a substantial change in the plan, a supplemental EIS. *See id.* [Return to text.](#)

[316] *See id.* at 450. [Return to text.](#)

[317] *See id.* [Return to text.](#)

[318] *See id.* at 448. [Return to text.](#)

[319] *Id.* [Return to text.](#)

[320] *Id.* at 450. [Return to text.](#)

[321] *Id.* [Return to text.](#)

[322] *Id.* at 451. [Return to text.](#)

[323] *Id.* at 452. [Return to text.](#)

[324] *Id.* at 448-49. [Return to text.](#)

[325] *Id.* at 449. [Return to text.](#)

[326] *See id.* (citing *Douglas County v. Babbitt*, 48 F.3d 1495 (9th Cir. 1995), and *Catron County v. U.S. Fish & Wildlife Service*, 75 F.3d 1429 (10th Cir. 1996) as support). [Return to text.](#)

[327] Recast, the court summarized the injury in fact requirement:

the litigant must show that in making its decision without following the National Environmental Policy Act's procedures, the agency created an increased risk of actual, threatened, or imminent environmental harm; and the litigant must show that the increased risk of environmental harm injures its concrete interests by demonstrating either its geographical nexus to, or actual use of the site of the agency action.

Rio Hondo, 102 F.3d at 449. [Return to text.](#)

[328] *See id.* at 450-51. [Return to text.](#)

[329] *See id.* [Return to text.](#)

[330] *See id.* at 450. [Return to text.](#)

[331] *See id.* at 450-51. [Return to text.](#)

[332] *See id.* at 451-52. [Return to text.](#)

[333] *See id.* at 451. [Return to text.](#)

[334] *See id.* [Return to text.](#)

[335] *Id.* [Return to text.](#)

[336] *See id.* (citations omitted). [Return to text.](#)

[337] *Id.* at 452. [Return to text.](#)

[338] *Id.* Logically, the court's statement belies its own analysis because the showing of any environmental harm should be equally irrelevant if the injury arises from the failure to ensure an informed decision. Whether or not significant environmental impacts will exist goes to the merits of the claim, not to whether a party can bring the claim. [Return to text.](#)

[339] *See id.* [Return to text.](#)

[340] *See id.* "Compliance with the National Environmental Policy Act would avert the possibility that the Forest Service may have overlooked significant environmental consequences of its action." *Id.* [Return to text.](#)

[341] 102 F.3d 1273 (1st Cir. 1996), *cert. denied sub nom.*, *Loon Mountain Recreation Corp. v. Dubois*, 117 S. Ct. 2510 (1997). [Return to text.](#)

[342] *See id.* at 1280-83. [Return to text.](#)

[343] *See id.* at 1277. Although deprived of jurisdiction over the CWA issue, the court nevertheless determined that it could decide the CWA issue in the context of reviewing whether the Forest Service had considered all relevant factors in accordance with its obligation under NEPA. *See id.* at 1295. Therefore, the only significant injury allegedly occurred as a consequence of the asserted NEPA violation. *See id.* [Return to text.](#)

[344] *Id.* at 1283. [Return to text.](#)

[345] *See id.* at 1281. The references to *SCRAP* and *Warth* are curious. The notion that injuries can be shared by many was, as noted earlier, also one of the elements of *Sierra Club*, and the continued efficacy of *SCRAP* has been questioned. *See supra* notes 120-21 and accompanying text; *see also supra* note 302. In *Warth*, the Court did not say that an injury could not be common to everyone. *See Warth v. Seldin*, 422 U.S. 490 (1975). Rather, the Court observed that "when the asserted harm is a 'generalized grievance' shared in substantially equal measure by all or a large class of citizens, that harm alone normally does not warrant exercise of jurisdiction." *Id.* at 499 (citations omitted). Taken at face value, the statement in *Dubois* may suggest that federal air quality standards that impact us all might be immune from suit, although that clearly was not the court's intent. [Return to text.](#)

[346] *See Dubois*, 102 F.3d at 1281. [Return to text.](#)

[347] *See id.* at 1282-83. [Return to text.](#)

[348] *Id.* at 1283. The court further noted that *Dubois*' standing was being decided on a motion to dismiss (as in *SCRAP*) and might not be subject to the same exacting level of scrutiny during a review of a motion for summary judgment. *See id.* at 1283 n.13. This statement, however, seems somewhat disingenuous. Ostensibly, Article III standing is constitutional and thus jurisdictional, but the court decided the merits of the case because three of the parties had filed motions for summary judgment as well. *See id.* at 1283-85 (discussing the appropriate standard of review). In addition, the court explained that *Dubois*' standing was explored beyond the pleading stage during a hearing. *See id.* at 1282-83. [Return to text.](#)

[349] *See id.* at 1281. The court merely recites part of *Defenders'* footnote 7 without ever explaining its relevance to the case. *See id.* at 1281 n.10 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572 n.7 (1992)); *see also supra* note 341 (explaining that the asserted NEPA violation was the only significant violation because the court lacked jurisdiction over the CWA violation). In *Associated Fisheries, Inc. v.*

Daley, 954 F. Supp. 383 (D. Maine 1997), *aff'd*, No. 97-1327, 1997 U.S. App. LEXIS 24436 (1st Cir. Sept. 16, 1997), the district court relied upon *Dubois* to conclude that fishery interests had standing to challenge an action of the Department of Commerce. *See id.* at 386. [Return to text.](#)

[350] *Data Processing*, 397 U.S. at 154. [Return to text.](#)

[351] *See id.* at 154-57. [Return to text.](#)

[352] *See id.* [Return to text.](#)

[353] *See Davis*, *supra* note 41, at 450. [Return to text.](#)

[354] *See Sierra Club*, 405 U.S. at 740. [Return to text.](#)

[355] *See id.* [Return to text.](#)

[356] *See, e.g.*, *Whitmore v. Arkansas*, 495 U.S. 149 (1990); *Allen v. Wright*, 468 U.S. 737 (1984); *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464 (1982); *Duke Power Co. v. Carolina Env'tl. Study Group, Inc.*, 438 U.S. 59 (1978); *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26 (1976); *Warth v. Seldin*, 422 U.S. 490 (1975); *Linda R.S. v. Richard D.*, 410 U.S. 614 (1973); *see also Clarke v. Securities Indus. Ass'n*, 479 U.S. 388 (1987) (clarifying the zone of interests test); *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333 (1977) (articulating when an organization may sue on behalf of its members). [Return to text.](#)

[357] *See Sunstein*, *supra* note 16, at 1452. [Return to text.](#)

[358] Federal Power Act, 16 U.S.C. § 825l(b) (1994); *see supra* note 36. [Return to text.](#)

[359] 950 F. Supp. 1005 (C.D. Cal. 1996). *See also supra* notes 260-62 and accompanying text. [Return to text.](#)

[360] *See, e.g.*, *Western Radio Services Co. v. Espy*, 79 F.3d 896, 902-03 (9th Cir. 1996); *Glickman*, 950 F. Supp. at 1012 n.5. [Return to text.](#)

[361] *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989); *see also Inland Empire Pub. Lands Council v. United States Forest Serv.*, 88 F.3d 754, 758 (9th Cir. 1996) (holding that NEPA ensures a process, not a result). Although the *Glickman* court stated that "NEPA standing is procedural standing," it failed to address how NEPA's procedural focus relates to the zone of interests test. *Glickman*, 950 F. Supp. at 1015 n.10. The decision in *Glickman* is not likely to survive (if it has not already been reversed as of the date of this publication). [Return to text.](#)

[362] Some commentators suggest that the policy goals animating the passage of NEPA should be construed as having a substantive effect. *See Coleman*, *supra* note 35; *Hanks & Hanks*, *supra* note 35; *see also James McElfish, Back to the Future*, 12 ENVTL. FORUM 14 (Sept./Oct. 1995) (arguing that NEPA should be interpreted as having a substantive component); Ronald B. Robie, *Recognition of Substantive Rights Under NEPA*, 7 NAT. RESOURCES LAW 387 (1974); *Yost*, *supra* note 35. [Return to text.](#)

[363] In *Plenert*, the Ninth Circuit even relied on an earlier NEPA case for its analysis. *See Plenert*, 63 F.3d at 919-20 (citing *Nevada Land Action Ass'n v. U.S. Forest Serv.*, 8 F.3d 713, 716 (9th Cir. 1993)). [Return to text.](#)

[364] *See Sierra Club*, 405 U.S. at 734-35; *see also supra* notes 64-74 and accompanying text. [Return to text.](#)

[365] *See Fletcher*, *supra* note 15, at 231-33 (commenting that the injury in fact requirement "is a singularly

unhelpful, even incoherent, addition to the law of standing"); Sunstein, *supra* note 15, at 188-92; Sax, *supra* note 2. [Return to text.](#)

[366] *See* Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 374 (1989); Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350, 352 (1989); Natural Resources Defense Council, Inc. v. Morton, 458 F.2d 827, 838 (D.C. Cir. 1972). [Return to text.](#)

[367] *See* Babbitt, 48 F.3d at 1501. [Return to text.](#)

[368] *See* Catron County, 75 F.3d at 1433. [Return to text.](#)

[369] *See* Florida Audubon Society, 54 F.3d at 875; Rio Hondo, 102 F.3d at 452; *see also supra* notes 286-95 and 323-30 and accompanying text. [Return to text.](#)

[370] *See, e.g.,* Seattle Audubon Soc'y v. Espy, 998 F.2d 699, 703 (9th Cir. 1993); Idaho Conservation League v. Mumma, 956 F.2d 1508, 1514 (9th Cir. 1992). [Return to text.](#)

[371] In *Salmon River Concerned Citizens v. Robertson*, 32 F.3d 1346 (9th Cir. 1994), for example, the plaintiffs challenged the adequacy of an EIS prepared by the Forest Service to accompany the Service's decision to use herbicides as part of its reforestation program. *See id.* at 1348. The court emphasized that the plaintiffs had not alleged a mere procedural injury, but had demonstrated a concrete interest, namely, the substantive harm that might occur from the use of the herbicides. *See id.* at 1354-55. The court, therefore, concluded that the plaintiffs "have a concrete interest apart from their interest in having procedure observed." *Id.* at 1355 n.14. The concrete interest was a geographical nexus or actual use of the area affected by the herbicides. *See id.* at 1355. The court's analysis focused on the harm that might occur from the agency's substantive decision, not from the harm that may occur as a result of the alleged procedural violation, but the analysis shifted focus when the court added that "[s]peculation that the application of herbicides might not occur is irrelevant. 'The asserted injury is that environmental consequences might be overlooked,' as a result of deficiencies in the government's analysis under environmental statutes." *Id.* (citations omitted); *see also* Sierra Club v. USACE, 935 F. Supp. 1556, 1571 (S.D. Ala. 1996) (disagreeing with the characterization of the plaintiff's injury as procedural, stating that "the plaintiffs allege environmental and aesthetic losses which, they claim, would not have been sustained had the proper procedures been followed. Thus, it is not the procedures themselves, but the effect of the Corps' alleged divergence from such procedures" that is being challenged). [Return to text.](#)

[372] *See, e.g.,* Rio Hondo, 102 F.3d at 450-51; Catron County, 75 F.3d at 1433; Douglas County, 48 F.3d at 1501; Sierra Club v. Marita, 46 F.3d 606, 612-13 (7th Cir. 1995); *Salmon River*, 32 F.3d at 1355; *Seattle Audubon Soc'y*, 998 F.2d at 703; *see also* Sierra Club v. Pena, 962 F. Supp. 1037 (N.D. Ill. 1997). [Return to text.](#)

[373] *See, e.g.* Dubois, 102 F.3d at 1283; Rio Hondo, 102 F.3d at 448-51; National Wildlife Fed'n v. Espy, 45 F.3d 1337, 1341 (9th Cir. 1995); Portland Audubon Soc'y v. Babbitt, 998 F.2d 705, 708 (9th Cir. 1993); *Seattle Audubon Soc'y*, 998 F.2d 699, 703 (9th Cir. 1993); Friends of the Earth v. United States Navy, 841 F.3d 927, 931-32 (9th Cir. 1988); Oregon Env'tl. Council v. Kunzman, 817 F.2d 484, 491 (9th Cir. 1987); Southwest Ctr. for Biological Diversity v. FERC, 967 F. Supp. 1166, 1171 (D. Ariz. 1997); Swan View Coalition, Inc. v. Turner, 824 F. Supp. 923, 929-30 (D. Mont. 1992). The same is generally true for other types of environmental cases. *See, e.g.,* Alaska Wildlife Alliance v. Jensen, 108 F.3d 1065 (9th Cir. 1997) (challenging the legality of commercial fishing in Glacier Bay, with the organizational members' recreational and aesthetic experience affected by the fishing); Sierra Club v. Cedar Point Oil Co., 73 F.3d 546, 555-58 (5th Cir. 1996) (bringing a citizen suit under the CWA, where plaintiff's members used the allegedly affected waters, and two of the members also lived near the waters); Mt. Graham Red Squirrel v. Espy, 986 F.2d 1568, 1581-82 (9th Cir. 1993) (finding standing where the project threatened the red squirrel and the plaintiff's members enjoyed observing the red squirrel in its natural habitat); Didrickson v. Department of the Interior, 982 F.2d 1332 (9th Cir. 1992) (bringing a challenge to a regulation under the Marine Mammal Protection Act of 1972, where the challenging party had an interest in the observation

and study of sea otters in Alaska); *Sierra Club v. Tri-State Generation & Transmission Ass'n*, 173 F.R.D. 275 (D. Colo. 1997) (suing plaintiff challenged the defendant under the citizen suit provision of the CAA, where plaintiff alleged that its members lived, worked, and recreated in the area and their ability to breathe clean air and view the surroundings would be adversely affected); *Ross v. Federal Highway Admin.*, No. 97-2132-GTV, 1997 U.S. Dist. LEXIS 11917 (D. Kan. July 17, 1997) (claiming plaintiffs adjacent land would be affected); *Pilgrim Pub. Interest Lobby v. Dow Chem. Co.*, No. 95-CV-73286-DT, 1996 WL 90389, at *2, *3 (E.D. Mich. Sept. 25, 1996). Conservation groups have been able to maintain a CWA citizen suit even in the absence of any serious environmental harm. *See, e.g., Friends of the Earth v. Laidlaw Env'tl. Serv.*, 956 F. Supp. 588 (D.S.C. 1997). In *Cedar Point*, for instance, the Fifth Circuit expressed little interest in examining whether any harm actually existed, observing that the plaintiff's members were sufficiently "concerned" and that there was a sufficient threat of future injury. *See Cedar Point*, 73 F.3d at 556-57; *see also supra* note 302. However, in *Public Interest Research Group, Inc. v. Magnesium Elektron*, 123 F.3d 111 (3d Cir. 1997), the Third Circuit reconsidered the issue of standing after the lower court concluded that the defendant's CWA violation did not pose a threat to the body of water that plaintiffs' members used. *See id.* at 117-23. The court accepted that the members used the water body and that the defendant violated the Act, but it required the members, through the organization, to show that the defendant's conduct caused injury to the waterway. *See id.* at 119-23. [Return to text.](#)

[374] *See Florida Audubon Soc'y*, 94 F.3d at 667-69. [Return to text.](#)

[375] *See id.* [Return to text.](#)

[376] 936 F. Supp. 13 (D.D.C. 1996). [Return to text.](#)

[377] *See id.* at 16-18. [Return to text.](#)

[378] *See id.* at 18. [Return to text.](#)

[379] *See Mountain States Legal Found. v. Glickman*, 92 F.3d 1228, 1235 (D.C. Cir. 1996). [Return to text.](#)

[380] In *Babbitt*, for instance, the court specifically commented that "[t]he district court was correct to equate the 'geographic nexus' test of past Ninth Circuit cases with the 'concrete interest' test of *Lujan*." *Babbitt*, 48 F.3d at 1501 n.5. [Return to text.](#)

[381] *See Defenders of Wildlife*, 504 U.S. at 564; *see also supra* note 154 and accompanying text. [Return to text.](#)

[382] *See supra* note 154 and accompanying text. [Return to text.](#)

[383] *See generally* Michael J. Gippert & Vincent L. DeWitt, *The Nature of Land and Resource Management Planning Under the National Forest Management Act*, 3 THE ENVTL. LAW. 149 (1996) (discussing land use plans adopted by the Forest Service); John P. Hogan, Note, *The Legal Status of Land and Resource Management Plans for the National Forests: Paying the Price for Statutory Ambiguity*, 25 ENVTL. L. 865 (1995); Jack Tuholske & Beth Brennan, *The National Forest Management Act: Judicial Interpretation of a Substantive Environmental Statute*, 15 PUB. LAND L. REV. 53 (1994); Charles F. Wilkinson & H. Michael Anderson, *Land and Resource Planning in the National Forests*, 64 ORE. L. REV. 1 (1985). [Return to text.](#)

[384] *See generally* Beth Brennan & Matt Clifford, *supra* note 15 (discussing standing to challenge these land use plans); Paul A. Garrahn, Note, *Failing to See the Forest For the Trees: Standing to Challenge National Forest Management Plans*, 16 VA. ENVTL. L.J. 145 (1996); Kelly Murphy, *Cutting Through the Forest of the Standing Doctrine: Challenging Resource Management Plans in the Eighth and Ninth Circuits*, 18 U. ARK. LITTLE ROCK L.J. 223 (1996); Miles A. Yanick, Note, *Loss of Protection As Injury in Fact: An Approach to Establishing Standing to Challenge Environmental Planning Decisions*, 29 U. MICH. J.L. REF. 857 (1996). [Return to text.](#)

[385] *See, e.g.*, *Sierra Club v. Marita*, 46 F.3d 606 (7th Cir. 1995); *Resources, Ltd., Inc. v. Robertson*, 8 F.3d 1394 (9th Cir. 1993); *Portland Audubon Soc'y v. Babbitt*, 998 F.2d 705 (9th Cir. 1993); *Seattle Audubon Soc'y v. Espy*, 998 F.2d 699 (9th Cir. 1993); *Idaho Conservation League v. Mumma*, 956 F.2d 1508 (9th Cir. 1992). The Seventh Circuit correctly responded that "[o]nce the plan has passed administrative review, the procedural injury has been inflicted. Unless a plaintiff's purported interest in the matter is wholly speculative, waiting any longer to address that injury makes little sense." *Marita*, 46 F.3d at 612. This issue will likely get resolved by the Supreme Court in *Sierra Club v. Thomas*, 105 F.3d 248 (6th Cir. 1997), *cert. granted sub nom.*, *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 66 U.S.L.W. 3296 (U.S. Oct. 20, 1997) (No. 97-16), where standing and ripeness were considered almost in the same breath, with the court concluding that the challenge to the plan was justiciable. *See id.* at 250. Also, in *Citizens for a Better Environment v. Steel Co.*, 90 F.3d 1237 (7th Cir. 1996), *cert. granted*, *Steel Co. v. Citizens for a Better Environment*, 117 S. Ct. 1079 (1997), the Court may address whether Congress can confer standing on citizens to sue for wholly past violations of the Emergency Planning and Community Right-to-Know Act of 1986, in circumstances where the plaintiff has not alleged any current or future injury in fact. [Return to text.](#)

[386] *See* *Sierra Club v. Robertson*, 28 F.3d 753, 759 (8th Cir. 1994). [Return to text.](#)

[387] *See id.* [Return to text.](#)

[388] *Wilderness Soc'y v. Alcock*, 83 F.3d 386, 389-90 (11th Cir. 1996). The court added that the confusion between the two doctrines is not surprising because "[b]oth doctrines focus initially on the injury to the person bringing the action." *Id.* at 390. A requirement for imminence in the likelihood of the environmental effects is more appropriately addressed where the plaintiff has sought injunctive relief or where a particular statute requires an imminent and substantial endangerment to health or the environment. *See, e.g.*, *Forest Conservation Council v. Rosboro Lumber Co.*, 50 F.3d 781 (9th Cir. 1995); *Dague v. City of Burlington*, 935 F.2d 1343, 1355 (2d Cir. 1991); *Chemical Weapons Working Group, Inc. v. United States Dep't of the Army*, 935 F. Supp. 1206, 1216 (D. Utah 1996), *aff'd*, 111 F.3d 1485 (10th Cir. 1997); *Loggerhead Turtle v. Volusia County Council*, 896 F. Supp. 1170 (M.D. Fla. 1995), *appeal pending*; *Village of Wilsonville v. SCA Serv., Inc.*, 426 N.E.2d 824 (Ill. 1981). [Return to text.](#)

[389] *See Defenders of Wildlife*, 504 U.S. at 572-73; *see also supra* notes 167-69 and accompanying text. [Return to text.](#)

[390] The *Robertson* Court observed that compliance with procedures is "almost certain to affect the agency's substantive decision." *Robertson*, 490 U.S. at 350. [Return to text.](#)

[391] *Committee to Save the Rio Hondo v. Department of Agric.*, 102 F.3d 445, 450-51 (10th Cir. 1996). [Return to text.](#)

[392] *See Rio Hondo*, 102 F.3d at 451-52. [Return to text.](#)

[393] *See id.* [Return to text.](#)

[394] *See Marita*, 46 F.3d at 613 ("To the extent that the Sierra Club suffered a procedural injury, it is directly tied to an underlying, particularized interest."). [Return to text.](#)

[395] When a plaintiff is not alleging injury from an increased risk of environmental harm, causation and redressibility become even more problematic. *See Baca v. King*, 92 F.3d 1031, 1037 (10th Cir. 1996); *Mount Evans Co. v. Madigan*, 14 F.3d 1444, 1451 (10th Cir. 1994) (economic interest challenging Forest Service decision not to rebuild a structure on Forest System lands); *Wyoming v. Lujan*, 969 F.2d 877, 881-82 (10th Cir. 1992) (challenge to an exchange transaction when injury was economic); *Desert Citizens Against Pollution v. Bisson*, 954 F. Supp. 1430 (S.D. Cal. 1997) (challenge to land exchange); *Lodge Tower Condominium Ass'n v. Lodge Properties, Inc.*, 880 F. Supp. 1370, 1381 (D. Colo. 1995), *aff'd*, 85

F.3d 476 (10th Cir. 1996); *see also* Earth Island Inst. v. Christopher, 913 F. Supp. 559, 564-65 (Ct. Int'l Trade 1995) (Georgia Fishermen's Association's economic interests not sufficient to press ESA issue). [Return to text.](#)

[396] For example, in *Sierra Club v. Marita*, the court indicated that redressibility was not an issue. *See Marita*, 46 F.3d at 613 n.4; *see also supra* notes 270-272 (discussing *Douglas County v. Babbitt*, 48 F.3d 1495 (9th Cir. 1995)). *See generally* Gatchel, *supra* note 253, at 100-05. [Return to text.](#)

[397] *See* Portland Audubon Soc'y v. Babbitt, 998 F.2d 705, 708 (9th Cir. 1993); Idaho Conservation League v. Mumma, 956 F.2d 1508, 1517-18 (9th Cir. 1992); Colorado Env'tl. Coalition v. Lujan, 803 F. Supp. 364, 369 (D. Colo. 1992); *see also* Florida Audubon Soc'y v. Bentsen, 94 F.3d 658, 684 (D.C. Cir. 1996) (Rogers, J., dissenting). [Return to text.](#)

[398] In *Mountain States*, for instance, the court responded in the following manner to the argument that the plaintiffs' economic injury would not be redressed if the agency, in this case, were forced to follow the law because plaintiffs had no legal interest in any specific outcome in the agency decisionmaking process:

We need not resolve this conflict here. So far as appears no court in the modern era has treated a garden-variety substantive defect in plaintiffs' claim as defeating redressibility. Unlike [other situations], the alleged impediment to redress stems not from a defect in the court's institutional power to order a specific remedy but merely from the interplay of various statutes bearing on the substantive validity of the Forest Service decision. Assuming that purely legal remedial gaps can establish a lack of redressibility, the substantive impact of the ESA is not a remedial gap at all; to treat it as an impairment of redressibility would seemingly allow any merits defect in plaintiffs' claim to defeat their standing. Accordingly the ESA's substantive provisions are irrelevant on this point.

Mountain States Legal Found. v. Glickman, 92 F.3d 1228, 1234 (D.C. Cir. 1996). Yet another judicial approach is to ignore these requirements. *See, e.g.,* Oregon Natural Desert Ass'n v. Green, 953 F. Supp. 1133, 1141 (D. Or. 1997); Colorado Env'tl. Coalition v. Bureau of Land Management, 932 F. Supp. 1247, 1250 (D. Colo. 1996); Greater Gila Biodiversity v. United States Forest Serv., 926 F. Supp. 914, 916 (D. Ariz. 1994). [Return to text.](#)

[399] *See* City of Klamath Falls, Oregon v. Babbitt, 947 F. Supp. 1, 5 (D. D.C. 1996). [Return to text.](#)

[400] In NEPA, Congress declared that it was this nation's policy, in part, to "encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation." National Environmental Policy Act of 1969 § 102, 42 U.S.C. § 4321 (1994). Elsewhere, Congress declared it a national goal to eliminate the discharge of pollution into the nation's waters by 1985. *See* 33 U.S.C. § 1251(a)(1) (1994). The 1970 Clean Air Amendments were equally ambitious in establishing timetables, *e.g.,* Clean Air Amendments of 1970 § 304, Pub. L. No. 91-604, § 6, 84 Stat. 1676, 1690 (1970) (mobile emissions), with the goal of protecting and enhancing the quality of the nation's air resources. *See* 42 U.S.C. § 7401(b)(1) (1994). In the ESA, Congress declared that the species being protected "are of esthetic, ecological, educational, historical, recreational, and scientific value to the *Nation and its people*." Endangered Species Act, 16 U.S.C. § 1531(a)(3) (1994) (emphasis added). [Return to text.](#)

[401] *See* RACHAEL CARSON, SILENT SPRING (1962). [Return to text.](#)

[402] Oregon Natural Resources Council, Inc. v. Kantor, 99 F.3d 334, 339 (9th Cir. 1996). [Return to text.](#)

[403] For instance, how does one establish harm from the EPA's decision on the appropriate level for particulate matter under the Clean Air Act, when the debate is over the science surrounding the level of harm? *See* Robert Yuhnke, *Particles of Concern*, 14 ENVTL. FORUM 24 (Mar./Apr. 1997). Perhaps because

air quality is perceived to affect us all, standing to challenge federal air quality decisions is not typically an issue. *See, e.g.*, *Environmental Defense Fund v. EPA*, 82 F.3d 451 (D.C. Cir. 1996) (challenge to EPA's Transportation Conformity Rule). *But cf.* *Louisiana Env'tl. Action Network v. Browner*, 87 F.3d 1379, 1382-83 (D.C. Cir. 1996). However, not all diffuse harms are so easily perceived. Judge Posner, for example, once called an alleged right to view wildlife as a "diffuse and impalpable deprivation." *Village of Elk Grove Village v. Evans*, 997 F.2d 328, 329 (7th Cir. 1993). In *Humane Society v. Babbitt*, the D.C. Circuit illustrated the difficulty with establishing standing when there is no identifiable harm to a specific place or use of an area. *See Humane Soc'y*, 46 F.3d at 93. The Humane Society challenged an interpretation of the ESA that would allow an endangered Asian elephant from being transported interstate or abroad. *See id.* at 95. The elephant already had been transferred from a zoo to a corporation that apparently intended to make the elephant into a circus animal, and the company needed a certificate from the USFWS in order to transport the elephant. *See id.* The Society challenged the issuance of the certificate exempting the company from the ESA's prohibition on transport. *See id.* The Society sought to establish harm through one of its members who had visited the zoo and would be harmed by losing the opportunity to study Asian elephants generally. The Society also asserted that harm could be established by others who lamented the lost opportunity to observe the elephant at the zoo. *See id.* at 97-99. Although the court did not foreclose the possibility in another case, the court observed that the Society had not shown how the loss of this one particular elephant threatened the ability to observe and study Asian elephants generally, particularly considering the Society did not assert that its members intended to return to the zoo. *See id.* The court also rejected the Society's claim of procedural injury, indicating that the injury must result from the denial of the statutorily proscribed procedure and held that in this case it did not. *See id.* at 99. The court then added that the plaintiffs failed to satisfy the requirements for causation and redressibility because the zoo already had donated the elephant, and neither the harm nor the relief related to the elephant's return to the zoo. *See id.* at 100-01; *see also* *Citizens to End Animal Suffering & Exploitation v. New England Aquarium*, 836 F. Supp. 45 (D. Mass. 1993).

Dr. Robin Silver, a committed advocate for the protection of endangered species, was granted intervention as of right in an ESA challenge by a coalition of counties to the listing of the Mexican Spotted Owl, in a case involving a professional and vocational interest in certain species. *See Coalition of Ariz./N.M. Counties for Stable Econ. Growth v. Babbitt*, 100 F.3d 837 (10th Cir. 1996). Dr. Silver's interest in the litigation was that he had photographed and studied the owl in the wild and had a persistent record of advocacy for its protection. *See id.* at 839, 841. Using the doctrine of standing to decide whether to grant intervention, the court indicated that "Dr Silver's interest in the Owl is legally protectable . . ." *Id.* at 841. The court stated that *Defenders of Wildlife* specifically recognized that the desire to use or observe animal species is a cognizable interest for purpose of standing. *See id.* Of course, these same interests could apply to virtually all environmental organizations and their members; the analysis, therefore, avoids the issue of whether the legally cognizable interest is joined with a showing of individualized injury. *See id.*; *see also* *Fund for Animals v. Babbitt*, 89 F.3d 128, 134 (2nd Cir. 1996) (in a challenge to a moose hunt program, defendant did not challenge plaintiff's asserted professional, recreational, aesthetic and information interest or plaintiff's interest in receiving and commenting upon information as part of NEPA compliance as an injury in fact); *Earth Island Inst. v. Christopher*, 913 F. Supp. 559, 568-72 (Ct. Int'l Trade 1995). [Return to text.](#)

[404] Sax, *supra* note 2, at 88. [Return to text.](#)

[405] *See supra* note 103 and accompanying text. [Return to text.](#)

[406] *See supra* note 75 and accompanying text. [Return to text.](#)

[407] *See* *Light v. United States*, 220 U.S. 523, 537 (1911) ("All the public lands of the nation are held in trust for the people of the whole country.") (quoting *United States v. Trinidad Coal & Coking Co.*, 137 U.S. 160 (1890)). [Return to text.](#)

[408] People, for instance, may "feel the need for pristine places, places substantially *unaltered* by man.

Even if we do not visit them, they matter to us. We need to know that though we are surrounded by buildings there are places where the world goes on as it always has." BILL MCKIBBEN, *THE END OF NATURE* 55 (1989). Congress and the American public endorsed this notion in the Wilderness Act, 16 U.S.C. §§ 1131-1136 (1994). For a further discussion of the concept of standing to preserve interests for future generations, see Raymond A. Just, Note, *Intergenerational Standing Under the Endangered Species Act: Giving Back the Right to Biodiversity After Lujan v. Defenders of Wildlife*, 71 TUL. L. REV. 597 (1996). [Return to text.](#)

[409] In these situations, "the legal questions presented to the court will be resolved, not in the rarefied atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action." *Valley Forge Christian College v. Americans United for Separation of Church & State*, 454 U.S. 464, 472 (1982). [Return to text.](#)

[410] *See, e.g., Flast v. Cohen*, 392 U.S. 83, 96-97 (1968) (discussing advisory opinions). The Court has been less than careful in transplanting standing analysis from cases involving constitutional disputes to those involving alleged violations of statutory programs. In non-environmental cases, the Court typically articulated its concern with deciding cases involving "abstract" injuries and "generalized grievances," sometimes denying standing on the grounds that the claim of injury was not *judicially cognizable*. *See, e.g., Allen v. Wright*, 468 U.S. 737, 754-55 (1984). In environmental cases, however, the Court usually has accepted that the injury is *judicially cognizable*, and thus, the need for any further requirement should have been unnecessary. [Return to text.](#)

[411] It may well be that some showing of individualized injury is necessary to justify implying a cause of action under a constitutional provision. *See Fletcher, supra* note 15, at 265-72, 280. [Return to text.](#)

[412] *See Sunstein, supra* note 15, at 170-80. [Return to text.](#)

[413] *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 576 (1992). [Return to text.](#)

[414] *Fletcher, supra* note 15, at 223-24. [Return to text.](#)

INTERNATIONAL PESTICIDE TRADE: IS THERE ANY HOPE FOR THE EFFECTIVE REGULATION OF CONTROLLED SUBSTANCES?

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I. INTRODUCTION

"My pregnancy was so normal, . . . they didn't even do an ultrasound test. Two or three days after the birth, I found out something was terribly wrong." The child of Eugenia Mejias was born with a swollen brain, an exposed and twisted spine, as well as deformed hands and feet. Like many other parents in developing countries, Eugenia Mejias' child was the victim of pesticide exposure.^[1]

In the last decade, the international community has grown increasingly concerned with pesticides and their effects on human health and the environment, with particular emphasis on the threat posed in developing countries.^[2] Workers in developing countries are exposed to pesticides in the course of their work to provide produce for domestic consumption as well as for export to developed countries like the United States (U.S.).^[3] Because export dollars are so valuable to developing countries, there is added pressure to produce a higher yield of produce. These countries often obtain a higher yield through the use of pesticides considered too dangerous to use in developed countries.^[4] Therein lies the crisis, large international corporations are able to sell pesticides abroad that cannot be sold in the U.S. These corporations sell pesticides that are classified as so harmful to human health and the environment, that their use cannot be justified for any purpose.^[5] In response to worldwide concerns, the United Nations has advanced some important initiatives to regulate the international pesticide trade. For example, in 1985 the United Nations Food and Agriculture Organization (FAO) published the International Code of Conduct (Code) on the Distribution and Use of Pesticides,^[6] giving participating countries a formal method to refuse or consent to hazardous imports. FAO designated this method the "Prior Informed Consent" (PIC) procedure.^[7] Developed and developing countries alike welcomed PIC because this procedure possesses a common sense approach to the problem by providing an important link in the transfer of information on pesticides to developing countries that otherwise would not have access to the information.^[8]

The United Nations London Guidelines for the Exchange of Information on Chemicals in International Trade (London Guidelines)^[9] and United Nations Codex Alimentarius Commission (Codex)^[10] represent more recent efforts to regulate pesticide trade. The London Guidelines attempt to incorporate PIC procedures while Codex attempts to harmonize standards for maximum residue levels (MRLs) for participating nations.^[11] The most frequent criticism of these efforts is that they are voluntary, providing no enforcement scheme to ensure that PIC requirements are followed before pesticides are exported.^[12]

Part II of this article describes why there is a need for improved regulation with a discussion of the impact conventional use of pesticides has on human health and the environment. Part III discusses the concept of PIC. Part IV examines the substantive provisions of the London Guidelines and compares them to similar conventions attempting to control trade in pesticides. Part V reviews the substantive provisions of the FAO Code of Conduct. Part VI examines the substantive provisions of the Codex. Part VII reviews the U.S. regulatory initiatives and areas where they fail to address international concerns. This is followed by Part VIII which illustrates the U.S.'s history of neglect of pesticide trade and how this neglect may effect U.S. consumers. Part IX concludes that not only are improved exposure intervention programs needed, but nations and industries should follow stricter notification and consent procedures.

II. THE NEED FOR FURTHER REGULATION

The list of the world's most hazardous agrichemicals, originally called the "dirty dozen," has grown from twelve to eighteen.^[13] U.S. manufacturers recently exported fifty-eight million pounds of these pesticides to more than twelve countries.^[14] Notwithstanding regulatory obstacles in importing countries, eleven million pounds of the pesticides have been exported to countries where they are officially banned.^[15] For example, even though Singapore banned

Chlordane more than a decade ago, manufacturers continue to export the chemical there.[\[16\]](#)

A small number of international corporations dominate the international pesticide market. The ten largest companies, all of which are based in Europe or the U.S., control seventy-three percent of the market share.[\[17\]](#) In 1994, the U.S. alone exported \$1.9 billion worth, making it a key export industry for the U.S.[\[18\]](#) Transnational companies export much of their production outside the U.S. and Europe, where lack of information, resources and controls often result in misuse.[\[19\]](#) Many countries in the developing world have inadequate laws to ensure proper use of chemicals.[\[20\]](#) Where appropriate regulations exist, these countries often lack the resources necessary for implementation and enforcement.[\[21\]](#)

When pesticides leave U.S. shores for export, they are no longer subject to regulation. The U.S. ships pesticides to any country, which are then used for any purpose regardless of the risk to human health or the environment. For example, the U.S. shipped more than 114,600 tons of banned pesticides to developing nations between 1992 and 1994.[\[22\]](#) Although the requirement exists to specifically name exports in shipping manifests, the majority of the exports were unnamed.[\[23\]](#) Because agriculture is often the largest segment of the economy in developing countries, pesticide exporters naturally find a viable market. Since developing countries have limited resources, they have trouble regulating the pesticides imported to their area, due particularly to pressing concerns of economic development and political stability, which take priority over health and the environment. The problem may also be overlooked because pesticides increase crop yield, which results in economic progress.

Presently, no international regulation or policy requires the pesticide industry to share responsibility for safety and efficiency in the distribution or application of pesticides. The effects of chemical misuse on human health and the environment, however, provide a strong incentive for international commitment to achieve an effective and comprehensive solution.

A. Adverse Effects of Pesticides

Pesticides play a vital role in protecting crops and livestock, as well as in controlling vector-borne diseases.[\[24\]](#) In many countries, pesticides also present significant dangers to people and the environment.[\[25\]](#) The danger to people arises from residues in food crops and livestock, as well as from the handling of pesticides by farmers.[\[26\]](#) Farm workers suffer from pesticide exposure the most, with an estimated 20,000 deaths each year.[\[27\]](#) Ninety-nine percent of these deaths occur in developing countries due to farming practices, storage of pesticides in living areas, location of residential areas near application sites, method of application and type of equipment used.[\[28\]](#) Pesticides also cause water pollution, soil degradation, insect resistance and resurgence, and the destruction of native flora and fauna.[\[29\]](#)

Of all the potential hazards of pesticides, the most serious is the risk to human health.[\[30\]](#) Adverse effects of exposure include cancer, reproductive impairment, mutation and neuro-toxicity.[\[31\]](#) Recently, pesticides have also been found to cause endocrine disruption.[\[32\]](#) The pesticide bio-accumulates in human tissue, mimicking estrogen and disrupts regular hormonal activity.[\[33\]](#)

The high incidence of injury in developing countries primarily results from inadequate information on proper application methods, insufficient government resources to monitor pesticide use, and the greater availability of highly toxic substances than in developed nations.[\[34\]](#) For example, field and packing plant workers in Chile have little knowledge about the hazards of pesticides.[\[35\]](#) The workers wear no protective clothing and continue to work in the fields while airplanes or tractors pass by spraying produce.[\[36\]](#) The workers are primarily young, transient, uneducated individuals with little political influence to improve the situation.[\[37\]](#)

Common environmental problems associated with pesticides include contamination of water resources and insect resistance and resurgence.[\[38\]](#) Some pesticides deplete the ozone and exacerbate the greenhouse effect.[\[39\]](#) Further, diffuse aerial spraying of fields damages non-target crops and may destroy non-target species.[\[40\]](#) Pesticides that enter the waterways through run-off result in fish kills.[\[41\]](#) Wild animals and domestic livestock also ingest pesticides by drinking contaminated water or by eating smaller animals and vegetation in which toxic chemicals exist.[\[42\]](#) Persistent pesticides like DDT do not dissolve, and concentrate in the fatty tissue of animals.[\[43\]](#) DDT bio-accumulates, moving up the food chain until it finally becomes part of the human diet.[\[44\]](#)

Excessive use of pesticides leads to the destruction of natural enemies and the resurgence of pest species, which in turn leads to increased spraying.^[45] This process is commonly known as the "pesticides treadmill,"^[46] which leads to the resistance of pesticides.^[47] In extreme cases, a pesticide can create a more destructive "super pest" by altering the genetic composition of the insect.^[48] In India, the introduction of DDT to reduce malaria resulted in the number of cases dropping from 7.5 million to 50,000; however, increased resistance eventually raised the number back to 6.5 million.^[49] Although only 182 existed in 1965, there are now more than 900 pesticide and herbicide resistant species of insects, weeds, and plant pathogens, while seventeen insects show resistance to all major categories of insecticides.^[50] In addition, resistant species of weeds have grown from twelve to eighty-four.^[51]

The foregoing information illustrates that agrichemicals have a profound and significant impact on human health and the environment. However, a solution must also objectively evaluate why these substances are so highly valued. Pesticides increase the food yield for an ever-increasing populace.^[52] Measuring the environmental and health damage that results from pesticide exposure against the famine that would result without pesticides is a model not yet constructed.^[53]

DDT probably best illustrates the double-edged nature of pesticides. Although restricted from use in the U.S. in 1972, several developing countries still use it as an effective defense against vector-borne diseases like malaria, yellow fever, river blindness, elephantiasis and sleeping sickness.^[54] Developing countries must consider what is more beneficial to public health by balancing the disabling or fatal effects of vector-borne disease with the disabling or fatal effects of DDT use. This is particularly important since DDT is a known carcinogen found to increase the risk of breast cancer in women exposed to the pesticide by a magnitude of four.^[55]

Vietnam exemplifies the abuse of pesticides. Since Vietnam's shift to a free market economy in 1988, agricultural exports have been increasing with the use of pesticides.^[56] Emphasizing agriculture, Vietnam has enjoyed steady economic growth.^[57] To maintain yield, farmers have applied increasing amounts of DDT to fight pest resistance.^[58] Unfortunately, this practice shows little sensitivity to the long-term adverse effects on the environment and sustainable economic development.^[59] Soil acidification and salinization has occurred in conjunction with contamination of fisheries and water resources.^[60] The U.S. exhibits little sensitivity to the issue. The Pesticide Action Network (PAN), a special interest group tracking pesticide exports, reported that the U.S. exported fifty-eight million pounds of banned pesticides between 1991 and 1994,^[61] making the U.S. a key contributor to the degradation of human health and the environment in Vietnam.

B. The "Circle of Poison"

As early as 1981, various pesticides restricted in the U.S. were exported to developing countries, only to return as residues concentrated in imported foods.^[62] This problem has been termed the "circle of poison."^[63] In 1989, the General Accounting Office (GAO) reported that the circle of poison was a concern because the EPA was not monitoring the content, quantity, or destination of exported, unregistered pesticides under sections 17(a) and 17(b) of the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA).^[64] Specifically, the GAO found that the EPA "does not know whether export notices are being submitted, as required under FIFRA" and that "notices were not sent for three pesticides (out of four) that were voluntarily canceled [by the manufacturer] because of concern about toxic effects."^[65]

The U.S. is a leading producer of pesticides, contributing fourteen percent of the world's export market.^[66] At least twenty-five percent of the four to six hundred million pounds of pesticides exported annually are not registered with the EPA.^[67] The EPA canceled or suspended some of these chemicals because of the dangers they pose to human health and the environment, and in some cases manufacturers voluntarily withdrew their products.^[68] Because the U. S. exports a high percentage of unregistered pesticides, these chemicals have a high potential to reenter this country as residues on imported foods. For example, Chile is a large market for U.S. manufacturers of pesticides.^[69] Included in the 1,460 pesticides used by Chile are Lindane, a substance banned in the U.S.; Paraquat, which contains dioxin; and Parathion, a toxic organic phosphate that has restricted use in the U.S.^[70] In addition, Chile uses Methyl Bromide.^[71] Ironically, these pesticides are either banned or restricted in the U.S., but may be used on produce that is eventually imported by the U.S.^[72]

III. THE CONCEPT OF PRIOR INFORMED CONSENT

Prior Informed Consent (PIC) is the regulatory process countries use to control products for export by providing notification and adequate data to the importing country.^[73] PIC presently exists as the most effective way to regulate the international trade of pesticides and prevent damaging exposure because it encourages importing countries to make well-informed decisions through an affirmative deliberation.^[74] After reviewing the notification, importing countries must give express consent before exporters are permitted to ship pesticide products.^[75] PIC preserves the sovereignty and self-determination of an importing state, and enhances the ability of a country to protect its citizens and environment.^[76] However, the PIC system is flawed. Opponents argue that the process duplicates information exchange systems already in existence.^[77] The system is also impractical, because it burdens a high-speed industry that requires rapid movement of agricultural products to prevent spoilage, food shortages, and famine.^[78]

Finally, PIC does nothing to help developing countries build an enforcement and regulatory foundation that will assist in evaluating a pesticide for import. Even if developing countries had the regulatory structure to make informed decisions on what pesticides to import, there is no mechanism to force manufacturers to comply. Manufacturers have routinely violated PIC provisions in the course of their pesticide trade.^[79]

IV. THE LONDON GUIDELINES

The United Nations Environmental Programme Governing Council (EPGC) adopted the London Guidelines on June 17, 1987,^[80] and amended them in 1989 to introduce voluntary measures for information exchange on pesticides.^[81] Although the London Guidelines attempt to increase pesticide safety through the exchange of information, they do not adequately ensure compliance with PIC requirements because they are voluntary.^[82]

The PIC procedure adopted in 1989 provides a structure for exporting countries to formally obtain the consent of importing countries on future shipments of "banned" and "severely restricted" pesticides.^[83] Participating countries also have the opportunity to explain their policies regarding the future receipt of banned or restricted products.^[84] Decisions to ban or severely restrict a chemical are circulated to all participating countries.^[85] Notices provided to importing countries also appear in the International Register of Potentially Toxic Chemicals (IRPTC),^[86] which maintains a file of circulated notices.^[87] Under the IRPTC, each participating nation is assigned a Designated National Authority (DNA) to exchange information regarding pesticide imports and exports.^[88] The IRPTC prepares Decision/Guidance documents for pesticides covered by PIC and then forwards them to each participating nation through the DNA.^[89] Once a country decides whether to import a pesticide, the DNA notifies the IRPTC. In turn, the IRPTC forwards the decision to all participating governments.^[90] The IRPTC has a database of all these decisions for reference by exporters and importers.^[91] The main benefit received by importing countries participating in this program is that the IRPTC forwards notifications to them directly rather than having to rely on exporting countries to provide them.

The London Guidelines are focused on the promotion of information exchange for the protection of human health and the environment.^[92] Although the London Guidelines were not designed to address the complex problems encountered by developing countries,^[93] they nonetheless succeed in identifying and resolving some of the areas of concern. The two-step system provides developing countries an opportunity to receive export notifications for banned and severely restricted substances.^[94] The first step requires the circulation of notices where regulatory actions have been taken under domestic law.^[95] Circulation is only required for those regulatory actions constituting bans or severe restrictions.^[96] The second step identifies those chemicals that have been banned or restricted by ten or more participating countries.^[97]

In an effort to prevent shipment of unwanted chemicals to importing countries, the London Guidelines include a PIC procedure requiring formal correspondence between importing and exporting countries.^[98] Exporting countries must obtain an affirmative response from importing countries before shipment.^[99] The notices must include the reasons for the importing country's regulatory action and a contact point for further information.^[100] The London Guidelines PIC procedure requires exporting nations to inform other countries, either directly or through the IRPTC, that a chemical has been domestically "banned" or "severely restricted."^[101] The notification includes the chemical identification, a summary of the control action taken, alternative compounds to the chemical, and the contact where importing nations

can request additional information.[102] All interested participating countries receive the list.[103] The London Guidelines also require exporting governments to declare the regulatory status of a pesticide at the earliest stage of export.[104] Although the notice is ideally supposed to be given to an importing country before the export actually occurs, no firm guidance on timing is provided.

The London Guidelines encourage exporting countries to use classification, labeling, and packaging requirements that are as stringent as those in their own domestic market.[105] In addition, they call for the exchange of technical advice and precautionary information on chemicals introduced into the market.[106] Finally, developed countries are encouraged to recognize the unique circumstances of developing countries by providing them financial and technical assistance.[107]

Another significant feature of the London Guidelines is its provisions covering notification and labeling requirements for hazardous chemicals.[108] These provisions are especially important because they are the first step to insuring that instructions and warnings about pesticides are communicated in the language of the importing country.[109] The London Guidelines state that "[a]s far as practicable, precautionary information should be provided in the principal language or languages of the State of import and of the area of intended use, and should be accompanied by suitable pictorial and/or tactile aids and labels." [110] This provision continues by requiring "harmonized procedures for the classification, packaging and labeling of chemicals . . . tak[ing] into account the special circumstances surrounding the management of chemicals in developing countries." [111]

The apparent weakness of the London Guidelines is that the provisions are voluntary, and consequently fail to adequately address the needs of the developing world. The London Guidelines state that "exporting countries are expected to participate in the PIC procedure[s]." [112] Further, IRPTC should invite countries to participate in the PIC procedure with respect to imports.[113] Although there is language in the London Guidelines reflecting a sensitivity to developing countries, the lack of specificity and their non-binding nature place developing countries at a significant disadvantage. Even if the London Guidelines were binding, enforcement would be difficult without incentives to ensure adequate participation and compliance.

V. THE FAO INTERNATIONAL CODE OF CONDUCT

The United Nations Food and Agriculture Organization (FAO) adopted the International Code of Conduct on the Distribution and Use of Pesticides (Code)[114] in 1985 to reduce the health and environmental hazards caused by pesticides, and to establish firm guidance for their export and sale.[115] The Code strives to combine different domestic policies for pesticide regulation into a universally accepted pesticide trade program.[116] Like the London Guidelines, the Code is voluntary, serving as a reference for a developing country until they have established their own regulatory infrastructure for pesticide control.[117] The FAO also recognizes the importance of PIC and adopted it as part of the Code in 1989.[118]

The practical application of the Code is fairly easy to follow. A pesticide is placed in the PIC process noted above if the pesticide meets one of three criteria: (1) the chemical has been banned for health or environmental reasons in five or more countries; (2) the chemical has been banned or severely restricted for health or environmental reasons in a single country after January 1, 1992; or (3) the chemical causes health or environmental problems under the conditions of use in developing countries.[119]

In drafting the substantive provisions of the Code, the FAO sought to balance the divergent needs of developing and developed countries. For example, developed countries have concerns over the existence of residues in food or commodities imported from developing countries.[120] If a pesticide is restricted in a developed country, but completely unregulated in a developing country, little control may exist over the safety of imported food. The Code provides that since "it is impossible to eliminate all such occurrences, because of diverging pest control needs, it is none the less essential that . . . [pesticides are applied] in accordance with good and recognized practices." [121] In addition, the Code encourages developed countries to recognize the needs of developing countries when promulgating residue control programs for imported food.[122]

As a method of enforcement, the Code encourages "collaborative action" by participating countries,[123] instructing governments to report to the FAO on their methods of compliance and progress.[124] Although the Code recognizes

that governments possess the ultimate responsibility to regulate the distribution and use of pesticides in their countries,[\[125\]](#) the Code encourages governments to meet this responsibility through the implementation of a "pesticide registration and control program."[\[126\]](#) Under this program, governments must register pesticides before they can be used domestically,[\[127\]](#) and all registration programs must include provisions for enforcement.[\[128\]](#) To facilitate international respect for each country's registration program, the Code encourages governments to establish registration schemes and infrastructures that ensure that each pesticide product is registered under the laws or regulations of the country of use before it can be made available there.[\[129\]](#)

The Code delineates responsibilities between the private and public sectors by establishing "voluntary standards of conduct for all public and private entities engaged in or affecting the distribution and use of pesticides."[\[130\]](#) The Code establishes standards for both governments and industries in several reporting categories including pesticide development,[\[131\]](#) packaging,[\[132\]](#) labeling,[\[133\]](#) advertising,[\[134\]](#) disposal, and storage.[\[135\]](#) Within these categories, the Code notes that concerted efforts between governments and the pesticide industry are acceptable means to develop and promote integrated pest management (IPM) systems and the use of safe and efficient application methods.[\[136\]](#) The Code dictates that even though governments retain the responsibility and specific authority to regulate the distribution and use of pesticides in their countries, the pesticide industry must adhere to the provisions of the Code in the manufacture, distribution, and advertising of pesticides.[\[137\]](#) Manufacturers must ensure that they test each pesticide by recognized methods to fully evaluate safety, efficacy, and long-term effects, with an emphasis on the expected conditions in the regions of use.[\[138\]](#) In an effort to reduce public health hazards, the Code then requires governments to review the pesticides that are marketed in their country, determine their acceptable uses and identify the intended consumers within the public sector.[\[139\]](#) Although adherence to the Code is voluntary, the labeling and packaging provisions attempt to establish a system to implement PIC procedures.[\[140\]](#) The Code places controls on advertising to prevent deception and promote safe application.[\[141\]](#) Labeling is expected to be appropriate for each specific market,[\[142\]](#) and to include "information and instructions in a form and language adequate to ensure safe and effective use."[\[143\]](#) Manufacturers must guarantee that labels truly reflect testing data.[\[144\]](#) The Code charges industry with making "every reasonable effort to reduce hazard[s]"[\[145\]](#) by using "clear and concise labeling."[\[146\]](#) Labels must state "recommendations consistent with those of the recognized research and advisory agencies in the country of sale,"[\[147\]](#) and should include "symbols and pictograms whenever possible, in addition to written instructions, warnings and precautions."[\[148\]](#) Finally, labels should reflect appropriate hazard classifications of the contents.[\[149\]](#) Labels must contain a warning against the reuse of containers, as well as instructions for the safe disposal or decontamination of empty containers.[\[150\]](#)

As with labeling, the Code requires that packaging is appropriate for each specific market.[\[151\]](#) The goal of the packaging requirement is to introduce products in "ready-to-use" packages for a safer method of application.[\[152\]](#) The Code's packaging provision seeks to discourage repackaging and decanting or dispensing of pesticides into food or beverage containers.[\[153\]](#) Accordingly, packaging or repackaging should take place only on licensed premises.[\[154\]](#)

Although labeling and packaging are aspects of the PIC procedure that assist in a remedy for the pesticide problem, their importance may be overemphasized. The pesticide industry has made an effort to address labeling shortcomings;[\[155\]](#) however, workers using pesticides are often illiterate[\[156\]](#) or speak a different language than that printed on the pesticide container.[\[157\]](#) Additionally, the instructions are often so complex that consumers simply ignore them. Countries with citizens who speak multiple languages may import pesticides with instructions incomprehensible to some users.[\[158\]](#) The ethnic diversity of a developing country often includes a diverse number of language dialects, making effective labeling nearly impossible.[\[159\]](#) For example, in Tamil speaking regions of India, labels are in English or Hindi. In Tunisia, pesticides are commonly sold with labels printed in a language other than Arabic.[\[160\]](#) If the population does not speak the official language or labels simply are not in the official language, written instructions on the use of pesticides are useless.

A PIC amendment to the Code was adopted in 1989 at the request of several interested developing countries.[\[161\]](#) The amendment prohibits exportation of any pesticide severely restricted or banned to another country participating in the PIC system that has expressly requested not to receive imports of that pesticide.[\[162\]](#) The amendment includes importing countries that elect participation, as well as each exporting country.

If a pesticide exporting country decides to ban or severely restrict the use of a pesticide, that country must notify

FAO,[\[163\]](#) which in turn will forward the action to all participating countries through the IRPTC.[\[164\]](#) If an importing country refuses to accept a pesticide, the exporting country must respect that decision. In addition, the country refusing a pesticide must stop any domestic production of that pesticide.[\[165\]](#)

The pesticide industry has, to some extent, cooperated in the implementation of PIC under the Code.[\[166\]](#) Industry occupies a crucial role in a successful PIC program because PIC does not require exporting countries to introduce any export controls or monitor exports.[\[167\]](#) Goodwill and product stewardship within the industry are necessary ingredients for a successful PIC program.[\[168\]](#) With effective product stewardship, the pesticide industry assumes responsibility for pesticides after they leave the factory.[\[169\]](#) This concept promotes industry policies consistent with requirements of the Code, including checks on labeling, advertising, and marketing.[\[170\]](#) In fact, Groupement International des Associations Nationales de Fabricants de Produits Agrochimiques (GIAFP), a major pesticide manufacturing association, makes compliance with the Code a condition of membership.[\[171\]](#)

The Code requires pesticide manufacturers to test each pesticide "so as to fully evaluate its safety, efficacy . . . and fate . . . with regard to the various anticipated conditions in regions or countries of use."[\[172\]](#) The data must show that the pesticide can be used safely without posing an "unacceptable hazard to human health, plants, animals, wildlife [or] the environment."[\[173\]](#) Additionally, the Code calls for residue trials to help establish maximum residue limits (MRLs),[\[174\]](#) and requires industry to conduct testing prior to marketing.[\[175\]](#) To enhance international control, industry must submit the results of the test "to the local[ly] responsible authority for independent evaluation and approval before the products enter trade channels in that country."[\[176\]](#)

Industry and local authorities forwarded the first list of pesticide notifications in September of 1991, indicating implementation of PIC under the Code was initially slow.[\[177\]](#) Unfortunately, the Code shares the same central weakness as the London Guidelines—participation and compliance are voluntary.[\[178\]](#) The adopting resolution by the FAO conference emphasized the non-binding nature of the standard:

THE CONFERENCE,

Hereby adopts a voluntary International Code of Conduct on the Distribution and Use of Pesticides as given in the annex to this Resolution;

Recommends that all FAO member Nations promote the use of this Code in the interests of safer and more efficient use of pesticides and of increased food production;

Requests governments to monitor the observance of the Code, in collaboration with the Director-General who will report periodically to the Committee on Agriculture;

Invites other United Nations agencies and other international organizations to collaborate in this endeavour within their respective spheres of competence.[\[179\]](#)

The Code attempts to respond to opposing interests between industrialized countries that export pesticides and developing countries that import them.[\[180\]](#) While industrialized countries enjoy relatively extensive pesticide regulatory programs, they have little control over how exported pesticides are used once they leave their borders.[\[181\]](#) A double standard exists whereby pesticides may be exported to countries without effective regulatory protection exposing them to pesticide hazards where use of the same pesticides in the exporting country is prohibited.[\[182\]](#) PIC attempts to eliminate the double standard.

Despite the voluntary nature of the Code, it is a useful model for developing countries to initiate their own pesticide control programs. The Code cites the need for the participation of several segments of society to effectively reduce the adverse effects on human health or the environment.[\[183\]](#) These segments of society include the public, industry, and government.[\[184\]](#)

Several governments and organizations have expressed concern about the propriety of supplying pesticides to countries that lack infrastructures to register them.[\[185\]](#) The absence of a compulsory pesticide registration process and an adequate international regulatory infrastructure for controlling the availability of pesticides forces some importing

countries to rely heavily on the pesticide industry to promote safe and proper pesticide distribution and use.^[186] "In these circumstances foreign manufacturers, exporters and importers, as well as local formulators, distributors, repackers, advisers and users, must accept a share of the responsibility for safety and efficiency in the distribution and use" of pesticides.^[187]

Under the Code, the fact that a product is not used or registered in a particular exporting country is not necessarily a valid reason to prohibit the export of that pesticide.^[188] However, the notion that no company should trade in pesticides without a proper and thorough evaluation of the pesticide, including a risk analysis, has gained acceptance in the international community.^[189] A large number of developing countries are situated in tropical and semi-tropical regions where the conditions and pest problems can differ markedly from those in countries manufacturing and exporting pesticides.^[190] Thus, governments of exporting countries may not be able to adequately assess the suitability, efficacy, or safety of pesticides under the conditions in the country of ultimate use.^[191] The responsible authority in the importing country must make such judgments in conjunction with industry, considering the available scientific data and the conditions prevailing in the country of proposed use.

Although the Code does not solve all of the problems in the international pesticide trade, it does define and clarify the responsibilities of the various parties involved in the development, distribution and use of pesticides. The Code is of particular value to countries which are without their own control procedures. Furthermore, the London Guidelines and the Code overlap in many areas. Both generally share the same objective; to promote the responsible trade of pesticides.^[192] A close comparison of the two reveals the conceptual identity of many provisions. Thus, combining the two initiatives into a single binding formal agreement could reduce confusion of PIC requirements and render a more comprehensive, acceptable solution to the chemical trade problem.^[193]

VI. THE CODEX ALIMENTARIUS COMMISSION

The United Nations established the Codex Alimentarius Commission (Codex) to address the effects of pesticides on food safety.^[194] Codex recognizes that pesticides are an ubiquitous component of food placed in the market for consumption.^[195] However, not all pesticide-containing food is dangerous for consumption. A paramount objective of Codex is to set food safety standards that apply on an international level and to publish them on behalf of the international community.^[196]

On the basis of the research conducted by the FAO/World Health Organization (WHO) Joint Meeting on Pesticide Residues, Codex compiles a list of pesticides that should be authorized for use in light of food safety risks.^[197] At the same time, Codex establishes over 2,000 maximum limits for residues (MRLs),^[198] taking into account findings on toxicities from their Expert Committee and good agricultural practices. The MRLs are particularly relevant to countries that export staple crop foods, including the U.S. A food manufacturer must avoid using raw materials that may lead to undesired levels of pesticides in the finished food product. Codex MRLs are tolerances based on standards that the Committee determines to be good agricultural practice in a variety of countries with differing climatic conditions and pest problems.^[199] Codex MRLs are also valuable tools representing a consensus of international opinion regarding safety and practicability of pesticides in food staples.^[200]

Establishing an MRL is an eight-step process. The process may take several years to complete. The steps are: (1) the FAO commission determines the need for a standard and assigns the work to a committee, known as the WHO Expert Group on Pesticide Residues,^[201] which usually recommends that Codex establish an MRL or elaborate a standard; (2) a draft standard is then prepared;^[202] (3) the Commission submits the proposed draft standard to interested international organizations for comment on all aspects including possible implications of the draft standard on their economic interests;^[203] (4) the Codex Committee on Pesticide Residue (CCPR) will also evaluate the proposed draft standard by considering "all appropriate matters"^[204] including the need for urgency, comments submitted by individual governments, and the likelihood of new information becoming available in the near future;^[205] (5) CCPR then sends the draft standard to the Commission through the Secretariat for adoption as a draft standard;^[206] (6) international organizations and governments receive the draft standard for comment;^[207] (7) the Secretariat, along with private organizations, forwards any comments to the committee;^[208] and (8) the Commission reviews and considers comments and finally executes the draft standard for adoption and publication as a Codex Standard.^[209]

Codex recognizes the balance between the need for fair and unrestricted trade and the protection of human health and the environment. The provisions of Codex state that it "is a collection of internationally adopted food standards presented in a uniform manner. These food standards aim at protecting consumers' health and ensuring fair practices in the food trade."[\[210\]](#) One key value to the international trade community is that Codex establishes harmonized international MRLs that prevent food product trade barriers.[\[211\]](#) As early as the 1950's, the U.S. recognized the need for international harmonization when the European Economic Community (EEC) attempted to adopt draft residue standards with higher tolerances than similar pesticides manufactured in the U.S.[\[212\]](#) The adoption of Codex was one of the first attempts by the U.S. to prevent the use of pesticide residue standards as artificial trade barriers.[\[213\]](#)

VII. U.S. REGULATORY EFFORTS TO DEVELOP EXPORT CONTROLS

The U.S. is commonly depicted as a leader in the international community, confronting difficult issues and adopting bold and progressive initiatives to benefit all countries.[\[214\]](#) However, the recommendation that the U.S. take the lead in resolving the pesticide trade dilemma is not likely to occur.[\[215\]](#) In 1993, the Department of Commerce valued the U.S. chemical industries at just over \$4.5 billion for both domestic and international sales.[\[216\]](#) As one of the largest U.S. industry sectors, chemicals have in the past accounted for approximately ten percent of the nation's export income.[\[217\]](#) Consider that the amount of residue on imported food and types of pesticides permitted in the U.S. is not necessarily selected with the health of U.S. consumers in mind.[\[218\]](#) The EPA balances the incidence of cancer against the economic advantage to the pesticide industry and its market.[\[219\]](#) Consequently, the U.S. is unlikely to coordinate an international convention absent a commitment by other key chemical producing countries to participate. Leveling the economic playing field by mandating total participation by major chemical exporting countries is the only way to prevent non-participating countries from taking economic advantage of participating countries. Thus far, economic benefits in an under regulated world market have stifled any incentive to adopt a leadership role to propose a convention or domestic legislation. Trade restricting legislation may inure to the economic detriment of the U.S. because if the U.S. does not export pesticides, another country will.

The U.S. Customs Service has compiled a public record on pesticide exports. Although the U.S. has taken steps to regulate the domestic sale and use of particularly hazardous substances, exports have escaped similar regulation. At present, the U.S. does not effectively regulate the export of pesticides the EPA has banned or restricted due to health or environmental concerns.[\[220\]](#)

In 1990, it reported the shipment of 465,338,865 pounds of pesticide products from U.S. ports.[\[221\]](#) Although the importance of specificity in identifying and labeling pesticides is critical to human health and the environment, 56.2% of the chemicals exported could not be identified in Customs records beyond the most general terms.[\[222\]](#) Labels generally referred to chemicals in terms such as "agricultural insecticide" or "seed killing compound."[\[223\]](#) A lack of appropriate identification and incomplete labeling precluded an accurate identification of the hazard level for over 73% of the chemicals shipped.[\[224\]](#) "Despite these omissions, Customs records indicate that 52,022,337 pounds of banned, unregistered or restricted-use pesticides were exported in 1990."[\[225\]](#) The problem continued between 1992 and 1994, when three-quarters of the exports failed to adequately identify their chemical contents.[\[226\]](#)

A. *The Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA)*

The Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) is the basic statute that the EPA uses to regulate pesticides in the U.S.[\[227\]](#) Pesticides intended for use in the U.S. found to cause an "unreasonable adverse effect" on human health or the environment, may be canceled, suspended or significantly restricted by the EPA.[\[228\]](#) A manufacturer that wishes to register a pesticide product must file efficacy data with the EPA, including the pesticide's formula and labeling, a statement of all claims to be made regarding the pesticide, direction for its use, and the pesticides safety data.[\[229\]](#) FIFRA requires the EPA to register a pesticide if there is a finding that: (1) the composition of the pesticide achieves what the manufacturer claims; (2) labeling and other promotional materials comply with claims and are not deceptive; (3) the pesticide will perform without unreasonable adverse effects on the environment; and (4) when used in accordance with generally recognized practices, the pesticide will not unreasonably affect the environment.[\[230\]](#)

FIFRA establishes a broad risk-benefit analysis for the EPA to evaluate how a pesticide affects the environment and

human health.[\[231\]](#) The statutory mandate to avoid "unreasonable effect on the environment" explicitly directs the EPA to consider the economic, social and environmental costs and benefits from the use of a particular pesticide, in addition to the risks that the pesticide poses to humans or the environment.[\[232\]](#)

If a pesticide "may reasonably be expected to result, directly or indirectly, in residues of the pesticide becoming a component of food," EPA regulations preclude the registration of a pesticide under FIFRA until the FDA issues appropriate tolerances for residues under the Federal Food, Drug, and Cosmetic Act (FFDCA).[\[233\]](#) This requirement prevents the registration of a pesticide for food crop use under FIFRA unless the EPA determines that pesticide residue on the crop will not exceed a safe level.[\[234\]](#)

FIFRA represents one of the earliest domestic efforts in the U.S. to control the exchange of chemicals in international commerce. The statute requires manufacturers to label their products in English as well as the language of the importing country.[\[235\]](#) Section 17(a) of FIFRA requires a manufacturer exporting a pesticide to obtain a statement from the foreign purchaser acknowledging that the pesticide is unregistered and cannot be sold in the U.S.[\[236\]](#) The foreign purchaser forwards the statement to the EPA and section 17(a) directs the EPA to send a copy of the statement to the U.S. embassy in that foreign country. The U.S. embassy then provides a copy to the regulating office of the importing country.[\[237\]](#) Additionally, section 17(b) requires the EPA to notify a foreign importer whenever a U.S. pesticide registration is canceled or suspended.[\[238\]](#) Any unregistered, canceled or suspended chemicals in the U.S. can legally be exported with a signed acknowledgment that the chemical is not subject to restriction in the U.S.[\[239\]](#) FIFRA's section 17 methods of notification provide foreign governments with critical information on unregistered pesticides.

The EPA revised its FIFRA regulations to clarify this area of the statute. For example, the EPA now permits exporters to add information onto the label of the pesticide explaining why a product is not registered, the status of the registration, or its use classification.[\[240\]](#) In addition, exporters are required to use English on the label, as well as the language of the importing country and the language of the country of final destination when it is reasonably ascertainable.[\[241\]](#)

The EPA also permits exporters to use supplemental labeling.[\[242\]](#) Section 17(a)(1) labeling requirements are met by placing supplemental labeling on shipping containers instead of on the product container.[\[243\]](#) The requirement applies to pesticides that are being "shipped or held for shipment in the United States."[\[244\]](#)

The EPA has made significant progress in resolving language used in labeling pesticides. The EPA now requires that pesticides are labeled in the "appropriate foreign languages."[\[245\]](#) Although a large amount of information is required to be labeled in English, multilingual labeling is limited to: (1) a warning and caution statement; (2) the statement "Not Registered for Use in the United States of America," when required; (3) the ingredients of the pesticide; and (4) the word "Poison" and practical treatment, when required.[\[246\]](#) The regulations do not require instructions on proper method of application (amount, etc.), occupational safety, and alternatives to the pesticide. This information is most useful because the incidence of pesticide exposure is highest among agricultural workers. Further, the regulation suggests an exporter has the option to label the "immediate product," the shipping container of the pesticide, or a combination of the two.[\[247\]](#)

To prevent exposure or misuse of pesticides, full disclosure should be made on both the immediate product and the shipping container. Finally, supplemental labeling requirements apply only to those pesticides being "shipped or held for shipment."[\[248\]](#) There are apparently no provisions to prevent exporters from repackaging the pesticide without FIFRA labeling after the product leaves the U.S.[\[249\]](#)

Food safety also remains a concern under FIFRA.[\[250\]](#) In 1986, GAO noted that FDA sampled less than one percent of the imported foods shipped into the U.S. for compliance with pesticide residue levels under FIFRA.[\[251\]](#) GAO criticized the one percent sample rate because it comprises a "very small percentage of imported food shipments, and the selection of which foods and shipments to sample were left to the individual judgment of FDA inspectors."[\[252\]](#) The FDA monitored 33,687 samples between 1979 and 1985 and found that 6.1% contained illegal residue contamination.[\[253\]](#) GAO stated that "foods from many of the importing countries were not sampled even though they are imported year after year."[\[254\]](#) Although the GAO released the report ten years ago, more recent GAO studies

confirmed that the problem still existed in 1992 when the last review of the program was published.[\[255\]](#)

While the federal government has made some progress in dealing with the very difficult problem of balancing the risks and benefits of pesticides, limitations remain. Thus, some of the same concerns raised by . . . GAO over the last 24 years are unresolved today. They include:

1. limited progress in reviewing older pesticides in light of current scientific knowledge and standards,
2. difficulties in removing pesticides that are a cause for concern from the marketplace,
3. holes in the safety net designed to provide an early warning of pesticide dangers,
4. groundwater supplies becoming contaminated by pesticides,
5. shortcomings in the monitoring of pesticide residues on food,
6. deficiencies in notifying foreign governments about exports of pesticides that are banned or unregistered in the United States and are being sold abroad,
7. inadequate safety protection for farmworkers, and
8. the lack of a coordinated federal strategy to manage key pesticide data.[\[256\]](#)

Some of the problems associated with FIFRA are administrative in nature and do not suggest a lack of concern by the U.S. Although importing countries have frequently failed to receive timely notification of pesticide imports,[\[257\]](#) when the notifications do arrive, there is generally no assurance that the receiving official will forward the data to the user of the chemical.[\[258\]](#) If the user of the chemical does not receive this data, FIFRA's reporting procedure has failed its purpose. Additionally, many chemicals lack efficacy data to include in the notifications because these domestically manufactured chemicals are not registered for domestic use.[\[259\]](#)

B. The Federal Food, Drug, and Cosmetic Act

The Federal Food, Drug, and Cosmetic Act (FFDCA) is the national food-standards program for pesticide residues in the U.S.[\[260\]](#) Under the FFDCA, the EPA must establish tolerance levels for pesticide residues that will remain on raw agricultural commodities.[\[261\]](#) If a pesticide is one that "concentrates," or becomes increasingly potent as the raw agricultural commodity is processed into food, the EPA must base tolerances on the processed food.[\[262\]](#) The EPA considers several factors when setting food tolerances.[\[263\]](#) First, the pesticide must be generally recognized among experts as "safe for use."[\[264\]](#) In evaluating the safety of the pesticide, the EPA considers "the necessity for the production of an adequate, wholesome, and economical food supply," and "other ways in which the consumer may be affected by the same pesticide chemical or by other related substances that are poisonous or deleterious."[\[265\]](#) A processed-food tolerance must be set at "zero" if the pesticide would "induce cancer when ingested by man or animal."[\[266\]](#)

In its evaluation of a pesticide for the establishment of a tolerance, the EPA requires that an applicant submit a petition stating the name of the chemical, composition and test results, as well as the amount, frequency and time of application to crops.[\[267\]](#)

FFDCA's tolerance setting procedure differs in a number of respects from MRL setting procedures of Codex. The important differences are substantive rather than procedural. The EPA takes a more conservative approach in cancer classification decisions, especially with substances that Codex finds to be non-genotoxic. Similarly, there are differences in residue chemistry analysis, with Codex using more liberal indicator compounds.

C. Food Quality Protection Act of 1996

In April 1994, the Clinton Administration proposed a bill that would revise FIFRA and FFDCA, as well as forbid the

export of U.S.-made pesticides that have been banned for health reasons in the U.S.[268] The bill also proposed to prohibit the export of pesticides with registrations that were canceled, suspended, denied, withdrawn or canceled voluntarily.[269] The bill proposed the ban of all pesticides that had tolerances revoked under the FFDCA.[270] Pesticides could be exported if a tolerance was established or if three countries using internationally acceptable standards approved export of the pesticide.[271] The proposal received significant criticism from both industry and environmental groups.[272]

The final result would come in the form of the Food Quality Protection Act of 1996 (FQPA).[273] The Act states that pesticides exported from the U.S. must be prepared or packaged according to the specifications or directions of the foreign purchaser.[274] If a pesticide is not registered, then the exporter must obtain a signed statement from the importer acknowledging that the pesticide is not registered for use and cannot be sold in the U.S.[275] If a pesticide registration is canceled or suspended, the EPA is required to transmit notice of the action through the State Department for distribution to foreign countries and international organizations.[276] Upon request, the EPA will disclose all information related to the cancellation or suspension.[277] The EPA promulgated regulations to the FQPA, specifying that manufacturers of pesticides for export maintain copies of all labels and PIC statements for a period of only two years.[278] The manufacturer is not required to maintain records of the important information like quantity, type, active ingredients or dangers unless required by the importing country.[279] Manufacturers should be required to maintain this information so that the EPA and importing countries alike can more accurately monitor the volume and types of pesticides in trade.

Like FIFRA and FFDCA, the Food Quality Protection Act is a statute focused on domestic problems. The statute does not address the issues that many developing countries struggle with in regulating their pesticide imports. Although there is a specific standard for labeling and packaging of exported pesticides, the information needs of the importing country are not considered. The responsibility to obtain information is left to the importing country requesting it from the manufacturer. One method to promote developing countries' access to information is for their governments to simply require that all pesticides imported into their countries comply with domestic packaging and labeling requirements of the U.S.

D. The Toxic Substances Control Act

Under the Toxic Substances Control Act (TSCA), the EPA may restrict the export of a pesticide pursuant to Section 12(a) if found to pose an "unreasonable risk" to human health or the environment in the U.S.[280] An exporter is required to notify the EPA of any exports so the Agency can inform the importing country of the shipment.[281] TSCA is domestically protective but offers little assistance to developing countries in regulating pesticide imports. The weakness of TSCA occurs when an exporter labels the product "intended for export," resulting in shipment of the product without notice because it is not intended for use in the U.S.[282] If the pesticide is found to pose an "unreasonable risk" to human health or the environment in the U.S., [283] TSCA has no prior informed consent provision similar to FIFRA. Instead, the EPA is required to forward a notice of the shipment within seven days of contract execution or by the date of export, whichever is sooner.[284] TSCA's notification system is not designed with the developing nation in mind because it only provides notification to other nations of restrictions placed on U.S. imports. Further there is no requirement for what information is required in the notification. Without a firm PIC procedure and specific information requirements, importing countries are unable to make informed decisions regarding the rejection or acceptance of pesticide imports.

VIII. A HISTORY OF NEGLECT IN PROTECTING U.S. CONSUMERS

Prior to 1993, GAO described the FDA's efforts to protect American consumers from potentially harmful pesticide residues in imported food as "clearly inadequate." [285] GAO cited the FDA's "lack of knowledge regarding foreign pesticide use and the inability of its commonly used multi-residue analyses to detect 178 pesticides having U.S. tolerances and over ninety others permitted to be used in foreign countries which could not be identified as having U.S. tolerances." [286]

GAO also criticized the FDA for not acquiring adequate knowledge of foreign chemicals used on commodities imported into the U.S.[287] Further, GAO found that the FDA did not prevent the marketing of most foods found to

contain illegal pesticide residues.[288] GAO considered the FDA ineffective in monitoring pesticide residues on food and cited deficiencies in notification procedures to alert foreign governments about exports of banned and unregistered pesticides from the U.S.[289]

Finally in 1993, GAO reported that in the U.S. "people and the environment are exposed to many pesticides that have not been fully evaluated for their potential to cause cancer, reproductive disorders, birth defects, and environmental damage." [290] GAO attributed the problem in part to the EPA's inability to reregister pesticides. [291] According to the EPA, the program may not be completed until 2006. [292] Meanwhile, most of these products may continue to be sold and distributed even though knowledge of their health and environmental effects is unknown. [293]

The FDA released a residue monitoring report that found residues above EPA tolerance levels in approximately fifty-seven of the products tested. [294] Further, another fifty-seven products contained residues of pesticides for which the EPA had not established tolerance levels. [295] The report revealed that sixty-four imported products contained residue levels over EPA tolerances and 194 products contained residues of pesticides that had no tolerance. [296]

The last report released by GAO was in late 1994. [297] In that report, GAO recognized that the issues that GAO and other federal agencies had raised in approximately ninety previous reports were still a concern. [298] In summary, GAO found that U.S. reliance on foreign nations' inspection systems to ensure the food safety of U.S. imports does not provide assurance the food is safe for consumption. [299] Chemicals that have been canceled in the U.S. continue to be sold and used for food exports in these countries even after GAO presented it as a problem. [300] Because of the increase in the volume of U.S. food imports and lack of FDA resources to inspect imports, only about one percent of the imports are tested. [301] GAO also identified a significant problem in the use of reliable and accurate data to estimate human dietary exposure to chemicals. [302] In order for an accurate exposure assessment to be made, accurate consumption data for the U.S. populace is needed in conjunction with data on contaminant residue levels in food. [303] GAO reported that the USDA's 1987-88 survey was so flawed that EPA and FDA officials considered it useless. [304] As a result, exposure assessments are being based on data from a 1977-78 survey that does not accurately illustrate U.S. food consumption patterns. [305] The ongoing history of problems in monitoring pesticide imports and exports reflects a complex and tenuous problem for the U.S. Caught between the debate of economic value of exported pesticides and the safety of imported food is confusion and neglect of an overwhelmed U.S. regulatory program.

IX. CONCLUSION

The current unregulated practice of exporting chemicals to developing countries has yielded unfortunate consequences. Although the developed world feels the effects of pesticide trade, a majority of the detrimental impacts on human health and the environment afflict the developing world. Unfortunately, developing countries generally lack the resources, information and expertise to protect their people from dangerous chemical exports that are banned or severely restricted in developed countries. The incidence of pesticide exposure worldwide suggests that a major public health problem is not receiving the attention it deserves. New methods for estimating the true incidence of pesticide poisoning must be explored. The fact that exposure is almost exclusively in developing countries, even when pesticide consumption is so low in comparison to developed countries, would suggest research needs to be conducted to develop exposure intervention programs.

There is also a critical shortage of information on pesticide exposure, resulting in an inability to evaluate the true environmental and human health impacts of pesticides. Little is known about the effects of long term exposure to pesticide residues in food. Further, the lack of exposure data internationally makes the problem difficult to evaluate. As this article illustrates, exposure data is outdated and available only through special interest groups or from international organizations that currently suffer from budget shortfalls. For example, the most recent comprehensive exposure study was conducted by the World Health Organization in 1988. That report conservatively estimated over one million exposures occur annually. [306] Many developing countries do not keep track of exposure data, and those that do often fail to report the data to central organizations like the United Nations. There are indications of a worldwide pesticide exposure crisis, but there is little data to confirm or deny the conclusion. The situation can be associated with a patient who would rather not be examined for fear of hearing the news of a costly diagnosis. If reliable exposure data were available, perhaps there would be more interest in the problem leading to firm and decisive regulation.

One approach certain to bring responsibility to pesticide trade is to outlaw or severely restrict the export of those pesticides the U.S. has banned, withdrawn registration or severely restricted. Furthermore, pesticides that have no registration could also be included among those outlawed for export. This is probably the most unlikely resolution because the U.S. has a significant share of the global pesticide industry. Chemical lobbies and politicians alike have long recognized that foreign pesticide manufacturers would be more than satisfied to obtain the U.S. share of pesticide exports.[\[307\]](#)

Although domestic and international efforts are moving toward full disclosure of the dangers and proper use of pesticides, no single set of rules can ensure the safe use of pesticides under every condition. Instruction and restriction apply to specific pesticides, formulations, application methods and commodities. In an effort to help resolve this problem, governments and industry alike should follow strict PIC procedures. Demanding good conduct on the part of industry in exchanging toxicological information between states, and having rules on trading, labeling, packaging, storage and disposal will have a beneficial impact. The current trend in the pesticide industry involves more training time for agricultural workers and greater company efforts to monitor pesticide use.

Current initiatives to curb pesticide trade problems offer little assistance in resolving exposure problems without a firm commitment by the world's key chemical exporting countries. The voluntary nature of international "soft law" schemes render them virtually unenforceable in today's lucrative international chemical market. Moreover, until the international market reflects a level economic playing field, powerful domestic lobbies will likely defeat U.S. initiatives on a legislative level. Incentives greater than money must exist before key chemical producing countries would submit to a convention mandating responsible trade. Perhaps proponents should stress the potential loss of life and the danger of domestic food safety, in hopes that ethical and moral motivations will prevail.

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[1] Lake Sagaris, *Conspiracy of Silence in Chile's Fields: Pesticide Spraying of Fruit Results in High Levels of Birth Defects*, MONTREAL GAZETTE, Nov. 27, 1995, at C2. The article indicates that the most exposed parents in Chile work in the fruit-export industry and that the rise in birth defects coincides with the increase in the import of pesticides in Chile from \$4 million to \$38 million. *See id.* [Return to text.](#)

[2] The World Health Organization (WHO) estimates that in developing countries there is a minimum of one million unintentional and two million intentional cases of acute pesticide poisonings resulting in over 220,000 deaths each year. *See* Division of Health & Environment et al., *Pesticides and Health in the Americas*, Env't'l Series No. 12, at 15 (Feb. 1993) [hereinafter *Pesticides & Health*]. [Return to text.](#)

[3] *See id.* [Return to text.](#)

[4] *See* Food & Agricultural Organization of the U.N., *International Code of Conduct on the Distribution and Use of Pesticides*, U.N. Doc. M/R8130/E/5.86/1/3000 (1986), reprinted in 10 Int'l. Env't. Rep. (BNA) No. 3 at 3002-07 (Mar. 11, 1987) [hereinafter *Code of Conduct*]. [Return to text.](#)

[5] *See id.* [Return to text.](#)

[6] *See id.* [Return to text.](#)

[7] *See id.* [Return to text.](#)

[8] *See id.* [Return to text.](#)

[9] *See* London Guidelines for the Exchange of Information on Chemicals in International Trade, U.N. Doc. UNEP/GC.15/9/Add.2/Supp. 3 and Corr.1, Appendix; *amended*, Governing Council Decision 15/30, U.N. Doc.

UNEP/GC. 15/12, Annex II, at 17 (1989) [hereinafter London Guidelines]. [Return to text.](#)

[10] See Joint Food & Agriculture Organization of the United Nations/World Health Organization Food Standards Program, Codex Alimentarius Commission Procedural Manual (8th ed. 1993) [hereinafter Codex]. [Return to text.](#)

[11] See *id.* at 17. [Return to text.](#)

[12] See *CSD Says More Action Needed to Blend Environmental Protection, Development*, 17 Int'l Env't. Rep. (BNA) 511 (June 15, 1994); *Pressure Mounting For United Nations to Mandate Prior Informed Consent Program*, 16 Chem. Reg. Rep. (BNA) 2337 (Mar. 5, 1993). [Return to text.](#)

[13] See Haider Rizvi, *U.S. Companies Continue to Export Banned Pesticides*, INTER PRESS SERVICE, GLOBAL INFO. NETWORK, Dec. 8, 1995 at 1, available in 1995 WL 10136181. The pesticides considered dangerous to human health and the environment include: Aldicarb, Camphechlor, Chlordane, Heptachlor, Chlordimeform, DBCP, DDT, Aldrin, Endrin, EDB, HCH/BHC, Lindane, Paraquat, Parathion, Methyl Parathion, PCP, and 2,4,5-T. See *id.* [Return to text.](#)

[14] See *id.* [Return to text.](#)

[15] See *id.* [Return to text.](#)

[16] See *id.* Other developing countries the U.S. exports the dirty dozen to include India, Zimbabwe, Costa Rica, Thailand, El Salvador and Brazil. The list may be much longer since almost 70% of export shipments are not listed as "hazardous pesticides" in customs records. See *id.* [Return to text.](#)

[17] See J. AGROW, *FUTURE TRENDS IN THE AGRIBUSINESS INDUSTRY* 140 (1990). The top 15 companies are all based in Western Europe or the U.S., led by Ciba Geigy (Swiss), ICI (UK), Bayer (German) and Rhone Poulenc (French). Others with annual sales above \$1 billion include Zeneca, Monsanto, DuPont, Dow, Elanco, BASF, Cyanamid, and AgrEvo. Sumitomo, Sandoz, FMC, and Rohm & Haas all have annual sales below \$1 billion. See Luci Young et al., *The Pesticide Market and Industry: A Global Perspective*, 31(1) BUS. ECON. (Jan. 1, 1996) at 6. [Return to text.](#)

[18] See *Domestic Pesticide Sales Up, Exports Down, ACPA Reports*, PESTICIDE & TOXIC CHEM. NEWS, 23 (37), July 12, 1995, at 1. [Return to text.](#)

[19] See Karen A. Goldberg, *Efforts to Prevent Misuse of Pesticides Exported to Developing Countries: Progressing Beyond Regulation and Notification*, 12 ECOLOGY L.Q. 1025, 1030 (1985). [Return to text.](#)

[20] See *id.* [Return to text.](#)

[21] See *Pesticides: Export of Unregistered Pesticides Is Not Adequately Monitored By EPA*, GAO/RCED-89-128 (Apr. 1989)[hereinafter 1989 GAO Report]. [Return to text.](#)

[22] See N. Suresh, *Worldview Pesticides: U.S. Exports to Poor Nations Growing Study*, AMERICAN POLITICAL NETWORK GREENWIRE, July 10, 1996, at 1. [Return to text.](#)

[23] See *id.*; see also Bitte Hileman, *U.S. Exports Unnamed*, CHEMICAL & ENG'G NEWS, Mar. 4, 1996. [Return to text.](#)

[24] See Roger D. Middlekauff, *Pesticide Residues in Food: Legal and Scientific Issues*, 42 FOOD DRUG COSM. L.J. 251 (1987). [Return to text.](#)

[25] See *id.* [Return to text.](#)

[26] See *id.* [Return to text.](#)

[27] See *id.* [Return to text.](#)

[28] See Jacobo Finkelman et al., *Environmental Epidemiology: A Project for Latin American and the Caribbean*, in

Pan American Center for Human Ecology and Health, Division of Health and Environment, Pan American Health Organization, World Health Organization (1993), at 7; *see also* Philip Ngunjiri, *Environment: Stemming the Flow of Dangerous Chemicals*, INTER PRESS SERVICE, GLOBAL INFO. NETWORK, Sept. 24, 1996. [Return to text.](#)

[29] *See* BARBARA DINHAM, *THE PESTICIDE HAZARD: A GLOBAL HEALTH AND ENVIRONMENTAL AUDIT* 64 (1993) [hereinafter DINHAM]. [Return to text.](#)

[30] *See* J. Jeyaratnam, *Acute Pesticide Poisoning: A Major Global Health Problem*, 43 *WORLD HEALTH STAT.* Q. 143 (1990); *see also* Robert Repetto & Sanjay S. Baliga, *Pesticides and the Immune System: The Public Health Risks*, World Resources Institute Executive Summary (Mar. 1996).

Although systematic estimates of overall exposure are not available . . . farm workers, farm households, and consumers are probably exposed to dangerous levels of pesticides. Direct observations of farmers handling, spraying, and disposing of pesticides show that they can be significantly exposed at work. Observations of the way rural households in developing countries store pesticides, prepare food, bathe, obtain drinking water, and come near pesticide spray operations establish that rural household members can also be exposed through various routes. These observations are confirmed by biological measurements of metallic and organochlorine pesticide residues in people's bodies and of acetylcholinesterase enzyme depletion, which indicates exposure to organophosphate pesticides. The presence of persistent bioaccumulative pesticide residues in foods, body tissues, and human breast milk indicate that even consumers far removed from agricultural operation can also be significantly exposed.

Id. at 1. [Return to text.](#)

[31] *See* Finkelman et al., *supra* note 28, at 171-79. Other effects of human exposure to pesticides can range from temporary illness such as excitation, headaches, tremors, blurred vision, cramps, dizziness and vomiting to severe and chronic health problems such as blood diseases, sterility, nerve damage, birth defects and comatose. *See id.* at 171-79. [Return to text.](#)

[32] *See Greenpeace Presses Global POPs Ban; PAN Hits U.S. Exports*, 23(52) *PESTICIDE & TOXIC CHEM. NEWS*, Oct. 25, 1995, at 2. [Return to text.](#)

[33] *See id.* [Return to text.](#)

[34] *See* Bruce Selcraig, *Costa Rica's Lethal Harvest*, 21 *INT'L WILDLIFE* 20, 22-24 (Nov-Dec. 1991); *see generally* Matuku A. Mwanthi & Violet N. Kimani, *Health Hazards of Pesticides*, 11 *World Health Forum* 430 (1990) (discussing pesticide use in Kenya); Association pour la Sauvegarde De l'Environnement et le Developpement (ASED), *Report for the Pesticide Trust* (Apr. 14, 1992) (discussing pesticide use in Ecuador). [Return to text.](#)

[35] *See* Sagaris, *supra* note 1, at C2. [Return to text.](#)

[36] *See id.* [Return to text.](#)

[37] *See id.* [Return to text.](#)

[38] *See id.* [Return to text.](#)

[39] *See id.* [Return to text.](#)

[40] *See id.* [Return to text.](#)

[41] *See* THE PESTICIDES TRUST, *THE FAO CODE: MISSING INGREDIENTS* 29 (1989). Widespread fish kills were reported in Egyptian irrigation canals, lakes and coastal areas of the Nile because of disposal of left-over pesticides, washing of containers previously holding pesticides and even deliberate use of pesticides for fishing. *See id.* In the Sudan, hunters used pesticides to kill wild antelope and gazelle by poisoning their water-holes. *See id.* The meat was

subsequently processed and sold for human consumption. *See id.* [Return to text.](#)

[42] *See* Robert L. Metcalf, *Changing Role of Insecticides in Crop Protection*, 25 ANN. REV. ENTOMOLOGY 219, 239-40 (1980). [Return to text.](#)

[43] *See id.* at 238. [Return to text.](#)

[44] *See id.* [Return to text.](#)

[45] *See* Agrow, *supra* note 17, at 147. [Return to text.](#)

[46] *See id.* [Return to text.](#)

[47] *See* RUTH NORRIS, PILLS, PESTICIDES, AND PROFITS 24 (1982). [Return to text.](#)

[48] *See id.* at 19-25. [Return to text.](#)

[49] *See* Meri McCoy-Thompson, *Brazil Enlists DDT Against Malaria Outbreak*, WORLD WATCH, July-Aug. 1990, at 9. [Return to text.](#)

[50] *See* Gary Gardner, *IPM and the War on Pests*, WORLD WATCH, Mar. 13, 1996, at 36. [Return to text.](#)

[51] *See id.* [Return to text.](#)

[52] *See id.* [Return to text.](#)

[53] The concern for feeding an ever expanding world population is serious. In the 1930's, 6.5 million American farmers each fed 19 people. *See* National Agricultural Chemicals Association, *Environmental Agriculture: 60 Years of Inspiration* (1993). The population of the U.S. was roughly 123 million compared to approximately 249 million now. *See id.* The number of farmers has decreased to only 2.1 million individually supplying food to 129 people. *See id.* By 2050, estimates are that the world agriculture will have to supply food to more than 11 billion people. *See id.* Farmers currently cultivate 5.8 million square miles of land (about the size of South America). *See id.* To meet the needs of the future, 35 million square miles of cropland will be needed, equaling an area the size of North America, South America, Europe and most of Asia. *See id.* The figures are alarming to those committed to conservation of the natural environment. *See id.* The challenge to the agro-chemical industry is evident—food staples must triple in output over the next six decades, while reducing any agricultural and environmental impact. *See id.* Beginning in the 1960's, agro-chemicals, genetically enhanced strains of crops and biotechnology, have produced higher yields of wheat, rice, corn, soy and other staples. However, whether these methods can meet the needs of an exponentially exploding world population is speculative at best. *See id.* [Return to text.](#)

[54] *See* Faith Halter, *Regulating Information Exchange and International Trade in Pesticide and Other Toxic Substances to Meet the Needs of Developing Countries*, 12 COLUM. J. ENVTL L. 1, 3-4 (1987). [Return to text.](#)

[55] *See* Bill Lambrecht, *Crop Sprays Leave Residue of Ailments*, ST. LOUIS POST-DISPATCH, Dec. 12, 1993, at A1. [Return to text.](#)

[56] *See* Johanna Son, *Vietnam Agriculture: Farmers Forget Environment*, INTER PRESS SERVICE, GLOBAL INFO. NETWORK, Feb. 19, 1996, at 1. [Return to text.](#)

[57] *See id.* [Return to text.](#)

[58] *See id.* at 2. [Return to text.](#)

[59] *See id.* at 2-3 [Return to text.](#)

[60] *See id.* [Return to text.](#)

[61] *See Greenpeace Presses Global POPs Ban, Pan Hits U.S. Exports, supra* note 32. The Pesticide Action Network (PAN) reported the U.S. exported aldicarb, camphechlor, chlordane, heptachlor, chlordimeform, DBCP, DDT, aldrin, dieldrin, endrin, EDB, HCH/BHC, lindane, paraquat, parathion, methyl parathion, pentachlorophenol and 2,4,5-T. Aldicarb was registered with the EPA in 1995 for use on potatoes. *See id.* PAN reports that aldicarb is so toxic that "[o]ne drop . . . absorbed through the skin is enough to kill the average adult." *Id.* In addition, several shampoos sold in the United States for the treatment of hair lice have been found to contain lindane, a substance linked to blood disease, lymphoma, seizures and brain damage. *See id.* [Return to text.](#)

[62] *See* DAVID WEIR & MARK SCHAPIRO, *CIRCLE OF POISON: PESTICIDES AND PEOPLE IN A HUNGRY WORLD* 3-4 (1981). [Return to text.](#)

[63] *See id.* [Return to text.](#)

[64] *See* 1989 GAO Report, *supra* note 21, at 11-12, 25, 36. [Return to text.](#)

[65] *Id.* at 3. The Assistant Administrator for Pesticides and Toxic Substances at EPA acknowledged the deficiencies during his testimony before a U.S. Senate subcommittee in March 1986. *See id.* at 19. [Return to text.](#)

[66] *See* *U.S. Chemical Trade Surplus Sets a New High*, CHEMICAL & ENG'G NEWS, June 19, 1989, at 76. [Return to text.](#)

[67] *See* 1989 GAO Report, *supra* note 21, at 11-12. [Return to text.](#)

[68] *See id.* [Return to text.](#)

[69] *See* Sagaris, *supra* note 1, at C2. [Return to text.](#)

[70] *See id.* [Return to text.](#)

[71] *See id.* [Return to text.](#)

[72] *See id.* [Return to text.](#)

[73] *See* Cyrus Mehri, *Prior Informed Consent: An Emerging Compromise for Hazardous Exports*, 21 CORNELL INT'L L.J. 365, 387 (1988). [Return to text.](#)

[74] *See id.* [Return to text.](#)

[75] *See id.* [Return to text.](#)

[76] *See id.* [Return to text.](#)

[77] *See* NATIONAL AGRICULTURE CHEMICAL ASSOCIATION, *National Agricultural Chemicals Association Position on the "Prior Consent" Concept of Export Control of Agrichemicals in INT'L TRADE* (Nov. 30, 1986) [hereinafter *NACA Position Paper*]. [Return to text.](#)

[78] *See id.* The London Guidelines suggest a balance between regulation and economics. Specifically, the London Guidelines advise that any "measure to regulate chemicals with a view to protecting . . . the environment, should ensure that regulations and standards for this purpose do not create unnecessary obstacles to international trade." London Guidelines, *supra* note 9, at 3. *See also* Mehri, *supra* note 73, at 387. A 1978 Report from the House Government Operations Committee indicated that 68 percent of the foreign countries surveyed were interested in having the U.S. notify them of chemicals regulated under FIFRA. HOUSE COMM. ON GOV'T OPERATIONS, REPORT ON EXPORT OF PRODUCTS BANNED BY U.S. REGULATORY AGENCIES, H.R. REP. NO. 95-1686, 95th Cong., 2d. Sess. 13-14 (1978). [Return to text.](#)

[79] *See* Janet Raloff, *The Pesticide Shuffle*, SCIENCE NEWS, Mar. 16, 1996. The practice of manufacturers hiding their identity on exported products to prevent competitors from receiving confidential marketing information is legal in the United States, but presents an obstacle for developing countries and special interest groups trying to expose the risks posed by the careless use of the pesticide. A common illegal practice is masking the identity of the pesticide in customs records. *See id.* [Return to text.](#)

[80] *See Report of the Governing Council*, U.N. Environment Programme, 14th Sess., Agenda Item 14/27 at 79, U.N. Doc. A/42/25 (1987). At the June 1987 conference, United Nations Environment Programme (UNEP) Governing Council instructed UNEP to begin developing a system of PIC to supplement the London Guidelines. The draft revisions were completed in February 1989 and subsequently approved by the UNEP Governing Council in May 1989. *See* U.N. Doc. UNEP/PIC WG.2/L1/Rev.1 (May 25, 1989). [Return to text.](#)

[81] *See generally* London Guidelines, *supra* note 9. [Return to text.](#)

[82] *See id.* [Return to text.](#)

[83] *See id.* The London Guidelines provide in pertinent part:

1. Definitions

(b) "Banned chemical" means a chemical which has, for health or environmental reasons, been prohibited for all uses by final governmental regulatory action; (c) "Severely restricted chemical" means a chemical for which, for health or environmental reasons, virtually all uses have been prohibited nationally by final government regulatory action, but for which certain specific uses remain authorized;

Id. art. 1 (b)- (c). [Return to text.](#)

[84] *See id.* art. 7. [Return to text.](#)

[85] *See id.* [Return to text.](#)

[86] *See id.* art. 6(a). [Return to text.](#)

[87] *See id.* art. 5.8. [Return to text.](#)

[88] *See id.* art. 5.4. [Return to text.](#)

[89] *See id.* art. 9(c). [Return to text.](#)

[90] *See id.* art. 7.4(a). [Return to text.](#)

[91] *See id.* art 7.4(a). [Return to text.](#)

[92] *See id.* Introduction, para. 2. [Return to text.](#)

[93] *See id.* Introduction, para. 8. [Return to text.](#)

[94] *See id.* Introduction, para. 2. [Return to text.](#)

[95] *See id.* art. 7.4. [Return to text.](#)

[96] *See id.* art. 7.2. [Return to text.](#)

[97] *See id.* Annex II (1)(b)(i). [Return to text.](#)

[98] *See id.* art. 1(h), Annex II-IV. [Return to text.](#)

[99] *See id.* art. 7.3. [Return to text.](#)

[100] *See id.* art. 6(c). [Return to text.](#)

[101] *See id.* art. 1. [Return to text.](#)

[102] *See id.* art. 6. [Return to text.](#)

[103] *See id.* [Return to text.](#)

[104] *See id.* art. 8. [Return to text.](#)

[105] *See id.* art. 14(a). [Return to text.](#)

[106] *See id.* art. 2(e). Article (2)(e) of the London Guidelines provides that "[s]tates with more advanced systems for the safe management of chemicals should share their experience with those countries in need of improved systems." *Id.* [Return to text.](#)

[107] *See id.* art. 15. [Return to text.](#)

[108] *See id.* art. 13. [Return to text.](#)

[109] *See id.* [Return to text.](#)

[110] *Id.* art. 13(d). [Return to text.](#)

[111] *Id.* art. 14(b). [Return to text.](#)

[112] *Id.* art. 7.1(b). [Return to text.](#)

[113] *See id.* art. 7.1(c). [Return to text.](#)

[114] *See Code of Conduct, supra* note 4. [Return to text.](#)

[115] *See id.* art. 1. [Return to text.](#)

[116] *See id.* [Return to text.](#)

[117] *See id.* [Return to text.](#)

[118] *See id.* at 3. UNEP adopted the PIC scheme under the London Guidelines and operates jointly with the Food and Agriculture Organization (FAO) through IRPTC. *See* London Guidelines, *supra* note 9, art. 5.2. [Return to text.](#)

[119] *See Code of Conduct, supra* note 4, at 3. [Return to text.](#)

[120] *See id.* at 2. [Return to text.](#)

[121] *Id.* [Return to text.](#)

[122] *See id.* [Return to text.](#)

[123] *See id.* art. 12.1. [Return to text.](#)

[124] *See id.* art. 12.6 [Return to text.](#)

[125] *See id.* art. 6.1.2. [Return to text.](#)

[126] *See id.* art. 5.1.1. [Return to text.](#)

[127] *See id.* art. 6.1.2. [Return to text.](#)

[128] *See id.* art. 6.1.1. [Return to text.](#)

[129] *See id.* art. 6.1.2. [Return to text.](#)

[130] *Id.* art. 1.1. [Return to text.](#)

[131] *See id.* art. 4, 8. Manufacturers are required to assess effects on human health and the environment before introducing a pesticide to a foreign market. *See id.* art. 4.1.2. [Return to text.](#)

[132] *See id.* art. 3.4, 5.2, 10. The Code expects manufacturers to introduce products in ready-to-use packages that cannot be reused. *See id.* art. 5.2.2.2. [Return to text.](#)

[133] Labels and warnings should be clear and concise with symbols and pictures for the illiterate. *See id.* art. 10.2. Finally, the labels and warnings are to be written in the language of the importing country. *See id.* art. 3.4.2. [Return to text.](#)

[134] *See id.* art. 11. [Return to text.](#)

[135] *See id.* art. 10.3. [Return to text.](#)

[136] *See id.* art. 1. [Return to text.](#)

[137] *See id.* art. 3. [Return to text.](#)

[138] *See id.* art. 4.1. Article 4 provides in pertinent part:

Pesticide manufacturers are expected to: make available copies or summaries of the original reports of such tests for assessment by responsible government authorities in all countries where the pesticide is to be offered for sale. Evaluation of the data should be referred to qualified experts; take care to see that the proposed use pattern, label claims and directions, packages, technical literature and advertising truly reflect the outcome of these scientific tests and assessments; provide, at the request of a country, advice on methods for the analysis of any active ingredient of formulation that they manufacture, and provide the necessary analytical standards; provide advice and assistance for training technical staff in relevant analytical work. Formulators should actively support this effort; conduct residue trials prior to marketing in accordance with FAO guidelines on good analytical practice . . . and on crop residue data . . . in order to provide a basis for establishing appropriate maximum residue limits (MRLs).

Id. [Return to text.](#)

[139] *See id.* art. 5. Article 5 provides in pertinent part:

Governments which have not already done so should: keep extension and advisory services, as well as farmers' organizations, adequately informed about . . . the range of pesticide products available for use in each area.

5.2 Even where a control scheme is in operation, industry should: cooperate in the periodic reassessment of the pesticides which are marketed and in providing the poison control centers and other medical practitioners with information about hazards; make every reasonable effort to reduce hazard by: making less toxic formulations available; introducing products in ready-to-use packages and otherwise developing safer and more efficient methods of application; using containers that are not attractive for subsequent reuse and promoting programs to discourage their reuse; using containers that are safe (e.g. not attractive to

or easily opened by children), particularly for the more toxic home-use products;

using clear and concise labeling; halt sale, and recall products, when safe use does not seem possible under any use directions or restrictions.

5.3 Government and industry should further reduce hazards by making provision for safe storage and disposal of pesticides and containers at both warehouse and the farm level, and through proper siting and control of wastes from formulating plants.

Id. [Return to text.](#)

[140] *See id.* art. 9. [Return to text.](#)

[141] *See id.* art. 11. [Return to text.](#)

[142] *See id.* art. 3.4.1. [Return to text.](#)

[143] *See id.* art. 3.4.3. [Return to text.](#)

[144] *See id.* art. 4.1.4. [Return to text.](#)

[145] *Id.* art. 5.2.2. [Return to text.](#)

[146] *Id.* art. 5.2.2.5. [Return to text.](#)

[147] *Id.* art. 10.2.1. [Return to text.](#)

[148] *Id.* art. 10.2.2. [Return to text.](#)

[149] *See id.* art. 10.2.3. [Return to text.](#)

[150] *See id.* art. 10.2.4. [Return to text.](#)

[151] *See id.* art. 3.4.1. [Return to text.](#)

[152] *See id.* art. 5.2.2.2. [Return to text.](#)

[153] *See id.* art. 10.4. [Return to text.](#)

[154] *See id.* art. 10.3.2. [Return to text.](#)

[155] *See* DINHAM, *supra* note 29, at 58. [Return to text.](#)

[156] Countries such as Benin, Togo, South Africa, Brazil, Ecuador and India report that illiteracy is a serious problem. *See id.* [Return to text.](#)

[157] *See id.* [Return to text.](#)

[158] *See id.* [Return to text.](#)

[159] Although Kenya's official languages are Standard Swahili and English, there are between 30 and 40 dialects of Swahili. *See* William Kalmbach, III, *International Labeling Requirements for the Export of Hazardous Chemicals: A Developing Nation's Perspective*, 19 LAW & POLICY INT'L BUS, 811, 820 (1987). [Return to text.](#)

[160] *See* Bouguerra, GREEN PEACE INTERNATIONAL, REPORT ON ORGANOPHOSPHORUS PESTICIDES IN TUNISIA OVER THE PERIOD 1987-1990 (1990). [Return to text.](#)

[161] See FAO Res. 6/89, COAG, *Report of the Conference of FAO, 95th Sess.*, U.N. Doc. C/89/Rep. 120 (1989). [Return to text.](#)

[162] See *id.* at App. E. [Return to text.](#)

[163] See *Code of Conduct*, *supra* note 4, art. 9.5. [Return to text.](#)

[164] See *id.* [Return to text.](#)

[165] See *id.* art. 9.6 ("Guidelines on the Operation of Prior Informed Consent"). The FAO adopted these provisions on November 21, 1989, prohibiting the pesticide importing country from using the PIC as a trade barrier in order to assist that country's domestic pesticide industry. See *id.* art. 9.8.2. [Return to text.](#)

[166] See DINHAM, *supra* note 29, at 4. [Return to text.](#)

[167] See *id.* [Return to text.](#)

[168] See *id.* [Return to text.](#)

[169] See *id.* [Return to text.](#)

[170] See *id.* [Return to text.](#)

[171] See *id.* at 17. [Return to text.](#)

[172] *Code of Conduct*, *supra* note 4, art. 4.1.1. [Return to text.](#)

[173] *Id.* art. 4.1.2. [Return to text.](#)

[174] See *id.* art. 4.1.7. [Return to text.](#)

[175] See *id.* art. 8.1.1. [Return to text.](#)

[176] *Id.* art. 8.1.2. [Return to text.](#)

[177] Pesticides included in PIC and candidates for inclusion in 1992:

INCLUDED: aldrin, captafol, chlordane, chlordimeform, cyhexatine, dieldrin, dinoseb, DDT, EDB, fluoroacetamide, HCH (mixed isomers), heptachlor, hexachlorobenzene, mercury compounds, parathion ethyl, phosphides (aluminium and magnesium), toxaphene 2,4,5,-T.

UNDER CONSIDERATION: methamidophos, methomyl, methyl bromide, monocrotophos, paraquat, parathion methyl, phosphamidon.

Minutes of the UNEP/FAO Expert Meeting on PIC, Geneva (Feb. 1992). [Return to text.](#)

[178] The European community Member states were the first to implement the Code of Conduct. Effective November 1992, compliance with the PIC provisions of the Code of Conduct became mandatory. See Council Regulation 2455/92, 1992 O.J. (L 251)13 (concerning the export and import of certain dangerous chemicals). [Return to text.](#)

[179] *United Nations Food and Agriculture Organization Conference Resolution 10/85* (Nov. 28, 1985) (Adopting the Code of Conduct), *reprinted* in 41 Int'l Env't. Rep. (BNA) 3002 (Mar. 11, 1987). [Return to text.](#)

[180] See *Code of Conduct*, *supra* note 4, at 3. [Return to text.](#)

[181] See *id.* [Return to text.](#)

[182] See Charlotte Uram, *International Regulation of the Sale and Use of Pesticides*, 10 N.W. J. INT'L L. & BUS. 460, 469 (1990). [Return to text.](#)

[183] See *Code of Conduct*, *supra* note 4, art. 1.2. [Return to text.](#)

[184] See *id.* [Return to text.](#)

[185] See *id.* Introduction, para. 1. [Return to text.](#)

[186] See *id.* Introduction, para 5. [Return to text.](#)

[187] *Id.* [Return to text.](#)

[188] See *id.* Introduction, para 6. [Return to text.](#)

[189] See *id.* [Return to text.](#)

[190] See *id.* [Return to text.](#)

[191] See *id.* [Return to text.](#)

[192] See *id.* Introduction, para. 1; *see also* London Guidelines, *supra* note 9, at 1. [Return to text.](#)

[193] Two significant conventions should be noted that limit the international trade and movement of hazardous waste: Bamako Convention on the Ban of Import Into Africa and the Control of Transboundary Movement of Hazardous Waste, 28 I.L.M. 657 (Mar. 22, 1989). [Return to text.](#)

[194] See *Codex*, *supra* note 10, at 39. [Return to text.](#)

[195] See *id.* [Return to text.](#)

[196] See *id.* [Return to text.](#)

[197] See *generally id.* [Return to text.](#)

[198] See *id.* at 59-60. The primary purpose of setting MRLs for pesticide residues in food, and in some cases animal feeds, is to protect human health. See *id.* at 39. Codex MRLs help to ensure that only the minimum amount of pesticide is applied to food consistent with pest control needs. See *id.* Codex MRLs are based on residue data from supervised trials and not directly derived from Acceptable Daily Intakes (ADIs). See *id.* at 60. ADIs are a quantitative expression of acceptable daily amounts of residue that persons may ingest on a long term basis, based on toxicological data from animal studies. See *id.*

The acceptability of Codex MRLs is based on a comparison between the ADI and suitable intake studies. See *id.* at 59-60. Intake data from these studies, compared with ADIs, helps to determine the safety of food in relation to pesticide residues. Guidelines for predicting Dietary Intakes of Pesticide Residues have been prepared under the joint sponsorship of UNEP, FAO and WHO. See Joint Food & Agricultural Organization of the United States World Health Organization, *Guidelines for Predicting Dietary Intake of Pesticide Residue*, 66(4) BULLETIN OF THE WORLD HEALTH ORG. 429-34 (1988). [Return to text.](#)

[199] See *generally* *Codex*, *supra* note 10. [Return to text.](#)

[200] See *id.* [Return to text.](#)

[201] See *id.* [Return to text.](#)

[202] See *id.* [Return to text.](#)

[203] *See id.* at 27-55. [Return to text.](#)

[204] *See id.* [Return to text.](#)

[205] *See id.* [Return to text.](#)

[206] *See id.* [Return to text.](#)

[207] *See id.* [Return to text.](#)

[208] *See id.* at 27-55. [Return to text.](#)

[209] *See id.* [Return to text.](#)

[210] *Id.* at 39. [Return to text.](#)

[211] *See generally id.* [Return to text.](#)

[212] *See id.* [Return to text.](#)

[213] John P. Frawley, Ph. D., *Codex Alimentarius—Food Safety—Pesticides*, 42 FOOD DRUG COSM. L.J. 168, 168-69 (1987). [Return to text.](#)

[214] The United States is a leader in using alternatives to pesticide application. For example, the Clinton Administration presently promotes the biological pesticide industry's integrated pest management (IPM) system that minimizes chemical harm by using beneficial natural pest enemies. *See* Ronald Begley, *Biopesticides on the Rise*, CHEMICAL WEEK, Oct. 27, 1993, at A-4; Philip J. Hilts, *White House Moves on Easing Food-Pesticide Law*, N.Y. TIMES, Aug. 20, 1993, at A-14. [Return to text.](#)

[215] *See* Greenwood, *Restrictions on the Exportation of Hazardous Products to the Third World: Regulatory Imperialism or Ethical Responsibility?*, 5 B.C. THIRD WORLD L.J. 129, 148-49 (1985) (recommending an approach to developing binding regulations of chemical trade and discussing the need for U.S. leadership). [Return to text.](#)

[216] *See* U.S. Department of Commerce, Bureau of the Census (FT900-E) (Dec. 1993). [Return to text.](#)

[217] *U.S. Chemical Trade Falls but Remains Key to Growth*, CHEMICAL MKTG. REP., Feb. 14, 1994, at 7. [Return to text.](#)

[218] Caroline Cox & Norman Grier, *Is EPA Registration a Guarantee of Pesticide Safety?*, J. OF PESTICIDE REFORM, Spring 1992, at 10. [Return to text.](#)

[219] *See id.* at 6. [Return to text.](#)

[220] Although Congress has often attempted to enact legislation controlling American chemical exports, these attempts have been unsuccessful. *See* S. 898, 102d Cong. (1991); H.R. 2083, 102d Cong. (1991); S. 2227, 99th Cong. (1990); H.R. 6587, 96th Cong. (1980). [Return to text.](#)

[221] *Circle of Poison: Impact on American Consumers*, Hearing Before the Comm. on Agriculture, Nutrition and Forestry, U. S. Senate, 102d Cong. (1991) (referring to CARL SMITH & SHELLEY BECKMANN, EXPORT OF PESTICIDES FROM U.S. PORTS IN 1990 1 (Foundation for Advancements in Science and Education 1991)). [Return to text.](#)

[222] *See* Smith & Beckmann, *supra* note 221, at 2. [Return to text.](#)

[223] *Id.* [Return to text.](#)

[224] *See id.* [Return to text.](#)

[225] *Id.* [Return to text.](#)

[226] Janet Raloff, *The Pesticide Shuffle*, 149(11) SCIENCE NEWS 1 (Mar. 16, 1996). [Return to text.](#)

[227] *See* 7 U.S.C. § 136 (1988 & Supp. V. 1993). [Return to text.](#)

[228] *See id.* § 136a(a). [Return to text.](#)

[229] *See id.* § 136a(c). [Return to text.](#)

[230] *See id.* § 136a(c)(5). [Return to text.](#)

[231] *See id.* § 136a(c)(2)(A). [Return to text.](#)

[232] *See id.* § 136(bb). [Return to text.](#)

[233] Federal Food, Drug and Cosmetic Act, Pub. L. No. 75-717, 52 Stat. 1040 (1938), *amended by* 21 U.S.C. §§ 301-393 (1988); *see* 40 C.F.R. §§ 152.112, 152.113, 152.114 (1991). [Return to text.](#)

[234] *See Regulation of Pesticides in Food: Addressing the Delaney Paradox Policy Statement*, 53 Fed. Reg. 41,104, 41,105 (1988). [Return to text.](#)

[235] *See* 7 U.S.C. § 136(p)- (q); *see also* 45 Fed. Reg. 50,274 (1980). [Return to text.](#)

[236] *See* 7 U.S.C. § 136o. FIFRA § 17(a)(1) states that an exported pesticide is mislabeled if there is no registration number, misrepresentation of the identity of the pesticide, absence of warning statements or absence of ingredients, weight and use restrictions. *See id.* § 136o(a)(1). [Return to text.](#)

[237] *See id.* § 136o. [Return to text.](#)

[238] *See id.* § 136o(b). [Return to text.](#)

[239] *See id.* [Return to text.](#)

[240] *See* 40 C.F.R. § 168.75(b)(3) (1996). [Return to text.](#)

[241] *See* 40 C.F.R. § 168.65(b)(4) (1997). [Return to text.](#)

[242] *See id.* § 168.65(c). [Return to text.](#)

[243] *See id.* [Return to text.](#)

[244] *Id.* § 168.65(c)(2). [Return to text.](#)

[245] *Id.* § 168.65(a). [Return to text.](#)

[246] *See id.* § 168.65(b)(4)(i). [Return to text.](#)

[247] *Compare* 40 C.F.R. § 168.65(a) *with* 40 C.F.R. § 168.65(c). [Return to text.](#)

[248] 40 C.F.R. §168.65(c). [Return to text.](#)

[249] *See* James H. Colopy, *Poisoning the Developing World: The Exportation of Unregistered and Severely Restricted Pesticides from the United States*, 13 J. ENVTL. L. 167, 191 (1995). [Return to text.](#)

[250] See U.S. GAO, *Pesticides: Better Sampling and Enforcement Needed on Imported Food*, 12-14, GAO/RCED-86-219 (Sept. 16, 1986) [hereinafter *1986 GAO Report*]. Chlordane and Heptachlor, manufactured by Velsicol Chemical Corp. in Memphis, TN, are two examples of chemicals suspected to be carcinogenic. See Michael Satchell, *A Vicious 'Circle of Poison'*, U.S. NEWS & WORLD REP., June 10, 1991, at 32. Although 48 countries, including the United States, have restricted or banned agricultural use of the chemicals, Velsicol exports between 1.5 to 2.0 million pounds a year. See *id.* In 1990, the two pesticides were detected on fish imported into the United States from Canada, Argentina and Norway, rice from Pakistan, mushrooms from France, squash from Mexico and chilies from Thailand. See *id.* Americans annually consume approximately 135 billion pounds of produce, over 25% of which is imported. See *id.* The FDA says that one percent of imported products are tested even though five percent are admittedly contaminated. See *id.* [Return to text.](#)

[251] See *1986 GAO Report*, *supra* note 250, at 1. [Return to text.](#)

[252] See *id.* at 2. [Return to text.](#)

[253] See *id.* at 3. [Return to text.](#)

[254] See *id.* at 22. [Return to text.](#)

[255] See *Pesticides: 30 Years Since Silent Spring—Many Long-standing Concerns Remain* (GAO/T-RCED-92-77) (July 23, 1992). [Return to text.](#)

[256] *Id.* at 1-2. [Return to text.](#)

[257] See *Highlights*, 7 INT'L ENV'T. REP. (BNA) 296 (July 13, 1983) (citing testimony of Don Clay, Acting Assistant Administrator for EPA's Office of Pesticides and Toxic Substances, Before the House Agric. Subcomm. on Dept. Operations, Research, and Foreign Agric. (June 9, 1983)). [Return to text.](#)

[258] See *id.* [Return to text.](#)

[259] See *id.* [Return to text.](#)

[260] See 21 U.S.C. §§ 301-94 (1997). [Return to text.](#)

[261] See 21 U.S.C. § 346a (1994). [Return to text.](#)

[262] See *id.* § 301 (1994). [Return to text.](#)

[263] See *id.* [Return to text.](#)

[264] See *id.* [Return to text.](#)

[265] *Id.* § 346a(b). [Return to text.](#)

[266] *Id.* § 348(c)(3)(A). This provision is known as the "Delaney Clause." [Return to text.](#)

[267] See *Petitions Proposing Tolerances or Exemptions for Pesticide Residues in or on Raw Agricultural Commodities*, 40 C.F.R. §180.7 (1990). [Return to text.](#)

[268] See *Long-Awaited Reform Bills Released*, Daily Rep. for Executives (BNA), Apr. 28, 1994, at A80. [Return to text.](#)

[269] See *id.* [Return to text.](#)

[270] See *id.* [Return to text.](#)

[271] See *id.* [Return to text.](#)

- [272] See John H. Cushman, *Clinton Proposes Revising Pesticide Regulations*, N.Y. TIMES, April 27, 1994, at A12. After opposition from virtually all sides of the issue, the Clinton administration modified the bill to permit shipment of an unregistered pesticide if it was registered in at least three OECD countries and to provide \$4 million to promote product stewardship in developing countries. The funding would have been provided from a tax on exported pesticides at the rate of one cent per pound. One day before hearings began, the stewardship program was eliminated and unregistered pesticides could be exported if any three countries with "credible pesticide regulatory programs" registered it. *Pesticides: Food Safety Reform Top Priority*, BNA Daily Rep., Jan. 25, 1994. [Return to text.](#)
- [273] See Food Quality Protection Act of 1996, Pub. L. No. 104-170, 110 Stat. 1489 (1996). [Return to text.](#)
- [274] See 7 U.S.C. § 136o(a) (1994). [Return to text.](#)
- [275] See *id.* [Return to text.](#)
- [276] See *id.* § 136o(b). [Return to text.](#)
- [277] See *id.* [Return to text.](#)
- [278] See 40 C.F.R. § 169.2(h) (1997). [Return to text.](#)
- [279] See *id.* [Return to text.](#)
- [280] See 15 U.S.C. § 2611(a)(2) (1997). [Return to text.](#)
- [281] See *id.* § 2611(b)(1). [Return to text.](#)
- [282] See *id.* § 2611(a)(1)(B). [Return to text.](#)
- [283] *Id.* § 2611(a)(2). The EPA Administrator has discretionary authority to test and determine which chemicals pose an "unreasonable risk" to human health or the environment. See *id.* [Return to text.](#)
- [284] See *id.* [Return to text.](#)
- [285] See *Comptroller General of the United States, Report to the Congress: Better Regulation of Pesticide, Exports and Pesticide Residues in Imported Food is Essential*, 1, 11-12 GAO/CED-79-43 (June 22, 1979). [Return to text.](#)
- [286] See *id.* [Return to text.](#)
- [287] See generally *U.S. GAO Report, Pesticides: Better Sampling and Enforcement Needed on Imported Food*, 32 GAO/RCED-86-219 (Sept. 1986). [Return to text.](#)
- [288] See Resources, Community and Economic Development Division, U.S. GAO, *Pesticides: Need to Enhance FDA's Ability to Protect the Public from Illegal Residues*, 2 GAO/RCED-87-7 (Oct. 1986). [Return to text.](#)
- [289] See *Pesticides: 30 Years Since Silent Spring—Many Long-standing Concerns Remain*, Testimony Before the Subcomm. on Env't. & Nat. Resources, 1(6) GAO/T-RCED-92-77) (July 23, 1992) (Statement of Peter Guerraro, Assoc. Dir., Env't'l Protection Issues, Resources, Community, and Econ. Dev. Div., U.S. GAO). [Return to text.](#)
- [290] See Resources, Community & Econ. Dev. Div., U.S. GAO, *Pesticide Reregistration May Not be Completed*, 2 GAO/RCED-93-94 (May 21, 1993). [Return to text.](#)
- [291] See *id.* [Return to text.](#)
- [292] See *id.* [Return to text.](#)

[293] *See id.* [Return to text.](#)

[294] *See* Pesticide Program, FDA, *Residue Monitoring—1993*, 4 (1994). [Return to text.](#)

[295] *See id.* [Return to text.](#)

[296] *See id.* [Return to text.](#)

[297] *Food Safety: Changes Needed to Minimize Unsafe Chemicals in Food*, GAO/RCED-94-192 (Sept. 1994) [hereinafter *1994 GAO Report*]. [Return to text.](#)

[298] *See id.* at 19. [Return to text.](#)

[299] *See id.* at 49. [Return to text.](#)

[300] *See id.* [Return to text.](#)

[301] *See id.* at 50. [Return to text.](#)

[302] *See id.* at 23. [Return to text.](#)

[303] *See* 1994 GAO Report, *supra* note 297, at 23. [Return to text.](#)

[304] *See id.* at 24. [Return to text.](#)

[305] *See id.* [Return to text.](#)

[306] *See* Gary Gardner, *IPM and the War on Pests*, 9(2) *WORLD WATCH* 36 (Mar. 13, 1996). [Return to text.](#)

[307] *See* Testimony of William D. Gullickson, Chairman Chemical Producers & Distributors Ass'n, House Agric. Dept. Operations and Nutrition Pesticides and FIFRA, Before the Subcomm. on Dept. Operations and Nutrition, June 15, 1994. [Return to text.](#)

CITY OF BOERNE V. FLORES AND THE RELIGIOUS FREEDOM RESTORATION ACT: THE DELICATE BALANCE BETWEEN RELIGIOUS FREEDOM AND HISTORIC PRESERVATION

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Responsible preservation requires a balance between public and private interests This is a conflict between change and continuity, between progress toward the future and preservation of the past.^[1]

I. INTRODUCTION

Since the birth of the country, freedom from religious persecution has been a fundamental value and is embodied in the First Amendment for the protection of all citizens' religious freedom.^[2] Citizens nationwide enjoy the free exercise of their religious values in churches, synagogues, and other religious organizations. Many of these religious congregations worship in historic buildings that bestow distinctive cultural and aesthetic value and special character to communities across the nation.^[3] Though the historic preservation movement is a fledgling in comparison to religious freedom, the movement has been exponentially gaining in strength over the past thirty years, as evidenced by new ordinances, federal statutes, and judicial protection to preserve America's architectural past.^[4] Earlier this year, the United States Supreme Court considered the unique conflict between religious freedom rights and historic preservation in *City of Boerne v. Flores*.^[5]

Flores centers around Congress's 1993 enactment of the Religious Freedom Restoration Act (RFRA).^[6] RFRA affords additional protection to religious practices by subjecting neutral, non-religion based government laws (such as preservation ordinances) to judicial scrutiny,^[7] usurping the Supreme Court's previous judicial interpretation of the First Amendment.⁸ In *Flores*, the Court ruled on the constitutionality of RFRA, thereby affecting the ability of governments to protect religious historic structures and establishments.⁹ The *Flores* decision will have significant repercussions on American religion protection law and hopefully has clarified some of its ambiguities.^[10]

Using the backdrop of *Flores*, this article analyzes the constitutionality and policy behind RFRA and examines RFRA's effects on historic preservation. Part II reviews judicial protections afforded to religious freedom, summarizing relevant case law. Additionally, Part II recounts the growth of the historic preservation movement in the United States and examines judicial opinions resolving conflicts between religious freedom and historic preservation. Part III reviews RFRA and the decisions under RFRA relating to historic preservation. Part IV examines the two views regarding the constitutionality of RFRA, reviewing the separation of powers doctrine and Congress's power to enact RFRA, and presents the Supreme Court's view as enunciated in *Flores*. Part V projects the effects that the Court's ruling of RFRA as unconstitutional will have on historic preservation and religious freedom. This is done by using the previous effects of RFRA's compelling interest test as a measuring tool. Part VI analyzes the costs and benefits of RFRA and the reinstatement of the *Smith* test, with special consideration of the religious freedom benefits that the Court's ruling may forfeit. Lastly, Part VII explores alternatives to the *Smith* standard that could achieve greater balance between religious freedom interests and historic preservation.

II. REVIEW OF THE CONFLICTS BETWEEN RELIGIOUS FREEDOM AND HISTORIC PRESERVATION

The First Amendment of the United States Constitution prevents Congress from making a law "respecting an establishment of religion, or prohibiting the free exercise thereof."^[11] This clause of the constitution provides the basis of religious protection in the United States, ensuring that American citizens' religious practices are not unnecessarily impeded by the government.^[12] While protecting religious freedom, the government also maintains an interest in preserving the country's historical structures and monuments, as evidenced by the vast body of legislation enacted to protect historic resources.^[13] The conflict between the interests of religious freedom and historic preservation can emerge when the government moves to protect a historic structure owned by a religious establishment, such as a church or synagogue.^[14] This section provides background case law, defining the interests of religion and

historic preservation necessary to fully understand the complex intertwining of religion and historic preservation.

A. Protection Afforded to Religious Freedom

In *Sherbert v. Verner*,^[15] the Supreme Court issued a Free Exercise Clause interpretation which emphasized that governmental regulation of religious beliefs would not be tolerated unless the regulation serves a compelling state interest within the state's constitutional power to regulate.^[16] The Court described an interest sufficiently compelling enough to permissibly limit a citizen's First Amendment rights to include^[17] "[o]nly the gravest abuses, endangering paramount interest."^[18] Additionally, in proving the compelling nature of an interest, the Court required the state to prove that the regulation was the least restrictive means of meeting the state's goal.^[19]

In *Sherbert*, the appellant, a woman seeking unemployment compensation, argued that her religious faith dictated that she not work on Saturday, the Sabbath Day for her faith. The South Carolina Unemployment Compensation Act provided that a claimant is eligible for employment benefits only if available to work and willing to accept employment unless good cause is shown why an offer of employment was declined.^[20] The appellant refused to work on Saturdays, preventing her from obtaining employment. The Employment Security Commission found that the appellant's restricted availability disqualified her from receiving employment benefits. The Supreme Court found it unacceptable that the appellant was forced to choose between following the tenets of her religious faith or receiving unemployment benefits, stating that the governmental imposition burdened the appellant's free exercise of religion.^[21] The Court ruled that the appellant should not be denied unemployment benefits.^[22]

In *Wisconsin v. Yoder*,^[23] the Supreme Court applied the *Sherbert* standard to a challenge to the Wisconsin Supreme Court's ruling that the religious convictions of parents of Amish school children were invalid on First Amendment grounds.^[24] In *Yoder*, Amish parents refused to send their children to private or public secondary school, violating Wisconsin's laws requiring school attendance until age sixteen. The Supreme Court found that forced application of the Wisconsin law to those of the Amish faith would interfere with the "fundamental tenets" of their beliefs, precisely the effect that the First Amendment was fashioned to prevent.^[25] The Court affirmed the principle from *Sherbert* that a facially neutral regulation may unduly burden the free exercise of religion by its application.^[26] The Court rejected the state's argument that it had a compelling interest in administering uniform education to all Wisconsin children, noting that the Amish alternative to traditional schooling has allowed the Amish people to function effectively in their self-sufficient community for more than two hundred years.^[27] The Court held that the state could not require the Amish children to attend formal high school.^[28]

Taken together, *Sherbert* and *Yoder* represent strong protections of the free exercise of religion, seemingly applying strict scrutiny to the state's interest for burdening religion. After these decisions, the Court continued to apply the *Sherbert-Yoder* compelling interest analysis though it became increasingly unwilling to recognize religion exceptions.^[29] Several state unemployment compensation rules were invalidated using the *Sherbert-Yoder* analysis when a claimant was denied unemployment benefits due to religion-related conditions.^[30] However, outside the employment benefits context, the once-strict scrutiny of the *Sherbert-Yoder* analysis eroded to a much more lenient standard where the state often prevailed.^[31] In more than one instance, the Court refrained from protecting religious interests in favor of rubber-stamping a government regulation, even where the regulation's underlying justification appeared to be less than compelling.^[32]

In 1990, the Supreme Court decided *Employment Division, Department of Human Resources v. Smith*^[33] and finally departed completely from the strict scrutiny approach articulated in *Sherbert* and *Yoder*. In *Smith*, the respondents were fired from their job at a private drug rehabilitation organization for ingesting an illegal drug, peyote, used for sacramental purposes in their religion. They ingested the peyote at a religious ceremony of the Native American Church.^[34] The respondents were denied unemployment benefits because they had been released due to work-related misconduct. The respondents sued the state, claiming that their free exercise rights under the First Amendment had been violated.^[35]

Justice Scalia delivered the Court's opinion, declaring that the state can impose a valid and neutral law regulating religious activities, provided the law applies to all citizens generally—regardless of religion.^[36] The Court supported its finding by claiming that free exercise of religion has never exempted citizens from following general laws

formulated by the government.^[37] Thus, the denial of unemployment benefits to the respondents was affirmed, and the Court expressly denied extending the *Sherbert-Yoder* analysis outside the unemployment compensation scenario.^[38] Though an employment benefits case, the Supreme Court recognized the law in *Smith* as a "generally applicable criminal law," and thus grouped the *Smith* decision in a different niche than pure employment benefits cases such as *Sherbert* and *Yoder*.^[39] Based on the criminal aspects of the *Smith* case, the majority did not apply the *Sherbert-Yoder* analysis, overlooking that *Smith's* basic controversy involved employment benefits.^[40]

Further, the majority compared the compelling interest requirement contained in the *Sherbert-Yoder* analysis to other areas of law that require a compelling interest examination. The Court stated that

The "compelling government interest" requirement seems benign, because it is familiar from other fields. But using it as the standard that must be met before the government may accord different treatment on the basis of race, or before the government may regulate the content of speech, is not remotely comparable to using it for the purpose asserted here. What it produces in the other fields—equality of treatment and an unrestricted flow of contending speech—are constitutional norms; what it would produce here—a private right to ignore generally applicable laws—is a constitutional anomaly.^[41]

In sum, the Supreme Court rejected the compelling interest *Sherbert-Yoder* analysis, limiting it to *pure* unemployment benefits scenarios and imposed an analysis based on the general applicability of a regulation or law. Under *Smith*, where a regulation is neutral and generally applicable to all citizens, without regard to religion, the regulation stands even if it incidentally burdens one's religious beliefs.^[42] Thus, *Smith* represented the Supreme Court's most current view on the strength of religious rights as opposed to government's right to regulate prior to *Flores*.

B. Protection Afforded to Interests in Historic Preservation

The preservation movement began early in the United States as citizens realized the importance of protecting sites of particular significance to America's heritage. In 1813, preservationists saved Independence Hall from demolition and in 1853 saved Mount Vernon from destruction.^[43] Though preservation has long been of interest to American citizens, both the federal government and courts have been slow to develop the legal processes to reflect these concerns. Legislation and judicial opinions reflecting historic preservation concerns are therefore a relatively new occurrence.^[44]

1. Federal Involvement

As national interest in preservation grew in the late Nineteenth century, the federal government also became more actively involved in the preservation movement, first acting to preserve the country's natural features by establishing Yellowstone National Park^[45] and second appropriating money to protect Native American dwellings in the southwestern United States.^[46] Congress enacted the Antiquities Act in 1906,^[47] the first general federal legislation protecting historic resources,^[48] evidencing the growing interest in the preservation movement.^[49] This Act provided a foundation for the current preservation scheme coordinated by the Secretary of Interior.^[50] During this time period, Congress also founded the National Park Service and defined one of its functions as protecting historic sites, particularly areas too large to be privately preserved, by designating them as national park sites.^[51] During the early to mid twentieth century, the federal government showed moderate interest in historic preservation by enacting preservation legislation on a small scale^[52] and creating the National Trust for Historic Preservation.^[53]

Beginning with the enactment of the National Historic Preservation Act in 1966,^[54] federal interest in protecting historic resources heightened. This Act created a National Register of Historic Places, historic districts, and an advisory council on historic preservation.^[55] Additionally, Congress provided tax benefits for property containing structures of historic interest in the late 1970s and early 1980s.^[56] In the last twenty years, Congress has enacted a flurry of legislation to protect historic resources, reflecting the current emphasis placed on protecting America's rich panoply of resources.^[57]

2. Judicial Involvement

Just as the federal government has been slow to react to the strengthening of the preservation movement, judicial recognition of interests in historic preservation has also been slow to develop. In 1954, the Supreme Court first

enunciated in *Berman v. Parker*^[58] that the government may regulate based on purely aesthetic interests:

The concept of public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled If those who govern the District of Columbia decide that the Nation's Capital should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way.^[59]

Though *Berman* did not deal directly with historic preservation,^[60] its removal of the previous "aesthetic-plus" principle^[61] affected regulations based on historic preservation. The *Berman* case departed from the previous standard that governments could only regulate based on historic preservation if the regulation involved more than just aesthetics, such as public welfare. In doing so, *Berman* broadened governments' power to regulate based purely on historic preservation interests, signifying a major judicial victory for the preservation movement.^[62]

In 1978, the Supreme Court dealt directly with historic preservation interests in *Penn Central Transportation Co. v. City of New York*,^[63] a seminal takings case involving New York City's landmark laws. In *Penn Central*, the owners of Grand Central Terminal sought to build a fifty story office building over the Terminal. Because the New York City Landmarks Preservation Committee had designated Grand Central Terminal as a landmark,^[64] the Commission denied plans for construction of the office building.^[65] Owners of the Terminal filed suit against the City of New York, alleging that the application of the landmarks preservation law constituted a taking of property without just compensation.^[66] The Court found that the New York City landmarks law as applied to Grand Central Terminal was not a taking because the restrictions it imposed on the Terminal were related to the promotion of the general welfare and allowed reasonable use of the landmark site.^[67]

The Supreme Court's majority opinion^[68] in *Penn Central* affirms the importance of the growing historic preservation movement in the United States.^[69] The Court notes two major concerns that have developed from preservation efforts around the nation: (1) the destruction of historic landmarks, structures, and areas^[70] without contemplation of the value of these properties or alternative uses for these structures; and (2) the prevailing belief that structures with particular historic significance enhance the quality of life and preserve the country's past.^[71] Additionally, the *Penn Central* Court's holding that no taking occurred further establishes the overwhelming judicial support for preserving historic structures. By recognizing that a law fashioned exclusively for preservation promotes the general welfare, the Court affirmed a local government's ability to use its police powers exclusively for historic preservation, upholding the legitimacy of historic preservation ordinances.^[72] With the Supreme Court's express recognition of preservation ordinances and overarching support for the preservation movement, *Penn Central* firmly rooted judicial protection of historic preservation.^[73]

C. Pre-RFRA: Review of Conflicts Between Religious Freedom and Historic Preservation

Conflicts between religious freedom and historic preservation embody a struggle between the constitutional rights of citizens (such as a church or synagogue congregation) and the police powers of the government through which it applies a preservation ordinance or law.^[74] Prior to the enactment of RFRA, courts applied the judicially-created analysis for laws and regulations that affect religious activities^[75] when religious freedom and historic preservation interests collide.

1. Pre-1990: The Sherbert-Yoder Era

Before 1990, courts relied on the analysis^[76] set forth in *Sherbert and Yoder*.^[77] Courts generally gave religious entities special deference when the government imposed regulations using their police powers. For example, in *Westchester Reform Temple v. Brown*,^[78] the court stated that "[r]eligious structures enjoy a constitutionally protected status which severely curtails the permissible extent of governmental regulation in the name of the police powers."^[79] The court asserted that though the government's use of its police power may be properly related to the health, safety, and welfare of the community, the police power may be outweighed by the First Amendment guarantee of freedom of religion.^[80] The court further pointed out that "the power of [government] regulation [of religious structures] has not been altogether obliterated."^[81] Similarly, the court in *Bethlehem Evangelical Lutheran Church v. City of Lakewood*^[82] maintained that churches are subject to the police power of the state but should be given preferential

treatment by requiring the state to show a substantial interest^[83] before using its power.^[84] Thus, the approach followed by the majority of courts faced with religion-historic preservation cases during the *Sherbert-Yoder* era involved weighing the legitimate concerns of the government and the detrimental effects of the government's regulation on freedom to practice religion.^[85] Such a test led to a heavily factually-based analysis, yielding mixed results dependent upon the court's perception of each party's interests.^[86] But, as a whole, courts gave deference to free exercise interests unless presented with a compelling government interest.

2. *Post-1990: The Smith Era*

As noted, the Supreme Court departed from the strict scrutiny *Sherbert-Yoder* analysis in 1990, requiring courts faced with religion-historic preservation cases to follow the *Smith* analysis. Though the *Smith* analysis allows more deference to government regulation than the previous *Sherbert-Yoder* standard,^[87] courts still return mixed results.^[88]

One of the most prominent religion-historic preservation cases after *Smith* is *St. Bartholomew's Church v. City of New York*.^[89] The case involved a church's challenge of the application of a landmark law, where the church claimed the law to be a burden on its free exercise of religion. In 1967, St. Bartholomew's Church and adjacent structures were designated by the New York Landmarks Preservation Commission as a landmark, prohibiting the alteration or demolition of the Church's buildings without approval by the Commission.^[90] In 1983, the Church sought to replace its Community House with a fifty-nine story office tower, but the Commission denied this request. After several more requests were denied by the Commission, the Church brought suit against the city.^[91] On appeal to the Second Circuit, the Church alleged violations of the Free Exercise Clause and Takings Clause.^[92]

The Church claimed that its right to continue its religious mission was impaired by the Commission because its Community House was no longer a sufficient facility in which the Church could continue its ministerial and charitable services.^[93] Further, the Church claimed that renting space in the office tower would generate revenue to expand ministerial and charitable activities.^[94] The court applied the *Smith* test, maintaining that

government regulation may affect conduct or behavior associated with [religious] beliefs. Supreme Court decisions indicate that while the government may not coerce an individual to adopt a certain belief or punish him for his religious views, it may restrict certain activities associated with the practice of religion pursuant to its general regulatory powers.^[95]

The court summarized the post- *Smith* view as requiring courts to distinguish between the constitutionally neutral, generally applicable law that bears an incidental effect on religious activities and the unconstitutional religiously-oriented law that burdens free exercise of religion.^[96]

The court acknowledged the restriction of the landmark law on the Church's ability to raise money and carry out ministerial programs but held that no First Amendment violation existed because of the landmark law's neutral, generally applicable nature.^[97] The court pointed out that the Church could still proceed in its religious practice using its current facilities and that the landmark law possessed no discriminatory motive.^[98] Based on these findings, the court ruled that no Free Exercise Clause violation existed in the application of the landmark law to St. Bartholomew's Church.^[99]

Though *Smith* seemed to tip the religious freedom/historic preservation conflict toward protection of historic structures by allowing neutral, generally applicable laws *carte blanche*, some courts have still managed to favor protecting First Amendment freedoms over historic preservation, showing that even after *Smith*, religious freedom will be judicially protected. In *First Covenant Church of Seattle v. City of Seattle*,^[100] the City of Seattle designated First Covenant Church a landmark by adopting an ordinance which also required First Covenant Church to seek approval from the City before making certain external alterations.^[101] First Covenant Church sued the City to prohibit application of the landmark ordinance to First Covenant Church, claiming that the ordinance violated the Free Exercise Clause.^[102]

The Washington Supreme Court asserted that the *Smith* test did not apply to the factual situation set forth in *First Covenant* and promptly distinguished *St. Bartholomew* on its facts.^[103] In addition, the court deemed *First Covenant* a "hybrid situation," in which First Covenant Church's claim included multiple protected interests: free exercise and free speech.^[104] The court termed the design of the church building to be non-verbal conduct that expresses the Christian

belief and message. Based on its hybrid situation determination (derived from the addition of the free speech claim), the court found that *First Covenant* fell into an exception category, free from the tentacles of the *Smith* test. The court then applied the *Sherbert-Yoder* compelling interest analysis.[\[105\]](#)

First, the court determined that the government regulation on First Covenant Church burdened the church in two ways: administratively because the church must seek approval from a government body before changing their structure and financially because the value of the church's property was reduced almost in half.[\[106\]](#) Next, the court ruled that the government did not have a compelling interest to support its enactment. The court opined that historic preservation interests were not strong enough to be deemed compelling because they only encompass aesthetics and cultural interests, not public health or safety.[\[107\]](#) Thus, despite the pro-regulation *Smith* ruling, the court in *First Covenant* held that the ordinance at issue was a burden on free exercise of religion and, as such, invalidated the landmark designation ordinance.[\[108\]](#)

Similarly, the court in *Society of Jesus v. Boston Landmarks Commission*[\[109\]](#) also diverged from the holding in *St. Bartholomew*. *Society of Jesus* involved a dispute between a Jesuit church and the Boston Landmarks Commission over the constitutionality of the Commission's designation of the interior of the church as a landmark.[\[110\]](#) In 1987, the Commission designated the interior of the church a landmark. The designation limited permanent alterations to the church interior without approval by the Commission. The church promptly challenged the designation on constitutional grounds. The Massachusetts Supreme Court ruled that the Commission's designation of the interior of the church violated state and federal constitutional provisions.[\[111\]](#) Because the court found that the designation violated state constitutional provisions, the court never engaged in a full discussion regarding the federal free exercise violations.[\[112\]](#) But, the court did add that "[t]he government interest in historic preservation, though worthy, is not sufficiently compelling to justify restraints on the free exercise of religion, a right of primary importance."[\[113\]](#) Thus, like the *First Covenant* court, the *Society of Jesus* court placed the importance of historic preservation as unconditionally subservient to protecting the right of religious freedom and held against preservation interests, despite the recent *Smith* decision.[\[114\]](#)

Though the facial application of the *Smith* doctrine would seem to place a pro-preservation slant on religion-preservation conflicts, courts have broad interpretative leeway, making decisions highly reliant on the individual facts of each case. Surprisingly, no more cases have leaned toward protecting preservation interests under the *Smith* era than during the *Sherbert-Yoder* compelling interest era.[\[115\]](#) This result is most likely due to the ability of courts to distinguish their cases factually, as in *First Covenant*, or "sidestep" First Amendment issues altogether and apply different laws, as in *Society of Jesus*. Such cases demonstrate the wide room for judicial interpretation in this area of the law.[\[116\]](#) No doubt, RFRA was enacted to replace the previously judicially-created law and narrow the interpretative liberties that courts could take in deciding religion-preservation cases.[\[117\]](#)

III. OVERVIEW AND APPLICATION OF THE RELIGIOUS FREEDOM RESTORATION ACT

In 1993, Congress enacted RFRA[\[118\]](#) in response to the *Smith* decision.[\[119\]](#) When enacting RFRA, Congress primarily intended to reinstate the *Sherbert-Yoder* compelling interest test.[\[120\]](#) Specifically, Congress wished to provide protection where religion is burdened by a neutral law of general applicability.[\[121\]](#) To accomplish this goal, Congress enacted RFRA to override the Supreme Court's ruling in *Smith* which basically allowed the government to impose burdens on religion via neutral, generally applicable laws.[\[122\]](#)

Among the factors motivating Congress to enact RFRA were its finding that neutral laws may burden religion just as other laws do and its finding that the framers of the Constitution recognized free exercise of religion to be an unalienable right of all citizens.[\[123\]](#) Congress further cited the testimony of Reverend Oliver S. Thomas from committee hearings that the impact of the *Smith* decision has severely undermined freedom to practice religion— prognosticating that every American religion will eventually suffer from the *Smith* holding.[\[124\]](#) Specifically, Reverend Thomas stated that churches had been zoned out of commercial areas,[\[125\]](#) and Jews had been subjected to autopsies, violating their families' faith.[\[126\]](#) After these considerations, Congress enacted RFRA.

A. Overview of RFRA

RFRA prevents the government from substantially burdening a person's free exercise of religion, even when the burden

results from a neutral law of general applicability.^[127] The only exception is where a government demonstrates^[128] that the burden placed on an individual is the least restrictive means of furthering a compelling governmental interest.^[129] A plaintiff has the initial burden of proof to show that a substantial burden on his or her religion exists.^[130] If this burden is satisfied, then the burden shifts to the government to demonstrate that there is a logical and rational connection between its regulation and a compelling governmental interest and that the regulation is neutral and generally applicable.^[131] RFRA entitles a person whose religious freedom has been violated to obtain appropriate relief against the government by asserting a violation of RFRA as a claim or defense.^[132] Reading the plain language of RFRA, its scope appears to encompass all First Amendment free exercise cases in order to prevent intrusive government regulations on religion.^[133]

B. Application of RFRA in the Context of Historic Preservation

Since the enactment of RFRA and the renewal of the *Sherbert-Yoder* test, only two cases have involved both RFRA and historic preservation. The first, *Keeler v. Mayor of Cumberland*,^[134] was decided in 1996 by a Maryland federal district court. The second, *City of Boerne v. Flores*,^[135] was decided by the Fifth Circuit in 1996 and the United States Supreme Court in June 1997 and is discussed in the next section.^[136] Several other cases have been heard that involved ordinances restricting the religious practices of churches.^[137] Though not directly impacting historic preservation, these cases may prove to be useful analogies for courts hearing RFRA cases involving the application of preservation ordinances to churches.

The *Keeler* dispute involved St. Peter and Paul's Roman Catholic Church, located on an entire block in the city of Cumberland, Maryland within the Washington Street Historic District.^[138] Buildings and structures located within the historic district cannot be destroyed or altered without approval from the Cumberland Historic Preservation Commission. Since 1986 a chapel and monastery on the site were vacant and in disrepair. The cost to repair and maintain the structures was estimated to exceed \$380,000.^[139] After several failed plans to convert the chapel and monastery, the congregation decided to demolish the structures to build a much needed church annex on the property and eliminate the large financial drain created by the monastery and chapel buildings. In 1995, the congregation applied to the Commission to demolish the chapel and monastery, but the request was denied.^[140]

The congregation filed suit, alleging that the City's application of the historic preservation ordinance to the chapel and monastery violated RFRA and the Free Exercise Clause because of the substantial burden it imposed on the free exercise of the congregation's religion.^[141] In response, the City argued that RFRA violates the separation of powers doctrine because RFRA imposes the *Sherbert-Yoder* test, a rule of constitutional interpretation, on the courts. The congregation refuted this claim by urging the court to view RFRA as "prophylactic statutory protection for the Fourteenth Amendment's free exercise guarantee, as substantively interpreted by the judiciary."^[142]

The court recounted the tradition of reserving constitutional construction questions to the courts, rather than Congress, noting that the tradition is traceable to the Federalists' arguments for the ratification of the Constitution.^[143] The court determined the rule imposed by RFRA to be judicial, not legislative in nature, due to the bald assertion of RFRA to reinstate the *Sherbert-Yoder* test.^[144] Based on this determination, the court found that Congress did not have the power to enact RFRA and held the statute unconstitutional.^[145]

After holding RFRA unconstitutional, the court issued a separate order for the congregation's free exercise claim and other claims.^[146] The court applied the *Smith* test and found that the congregation satisfied its initial burden of proving that their free exercise rights were burdened by proving that the new construction was crucial to the spiritual growth of the church.^[147] Then the court determined that the ordinance at issue in *Keeler* cannot be categorized as religiously neutral but placed it in an excepted category mentioned in *Smith* involving a system of exemptions and exceptions that require the application of principles rather than those articulated in *Smith*.^[148] Due to the ordinance's exemption for several non-religion based circumstances, the court found that the system of exemptions should be extended for religious hardship when such interests outweigh historic preservation.^[149] Thus, the court applied a compelling interest analysis, requiring the City to assert a compelling interest to support its ordinance. The court found that the City failed to present a compelling interest and held that the City's denial of the congregation's application for demolition was an unconstitutional violation of the First Amendment.^[150] Thus, despite the court's rejection of RFRA, the court ironically implemented the compelling interest test for different reasons and ultimately found that religious

freedom interests should prevail. *Keeler* provides another example of the widely variant avenues a court can take in resolving a religion-historic preservation conflict.^[151]

C. City of Boerne v. Flores: A Landmark Decision

"A little church that wants to be big will test a new law meant to guarantee freedom of religion."^[152]

1. The Fifth Circuit's Opinion

The Supreme Court granted certiorari to the Fifth Circuit's *Flores* decision and heard oral arguments in February of 1997.^[153] Though the *Flores* case involved a small church in a small Texas town, many legal scholars and national organizations^[154] anticipated that the Supreme Court would take this opportunity to rule on the constitutionality of RFRA and clarify the law interpreting the Free Exercise Clause.^[155] Indeed, the *Flores* decision should shape First Amendment jurisprudence as it is interpreted by lower courts in the years to come. As stated by one commentator: "It's the authority of Congress that is at stake, not only to protect the religious liberty but to protect any other constitutional liberties."^[156] Additionally, the *Flores* case drew the attention of preservation groups,^[157] evidence of the widespread belief that the Supreme Court's ruling on RFRA's constitutionality will dramatically affect historic preservation efforts of governments.^[158]

The *Flores* dispute involved Saint Peter's Catholic Church, built in 1923 and located within a historic district in the City of Boerne, Texas.^[159] In 1993, the Church applied for a permit from the City to enlarge the church building without affecting the building's facade. The City denied the Church's application, and subsequent appeal was denied. The Church thereafter filed suit against the City, alleging that the ordinance containing the City's preservation scheme was unconstitutional and violated RFRA.^[160]

The majority of the Fifth Circuit's *Flores* decision analyzed whether Congress had the power to enact RFRA in light of the separation of powers doctrine.^[161] The court concluded that Section 5 of the Fourteenth Amendment empowered Congress to enact RFRA and that Congress's enactment of RFRA does not infringe on the court's power to interpret the Constitution.^[162] The court also found that RFRA does not facially violate the Tenth Amendment's limitation on the power of states to legislate in traditional areas of state prominence.^[163]

2. The Supreme Court's Opinion

Like the Fifth Circuit's opinion, much of the Supreme Court's opinion focused on whether Congress had the power to enact RFRA under the Fourteenth Amendment.^[164] The Court determined that RFRA was solely intended to replace the *Smith* standard. Consequently, the Court ultimately held RFRA unconstitutional, based almost entirely on a separation of powers analysis under Section 5 of the Fourteenth Amendment.^[165] The Court then reaffirmed the *Smith* standard, invalidating the RFRA strict scrutiny test.^[166]

The Court presented a panoply of additional reasons to explain why RFRA's strict scrutiny standard should not be imposed.^[167] Most notably, the Court argued that RFRA's standard is a significant "intrusion into the States' traditional prerogatives and general authority to regulate for the health and welfare of their citizens."^[168] Additionally, the Court asserted that the exercise of religion is burdened by a variety of general laws in an incidental way. These general laws burden every citizen equally—irrespective of their religious beliefs.^[169] From a policy perspective, the Court recognized that RFRA's standard imposes a significant litigation burden on states.^[170] The Court found that the costs of imposing the RFRA standard far outweigh the minimal benefits of the enactment.^[171] The coming discussion of the constitutionality of RFRA uses the Fifth Circuit's analysis in *Flores* as an analytical model.

IV. THE CONSTITUTIONALITY OF RFRA

The constitutionality of RFRA occupied the majority of the Supreme Court's opinion in *Flores*. As such, the Court's decision regarding RFRA's constitutionality will have vast consequences on future religious freedom cases, including those dealing with historic preservation issues. Specifically, the Supreme Court addressed whether Congress had the authority to enact RFRA under Section 5 of the Fourteenth Amendment, considering the traditional deference given to courts to interpret the constitution.^[172] This section reviews Congress's power to enact RFRA under the Supreme

Court's *Morgan* decision, using the framework of *Katzenbach v. Morgan*^[173] and case law interpreting the constitutionality of RFRA. Two views are presented regarding RFRA's constitutionality followed by the Supreme Court's interpretation of the *Morgan* issue.

A. Two Interpretations of the Fourteenth Amendment *Morgan* Analysis

Section 5 of the Fourteenth Amendment of the United States Constitution provides that "Congress shall have power to enforce, by appropriate legislation, the provisions of this article."^[174] Section 5 was first interpreted in *Ex Parte Virginia*,^[175] where the Supreme Court read Congress's power to enact legislation narrowly.^[176] The Supreme Court later interpreted Section 5 during the Civil Rights Era in *Morgan*, which still stands today as the modern interpretation of Section 5.^[177] In *Morgan*, the Court held that Congress's authority to legislate under Section 5 is determined by three elements: (1) whether the statute is enacted to prohibit ongoing violations of the Fourteenth Amendment; (2) whether the statute is "plainly adapted to that end;" and (3) whether the statute is consistent with the "letter and spirit of the constitution" and not prohibited by it.^[178] The Supreme Court reaffirmed the *Morgan* interpretation of Section 5 in *Oregon v. Mitchell*^[179] and has continued to follow these principles since *Mitchell*.^[180]

The first prong of the *Morgan* test focuses on whether Congress enacted RFRA to enforce ongoing violations of the Fourteenth Amendment. This prong of the *Morgan* test as applied to RFRA turns on the Court's interpretation of what RFRA actually was enacted to do. Lower courts are split in their interpretations of this question.

Some courts, such as *Keeler* and *In re Tessier*, assert that RFRA does not enforce ongoing violations of the Fourteenth Amendment but instead "attempts to statutorily impose upon the interpretation of federal statutes a formerly constitutional standard"^[181] by bringing back the *Sherbert-Yoder* compelling interest test. Congress does possess the power to remedy judicial institutional barriers^[182] by passing legislation consistent with judicial interpretation to "animate the Court's decisionmaking."^[183] However, these courts assert that Congress cannot simply enact any legislation connected to the Fourteenth Amendment, ignoring previous judicial precedent.^[184] RFRA neither fine-tunes the Supreme Court's *Smith* interpretation nor addresses the Court's competence to implement the *Smith* balancing analysis. These jurisdictions hold that by reinstating the *Sherbert-Yoder* analysis, Congress abrogated the Court's interpretation of the Constitution in *Smith* because RFRA applies to all situations where *Smith* applies—in effect replacing the *Smith* standard with RFRA's statutory standard.^[185] Such a congressional action fails to enforce an ongoing violation of the Fourteenth Amendment and, thus, fails the first prong of the *Morgan* test.

Other jurisdictions counter this argument with a broader interpretation of Congress's legislative power under Section 5 of the Fourteenth Amendment. The Fifth Circuit in *Flores* quickly dispensed with this prong by stating that RFRA enforces ongoing violations of the Fourteenth Amendment by enforcing free exercise rights of the First Amendment, which is incorporated by the Fourteenth Amendment through the Due Process Clause.^[186] Citing RFRA's legislative history to advance its argument, *Flores* further expounds that witnesses at congressional hearings stated the immediate need for further protection of religious freedom and that the Senate Judiciary Committee responded to this need by reinstating the *Sherbert-Yoder* test.^[187]

The court in *Belgard v. State of Hawaii*^[188] countered the notion that Congress did not have the authority to enact RFRA by describing the similarities between RFRA and the Voting Rights Act at issue in *Morgan*.^[189] In *Morgan*, the Supreme Court ruled that Congress had the authority to enact the Voting Rights Act, even though the Supreme Court had directly upheld a standard contrary to the Voting Rights Act^[190] in *Lassiter v. Northampton County Board of Elections*.^[191] Based on this distinction, the *Belgard* court asserted that Congress had authority to enact RFRA despite contrary judicial precedent. The court did, however, note that opponents of this view distinguish *Lassiter* and the Voting Rights Act factually, contending that the Voting Rights Act does not specifically address issues decided in *Lassiter*.^[192]

Thus, when determining whether RFRA was enacted to prevent violations of the Fourteenth Amendment, pre-*Flores* courts varied in their interpretations of Congress's authority to pass legislation connected to the Fourteenth Amendment,^[193] providing differing views of the interaction between courts and Congress in developing the law.^[194]

The second prong of *Morgan* requires examination of whether RFRA is "plainly adapted to that end."^[195] Section 5 of

the Fourteenth Amendment only affords Congress remedial power to remedy *violations* of the Fourteenth Amendment.^[196] Thus RFRA must serve *remedial* ends. In *Flores*, three remedial justifications are offered in support of RFRA. They include: (1) deterrence of government violations of the Free Exercise Clause; (2) prohibition on laws that impede freedom of religion; and (3) protection of minority religion rights.^[197] The Fifth Circuit determined that RFRA serves a remedial function due to RFRA's additional measure of free exercise protection for persons burdened by neutral, generally applicable regulations, thereby including the rights of more citizens, particularly members of minority religions.^[198] Though the *Flores* court is the only court examined by this article to undertake this second prong of the *Morgan* analysis as applied to RFRA, the *Flores* interpretation that RFRA is remedial in nature would probably stand, assuming that the broad view of the first *Morgan* prong was adopted.^[199]

Under the third prong of the *Morgan* test, RFRA must be consistent "with the letter and spirit of the constitution."^[200] This prong mandates that RFRA be consistent with all other provisions of the Constitution.^[201] Opponents of RFRA primarily contend that the statute violates the Constitution's separation of powers doctrine.^[202] They state that RFRA offends the historic principles laid out in *Marbury v. Madison*^[203] by infringing on the judiciary's power as the ultimate interpreter of the constitution.^[204] *Marbury* enunciates this principle by stating that "[i]t is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule."^[205] *The Keeler* court held that RFRA is judicial in nature, rather than legislative, due to its invalidation of the judicial test set out in *Smith*. Due to this result, the court maintains that Congress steps into the shoes of the judiciary.^[206] *Keeler's* argument is quite compelling, in that the court notes that it is unaware of any other statute where Congress expressly rejects a judicial standard of review.^[207]

Proponents of RFRA's constitutionality claim that RFRA does not "second-guess" the intermediate scrutiny *Smith* test but assert that RFRA necessitates an "ad hoc review of the laws of general applicability that substantially burden the free exercise of religion," regulating *all* emerging violations of the Free Exercise Clause under RFRA's statutory trigger.^[208] Further, Congress *can* enact "constitutionally overinclusive" legislation without violating the separation of powers doctrine.^[209] Thus, proponents assert that RFRA does not supersede judicial precedent but permissibly expands the scope of government regulations subject to judicial scrutiny.^[210] But, no matter how creatively courts dance around RFRA's true purpose, the statute itself clearly states Congress's intent to denounce the *Smith* test, which expressly excluded judicial review of religious burdens relating to neutral laws.^[211]

Undeniably, courts have variant opinions regarding whether Congress had authority under Section 5 of the Fourteenth Amendment to enact RFRA under the three prong *Morgan* test. Because both sides present cogent arguments supported by judicial precedent, any accurate prediction of the Supreme Court's result in *Flores* was impossible. Prior to the Court's decision, most federal courts upheld RFRA's constitutionality, adopting the broader view of Congress's authority under Section 5.^[212] But regardless of the "majority" lower court opinion, the Court still was presented with the task of adopting their own view.

B. The Supreme Court's Interpretation

In the Supreme Court's *Flores* opinion, the Court began by reaffirming that Congress has only remedial enforcement power, not substantive power under the Fourteenth Amendment.^[213] The Court first addressed whether Congress's enactment of RFRA was remedial in nature, and thus, an appropriate enactment under Congress's remedial power. The Court noted that "[t]he appropriateness of the remedial measures must be considered in light of the evil presented."^[214] The Court provided a comparison of RFRA and the Voting Rights Act as an illustrative tool. In 1966, the Court had found Congress's enactment aimed at remedying voting rights discrimination to be constitutional under Section 5.^[215] The Court's decision relied primarily on the prevalent voting rights discrimination in New York and Congress's direct attempt to eliminate it. In contrast, the Court recognized that no recent religious discrimination incidents have occurred and that evidence of religious discrimination given at hearings was merely "anecdotal" while the thrust of the hearings centered instead on incidental burdens on religion imposed by laws of general applicability.^[216] Based on these findings, the Court distinguished Congress's voting rights legislation and RFRA due to the lack of religious discrimination for Congress to remediate.

Additionally, the Court stated that Congress's actions were not even focused on remedying the little discriminatory evidence that was presented at the congressional hearings.^[217] The Court concluded that RFRA is completely "out of

proportion to a supposed remedial or preventive object" and cannot be considered as devised to prevent unconstitutional behavior.^[218] Thus, the Court deemed RFRA's enactment as substantive rather than remedial.

The Supreme Court went further to address whether the "remedial" legislation was adapted to the end which the Fourteenth Amendment was meant to prevent.^[219] The Court found that RFRA has a very broad application, imposing restrictions on agencies and officials of state, federal, and local governments and affecting federal, state, and local laws.^[220] RFRA contains no other limitations, such as a termination date or geographic restrictions. Even upon comparison of other congressional enactments, RFRA's reach and scope remains noticeably broad.^[221] Thus, the Court found RFRA to be too broad to properly address any potential religious discrimination because of the Act's disproportionality with the legitimate ends of Section 5.^[222]

The *Flores* Court chose to employ a narrow Section 5 interpretation of RFRA and ruled RFRA unconstitutional, finding that RFRA exceeded Congress's remedial power under the Fourteenth Amendment.^[223] The Court reaffirmed its *Smith* decision, finding that RFRA directly contradicts the standards for scrutiny set out in the decision.^[224] The following section will project the effects that the Supreme Court's ruling will have on historic preservation and religious freedom by comparing the effects of the previous strict scrutiny standard (RFRA- *Sherbert-Yoder*) with the reinstated intermediate scrutiny standard (*Smith*).

V. EFFECTS OF THE SUPREME COURT'S RFRA RULING ON HISTORIC PRESERVATION: WEIGHING THE INTERESTS OF RELIGIOUS FREEDOM VERSUS HISTORIC PRESERVATION

The Court's decision regarding the constitutionality of RFRA solidified the stronghold of the *Smith* intermediate scrutiny test and will hopefully provide sorely needed guidance for federal and state courts in this previously uncertain area of litigation.^[225] Because most ordinances affording historic protection are neutral and generally applicable,^[226] these ordinances fall in the class of government regulations most substantially affected by the Supreme Court's ruling. Plainly, the difference between intermediate and strict scrutiny applied to historic preservation ordinances, regulations, and laws throughout the country will have a substantial effect on the preservation movement. To more closely measure the effects of this difference, this section analyzes and predicts the effect of both the standards on historic preservation and religious freedom. Further, this section focuses on the application of the compelling interest test to historic preservation, the seminal element in determining the true impact of the standards on historic preservation and religious freedom.

A. Application of RFRA's Compelling Interest Test Prior to the *Flores* Decision: Effect on the Balance of Historic Preservation and Religious Freedom

1. Effects of RFRA Alleged by Interested Parties

Before the Supreme Court's decision, the *Sherbert-Yoder* compelling interest test was applied to cases involving religious freedom and historic preservation. The *Sherbert-Yoder* test requires that the government present a compelling interest for its enactment once the plaintiff proves that religion is in fact burdened.^[227] In addition, the test requires the government to show that the application of the burden is the least restrictive means of furthering that compelling interest.^[228]

Proponents of the compelling interest test assert that under *Smith*, governments have zoned churches out of commercial districts^[229] and claim that governments cannot be trusted to formulate exceptions for religious minorities.^[230] However, these opponents fail to mention the effect the *Sherbert-Yoder* test has on a government's ability to exercise its police power (such as the power to zone) to forward the health, safety, and welfare of all citizens. In *Smith*, the Court denounced the broad application of the compelling interest test to all civic obligations in society that in effect grant religious exemptions for any law or obligation that burdens religion.^[231] The Court stated that "[a]ny society adopting such a system would be courting anarchy, but that danger increases in direct proportion to the society's diversity of religious beliefs, and its determination to coerce or suppress none of them."^[232] *The Smith* Court alludes to the fact that rekindling the compelling interest test will prevent local and state governments from properly exercising their legitimate police powers to control necessary daily activities.^[233] Other commentators have been troubled by RFRA's broad application to "all forms of law at every level of government."^[234] The amicus brief submitted by fifteen states and territories urged the Supreme Court to take notice of RFRA's massive impact on state sovereignty due to its

stringent limitation on police powers that affects all core areas of state and local governance.^[235] The coalition's brief focuses particularly on RFRA's "boundless" requirement that the least restrictive means be used when neutral laws affect religious freedom.^[236] Historic preservation ordinances are among the laws that state and local governments enact using their police powers.^[237] Thus, RFRA's broad limitation on police powers when religion is involved will surely affect governments' abilities to protect religious structures, such as churches and synagogues, because those entities will likely cry "religious burden!" to circumvent government regulation in the future.

Critics of the *Sherbert* test also acknowledge the troubling inconsistencies latent in the *Sherbert-Yoder* compelling interest test and state that

[i]t is not clear how many senators or representatives appreciated the inconsistencies in the test they voted to restore. Some of the people who drafted RFRA did notice the problem, but, in what one might regard as an especially cynical piece of draftsmanship, they seized upon the Supreme Court's inconsistencies to obscure the Act's meaning further.^[238]

One of the most debated inconsistencies of the *Sherbert-Yoder* analysis has been what constitutes a compelling interest,^[239] particularly in the context of historic preservation.

2. Judicial Interpretation of RFRA's Compelling Interest Test

The Court's reinstatement of the *Smith* test will subject historic preservation laws to only minimal scrutiny, a drastic difference from the former strict scrutiny approach.^[240] Consequently, the full effects of the Court's *Flores* ruling on future religion-preservation cases cannot be fully realized without examining whether historic preservation can be deemed compelling enough to overcome a court's strict scrutiny of the government's interest. Thus, the judicial interpretation of the compelling nature of historic preservation largely impacts the magnitude of limitations that RFRA has had on historic preservation. *Yoder* defines a compelling interest as "truly paramount" and only of the "highest order" to outweigh a burden on the free exercise of religion.^[241] *Penn Central* plainly states that historic preservation is a legitimate governmental interest,^[242] but subsequent courts disagree as to the "compelling" nature of preservation.

Though not dealing directly with historic preservation, the *Bethlehem Evangelical Lutheran Church* court balanced the interests of the city in upgrading the streets and improving traffic flow^[243] against the burden on religious freedom and determined that the city's interest should prevail.^[244] In discussing the interest of the government, the court noted that religious organizations are subject to the government's police powers and that public works projects, such as street improvements, can be compelling enough to overcome a religious interest.^[245] Thus, under *Bethlehem Evangelical Lutheran Church*, historic preservation could conceivably be compelling enough in some situations to overcome religious interests.^[246] *The Keeler* court also balanced the government's interest in historic preservation against religious interests and stated that "[t]he ordinance embodies a legislative judgment that the City's interest in historic preservation should . . . give way to other interests, such as furthering major development and protecting property owners from financial hardship" due to the system of exemptions embodied in the ordinance.^[247] Thus, the *Keeler* court found that the government had no compelling interest to support this particular historic preservation ordinance because the system of exemptions present in the ordinance proved that the government's "interest in enforcement is not paramount."^[248] However, the court did not foreclose the possibility that historic preservation could be compelling enough to override religious freedom burdens in other scenarios, particularly in the absence of a system of exemptions.^[249]

In contrast, the *Westchester Reform* court took the view that governmental actions (such as minimizing traffic hazards) that forward health, safety, and welfare must yield to religious interests where an irreconcilable conflict exists, implying that police power interests (similar to historic preservation) are never compelling enough to outweigh religion.^[250] Additionally, the Supreme Court of Washington in *First Covenant Church* acknowledged the importance of historic preservation, recognized its positive effects on a community's aesthetic appeal, and noted its ability to enhance the quality of life for all citizens.^[251] Though these cultural and aesthetic positives are inherent in historic preservation, the court discounted historic preservation interests, stating that they fail to relate to protection of the safety or health of citizens.^[252] *The First Covenant* court found that the city's preservation interest was not compelling and generally took a dim view of ever placing historic preservation interests over "paramount" religious freedom.^[253]

Similarly, the court in *Society of Jesus* categorically held that a government's interest in historic preservation is not compelling enough to justify burdening religious freedom under our "hierarchy of constitutional values."[\[254\]](#) Based on variant interpretations of the compelling nature of historic preservation, plainly no consensus exists. More courts have held that historic preservation is *not* compelling enough (either categorically or as applied to their factual scenario) to outweigh religious interests.[\[255\]](#) This trend indicates the Court's ruling in *Flores* will have a strong effect on historic preservation where before *Flores*, many courts recognized the religious freedom interests as compelling and preservation interests as less than compelling under the compelling interest test.

Supporters of RFRA argue that the *Smith* standard did not provide enough protection for religious freedoms.[\[256\]](#) They assert that by using a compelling interest test and "careful balancing and conscientious regulation," courts and legislatures can preserve historic structures while also protecting free exercise of religion.[\[257\]](#) However, the compelling interest test does not allow this balancing luxury, which is evidenced by the trend of courts to reject balancing historic preservation and religion.[\[258\]](#) In contrast, the *Smith* intermediate scrutiny test does employ an approach to balance these interests.[\[259\]](#)

B. Application of the Smith Intermediate Scrutiny Test: Effect on the Balance of Historic Preservation and Religious Freedom

After *Flores*, courts will now apply *Smith* intermediate scrutiny to subsequent conflicts involving religious freedom and historic preservation.[\[260\]](#) The *Smith* standard gives great deference to government to exercise valid and neutral laws, such as historic preservation laws, requiring only a rational relation to a valid purpose.[\[261\]](#) Though *Smith* critics assert that such a low level of scrutiny will give governments free reign to burden religious organizations,[\[262\]](#) such circumstances are exaggerated and are outweighed by the positive effects that the *Smith* test will have on historic preservation.[\[263\]](#)

The *Smith* test as applied does not give governments presumptive deference to employ their police power at the demise of free exercise rights. As evidence, cases under the *Smith* test have had varying results. In *St. Bartholomew*, a historic ordinance was upheld when applied to a church.[\[264\]](#) But in both *First Covenant Church* and *Society of Jesus*, the courts held that the free exercise rights of the respective churches were burdened and ruled against the city's preservation ordinances.[\[265\]](#) In addition, the *Keeler* court applied the *Smith* test after overruling RFRA and found that a historic preservation ordinance violated a church's free exercise rights.[\[266\]](#) Thus, based on previous applications of the *Smith* test, the outcome of an unconstitutional ruling of RFRA will yield uncertain results due to differences in factual circumstances of cases, such as differences in ordinances. However, though results are uncertain, the *Smith* test will give the appropriate weight to historic preservation interests, allowing governments to reasonably use their police powers and preventing religious interests from having a broad exemption from general laws enacted for the safety, health, and welfare of the public.[\[267\]](#)

Based on the differing views of the strength of historic preservation interests prior to the Court's decision, the effects of RFRA were unpredictable, as each jurisdiction maintained its own opinion of the importance of preservation and religious freedom, particularly concerning whether historic preservation is a compelling interest. Regardless of whether the Court had chosen the *Sherbert-Yoder* or *Smith* test, a "chilling effect" is likely to occur on governments enacting historic preservation legislation. Both tests have yielded inconsistent results in the past. The *Sherbert-Yoder* test has been inconsistent due to the varying interpretations of historic preservation as a compelling interest, while the *Smith* standard's inconsistencies are rooted in the balancing nature of the intermediate scrutiny test. Either standard's uncertainty will impel governments to avoid expensive litigation and transaction costs by avoiding litigation-breeding preservation ordinances.[\[268\]](#) Thus, due to the judiciary's inconsistencies, historic preservation will be detrimentally affected to some degree despite the Court's RFRA ruling. But as a whole, RFRA's implementation of the *Sherbert-Yoder* test would have produced a more negative impact on historic preservation than the *Smith* test because governments have less power to enact ordinances solely for preservation purposes.[\[269\]](#) Additionally, governments would be even further chilled from enacting preservation ordinances applicable to religious institutions under *Sherbert-Yoder*, knowing that they must show a compelling interest behind the ordinance if challenged.[\[270\]](#) Had RFRA been upheld by the Supreme Court, however, religious interests would have blossomed in the absence of constraining preservation ordinances under RFRA. Ultimately, the Court's reinstatement of the *Smith* test will positively impact preservation efforts, in large part by avoiding the negative effects that the RFRA standard would have had on

preservation efforts. However, judicial recognition of the importance of preservation efforts will necessarily diminish the religious freedom of entities impacted by preservation laws.

VI. POLICY: MEASURING THE RESULTING BENEFITS AND COSTS OF THE CURRENT *SMITH* STANDARD

Though the reinstatement of the *Smith* standard will positively impact historic preservation, a broad view of the benefits and costs to society of the former *Sherbert-Yoder* test must be analyzed to fully realize the impact that the change in standards will create. Through this analysis, the benefits of RFRA that will be lost become evident. This section comprehensively examines the costs of RFRA that will now be avoided and concludes by looking in hindsight at whether the negative impact on historic preservation would have been justified by RFRA's positive effects on religious freedom and society as a whole.

A. *Benefits of the Former RFRA Standard*

1. *Prevailing Religious Freedom*

America was founded on the principle that citizens are free to practice their religion without government inference.^[271] The First Amendment embodies this fundamental birthright of all citizens.^[272] RFRA provides broad protection of religious freedom rights, limiting *all* government burdens on religious freedom, including generally applicable laws.^[273] Congressional testimony indicates that neutral laws have placed a significant burden on the religious activities of Americans in the past.^[274] Further, because few governments enact religiously-biased laws, most government laws that affect religion are neutral.^[275] Thus, to provide citizens with the fullest form of religious freedom feasible under the First Amendment, RFRA's compelling interest test protects religion from its most common foe: the neutral, generally applicable law. With RFRA in place, religious entities and citizens can rest assured that only the most necessary interests will interfere with their religious activities. With this broad grant of religious freedom, religious establishments received special deference in situations such as zoning, historic preservation, and permitting, only affecting religious activities when the governmental interest is extreme.^[276] Thus, RFRA provides the benefit of broad religious protection for all citizens to enjoy. In contrast, the main concern with the *Smith* test lies in its pressures on religious freedom. With the increased use of preservation laws and ordinances, religious entities such as churches and synagogues must contend with the frustration of property sales, expansion efforts, and architectural preferences, all of which constrain religious expression.^[277]

2. *Freedom from Financial Pressures of Government Regulation*

Compliance with governmental regulation frequently comes with a price.^[278] Generally, the private property owner absorbs the cost of historic preservation up to the level that the regulation becomes a taking.^[279] RFRA largely exempts religious entities from bearing this financial burden. In *St. Bartholomew*, the church congregation contended that the prohibitive cost of complying with historic preservation laws by renovating the existing church structure would be a severe burden and prevent the church from carrying out its ministry.^[280] Similarly, the plaintiffs in *Keeler* argued that they would undergo great financial hardship as a result of the preservation ordinance.^[281] If RFRA were applied to both *Keeler* and *St. Bartholomew*, the governments' interest in regulating might not be found to be compelling enough to overcome religious interests, and the churches would be saved from financial strain.^[282] Additionally, complying with bankruptcy transfer regulations would have cost a church money in donations from a Chapter 7 trustee. But under RFRA, a court ruled that the church could accept these donations.^[283] With more financial resources, religious interests can expand their activities.^[284] Additionally, many religious establishments seek to better the community through service projects, food banks, and homeless shelters.^[285] Lessening financial strain on religious establishments would allow unconstrained religious activities and possibly better the community through more charitable projects. The RFRA test produces the benefits of prevailing religious freedom and relief for religious entities from financial burdens. The reinstatement of the *Smith* standard will eliminate these benefits.

B. *Costs of the Former RFRA Standard*

1. *Harsh Blow to the Preservation Movement*

RFRA's codification of the compelling interest test was a large step back for the steadily growing preservation

movement.^[286] RFRA greatly impeded preservation of religious buildings and structures both through challenges of laws by religious entities and the possible chilling effect that RFRA might have on government efforts to protect these structures.^[287] In many towns and cities, early community life grew around religious establishments such that the buildings that housed religious entities were often built in the center of town and became the backdrop for the development of the city.^[288] Expressing the important qualities of continuity that historic structures bring a community, Silver writes, "[C]ommunities have special irreplaceable values that must be preserved in order to provide a sense of place and continuity in people's lives."^[289] RFRA largely prevented governments from preserving structures such as churches and synagogues—buildings which are often excellent examples of the American architectural legacy. Unfortunately, the effects of demolition of structures is permanent.^[290]

2. Effects of the Decline of Aesthetic Quality in America's Cities

"[P]reservation is a potential catalyst to retaining an aesthetic quality in the urban environment where people live and work."^[291]

Tourists flock to Paris to see the impressive monuments, buildings, and churches, like Notre Dame, Sacre Coeur, the Eiffel Tower, and the Arc de Triomphe.^[292] Similarly, the charm of the Italian town of Siena is embodied in the impressive Piazza del Campo in the valley and the beautiful City Cathedral and Romanesque bell tower at the highest point in the town, attracting visitors world-wide to see this quaint town.^[293] Regardless of the size of the city, historical structures play an important role in the aesthetics of the urban environment, embracing the spirit of the nation.^[294] Just as in Europe, America's churches, synagogues, and other religious structures are very much a part of a city's aesthetics.^[295]

It is difficult to imagine the demolition of Notre Dame due to financial burdens on the congregation, or the addition of a modern building to the rear of the City Cathedral to accommodate a growing church membership. Such travesties would decrease the aesthetic appeal of their respective cities—and would do the same in American cities and towns. With the decline of aesthetic appeal comes the decline of tourism. Historic preservation efforts have a direct impact on tourism, frequently making preservation economically beneficial to a municipality.^[296] Aesthetic improvements have also been linked to a substantial decrease in crime in a community.^[297] Finally, due to increased tourism and public attention, historic districts and sites often raise property values when an area is restored and maintained, thus improving the area's economy.^[298]

3. Lost Economic Opportunities

Historic districts have been found to produce other economic benefits for a community, including the "creation of new jobs, stimulation of retail sales," and "dilution of deterioration and poverty."^[299] As one commentator noted, "Dollar for dollar, historic preservation is one of the highest job-generating economic development options available."^[300] In fact, several states have formalized studies proving precisely this point. In 1993, one such study examined the economic effects of Rhode Island's preservation efforts on its communities by comparing expenditures directly related to government-sponsored preservation programs with the impact of preservation efforts on employment, wage changes, and tax revenues.^[301] The study found that for every \$10 million spent on preservation through Rhode Island's programs, 285 new jobs were created, \$7.4 million was generated in wages, the gross state product increased by \$9.2 million, and state and local tax revenues rose by \$861 thousand.^[302] Texas and Illinois also published similar studies on the economics of their preservation efforts, both finding that preservation stimulated a considerable amount of revenue and jobs.^[303] Historic preservation evidently bestows considerable economic attributes on a community. If the RFRA standard had been affirmed by the Supreme Court, preservation of religious structures would have further declined, resulting in a decrease in potential economic benefits derived from preservation.

4. Inner City Revitalization

Since World War II, industry, jobs, and people have moved from cities and towns to outlying suburbs.^[304] Historic preservation aids in reducing the problems associated with urban sprawl. In states where the population is rapidly growing, metropolitan areas have become increasingly isolated from economic opportunities that lie in the suburbs.^[305] Because many preservation projects are located in the core of a community, visitors are drawn to the preservation activities, bringing economic growth to the inner city rather than the suburbs.^[306] Economic growth in

the inner city translates into environmental advantages as well, such as savings in proportion of land used for transportation, reduction in energy consumption, and reduction in air pollution.^[307] Additionally, reusing older downtown structures can lessen traffic congestion^[308] and the need for new infrastructure, such as roads and bridges.^[309] Thus, the preservation of religious structures also forwards urban revitalization.

If the Court in *Flores* had upheld RFRA, the aesthetic appeal of America's cities and towns would likely have been damaged because religious establishments could seek exemptions from preservation laws, allowing demolition and facial changes to historic religious structures.^[310] Consequently, cities dependent on visitors drawn by historic landmarks would have suffered economically, and other positive effects resulting from preservation would not have been realized. Thus, because the Court struck down RFRA, the preservation movement will not suffer from these setbacks, and America can enjoy the amenities accompanying preservation.

This analysis of the benefits and costs predicted to result from the use of the RFRA standard demonstrates the clash between two strong interests: religious freedom and historic preservation. Each maintains a strong following willing to argue vehemently and able to point out legitimate concerns for protecting their respective interest. The widespread aesthetic, cultural, and economic effects of preservation demand adequate protection of historic structures, as preservation affords many more benefits to society as a whole than the religious interests of a smaller number of owners of religious properties.^[311] Application of RFRA's compelling interest test would not have adequately represented preservation interests but would have instead resulted in an imbalance in favor of religious freedom interests over legitimate state interests such as historic preservation.^[312] The Court's reaffirmation of the *Smith* standard is therefore a major victory for preservationists, but pervasive religious freedom will likely be sacrificed. Based on this troubling reality, this article proposes alternatives aimed to soften the *Smith* standard's blow to religious freedom, while retaining the *Smith* standard's benefits to historic preservation.

VII. ALTERNATIVES TO THE REINSTATED *SMITH* STANDARD: TIPPING THE SCALE TO A MORE PERFECT BALANCE BETWEEN PROTECTION OF RELIGIOUS FREEDOM AND HISTORIC PRESERVATION

"[I]t is possible to strike a balance between the competing interests of the religious property owners and municipal governments, rather than negating one interest at the expense of the other."^[313]

A. Reinstatement of RFRA with a Judicial Interpretation that Historic Preservation can be Compelling Enough to Override Religious Freedom in Some Situations

*To balance the interests of historic preservation and religious freedom, the Supreme Court could apply the RFRA standard and at the same time interpret historic preservation as a compelling interest in some situations.^[314] Such an interpretation would allow religion and historic preservation to be more equally balanced—a feat that neither RFRA on its face or *Smith* accomplishes. The Court has enunciated historic preservation as a viable interest to consider but has not stated the magnitude of the interest.^[315] If the Supreme Court stated in dicta that historic preservation could overcome religious freedom interests in certain circumstances, then RFRA would be sufficiently diluted in historic preservation situations such that the interests could be more equally balanced.^[316] However, such a declaration from the current Supreme Court is highly unlikely, as many of the pro-preservation justices from the 1978 Penn Central Court are no longer on the Court.^[317] Of the justices from the Penn Central Court that remain on the Court today, Justices Rehnquist and Stevens were both in the Penn Central dissent. Additionally, the Court's reaffirmation of the *Smith* standard in *Flores* makes the future adoption of a RFRA-like standard unlikely. Therefore, the likelihood of a gratuitous finding that historic preservation is a compelling governmental interest is low.*

B. Avoiding Litigation: Encouraging Localities and Religious Entities to Work Together

Landmark laws already display much flexibility to accommodate the needs of religious organizations by including hardship provisions, zoning resolutions, and additional appeals opportunities.^[318] However, governments could further recognize the protected nature of religious organizations and help organizations work toward compliance with ordinances. Though the government must remain neutral toward religious organizations,^[319] it could offer several alternatives to soften the burden of preservation ordinances on these organizations. The government could allow a more lenient application of the ordinance by giving the religious organization additional time to comply with an

ordinance or allowing the organization to move toward compliance in stages.^[320] Such governmental action would advance the ultimate goal of preservation, while recognizing that special deference should be given to religious interests.^[321] Additionally, local governments could work together with religious organizations to explore affordable construction alternatives that would mitigate external architectural changes and also comply with preservation ordinances.^[322] Finally, localities should be encouraged to develop loan and grant programs to help religious and non-profit organizations restore their decaying historic structures.^[323] Congress could support an initiative encouraging local governments to enact these greater protections for religious interests. If local governments are forced to collaborate with religious entities rather than simply imposing rigid preservation ordinances on the entities, then religious constraints imposed by preservation efforts can be minimized.^[324]

C. A Law Requiring Localities to Use Their Eminent Domain Powers

Congress could enact a law requiring localities to compensate religious entities for whole buildings that the entity can no longer use but that cannot be altered due to historic preservation laws. Such a law would have to be carefully drafted to place the burden on religious entities to provide evidence of financial burdens. Additionally, the entity should be required to show why the historical structure is no longer adequate for its needs. If the government and religious entity could not arrive at an acceptable solution, then the government could use its power of eminent domain to compensate the religious institution for its property.^[325] This way, the government could save the historic structure, and the religious entity could reap enough financial benefits from the property to build a more suitable structure in a different location.^[326] The government could then use the structure for a public purpose such as a museum^[327] or public building. The government could also sell the church to private interests and include as part of the sale a covenant that the structure cannot be modified.^[328] For example, in Atlanta, Georgia, the up-scale Abbey restaurant operates in the location formerly occupied by the congregation of a Methodist Episcopal church.^[329] The restaurant preserves the architectural beauty and character of the over-eighty year-old church building^[330] and exemplifies the successful use of a former church building for business purposes. Other churches and cathedrals have been transformed to different uses to meet community needs.^[331] Modern reuses of churches include conversions to: a performing arts facility,^[332] a modern theater and offices for professional theater group,^[333] a university lecture hall and laboratory,^[334] a community activity center,^[335] and a bank.^[336] Thus, local governments have many options to consider when converting religious facilities to serve community needs.

Taking a less extreme approach, the law could require the local government to compensate the owner of a religious property for an architectural easement to preserve the structure on the land.^[337] An architectural easement may apply to the interior, exterior, or certain portions of a structure and generally prohibits the owner of the structure from modifying the protected elements.^[338] An easement grants local governments greater specificity in choosing what is protected and costs significantly less than acquiring the whole property.^[339] With such a law, local governments could distribute the burden of preservation to all citizens in the community rather than imposing the full burden of preservation on a small religious organization. Since the entire community enjoys the benefits of preservation, the community should also bear the burden.

D. Private Efforts

Private groups can assist churches and synagogues in the restoration of historic structures by contributing financial assistance.^[340] In many situations, religious establishments desire restoration over demolition but do not have the financial resources to commit to renovation and maintenance of a structure.^[341] Private efforts could enable religious entities to make expensive restoration efforts that meet religious needs of the congregation and also comply with preservation laws. Thus, churches and synagogues will not feel as religiously constrained by preservation laws and preservation would have less of an impact on religious freedom.

Private citizens can also contribute their knowledge in restoration to help the religious organization cut renovation costs. To motivate the private sector, reminders of the potential increase in property value and decrease in crime could be used.^[342] Additionally, private persons or preservation groups can also acquire historic properties, just as the government can.^[343] Thus, a private party can buy a religious landmark from the congregation so that the congregation can move to better suited accommodations and escape the pressures imposed by preservation laws. Though helpful, private efforts should only be relied upon as a supplementary source to bolster preservation of

religious structures, as private efforts can be inconsistent due to their dependence on available funding.[\[344\]](#)

E. Preservation Tax Incentives

To encourage preservation of historic buildings, Congress has created a program of tax incentives, which has successfully revitalized communities by promoting rehabilitation of historic properties nationwide.[\[345\]](#) The federal tax incentive program is the product of Congress's recognition that culturally-valuable historic structures can be converted to fit the current commercial and housing needs of America's communities.[\[346\]](#) The Internal Revenue Code (IRC) establishes tax credits[\[347\]](#) for rehabilitation of certified historic structures and non-historic buildings built prior to 1936.[\[348\]](#) Certified rehabilitation of a certified historic structure[\[349\]](#) receives a twenty percent tax credit while rehabilitation of non-historic buildings built before 1936 receives a ten percent credit.[\[350\]](#) Additionally, the IRC provides income and estate tax deductions for charitable contributions of interests in historic property, including easements.[\[351\]](#) The federal program has been successful in attracting businesses and other private investors to restore vacant or underused historic structures, including churches.[\[352\]](#)

Unfortunately, federal tax incentive programs are not as effective in preserving religious structures because religious organizations are already exempt from taxes.[\[353\]](#) Thus, any tax credit to a religious property owner will not help alleviate financial pressures of historic preservation laws because a full federal tax exemption is already in place.[\[354\]](#) Tax incentive programs do offer indirect benefits to congregations that seek to sell their historic religious property and relocate. Religious property owners can more easily sell their property because the incentive program provides an attractive inducement for others to buy the historic structure.[\[355\]](#) This way, religious entities can sell their properties more easily, giving the entity a way to alleviate financial pressures imposed by historic preservation laws and thereby allow the entity to practice its religion unbridled elsewhere. Thus, federal tax incentives indirectly increase the probability that religious structures will be restored and that religious entities can also retain more freedom in their religious activities.[\[356\]](#)

Based on the success of the federal incentive program, local and state governments should be encouraged to expand their tax incentive programs. Some states and local governments already have incentive programs, which include rehabilitation tax credits, tax deductions for easement donations, and decreased property taxes.[\[357\]](#) Property tax exemptions, in particular, encourage restoration and rehabilitation of historic structures because many of these structures are located on desirable, highly-valued properties, either in down town areas or in affluent suburbs.[\[358\]](#) As is the case with federal tax incentives, local and state tax exemptions for historic properties are also not as effective for religious property owners. Most state and local governments provide exemptions for religious properties, negating additional preservation tax cuts.[\[359\]](#) Increased local and state efforts for preservation tax incentives, however, should be commended because, like federal incentives, they encourage third parties to invest in revitalizing eroding and vacant religious structures when congregations are willing to sell.[\[360\]](#) Ultimately, tax incentives can help religious entities practice their religion more freely. However, like private efforts, tax incentive programs can only be viewed as a supplementary preservation measure for historic religious structures.

VIII. CONCLUSION

The Flores decision will prove to have a positive effect on preservation interests. However, religious freedom will suffer, as churches, synagogues, and other religious entities must comply with rigid historic preservation ordinances that often impose expensive restoration and maintenance. Of the alternatives mentioned above, a Supreme Court declaration of the compelling nature of historic preservation would best provide the necessary balance between preservation and religious interests.[\[361\]](#) Yet, given the current ideological climate of the Supreme Court, this alternative is probably the least likely to occur.[\[362\]](#) Congressional action to encourage local governments to enact laws forwarding religious protection is also doubtful, considering the potential frustration[\[363\]](#) resulting from the striking of RFRA which might deter further enactments in this area.[\[364\]](#) If neither of the first two alternatives is viable, then individual government and private efforts, including grants, loans, tax incentives, and usage of eminent domain powers, can always be employed to mitigate the effects of the Court's ruling on religious freedom. However, without a unifying governmental initiative, the balance between religious freedom and historic preservation will suffer—as efforts will be unharmonized and inconsistent.[\[365\]](#) Ultimately, none of these alternatives can fully balance the two interests.

[*] ASSOCIATE, CHAMBERLAIN, HRDLICKA, WHITE, WILLIAMS & MARTIN, ATLANTA, GEORGIA; B.S., FLORIDA STATE UNIVERSITY (1994); J.D., FLORIDA STATE UNIVERSITY COLLEGE OF LAW (1997). THE AUTHOR WISHES TO THANK PROFESSOR DONNA CHRISTIE FOR HER HELP IN THE DEVELOPMENT OF THIS ARTICLE AND THE INITIATION OF THE ENVIRONMENTAL CRIMES AND ARCHEOLOGICAL RESOURCES COURSE AT THE COLLEGE OF LAW. [Return to text.](#)

[1] John Nivala, *Saving the Spirit of our Places: A View on our Built Environment*, 15 UCLA J. ENVTL. L. & POL'Y 1, 51-52 (1996-97). [Return to text.](#)

[2] See discussion *infra* Part II (describing the constitutional protections of religious freedom). [Return to text.](#)

[3] See discussion *infra* Part VI.B.2. [Return to text.](#)

[4] See discussion *infra* Part II.B. [Return to text.](#)

[5] 117 S. Ct. 2157 (1997). [Return to text.](#)

[6] Pub. L. No. 103-141, §3, 107 Stat. 1488 (1993) (codified as amended at 42 U.S.C. § 2000bb (1994)). [Return to text.](#)

[7] See 42 U.S.C. § 2000bb(a)(2) (1994). [Return to text.](#)

[8] See discussion *infra* Part III. [Return to text.](#)

[9] See discussion *infra* Part V. [Return to text.](#)

[10] See discussion *infra* Part V.A. (reporting the vast outside interest in the Flores litigation and suggesting the expectancy of potentially broad effects of the case). [Return to text.](#)

[11] U.S. CONST. amend. I. [Return to text.](#)

[12] See *Allegheny County v. Greater Pittsburgh ACLU*, 492 U.S. 573, 590-91 (1989) (finding that a "government may not promote or affiliate itself with any religious doctrine or organization, may not discriminate among persons on the basis of their religious beliefs and practices, may not delegate a governmental power to a religious institution, and may not involve itself too deeply in such an institution's affairs" (citations omitted)). [Return to text.](#)

[13] See, e.g., *Historic Sites, Buildings, and Antiquities Act*, 16 U.S.C. §§ 461-467 (1985 & Supp. 1997); *National Historic Preservation Act*, 16 U.S.C. §§ 470-470w-6 (1985 & Supp. 1997); *Preservation of Historic and Archeological Data Act*, 16 U.S.C. §§ 469-469c-1 (1985 & Supp. 1997); 16 U.S.C. §§ 431-450rr-6 (1993 & Supp. 1997) (establishing various historic parks and monuments throughout the nation). [Return to text.](#)

[14] See discussion *infra* Part II.C (providing examples of cases where free exercise of religion and historic preservation interests have collided). [Return to text.](#)

[15] 374 U.S. 398 (1963). [Return to text.](#)

[16] See *id.* at 402-03 (affirming the standard set out in *NAACP v. Button*, 371 U.S. 415 (1963)). [Return to text.](#)

[17] See *id.* at 406 (no showing of a rational interest would suffice). [Return to text.](#)

[18] *Id.* at 406 (quoting *Thomas v. Collins*, 323 U.S. 516, 530 (1945)). [Return to text.](#)

[19] See *id.* at 407-08. [Return to text.](#)

[20] See *id.* at 400-01. [Return to text.](#)

[21] See *id.* at 404 (likening the appellant's burden to a fine imposed on her for worshiping on Saturdays). [Return to text.](#)

[22] See *id.* at 409-10. [Return to text.](#)

[23] 406 U.S. 205 (1972). [Return to text.](#)

[24] See *id.* at 207. [Return to text.](#)

[25] *Id.* at 218. [Return to text.](#)

[26] See *id.* at 220 (failing to find the broad application of Wisconsin's school attendance statute to all citizens in Wisconsin to be dispositive evidence that free exercise of religion was not burdened). [Return to text.](#)

[27] See *id.* at 225-26. The Court also rejected a panoply of alternative arguments by the State, attempting to forward its interest in uniform education. See *id.* [Return to text.](#)

[28] See *id.* at 235-36. [Return to text.](#)

[29] See Russell S. Bonds, Comment, *First Covenant Church v. City of Seattle: The Washington Supreme Court Fortifies the Free Exercise Rights of Religious Landmarks Against Historic Preservation Restrictions*, 27 GA. L. REV. 589, 595-96 (1993); see also Geoffrey R. Stone, *Constitutionally Compelled Exemptions and the Free Exercise Clause*, 27 WM. & MARY L. REV. 985, 994 (1986) (describing the breakdown of the strict scrutiny doctrine as applied to religious activity). [Return to text.](#)

[30] See, e.g., *Thomas v. Review Bd. of Indiana Employment Security Div.*, 450 U.S. 707 (1981); *Hobbie v. Unemployment Appeals Comm'n of Florida*, 480 U.S. 136 (1987). [Return to text.](#)

[31] See Bonds, *supra* note 29, at 595-96. [Return to text.](#)

[32] See, e.g., *Bowen v. Roy*, 476 U.S. 693 (1986) (finding that the government did not have to present a compelling justification for requiring an Indian child to be identified by a social security number even though the child's religious beliefs might be burdened); *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988) (holding that the government did not have to show a compelling interest for timber harvesting and road construction on sacred Indian land, as the decision was a matter of internal governmental policy). [Return to text.](#)

[33] 494 U.S. 872 (1990). [Return to text.](#)

[34] See *id.* at 874. [Return to text.](#)

[35] See *id.* [Return to text.](#)

[36] See *id.* at 879-80. [Return to text.](#)

[37] See *id.* at 880 (citing *United States v. Lee*, 455 U.S. 252 (1982)). In *Lee*, an Amish employer was denied an exemption from collection and payment of Social Security taxes. The employer's argument that his religion opposed participation in government support programs was rejected by the Court. The Court remarked that if religious activities could lead to exemptions from broad laws of general applicability then governmental systems would become too burdensome to properly function. For example, if an individual had a religious objection to fighting in a war, the country could not afford to provide exemptions to all persons claiming these beliefs. See *Lee*, 455 U.S. at 260. [Return to text.](#)

[38] The Court noted that the unemployment compensation program context is unique because eligibility criteria must be considered, allowing deliberation of an applicant's general characteristics. The *Sherbert-Yoder* analysis prevents religion from being the primary reason for benefits refusal, unless the state has a compelling reason. See *Smith*, 494 U.S. at 884. [Return to text.](#)

[39] *Id.* at 884. Criminal laws in Oregon, the site of the Smith controversy, prohibited the use of controlled substances, making usage of them a felony. See *id.* at 874. [Return to text.](#)

[40] See *id.* at 874. [Return to text.](#)

[41] *Id.* at 885-86 (citations omitted). [Return to text.](#)

[42] See *id.* at 880-85. [Return to text.](#)

[43] See University of Eastern Michigan, *Early History of the Preservation Movement* (visited Jan. 19, 1997) [hereinafter *Early History*] (recounting major events in the preservation movement in America). In 1846, John Washington offered to sell Mount Vernon to Congress for \$100,000, and the State of Virginia requested that Congress consider making the home a national shrine. See Melissa A. MacGill, *Old Stuff is Good Stuff: Federal Agency Responsibilities Under Section 106 of the National Historic Preservation Act*, 7 ADMIN. L.J. AM. U. 697, 702 (1994). Congress did not respond to this request until 1851, when offering to buy the home and make it an asylum for sick soldiers. At this point, John Washington doubled his asking price, and Congress refused to buy Mount Vernon, setting back the preservation effort. See *id.* However, the Mount Vernon Ladies' Association bought Mount Vernon in 1853, despite the federal government's weak showing for preservation interests. See *Early History*, *supra*. [Return to text.](#)

[44] See Ralph Michael Stein, *Buildings That Go Crash in the Night: A Special Problem in Historic Preservation Law*, 16 REAL EST. L. J. 242, 242-43 (1988). [Return to text.](#)

[45] See *Early History*, *supra* note 43 (establishing Yellowstone National Park in 1872). [Return to text.](#)

[46] See *id.* (protecting Casa Grande (adobe dwellings) in Arizona from ruin by looters in 1889). [Return to text.](#)

[47] *Historic Sites, Buildings, and Antiquities Act*, ch. 593, § 1, 49 Stat. 666 (1906) (codified as amended at 16 U.S.C. §§ 461-467 (1985 & Supp. 1997)). [Return to text.](#)

[48] See *Early History*, *supra* note 43. [Return to text.](#)

[49] The Antiquities Act provides harsh penalties for destroying federally-owned historic monuments, landmarks, prehistoric structures, and other objects of historic or scientific interest. Additionally, the Act gives the President the authority to designate such areas for federal protection. See 16 U.S.C. §§ 461-467. Private efforts were also visible during the early Twentieth Century. Preservation efforts were initiated by private citizens to restore Williamsburg, Virginia, establish the Greenfield Museum, and create the first historic district in the nation in Charleston, South Carolina. See *Early History*, *supra* note 43. [Return to text.](#)

[50] See *Early History*, *supra* note 43. The Antiquities Act established the national policy "to preserve for public use historic sites, buildings, and objects of national significance for the inspiration and benefit of the people of the United States." 16 U.S.C. § 461. [Return to text.](#)

[51] See *Early History*, *supra* note 43. After the National Park Service was established in 1916, the Jamestown and Yorktown sites were designated as historic areas to be protected in the Colonial National Historical Park. See *id.* [Return to text.](#)

[52] See, e.g., 16 U.S.C. §§ 461-467. [Return to text.](#)

[53] See 16 U.S.C. § 468 (1985 & Supp. 1997) (establishing the National Trust for Historic Preservation (National Trust)). The National Trust attempts to provide a link between private preservation efforts and public activity initiated by the National Park Service. The National Trust encourages preservation in a variety of ways, including lobbying, sponsorship of an annual conference, and preservation publications. See *Early History*, *supra* note 43. [Return to text.](#)

[54] Pub. L. No. 89-665, 80 Stat. 915 (codified as amended at 16 U.S.C. §§ 470-470w-6 (1985 & Supp. 1997)). [Return](#)

[to text.](#)

[55] See 16 U.S.C. §§ 470-470w-6. [Return to text.](#)

[56] See generally Miriam Joels Silver, Note, *Federal Tax Incentives for Historic Preservation: A Strategy for Conservation and Investment*, 10 HOFSTRA L. REV. 887, 898-924 (1982) (outlining tax incentives for historic preservation properties). "By the mid 1970s, Congress began to consider historic structures as valuable resources that could be converted, without damage to aesthetic or historic significance, into usable commercial space and housing stock." *Id.* at 897. Congress's attitude is reflected in the pro-preservation legislation in the late seventies. See *id.* at 898. [Return to text.](#)

[57] See, e.g., 16 U.S.C. §§ 470-470w-6 (1985 & Supp. 1997) (amended in 1980); 16 U.S.C. §§ 469-469c-1 (1985 & Supp. 1997). [Return to text.](#)

[58] 348 U.S. 26 (1954). [Return to text.](#)

[59] *Id.* at 33 (citations omitted). [Return to text.](#)

[60] *Berman* involved a dispute over whether the substandard housing and blighted buildings could be destroyed by the government to eliminate injurious conditions to the building's inhabitants. See *id.* at 28. Appellants in *Berman* disputed the constitutionality of destroying the buildings under the Fifth Amendment. The Court determined that the government was entitled to use its power of eminent domain to demolish the buildings. See *id.* at 35-36. [Return to text.](#)

[61] See *University of Eastern Michigan, Preservation Law* (visited Jan. 29, 1997) [hereinafter *Preservation Law*] (coining the term "aesthetic plus" to describe the pre-*Berman* rule that required the state to prove a reason to regulate beyond the historic significance of a structure). [Return to text.](#)

[62] See *id.* (commenting on the repercussions of the *Berman* case). [Return to text.](#)

[63] 438 U.S. 104 (1978). [Return to text.](#)

[64] *New York City's landmarks law* allows the Commission to designate buildings as landmarks and designate historic districts. See *id.* at 110-11. [Return to text.](#)

[65] See *id.* at 115-17. [Return to text.](#)

[66] See *id.* at 119. [Return to text.](#)

[67] See *id.* at 138. [Return to text.](#)

[68] Justice Brennan authored the majority opinion for the Supreme Court in *Penn Central*. See *id.* at 107. [Return to text.](#)

[69] See *id.* ("Over the past 50 years, all 50 States and over 500 municipalities have enacted laws to encourage or require the preservation of buildings and areas with historic or aesthetic importance."). [Return to text.](#)

[70] Of the buildings listed in the *Historic American Buildings Survey*, begun in 1933, over one-half have been destroyed. See *id.* at 108 n.2. [Return to text.](#)

[71] See *id.* at 108. [Return to text.](#)

[72] See *Preservation Law*, *supra* note 61. [Return to text.](#)

[73] See *id.* [Return to text.](#)

[74] See *City of Sumner v. First Baptist Church*, 639 P.2d 1358 (Wash. 1982) (*en banc*) (recognizing such a struggle

involving a church congregation and the police powers of the City of Sumner). [Return to text.](#)

[75] See discussion *supra* Part II.A. [Return to text.](#)

[76] For a complete description of the Sherbert-Yoder analysis, see discussion *supra* Part II.A. Preservation ordinance challenges fell under this framework before the Smith decision in 1990. [Return to text.](#)

[77] See, e.g., *City of Sumner*, 639 P.2d at 1363-64; *Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood*, 699 F.2d 303, 305-06 (6th Cir. 1983); *Jewish Reconstructionist Synagogue of the North Shore, Inc. v. Village of Roslyn Harbor*, 342 N.E.2d 534, 538-39 (N.Y. 1975). Some courts failed to cite Sherbert or Yoder, yet seem to adopt analyses similar to that enunciated in Sherbert and Yoder. See, e.g., *Bethlehem Evangelical Lutheran Church v. City of Lakewood*, 626 P.2d 668 (Colo. 1981) (*en banc*); *Denver Urban Renewal Auth. v. Pillar of Fire*, 552 P.2d 23 (Colo. 1976); *Westchester Reform Temple v. Griffin*, 239 N.E.2d 891, 896-97 (N.Y. 1968) (heard after Sherbert decision but four years before Yoder). [Return to text.](#)

[78] 239 N.E.2d 891 (N.Y. 1968). [Return to text.](#)

[79] *Id.* at 896. [Return to text.](#)

[80] See *id.* [Return to text.](#)

[81] *Id.* [Return to text.](#)

[82] 626 P.2d 668 (Colo. 1981). [Return to text.](#)

[83] Before the enactment of RFRA (codifying the compelling interest language), courts often interchanged "substantial" interest and "compelling" interest language but intended the same level of scrutiny. [Return to text.](#)

[84] See *Bethlehem Evangelical*, 626 P.2d at 674-75. [Return to text.](#)

[85] See, e.g., *Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood*, 699 F.2d 303, 305-06 (6th Cir. 1983) (applying the general rule that "the greater the cost of practicing one's religion, the more probable that the statute creates an unconstitutional infringement"); *City of Sumner v. First Baptist Church*, 639 P.2d 1358, 1363 (Wash. 1982) (*en banc*) ("There should be some play in the joints of both the zoning ordinance and the building code. An effort to accommodate the religious freedom of appellants while at the same time giving effect to the legitimate concerns of the City as expressed in its building code and zoning ordinance would seem to be in order."); *Jewish Reconstructionist Synagogue v. Village of Roslyn Harbor*, 342 N.E.2d 534, 538 (N.Y. 1975) (weighing the interests of the state in regulating and a synagogue's constitutionally protected rights). [Return to text.](#)

[86] Compare *City of Lakewood*, 699 F.2d at 309 (holding that a zoning ordinance prohibiting construction of church buildings in almost all residential districts in a city does not violate the Free Exercise Clause of the First Amendment), with *Westchester Reform Temple*, 239 N.E.2d at 896-97 (finding zoning ordinance giving planning commission power to determine building setbacks valid but ruling its application to a temple an unconstitutional burden on religious freedom). [Return to text.](#)

[87] Under Smith, a neutral and generally applicable regulation is constitutional, even if it incidentally burdens one's religious beliefs. See *Employment Div., Dep't of Human Resources v. Smith*, 494 U.S. 872, 880-85 (1990); see also discussion *supra* Part II.A. [Return to text.](#)

[88] See *Bonds*, *supra* note 29, at 600. [Return to text.](#)

[89] 914 F.2d 348 (2d Cir. 1990). [Return to text.](#)

[90] See *id.* at 351. [Return to text.](#)

[91] See *id.* [Return to text.](#)

[92] See *id.* at 352-53. [Return to text.](#)

[93] See *id.* at 353. [Return to text.](#)

[94] See *id.* [Return to text.](#)

[95] *Id.* at 354. [Return to text.](#)

[96] See *id.* [Return to text.](#)

[97] See *id.* at 355. [Return to text.](#)

[98] See *id.* at 355-56. [Return to text.](#)

[99] See *id.* [Return to text.](#)

[100] 840 P.2d 174 (Wash. 1992) (*en banc*). [Return to text.](#)

[101] See *id.* at 177-78. [Return to text.](#)

[102] See *id.* at 178. During the litigation of this case, the *Smith* decision came down from the Supreme Court. Previously, the state court had applied the *Sherbert-Yoder* test and determined that there was a burden on free exercise of religion. The City appealed to the United States Supreme Court, and the Court vacated the ruling based on *Sherbert*, requiring the state court to use the new *Smith* standard instead. See *id.* [Return to text.](#)

[103] See *id.* at 181-82. The court distinguished *St. Bartholomew* on five major bases: (1) *St. Bartholomew's* failure to immediately reject landmark designation; (2) commercial nature of *St. Bartholomew's* proposed use; (3) *St. Bartholomew's* failure to allege that landmark designation reduced its principal asset rather than just its ability to generate additional revenue; (4) *St. Bartholomew's* failure to challenge the effect of the religious exemption on New York law's constitutionality; and (5) bases of New York law not in "liturgy" like the *Seattle* law. See *id.* at 181. [Return to text.](#)

[104] See *id.* at 181-82. [Return to text.](#)

[105] See *id.* at 182. [Return to text.](#)

[106] See *id.* at 183. [Return to text.](#)

[107] See *id.* at 185. [Return to text.](#)

[108] See *id.* at 193. [Return to text.](#)

[109] 564 N.E.2d 571 (Mass. 1990). [Return to text.](#)

[110] See *id.* at 572. [Return to text.](#)

[111] See *id.* at 573 ("[T]he landmark designation of the church interior unconstitutionally restrains religious worship."). [Return to text.](#)

[112] See *id.* at 572. [Return to text.](#)

[113] *Id.* at 574. [Return to text.](#)

[114] *Society of Jesus and First Covenant* both embrace the churches' religious challenges without question, while the court in *St. Bartholomew* delves into the facts of the case. See Karen L. Wagner, *For Whom the Bell Tolls: Religious*

Properties as Landmarks Under the First Amendment, 8 PACE ENVTL. L. REV. 579, 613 (1991). [Return to text.](#)

[115] Compare *Society of Jesus*, 564 N.E.2d at 573 (ruling after *Smith* decision that the designation of interior of church in Boston is unconstitutional), and *First Covenant Church v. City of Seattle*, 840 P.2d 174 (Wash. 1992) (allowing church to change its structure and applying the *Smith* test), and *Vestry of St. Bartholomew's Church v. City of New York*, 728 F. Supp. 958 (S.D.N.Y. 1990) (upholding a government ordinance to preserve church buildings using *Smith*), with *Westchester Reform Temple v. Griffin*, 239 N.E.2d 891 (N.Y. 1968) (finding setback ordinance a "constitutional abridgement of religious freedom" under the *Sherbert-Yoder* analysis), and *Jewish Reconstructionist Synagogue v. Village of Roslyn Harbor*, 342 N.E.2d 534 (N.Y. 1975) (declaring zoning ordinance affecting synagogue unconstitutional under *Sherbert-Yoder*), and *Bethlehem Evangelical Lutheran Church v. City of Lakewood*, 626 P.2d 668 (Colo. 1981) (affirming constitutionality of city's requirement that church make dedication to receive permit under *Sherbert-Yoder* test). An extensive electronic search of pre- *Smith* and post-*Smith* cases shows no substantial differences in case outcomes between courts' applications of the two tests. [Return to text.](#)

[116] The wide room for judicial discretion in cases involving religious freedom and government regulation is demonstrated by the confusion state courts have had in applying the *Sherbert-Yoder* test because courts differ in their interpretations of what a compelling interest is. See *Swanner v. Anchorage Equal Rights Comm'n*, 513 U.S. 979 (1994) (Thomas, J., dissenting from denial of certiorari). [Return to text.](#)

[117] See discussion *infra* Part III. [Return to text.](#)

[118] Pub. L. No. 103-141, § 3, 107 Stat. 1488 (1993) (codified as amended at 42 U.S.C. § 2000bb (1994)). [Return to text.](#)

[119] See S. REP. NO. 103-111 (1993), reprinted in 1993 U.S.C.C.A.N. 1892. [Return to text.](#)

[120] Some scholars argue that RFRA's compelling interest test is much stricter than the standard applied in the *Sherbert-Yoder* days. Such a discussion is beyond the scope of this article. For purposes of this article, assume that the *Sherbert-Yoder* and RFRA standards are identical as Congress intended them to be. [Return to text.](#)

[121] See S. REP. NO. 103-111. [Return to text.](#)

[122] See *id.* [Return to text.](#)

[123] See *id.* ("The Nation . . . was founded upon the conviction that the right to observe one's faith, free from Government interference, is among the most treasured birthrights of every American. That right is enshrined in the free exercise clause of the first amendment . . ."). [Return to text.](#)

[124] See *id.* [Return to text.](#)

[125] Though Reverend Thomas did not mention it in his address, churches have also been zoned out of residential areas as well as commercial areas. See, e.g., *Town v. State*, 377 So.2d 648, 651 (Fla. 1979) (upholding city ordinance zoning churches out of residential areas); *Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood*, 699 F.2d 303 (6th Cir. 1983) (preventing church construction in almost all residential districts in city). Though the *Town* and *City of Lakewood* cases were decided during the *Sherbert-Yoder* era, intuitively, the *Smith* test has the potential for more churches to be zoned out of residential districts due to *Smith*'s lesser protection of religious interests. See, e.g., *First Assembly of God v. Collier County*, 20 F.3d 419 (11th Cir. 1994) (*Smith* era case upholding ordinance preventing church from locating homeless shelter in residential area); *Daytona Rescue Mission, Inc. v. City of Daytona Beach*, 885 F. Supp. 1554 (M.D. Fla. 1995) (denying church permit to operate food bank in residential area). The only ruling invalidating a zoning ordinance within the Eleventh Circuit under the Free Exercise Clause is *Church of Jesus Christ of Latter Day Saints v. Jefferson County*, 741 F. Supp. 1522 (N.D. Ala. 1990), and was decided during the *Sherbert-Yoder* era. See *First Assembly of God v. Collier County*, 775 F. Supp. 383, 388 (M.D. Fla. 1991). [Return to text.](#)

[126] See S. REP. NO. 103-111. [Return to text.](#)

[127] See 42 U.S.C. § 2000bb-1. "General applicability" requires that the government regulation cannot selectively impose burdens on conduct that is religiously motivated. See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 543 (1993) (finding an ordinance that prevents ritual animal sacrifice not generally applicable due to the ordinance's under inclusion of all animal slayings, non-religious and religious in nature). [Return to text.](#)

[128] "Demonstrates" refers to the government meeting "the burdens of going forward with the evidence and of persuasion." 42 U.S.C. § 2000bb-2. [Return to text.](#)

[129] See *id.* [Return to text.](#)

[130] See *Stefanow v. McFadden*, 103 F.3d 1466, 1471 (9th Cir. 1996) (applying RFRA in an action brought by an inmate claiming that his free exercise rights were burdened by confiscation of a religious book that supported violence against Jews and the government); see also *Young v. Crystal Evangelical Free Church*, 82 F.3d 1407, 1417 (8th Cir. 1996) (holding that recovery of contributions to church substantially burdens debtors' free exercise of their religion due to emphasis of tithing in religion). [Return to text.](#)

[131] See *Swanner v. Anchorage Equal Rights Comm'n*, 513 U.S. 979 (1994) (Thomas, J., dissenting from denial of certiorari) (questioning the compelling nature of Alaska's interest in preventing discrimination on the basis of marital status); *Stefanow*, 103 F.3d at 1471; see also *In re Tessier*, 190 B.R. 396, 400 (D. Mont. 1995) ("The first two elements established, the onus then falls upon the government to show that when weighed against the First Amendment interests of the claimants, enforcement of the law in question advances a compelling government interest by the least restrictive means."). [Return to text.](#)

[132] See 42 U.S.C. § 2000bb-1. [Return to text.](#)

[133] See *Keeler v. Mayor of Cumberland*, 928 F. Supp. 591, 599 (D. Md. 1996). [Return to text.](#)

[134] 928 F. Supp. 591 (D. Md. 1996). [Return to text.](#)

[135] 73 F.3d 1352 (5th Cir. 1996); 117 S. Ct. 2157 (1997). [Return to text.](#)

[136] *First United Methodist Church of Seattle v. Seattle Landmarks Preservation Bd.*, 916 P.2d 374 (Wash. 1996) (*en banc*) was also decided after the enactment of RFRA and involves a religion-historic preservation dispute. Curiously, the plaintiffs did not allege a violation of RFRA and only alleged a violation of the Free Exercise Clause. See *id.* at 375-76. The case had a similar factual scenario to *Keeler*, where a church was designated a landmark, preventing alteration of the building without city approval. The Church challenged the designation. The Washington Supreme Court borrowed heavily from its 1993 decision in *First Covenant* and found that the landmark designation was a severe burden on the congregation's free exercise of religion. See *id.* at 381. Though this case did not directly involve RFRA, it may have interpretative value because the application of RFRA borrows exclusively from the judicial decisions involving religious freedom. [Return to text.](#)

[137] See, e.g., *Jesus Center v. Farmington Hills Zoning Bd. of Appeals*, 544 N.W.2d 698 (Mich. Ct. App. 1996) (involving ordinance preventing church from using its property as a homeless shelter); *Daytona Rescue Mission, Inc. v. City of Daytona Beach*, 885 F. Supp. 1554 (M.D. Fla. 1995) (alleging denial of permit to operate food bank and homeless shelter a RFRA violation). [Return to text.](#)

[138] See *Keeler*, 928 F. Supp. at 593. [Return to text.](#)

[139] See *id.* [Return to text.](#)

[140] See *id.* [Return to text.](#)

[141] See *id.* The congregation also included other counts in their complaint. Other counts included: violation of the United States and corresponding Maryland constitutional provision protecting free exercise of religion, violation of the Fifth Amendment due to an unconstitutional taking, and violation of the Due Process Clause of the Fourteenth

Amendment due to arbitrary and capricious actions unsupported by substantial evidence. See id. The coming discussion will deal exclusively with the alleged RFRA violation. [Return to text.](#)

[142] *Id.* at 598 (quoting *Memo. of United States* at 18). [Return to text.](#)

[143] *See id.* at 601. [Return to text.](#)

[144] *See id.* at 601-02. [Return to text.](#)

[145] *See id.* at 604. [Return to text.](#)

[146] *See Keeler v. Mayor of Cumberland*, 940 F. Supp. 879 (D. Md. 1996). [Return to text.](#)

[147] *See id.* at 884. *The congregation presented evidence that construction of a church annex was critical because the existing buildings failed to meet the congregation's current needs. Parishioners expounded that they needed space for religious education programs, weddings, funerals, baptisms, nursery, and parking facilities. See id. [Return to text.](#)*

[148] *See id.* at 885. *The Keeler ordinance allows for exemptions to construction and alteration rules in specific instances, such as when a structure is a major deterrent to an improvement program or retention of the structure would cause undue financial hardship on the owner. Due to this exemption portion of the ordinance, the court found the ordinance significantly differs from the generally applicable criminal prohibition in Smith. See id. at 885. [Return to text.](#)*

[149] *See id.* at 886. *The reasoning was that if the ordinance made an exemption for several non-religious reasons, then surely an exemption should be made for religious freedom due to its historical protection as a fundamental right provided to all American citizens since the birth of the country. See id. (stating that laws which restrict religious freedom must advance interests of the "highest order") (quoting *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993)). [Return to text.](#)*

[150] *See id.* at 886-87. [Return to text.](#)

[151] *Cf. First Covenant Church v. City of Seattle*, 840 P.2d 174 (Wash. 1992); *Society of Jesus v. Boston Landmarks Comm'n*, 564 N.E.2d 571 (Mass. 1990). [Return to text.](#)

[152] *Zeke MacCormack, Boerne case is more than church vs. state, SAN ANTONIO EXPRESS—NEWS*, Feb. 17, 1997, at 1A. [Return to text.](#)

[153] *See David G. Savage, Court Questions Law on Religious Liberty Judiciary: Justices Suggest That Congress May Have Exceeded its Power in Passing the '93 Statute That Gives Religious Claimants Special Exemptions, L.A. TIMES*, Feb. 20, 1997, at A20. [Return to text.](#)

[154] *The Flores case has drawn much public interest from a large and diverse coalition of national organizations, including the religious groups, civil liberties groups, and historic preservation groups, many who lobbied for the passage of RFRA in 1993. See Editorial, A Clash of Church vs. State, ROCKY MTN. NEWS*, Feb. 25, 1997, at 28A. [Return to text.](#)

[155] *See id.*; *see also MacCormack, supra note 152, at 1A. [Return to text.](#)*

[156] *MacCormack, supra note 152, at 1A (quoting Professor Douglas Laycock of the University of Texas, representing the church in Boerne). [Return to text.](#)*

[157] *Both the National Trust for Historic Preservation and San Antonio Conservation Society filed amicus briefs for the Flores case. See Amicus Brief for the San Antonio Conservation Society, City of Boerne v. Flores (No. 95-2074) (supporting petitioner); Amicus Brief for National Trust for Historic Preservation, City of Boerne v. Flores (No. 95-2074) (supporting petitioner). [Return to text.](#)*

[158] See discussion *infra* Part V (projecting effects of RFRA on historic preservation). [Return to text.](#)

[159] See *City of Boerne v. Flores*, 117 S. Ct. 2157, 2160 (1997). [Return to text.](#)

[160] See *Flores v. City of Boerne*, 73 F.3d 1352, 1353 (5th Cir. 1996). [Return to text.](#)

[161] See *id.* at 1364. [Return to text.](#)

[162] See *id.* at 1364-65. For a full discussion of the Fifth Circuit's analysis of Congress's power to enact RFRA and separation of powers issue, see discussion *infra* Part IV. [Return to text.](#)

[163] See *id.* at 1364. [Return to text.](#)

[164] See *City of Boerne v. Flores*, 117 S. Ct. 2157 (1997). For a complete analysis of the Court's treatment of the separation of powers issue, see discussion *infra* Part IV.B. [Return to text.](#)

[165] See *Flores*, 117 S. Ct. at 2172. [Return to text.](#)

[166] See *id.* [Return to text.](#)

[167] See *id.* at 2171. [Return to text.](#)

[168] *Id.* [Return to text.](#)

[169] See *id.* (providing zoning laws as an example of a generally applicable law that affects religion). [Return to text.](#)

[170] See *id.* [Return to text.](#)

[171] See *id.* [Return to text.](#)

[172] See *id.* at 2170-72. [Return to text.](#)

[173] 384 U.S. 641 (1966). [Return to text.](#)

[174] U.S. CONST. amend. XIV, § 5. [Return to text.](#)

[175] 100 U.S. 339 (1879). [Return to text.](#)

[176] *Id.* at 345-46 ("Whatever legislation is appropriate, that is, adapted to carry out the objects that the amendments have in view . . ."). [Return to text.](#)

[177] See *Flores v. City of Boerne*, 73 F.3d 1352, 1358 (5th Cir. 1996) ("This continued adherence to the principle that Congress may explicate textually located rights and obligations pursuant to Section 5 persuades us that the three-part test from *Morgan* remains the benchmark."). [Return to text.](#)

[178] *Morgan*, 384 U.S. at 651. [Return to text.](#)

[179] 400 U.S. 112 (1970) (holding that congressional prohibitions of literacy tests in state and national elections are constitutional under Section 5). [Return to text.](#)

[180] See, e.g., *Fullilove v. Klutznick*, 448 U.S. 448 (1980) (upholding congressional efforts to remedy past discrimination under Section 5 and expanding upon the Fourteenth Amendment's prohibition on overt discrimination); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) (failing to question congressional authority to enact affirmative action programs under Section 5). [Return to text.](#)

[181] *In re Tessier*, 190 B.R. at 405; see *Keeler*, 928 F. Supp. at 601. [Return to text.](#)

[182] See *In re Tessier*, 190 B.R. at 405. [Return to text.](#)

[183] See Christopher L. Eisgruber & Lawrence G. Sager, *Why the Religious Freedom Restoration Act is Unconstitutional*, 69 N.Y.U. L. REV. 437, 461-62 (1994). [Return to text.](#)

[184] See *id.* [Return to text.](#)

[185] See *In re Tessier*, 190 B.R. at 405. [Return to text.](#)

[186] See *Flores*, 73 F.3d at 1358. [Return to text.](#)

[187] See *id.* at 1358-59. [Return to text.](#)

[188] 883 F. Supp. 510 (D. Haw. 1995). [Return to text.](#)

[189] See *id.* at 514-15; see also *Abordo v. State of Hawaii*, 902 F. Supp. 1220 (D. Haw. 1995) (holding that Congress "can act to protect a constitutional right against conduct which has previously been held constitutional by the Supreme Court"). [Return to text.](#)

[190] See *Belgard*, 883 F. Supp. at 514-15. [Return to text.](#)

[191] 360 U.S. 45 (1959). [Return to text.](#)

[192] See *Belgard*, 883 F. Supp. at 515. [Return to text.](#)

[193] *Eisgruber*, *supra* note 183 at 461. Courts agree that the Fourteenth Amendment does provide Congress with a "blank check . . . to pass any legislation connected to liberty or citizenship." See *id.* [Return to text.](#)

[194] See *id.* at 461-62. [Return to text.](#)

[195] *Flores v. City of Boerne*, 73 F.3d 1352, 1359 (5th Cir. 1996). [Return to text.](#)

[196] See *E.E.O.C. v. Wyoming*, 460 U.S. 226, 260 (1983) (Burger, J., dissenting) ("Congress may act only where a violation lurks."). [Return to text.](#)

[197] See *Flores*, 73 F.3d at 1359. [Return to text.](#)

[198] See *id.* at 1359-60. [Return to text.](#)

[199] If a court took a broad view of RFRA's intent to enforce violations of the Fourteenth Amendment, then logic would dictate that court would also take a broad view of what is remedial to satisfy the second prong. [Return to text.](#)

[200] *Morgan*, 384 U.S. at 656. [Return to text.](#)

[201] See *id.* [Return to text.](#)

[202] See, e.g., *Keeler v. Mayor & City Counsel of Cumberland*, 928 F. Supp. 591 (D. Md. 1996); *In re Tessier*, 190 B.R. 396 (D. Mont. 1995). [Return to text.](#)

[203] 5 U.S. (1 Cranch) 137 (1803); see *In re Tessier*, 190 B.R. at 405 (stating that RFRA cannot change the meaning of the First Amendment under *Marbury*). [Return to text.](#)

[204] See *Keeler*, 928 F. Supp. at 601 (citing *Marbury* and *Baker v. Carr*, 369 U.S. 186 (1962), to support the proposition that the judiciary is the ultimate interpreter of the Constitution). [Return to text.](#)

[205] *Marbury*, 5 U.S. (1 Cranch) at 177. Supporters of RFRA assert that this quote from *Marbury* should not be read

to prohibit Congress from providing further protection to a constitutional right that has previously been found constitutional by the Supreme Court. See *Abordo v. State of Hawaii*, 902 F. Supp. 1220, 1231-32 (D. Haw. 1995). [Return to text.](#)

[206] See *Keeler*, 928 F. Supp. at 601-02. [Return to text.](#)

[207] See *id.* at 603-04. [Return to text.](#)

[208] *Flores v. City of Boerne*, 73 F.3d 1352, 1361 (5th Cir. 1996). But see Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 TEX. L. REV. 209, 244 (1994) ("RFRA is not a mere technical change from *Smith*. Rather, it restores a fundamentally different vision of human liberty."). [Return to text.](#)

[209] *City of Rome v. United States*, 446 U.S. 156, 176 (1980) (Rehnquist, J., dissenting). The majority affirmed this interpretation of the scope of Section 5 of the Fourteenth Amendment. See *id.* at 175-77. [Return to text.](#)

[210] See *Flores*, 73 F.3d at 1361; see also *Abordo*, 902 F. Supp. at 1231 (holding that RFRA merely provides more expansive protection of a person's right to free exercise of religion, a constitutionally protected right). [Return to text.](#)

[211] See 42 U.S.C. § 2000bb-1 (1994). [Return to text.](#)

[212] The *Abordo* court stated that the majority of courts addressing the constitutionality of RFRA upheld the Act. See *Abordo*, 902 F. Supp. at 1230. [Return to text.](#)

[213] See *Flores*, 117 S. Ct. at 2167. [Return to text.](#)

[214] *Id.* at 2169. [Return to text.](#)

[215] See *Katzenbach v. Morgan*, 384 U.S. 641 (1966); see also *Flores*, 117 S. Ct. at 2168. [Return to text.](#)

[216] See *Flores*, 117 S. Ct. at 2169. [Return to text.](#)

[217] See *id.* at 2169-70. The Court did not foreclose enactment of preventive laws when strong reasons exist to believe that unconstitutional behavior might commence. However, the Court determined that RFRA's enactment was too far from such a circumstance. See *id.* at 2170. [Return to text.](#)

[218] *Id.* at 2170. [Return to text.](#)

[219] See *id.* [Return to text.](#)

[220] See *id.* [Return to text.](#)

[221] See *id.* The Court again compared the Voting Rights Act and RFRA and found the Voting Rights Act to have a much more limited scope, tailored only to the prevalent voting discrimination. No such limitation could be found in RFRA. See *id.* [Return to text.](#)

[222] See *id.* "[T]he state laws to which RFRA applies are not ones which . . . have been motivated by religious bigotry." *Id.* at 2171. [Return to text.](#)

[223] See *id.* at 2172. Six out of the nine justices agreed that RFRA should be held unconstitutional based on the Section 5 analysis outlined by the majority opinion. Justices O'Connor, Breyer, and Souter diverged from the majority's analysis. [Return to text.](#)

[224] See *id.* at 2171. [Return to text.](#)

[225] See *Wagner*, *supra* note 114, at 617-18 (commenting on the need for Supreme Court clarification of religion-preservation conflicts). [Return to text.](#)

[226] See *St. Bartholomew's Church v. City of New York*, 914 F.2d 348, 354 (2d Cir. 1990) ("Because of the importance of religion, and of particular churches, in our social and cultural history, and because many churches are designed to be architecturally attractive, many religious structures are likely to fall within the neutral criteria . . ."). [Return to text.](#)

[227] See 42 U.S.C. § 2000bb-1 (codifying the *Sherbert-Yoder* test). [Return to text.](#)

[228] See *id.* [Return to text.](#)

[229] See *supra* note 125 and accompanying text. [Return to text.](#)

[230] See S. REP. NO. 103-111, at 7 (1993), reprinted in 1993 U.S.C.C.A.N.1892. [Return to text.](#)

[231] See *Smith*, 494 U.S. at 888. [Return to text.](#)

[232] *Id.* [Return to text.](#)

[233] *Smith* alludes to this point because the means to the Court's predicted anarchial end is the broad exemption from laws for religious reasons, thus weakening the overall effect of laws in place. See *id.* at 890. Such a process weakens the power for state and local governments to effectively use their police powers. [Return to text.](#)

[234] Amicus Brief for the San Antonio Conservation Society, the Municipal Art Society, and the National Alliance of Preservation Commissions at 5-6, *City of Boerne v. Flores* (No. 95-2074) (supporting petitioner). [Return to text.](#)

[235] Amicus Brief for States of Ohio, Arizona, Colorado, Delaware, Florida, Hawaii, Idaho, Mississippi, Nevada, New Hampshire, North Carolina, Oklahoma, Pennsylvania, and the Territories of American Samoa, Guam and the Virgin Islands at 24-25, *City of Boerne v. Flores* (No. 95-2074) (supporting petitioner). [Return to text.](#)

[236] *Id.* [Return to text.](#)

[237] See, e.g., *Bethlehem Evangelical Lutheran Church v. City of Lakewood*, 626 P.2d 668, 670 (Colo. 1981) (local government exercising police powers to impose a condition of a dedication on a church). [Return to text.](#)

[238] *Eisgruber*, *supra* note 183, at 451. Specifically, drafters of RFRA incorporated the decisions of *Sherbert* and *Yoder* to be the models for judicial interpretation of religious freedom violations. See *id.* However, the *Sherbert* and *Yoder* cases in particular were less deferential to the government than other federal jurisprudence in the area. By incorporating only *Sherbert* and *Yoder* as guidance, RFRA expressly incorporates the inconsistencies in those opinions that courts have been trying to harmonize for years. See *id.* at 451-52. [Return to text.](#)

[239] See *Swanner v. Anchorage Equal Rights Comm'n*, 115 S. Ct. 460, 461 (1994) (Thomas, J., dissenting) (rejecting the lower court's denial of certiorari and professing a need to hear *Swanner* to resolve whether preventing discrimination on marital status is compelling enough to outweigh a burden on religious freedom); see also *Laycock*, *supra* note 208, at 222 (stating that the compelling interest test has "fallen into disarray," particularly with lower courts). [Return to text.](#)

[240] See discussion *supra* Part II. [Return to text.](#)

[241] *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972). [Return to text.](#)

[242] See *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 129 (1978) (holding "preserving structures and areas with special historic, architectural or cultural significance" to be a legitimate governmental interest). [Return to text.](#)

[243] Interests in street and traffic flow are analogous to historic preservation interests. The court in *Furey v. City of Sacramento*, 592 F. Supp. 463 (E.D. Cal. 1984), discusses the public's general interest in zoning as involving the

assurance that a community's beauty, spaciousness, health, and safety will be maintained. See *id.* at 471. The court cites the *Berman* decision to support its discussion of these legitimate interests. *Berman v. Parker*, 348 U.S. 26 (1954). Using *Furey's* description of the public's interests in zoning, both historic preservation and public works projects would be legitimate interests, as they contribute to the beauty, health, and safety of a community. Thus, both historic preservation and public works interests should be afforded deference as comparable legitimate interests that the government must preserve. [Return to text.](#)

[244] See *Bethlehem Evangelical Lutheran Church v. City of Lakewood*, 626 P.2d 668, 675 (Colo. 1981). [Return to text.](#)

[245] See *id.* [Return to text.](#)

[246] In *Bethlehem Evangelical Lutheran Church*, the court found the city's permit conditions on the Church to be only a minimal burden on religion. Thus, traffic and improvement concerns were found to outweigh religion. See *id.* [Return to text.](#)

[247] *Keeler v. Mayor of Cumberland*, 940 F. Supp. 879, 886 (D. Md. 1996). [Return to text.](#)

[248] *Id.* [Return to text.](#)

[249] See *id.* [Return to text.](#)

[250] See *Westchester Reform Temple v. Brown*, 239 N.E.2d 891, 896-97 (N.Y. 1968). [Return to text.](#)

[251] See *First Covenant Church v. City of Seattle*, 840 P.2d 174, 185 (Wash. 1992). [Return to text.](#)

[252] See *id.* [Return to text.](#)

[253] *Id.* ("The possible loss of significant architectural elements is a price we must accept to guarantee the paramount right of religious freedom."). [Return to text.](#)

[254] *Society of Jesus v. Boston Landmarks Comm'n*, 564 N.E.2d 571, 574 (Mass. 1990) ("[W]e must accept the possible loss of historically significant elements of the interior of this church as the price of safeguarding the right of religious freedom."). [Return to text.](#)

[255] See, e.g., *id.* (categorically not compelling); *First Covenant Church*, 840 P.2d at 185 (not compelling as applied, leaning toward categorically not compelling); *Westchester Reform Temple*, 239 N.E.2d at 896 (not compelling as applied, leaning toward categorically not compelling); *Keeler*, 940 F. Supp. at 886 (not compelling as applied). [Return to text.](#)

[256] See *Bonds*, *supra* note 29, at 618-19. [Return to text.](#)

[257] *Id.* at 619. [Return to text.](#)

[258] See discussion *supra* Part V.A. (examining varying interpretations of the weight of a government's interest in historic preservation). [Return to text.](#)

[259] The intermediate and strict scrutiny tests have been employed by the Supreme Court in other areas of law. In equal protection law, the Court defines its strict scrutiny analysis as requiring the state to show that its actions are narrowly tailored in furtherance of a compelling state interest. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 235 (1995) (Scalia, J., concurring). The Court additionally notes that the compelling interest test is not "strict in theory but fatal in fact." *Id.* (citing *Fullilove v. Klutznick*, 448 U.S. 448, 519 (1980) (Marshall, J., concurring)).

In contrast, the Supreme Court finds intermediate scrutiny to require government action (such as gender classification) to be "substantially related to an important governmental objective." *Clark v. Jeter*, 486 U.S. 456, 461 (1988). In applying this test, the Court generally weighs the state's interests and the litigant's interests to reach its result. See *id.* at 462-63 (weighing the interests of state having a six-year statute of limitations for establishing paternity and a

litigant's interests in bringing suit after the six-year limitation period).

The Supreme Court's descriptions of the strict and intermediate scrutiny tests in equal protection litigation can be a helpful comparison to provide guidance in understanding the Smith (intermediate scrutiny) and Sherbert-Yoder (strict scrutiny) tests. Though the Smith test does not per se balance neutral regulations burdening religion, courts applying the test have, particularly when faced with a system of exemptions. See discussion supra Part II.C.2. [Return to text.](#)

[260] *Where a state law is involved, the Smith test might not be applied. See, e.g., Society of Jesus v. Boston Landmarks Comm'n, 564 N.E.2d 571 (Mass. 1990) (ruling on state constitutional violations, failing to apply either Smith or Sherbert-Yoder). [Return to text.](#)*

[261] *See Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872, 877-79 (1990). [Return to text.](#)*

[262] *See S. REP. NO. 103-111 at 7 (1993), reprinted in 1993 U.S.C.C.A.N. 1892. [Return to text.](#)*

[263] *See discussion infra Part VI.B. [Return to text.](#)*

[264] *See St. Bartholomew's Church v. City of New York, 914 F.2d 348 (2d Cir. 1990). [Return to text.](#)*

[265] *See First Covenant Church v. City of Seattle, 840 P.2d 174 (Wash. 1992); Society of Jesus v. Boston Landmarks Comm'n, 564 N.E.2d 571 (Mass. 1990). [Return to text.](#)*

[266] *The Smith exception used in Keeler for a system of exemptions also provides more flexibility to balance religion interests with historic preservation interests by carving out a special category of preservation schemes where courts should be more deferential to religion. See Keeler, 940 F. Supp. at 885-86. These situations also show that Smith does not merely make historic preservation a dominating interest when dealing with neutral laws. [Return to text.](#)*

[267] *In Smith, the majority stated that the Supreme Court has never held that a person's religious beliefs excuse him or her from observing an otherwise valid law that is not based on religion. More eloquently, the Court explained that "the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law." Smith, 494 U.S. at 879. The Smith test is in line with this concern. [Return to text.](#)*

[268] *When judicial interpretations of an area of law are inconsistent, the result is often a chilling effect on the persons exercising their legal rights. When persons are not sure what the law is, many times they will compensate by avoiding the questionable activity altogether. See Kenneth E. Spahn, The Beach and Shore Preservation Act: Regulating Coastal Construction in Florida, 24 STETSON L. REV. 353, 391-92 (1995) (stating that the inconsistencies in application of Florida's Beach and Shore Preservation Acts will have a chilling effect on development because litigation is decided on a case by case basis); Susanna Felleman, Ethical Dilemmas and the Multistate Lawyer: A Proposed Amendment to the Choice-of-Law Rule in the Model Rules of Professional Conduct, 95 COLUM. L. REV. 1500, 1509 (1995) (asserting that inconsistencies in state ethics rules may cause a chilling effect on the information that a client reveals to his or her attorney); Note, Lawyers' Responsibilities to the Courts: The 1993 Amendments to Federal Rule of Civil Procedure 11, 107 HARV. L. REV. 1629, 1649 (1994) ("Inconsistency arguably increases the frequency and cost of satellite litigation by increasing uncertainty and hence the chance of litigation, increases the ex ante risk that meritorious conduct will be sanctioned and hence the chilling effect of sanctions, and increases the arbitrariness and hence the potential unfairness of sanctions." (citations omitted)). [Return to text.](#)*

[269] *Though in the past, the outcomes of historic-religion cases under the strict and intermediate scrutiny tests have not been vastly different, simply affirming RFRA's compelling interest analysis sends a message to lower courts to return to the days before the relaxation of the Sherbert-Yoder compelling interest test. Additionally, the constitutionality of RFRA would have given courts less room to protect religious and historic preservation interests. [Return to text.](#)*

[270] *Even though results under the Smith test are inconsistent, governments will still be able to more freely enact preservation ordinances knowing that Smith excepts neutral laws from strict scrutiny. In contrast, Sherbert-Yoder provides no such exception but instead imposes an affirmative burden on governments. Based on these differences,*

governments would be less "chilled" from making preservation laws under the Smith test. [Return to text.](#)

[271] See S. REP. NO. 103-111, at 4 (1993), reprinted in 1993 U.S.C.C.A.N. 1892. (recounting America's history as a safe haven for those being religiously persecuted). [Return to text.](#)

[272] See U.S. CONST. amend. I. [Return to text.](#)

[273] See 42 U.S.C. § 2000bb-1. [Return to text.](#)

[274] See S. REP. NO. 103-111, at 4-5. [Return to text.](#)

[275] See *id.* at 6. [Return to text.](#)

[276] See *id.* at 8-9. [Return to text.](#)

[277] See John Nolon & Helen Maher, *RFRA is not Needed; New York Land Use Regulations Accommodate Religious Use*, N.Y. L. J., July 23, 1997, at 5. Since Flores, California localities have already begun to enact legislation that restrains churches from reaching out into the needy community. See Jon Kaiser, Editorial, *Churches Extending Charity Collide with Zoning Laws*, L.A. DAILY NEWS, July 31, 1997, at N19. [Return to text.](#)

[278] For example, to comply with historic preservation regulations, expensive renovation, restoration, and upkeep is often necessary. When a landowner is bound to comply with regulations that prevent alteration of a structure, the cost is borne at his own expense. However, sometimes the expense and problem resulting from historic designation reaps benefits, such as an increase in property value in the area. See Roy Hunt, Professor at University of Florida College of Law, Lecture at Meeting of Environmental Crimes and Historic Preservation Class (Florida State University College of Law, Mar. 20, 1997) (discussing the rising property values of the historically protected art deco section of Miami). [Return to text.](#)

[279] See *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 83 (1980) (finding that landowner must bear the burden imposed by government regulations in some situations); *Furey v. City of Sacramento*, 592 F. Supp. 463, 471 (E.D. Cal. 1984) ("To the extent that the private interest is in the maximum exploitation of a piece of property, it is entitled to no weight whatsoever."). [Return to text.](#)

[280] See *St. Bartholomew's Church v. City of New York*, 914 F.2d 348, 357-58 (2d Cir. 1990). Under Smith, the preservation ordinance was found constitutional, but such a ruling is questionable under RFRA's Sherbert analysis. Sherbert could have easily come to a different conclusion, showing that RFRA does help eliminate governmentally imposed financial burdens on religious entities. [Return to text.](#)

[281] See *Keeler v. Mayor of Cumberland*, 940 F. Supp. 879, 886 (D. Md. 1996). [Return to text.](#)

[282] Both *St. Bartholomew* and *Keeler* were decided under the Smith test that allowed neutral, generally applicable preservation laws in those cases to forgo strict scrutiny. But, under RFRA, these cases' preservation laws would be required to be compelling. Based on previous erratic application of the RFRA compelling interest test, it is difficult to predict whether application of the compelling interest test would reverse the outcome of those cases. However, facially, the RFRA test would provide more protection—and less financial strain. [Return to text.](#)

[283] See *Young v. Crystal Evangelical Free Church*, 82 F.3d 1407, 1410 (8th Cir. 1996). [Return to text.](#)

[284] See Nolon, *supra* note 277, at 5. [Return to text.](#)

[285] See, e.g., *St. Bartholomew*, 914 F.2d at 355 (carrying out charitable activities). [Return to text.](#)

[286] See discussion *supra* Part II.B. (describing the growth of the preservationist movement in the United States). [Return to text.](#)

[287] See discussion *supra* Part V (describing the effects of RFRA on preservation). [Return to text.](#)

[288] See, e.g., *Keeler v. Mayor of Cumberland*, 940 F. Supp. 879, 880 (D. Md. 1996) (describing a Roman Catholic church in Washington Street Historic District of the City of Cumberland). In Tallahassee, Florida, several churches are located in the midst of the downtown area. A Tallahassee Historic Tour publication lists three churches located among other downtown historic buildings. See HISTORIC TALLAHASSEE PRESERVATION BD., FLORIDA DEPT OF STATE, TOURING TALLAHASSEE 9-12 (including St. James C.M.E. Church built in 1899, First Presbyterian Church built from 1835-1838, and St. John's Episcopal Church built in 1880). [Return to text.](#)

[289] *Silver*, supra note 56, at 890. [Return to text.](#)

[290] See *Stein*, supra note 44, at 243 (noting that developers and owners irreversibly alter or destroy significant historic structures). Much of alternation and demolition of historic structures occurs in urban areas where other forms of crime attract public attention and prosecutorial resources. See *id.* at 247. [Return to text.](#)

[291] *Silver*, supra note 56, at 890. [Return to text.](#)

[292] See *Alexandre Polozoff, Alexandre Polozoff's Walking Tour of Paris* (visited Apr. 8, 1997) (discussing the monuments and religious structures in Paris). One of the values of historic preservation is truth or integrity. This value encompasses the special significance that seeing the "real thing" has. Thus, going to Disney's Epcot Center and viewing the model Eiffel Tower would not have the same effect as seeing the original. See *Hunt*, supra note 277. [Return to text.](#)

[293] See *Phyllis W. Zeno & Leslie Metzler, The Tears of Tuscany*, GOING PLACES, Mar.-Apr. 1997, at 23. [Return to text.](#)

[294] See *Silver*, supra note 56, at 890. [Return to text.](#)

[295] See *Elizabeth Cameron Richardson, Applying Historic Preservation Ordinances to Church Property: Protecting the Past and Preserving the Constitution*, 63 N.C. L. REV. 404, 421-22 (1985); see also NATIONAL TRUST FOR HISTORIC PRESERVATION, INFORMATION SHEET NO. 17, THE PRESERVATION OF CHURCHES SYNAGOGUES AND OTHER RELIGIOUS STRUCTURES I (1978) [hereinafter CHURCH PRESERVATION REPORT]. [Return to text.](#)

[296] See *Stein*, supra note 44, at 243; see also *Richardson*, supra note 295, at 421. [Return to text.](#)

[297] See *J. BRADLEY O'CONNELL ET. AL., HISTORIC PRESERVATION IN CALIFORNIA: A LEGAL HANDBOOK 115* (1982) (reporting a dramatic change in crime attributable to "residents' enhanced quality of life and increased sense of neighborhood pride"). [Return to text.](#)

[298] See *Richardson*, supra note 295, at 421; see also *O'CONNELL*, supra note 297, at 112 (recounting results from ADVISORY COUNCIL ON HISTORIC PRESERVATION, THE CONTRIBUTION OF HISTORIC PRESERVATION TO URBAN REVITALIZATION (1979) (studying economic effects of historic preservation for the first time)). [Return to text.](#)

[299] *O'CONNELL*, supra note 297, at 112. [Return to text.](#)

[300] *Donovan D. Rypkema, Economics and Historic Preservation*, 9 J. NAT'L TRUST FOR HIST. PRESERVATION 39, 40 (1995). [Return to text.](#)

[301] See INTERGOVERNMENTAL POLICY ANALYSIS PROGRAM, UNIVERSITY OF RHODE ISLAND, ECONOMIC EFFECTS OF THE RHODE ISLAND HISTORICAL PRESERVATION COMMISSION PROGRAM EXPENDITURES FROM 1971 TO 1993 iv-v (1993) [hereinafter RHODE ISLAND STUDY] (summarizing the methodology of the Rhode Island study); see also *Edward F. Sanderson, Economic Effects of Historic Preservation in Rhode Island*, 9 J. NAT'L TRUST FOR HIST. PRESERVATION 22, 22-23 (1994) (discussing the Rhode Island study). [Return to text.](#)

[302] See *RHODE ISLAND STUDY*, supra note 301, at 27. [Return to text.](#)

[303] See *SHLAES & CO., ECONOMIC BENEFITS FROM REHABILITATION OF CERTIFIED HISTORIC STRUCTURES IN TEXAS* 31-46 (1985) (submitted to the Texas Historical Commission) (finding that Texas rehabilitation programs have generated more than 13,590 jobs and \$10.16 million in state tax revenue); *SHLAES & CO., ECONOMIC BENEFITS FROM REHABILITATION OF HISTORIC BUILDINGS IN ILLINOIS* 67-68 (1984) (submitted to the Preservation Services Section of the Illinois Department of Conservation) (determining that Illinois tax revenues increased more than \$29.34 million and 16,100 jobs were created as a result of Illinois's preservation programs). [Return to text.](#)

[304] See *DONOVAN D. RYPKEMA, THE ECONOMICS OF HISTORIC PRESERVATION* 26 (1989). [Return to text.](#)

[305] See Charles E. Connerly & Marc Smith, *Developing a Fair Share Housing Policy for Florida*, 12 *J. LAND USE & ENVTL. L.* 63, 67 (1996) (stating that Florida is following the nation-wide trend of urban sprawl). [Return to text.](#)

[306] See *O'CONNELL*, *supra* note 297, at 114; see also *A HANDBOOK ON HISTORIC PRESERVATION LAW* 26 (Christopher J. Duerksen ed., 1983) ("This [preservation] movement has been a source of vitality in many communities as newcomers renovated old houses and injected funds into dying downtowns . . ."). [Return to text.](#)

[307] See *O'CONNELL*, *supra* note 297, at 114. [Return to text.](#)

[308] See *RYPKEMA*, *supra* note 304, at 38-39. If downtown employees can also do their shopping downtown, then they can walk from their workplace to commercial stores, lessening traffic. See *id.* [Return to text.](#)

[309] See *id.* [Return to text.](#)

[310] See *Wagner*, *supra* note 114, at 612-13 (describing the efforts of religious organizations to exempt themselves from landmark laws). [Return to text.](#)

[311] See *id.* at 617. [Return to text.](#)

[312] Cf. *Richardson*, *supra* note 295, at 429 (failing to advocate the compelling interest test, but instead, arguing for a balanced approach for promotion of preservation efforts through private means using "cooperation and flexibility" so that churches and local governments can work together). [Return to text.](#)

[313] *Wagner*, *supra* note 114, at 619. [Return to text.](#)

[314] Cf. Alan C. Weinstein, *The Myth of Ministry vs. Mortar: A Legal and Policy Analysis of Landmark Designation of Religious Institutions*, 65 *TEMP. L. REV.* 91, 157-58 (1992) (concluding that a blanket legislative exemption of churches from landmark designation is unnecessary, but courts should instead achieve the appropriate balance between religious interests and governmental interests). [Return to text.](#)

[315] See *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978) (declaring preservation a viable interest). [Return to text.](#)

[316] In the Court's Flores opinion, historic preservation was not addressed. See *Flores*, 117 S. Ct. at 2157. [Return to text.](#)

[317] In *Penn Central*, the majority was composed of Justices Brennan (writing the opinion), Stewart, White, Marshall, and Powell. The dissent was composed of Justices Rehnquist, Burger, and Stevens. [Return to text.](#)

[318] See *Wagner*, *supra* note 114, at 618-19; see also *JULIA H. MILLER, NATIONAL TRUST FOR HISTORIC PRESERVATION, UNTANGLING THE PRESERVATION WEB: UNDERSTANDING THE DIFFERENT APPROACHES TO RESOURCE PROTECTION* 6 (1995) [hereinafter *RESOURCE PROTECTION REPORT*] (stating that many communities have economic hardship provisions in local preservation ordinances). [Return to text.](#)

[319] See *Richardson*, *supra* note 295, at 429. The government would have to carefully fashion efforts toward both non-profit and religious organizations. See *id.* [Return to text.](#)

[320] *Some landmark commissions have advocated laws to provide special accommodations to religious and non-profit organizations to provide them with a higher return on their property. See Wagner, supra note 114, at 615-16. [Return to text.](#)*

[321] *This alternative operates under the philosophy that some movement forward to achieve the final goal is preferable to none. Brownfields operate under the same philosophy. Brownfields are contaminated former industrial sites that lie undeveloped because developers do not want to take on CERCLA clean-up liability. To promote redevelopment of these areas, the Environmental Protection Agency (EPA) enters into prospective purchaser agreements with developers and limits their scope of liability and, in some cases, lessens the amount of clean-up that the developer must do. Thus, Brownfields redevelopment moves toward the EPA's goal of complete clean-up. But, clean-up is not fully paid by polluters and clean-up efforts by the developer may not be one-hundred percent. See generally Brian C. Walsh, *Seeding the Brownfields: A Proposed Statute Limiting Environmental Liability for Prospective Purchasers*, 34 HARV. J. ON LEGIS. 191 (1997) (describing the Brownfields problem and proposing solutions); Scott H. Reisch, *Reaping "Green" Harvests from "Brownfields": Avoiding Lender Liability at Contaminated Sites: Part I*, COLO. LAW., Jan. 1997, at 3 (examining Brownfields and local, state, and federal efforts to redevelop contaminated lands). [Return to text.](#)*

[322] *See KAY D. WEEKS, U.S. DEP'T. OF INTERIOR, PRESERVATION BRIEFS 14, NEW EXTERIOR ADDITIONS TO HISTORIC BUILDINGS: PRESERVATION CONCERNS 1. Weeks discusses the importance of maintaining a historic building's character when making a new addition or renovation. To accomplish this, Weeks describes important elements in conserving a structure's character, including size of addition, consistent building profile, style, and building materials. See id. at 1-9. In Tallahassee, Florida, historic preservationists worked with members of St. John's Episcopal Church to fashion additions to preserve the historic character of the church. The ultimate renovation plans preserved far more of the church's outward character than previous plans. See Interview with David Ferro, Bureau of Historic Preservation, Florida Dep't of State, Tallahassee, FL (Apr. 5, 1997) (discussing St. John's renovation and additions). [Return to text.](#)*

[323] *For example, Tallahassee, Florida has developed a property grant and loan program to promote the conversion of historic structures to bed and breakfast inns, retail stores, hotels, and offices. See DOWNTOWN DEVELOPMENT OFFICE, CITY OF TALLAHASSEE, HISTORIC PROPERTY GRANT AND REVOLVING LOAN PROGRAM (1997) (detailing Tallahassee's program and providing eligibility requirements). [Return to text.](#)*

[324] *For example, New York zoning ordinances allow looser standards of historic preservation requirements for religious entities to mitigate religious burdens, and variances for religious entities are often allowed. See Nolon, supra note 277, at 5. [Return to text.](#)*

[325] *See Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978). [Return to text.](#)

[326] *Though acquiring a historic structure is a viable alternative, regulation of the structure is a less expensive way of effectuating the goal of preservation. Thus, a government's acquisition of a property would probably have to be forced by law. See O'CONNELL, supra note 297, at 29. [Return to text.](#)*

[327] *See RESOURCE PROTECTION REPORT, supra note 318, at 1 (recounting governmental efforts to buy historic resources and turn them into house museums). [Return to text.](#)*

[328] *See O'CONNELL, supra note 297, at 23. [Return to text.](#)*

[329] *See THE ABBEY RESTAURANT, THE ABBEY ESTABLISHED 1968 (advertising the Abbey restaurant and providing background information about the restaurant). [Return to text.](#)*

[330] *See id. The Abbey maintains the massive stained glass windows and fifty foot arched and vaulted ceiling of the original building. [Return to text.](#)*

[331] *See CHURCH PRESERVATION REPORT, supra note 295, at 9-17. [Return to text.](#)*

[332] *See id. at 9 (Christ Church Cathedral, St. Louis, Mo.). [Return to text.](#)*

[333] See *id.* at 13 (*St. Ignatius Church, Baltimore, Md.*). [Return to text.](#)

[334] See *id.* at 15 (*Gethsemane Lutheran Church, Austin, Tex.*). [Return to text.](#)

[335] See *id.* (*Immaculate Conception Church, Westerly, R.I.*). [Return to text.](#)

[336] See *id.* at 17 (*First Unitarian Church, Richmond, Va.*). [Return to text.](#)

[337] See *O'CONNELL*, *supra* note 297, at 25. [Return to text.](#)

[338] See *id.* [Return to text.](#)

[339] See *id.* [Return to text.](#)

[340] See *Richardson*, *supra* note 295, at 429. [Return to text.](#)

[341] See, e.g., *St. Bartholomew's Church v. City of New York*, 914 F.2d 348 (2d Cir. 1990). [Return to text.](#)

[342] See *Richardson*, *supra* note 295, at 429. Tax exemptions are also a motivating factor for private citizens who plan to contribute to historic preservation efforts by donating ownership interests in such properties to the government. See discussion *infra* Part VII.D (summarizing tax incentives for historic structures). [Return to text.](#)

[343] See *O'CONNELL*, *supra* note 297, at 22-23. [Return to text.](#)

[344] See *RESOURCE PROTECTION REPORT*, *supra* note 318, at 1. [Return to text.](#)

[345] See *HERITAGE PRESERVATION SERVICES, NATIONAL PARK SERV., U.S. DEP'T OF INTERIOR, PRESERVATION TAX INCENTIVES FOR HISTORIC BUILDINGS 2* (1996) [*hereinafter* *TAX INCENTIVES REPORT*]. [Return to text.](#)

[346] See *Silver*, *supra* note 56, at 897-98. [Return to text.](#)

[347] A tax credit decreases the amount of tax owed. See *TAX INCENTIVES REPORT*, *supra* note 345, at 3. [Return to text.](#)

[348] See I.R.C. §§ 46-47 (West Supp. 1997) (establishing the rehabilitation tax credit and stating requirements for receiving it). [Return to text.](#)

[349] A certified historic structure must be either: (1) individually listed in the National Register of Historic Places; or (2) located within a registered historic district and certified by the National Park Service as advancing the historic importance of that district. I.R.C. § 47(c)(3) Additionally, certified historic structures are defined as buildings while a historic district must be listed in the National Register of Historic Places. See *id.* [Return to text.](#)

[350] See I.R.C. § 47(a). [Return to text.](#)

[351] See I.R.C. § 170(h) (1986 & West Supp. 1997) (qualified conservation contribution). For further discussion of additional qualifications for tax credits, see *Silver*, *supra* note 56 (providing a detailed breakdown of the tax incentives afforded to historic preservation). [Return to text.](#)

[352] See *TAX INCENTIVES REPORT*, *supra* note 345, at 2. [Return to text.](#)

[353] See I.R.C. § 501(c)(3) (West Supp. 1997) (listing religious organizations as exempt from federal income taxes). For a comprehensive examination of the tax exemption for churches and other religious organizations, see John W. Whitehead, *Tax Exemption and Churches: A Historical and Constitutional Analysis*, 22 *CUMB. L. REV.* 521 (1991-92). [Return to text.](#)

[354] See I.R.C. § 501(c)(3). [Return to text.](#)

[355] See *TAX INCENTIVES REPORT*, *supra* note 345, at 2. [Return to text.](#)

[356] See *id.* [Return to text.](#)

[357] See *id.* at 20; see also *RESOURCE PROTECTION REPORT*, *supra* note 318, at 7 (describing property tax freezes for specified time periods). [Return to text.](#)

[358] See *STEPHEN L. KASS ET. AL., REHABILITATING OLDER AND HISTORIC BUILDINGS: LAW TAXATION, STRATEGIES* § 5.1, at 102 (1985). [Return to text.](#)

[359] See *John Witte, Jr. Tax Exemption of Church Property: Historical Anomaly or Valid Constitutional Practice?*, 64 *S. CAL. L. REV.* 363, 389-401 (1991) (discussing state and local tax exemptions and reporting on the trend toward more inclusive exemptions). [Return to text.](#)

[360] Intuitively, state and local tax exemptions make historic properties, including religious properties, an even more attractive investment when added to the federal exemption, particularly due to the avoidance of potentially prohibitive property taxes. See *KASS*, *supra* note 358, at § 5.1. [Return to text.](#)

[361] Such a declaration would send a message to lower courts to take preservation and religion concerns seriously. It would slightly relax the RFRA compelling interest test in the face of historic preservation interests. Consequently, RFRA would provide strict protection of religious interests but would include a special judicial exception for historic preservation interests where more of a balancing analysis would be employed. [Return to text.](#)

[362] See discussion *supra* Part VII.A. [Return to text.](#)

[363] See *Ellen Johnson, Constitutional Amendment on Prayer in Schools, CONG. TESTIMONY*, July 22, 1997, available at 1997 WL 11235099 (commenting on the low morale of Congress due to the ineffectiveness of recent legislation). [Return to text.](#)

[364] See *S. REP. NO. 103-111* (1993), reprinted in 1993 *U.S.C.C.A.N.* 1892. Based on Congress's pro-religion attitudes, Congress might consider this option as a vehicle for national emphasis on religious freedom. However, the majority membership of Congress has changed in the last four years from the democratic to republican party which might change the general congressional attitude on religious freedom. See e.g., *David M. Mason, How the 104th. Congress Reformed Itself* (visited Apr. 6, 1997) . Additionally, because the congressional majority has made it a priority to "avoid new impositions on state and local governments," the new Congress might be in favor of giving back more preservation powers to local and state governments rather than focusing on religious rights. *Id.* [Return to text.](#)

[365] See *RESOURCE PROTECTION REPORT*, *supra* note 318, at 1 (recognizing the merits of private preservation efforts but noting that preservation on an ad hoc basis is not as effective without governmental assistance). [Return to text.](#)

WINDFALLS OR WINDMILLS: THE RIGHT OF A PROPERTY OWNER TO CHALLENGE LAND USE REGULATIONS (A CALL TO CRITICALLY REEXAMINE THE MEANING OF LUCAS)

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I. INTRODUCTION

In 1992, the United States Supreme Court held that state legislatures could not preclude property owners from making use of their property without compensation merely because state legislatures had declared the uses as nuisances.^[1] The Court observed that limitations depriving owners of all beneficial use of their property "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."^[2] The Court also stated that certain property uses are necessarily prohibited, such as developing property in such a manner that it floods other land, or building a nuclear generating plant on an earthquake fault.^[3]

The meaning of this language seemed clear; regulations that do not inhere in background principles of nuisance and property law, and that deprive an owner of all beneficial use of their property, constitute a taking for which compensation is required.^[4] As Justice Kennedy observed in his concurring opinion, "[i]f the Takings Clause is to protect against temporary deprivations, as well as permanent ones, its enforcement must not be frustrated by a shifting background of state law."^[5]

Notwithstanding the *Lucas* opinion's apparent clarity, Justice Kennedy questioned the very basis for the Court's ruling in his concurring opinion. He criticized the Court for its reliance on nuisance law, which he described as "too narrow a confine for the exercise of regulatory power in a complex and interdependent society."^[6] Justice Kennedy believed that a state should have the ability to enact new regulatory initiatives in response to changing conditions, and that courts must consider all reasonable expectations whatever their source.^[7]

Justice Kennedy's comments marked the first challenge to a principle underlying the *Lucas* opinion—the thesis that a person acquires property subject to background principles of state property law. Many states would take this challenge further, arguing that a subsequent acquirer of property is precluded from challenging existing land use regulations, because all preacquisition restrictions become a part of the state's background principles of nuisance and property law.^[8] This view of preexisting regulations may stem from confusion as to the clear meaning of *Lucas* and *Nollan v. California Coastal Commission*.^[9] In addition, lower courts may have made a conscious decision to subvert the Supreme Court's *Nollan* and *Lucas* decisions in favor of policies that have the effect of severely restricting the Fifth Amendment's Taking Clause.^[10] Whatever the reasons, a number of courts are not applying the *Lucas* and *Nollan* holdings.

One of the most extraordinary post-*Lucas* challenges to the Fifth Amendment occurred on February 18, 1997, when the New York Court of Appeals decided four cases, *Anello v. Zoning Board of Appeals of Village*,^[11] *Gazza v. New York State Department of Environmental Conservation*,^[12] *Basile v. Town of Southampton*,^[13] and *Soon Duck Kim v. City of New York*.^[14] These four cases illustrate the degree to which a state is willing to disregard the rights of private property owners by taking property without just compensation and ignoring constitutional imperatives in the process.^[15]

The possibility that other states will follow the New York Court of Appeals leaves the Supreme Court with two possible responses. One response is for the Court to accept review of a case that questions whether a state can legislatively alter the definition of property in a way that deprives owners of valuable property without just compensation, or whether a state can preclude property owners from challenging land use restrictions imposed prior to the time they acquired the property. Under this response, the Court could declare that no property owner, regardless of when the property was acquired, might be deprived of that property without due process where the state relies on its background principles of property and nuisance law. The Court could also conclude that private property might not be

taken for public use without just compensation.

Alternatively, the Court can remain silent, allowing states to disassemble protections guaranteed under the Takings Clause. In either event, the Court must not stand by, tacitly encouraging the current assault on the Constitution, leaving property owners, much like Cervantes' tragic hero,[\[16\]](#) tilting at windmills in a futile struggle to preserve their diminishing property rights.

Assume an ordinance is passed declaring that all lots smaller than one quarter-acre in size shall remain unused as open space for the enjoyment of the entire community. The ordinance prescribes a variance procedure which has frequently been utilized, but to no avail. No applications are approved, and the town leaders admit they will never approve any. Should persons acquiring property after the ordinance is passed be able to challenge the ordinance as violating the Fifth Amendment?[\[17\]](#) May the state legislatively alter its background principles that define property interests, depriving owners of valuable property without just compensation?[\[18\]](#) Furthermore, may the government dictate that only some owners can bring a takings claim while others are left without a remedy?

The Fifth Amendment to the United States Constitution provides that no person may be deprived of property without due process, nor may private property be taken for public use without just compensation.[\[19\]](#) Under decisions of the United States Supreme Court, no property owners should be precluded from challenging the ordinance as depriving them of property in violation of the Fifth Amendment.[\[20\]](#) Unfortunately, this conclusion has not been reached by a number of lower courts.

Some states have barred takings claims under the theory that the owners acquired the land after the ordinance was passed.[\[21\]](#) The courts in these states hold that since the property's use was limited at the time it was purchased, these limitations were part of the title and the interest in the property. Because this "limited use" was all the owners acquired, they were not deprived of any property. Therefore, even if the ordinance was patently unconstitutional, the owners are not entitled to challenge it or receive compensation because they "got what they paid for."[\[22\]](#)

Other states permit the owners to challenge the ordinance or to claim a taking of their property under the rationale that the owners acquired everything owned by their predecessors in interest, including the right to sue for a taking of private property under the Fifth Amendment.[\[23\]](#) Some courts have held that such a suit could be maintained because the ordinance did not alter the fundamental character of property ownership.[\[24\]](#) Hence, the property owners acquired the property on which they had a right to build, notwithstanding the ordinance.[\[25\]](#)

To date, the conflict over whether a pre-encumbered property permits a takings claim is unresolved. The United States Supreme Court has not definitively stated whether a person acquiring property subject to land use restrictions may challenge the restrictions, although the Court observed that property rights are not altered because property is acquired after a restrictive policy is implemented.[\[26\]](#)

This article addresses the need for a more binding Supreme Court decision precluding states from redefining "property." The article summarizes recent state and federal decisions, discussing the rights of property owners to challenge regulations that deprive them of their property without just compensation, and their misapplication of the Supreme Court holdings in *Lucas v. South Carolina Coastal Council* and *Nollan v. California Coastal Council*. Part II provides background on the issue by discussing the Supreme Court's decisions in *Nollan* and *Lucas*. Part III explores the state of property law after the *Nollan* and *Lucas* decisions. Part IV discusses recent state and federal cases addressing the rights of individuals who acquire property that is subject to restrictions to challenge the restrictions, focusing on the courts' inconsistent application of the *Lucas* and *Nollan* holdings. Part V discusses the Supreme Court's need to address the issue, examining several issues that specifically needs addressing. Finally, Part VI concludes the article by discussing the need for universally understood and accepted decisions, and the need for the Supreme Court to take an active role in addressing the issue.

II. NOLLAN AND LUCAS—THE SUPREME COURT SPEAKS

A. *Nollan v. California Coastal Commission*[\[27\]](#)—The Right to Challenge Existing Land Use Regulations

Opinions on whether subsequent owners of property can bring takings claims challenging existing land use regulations

fall squarely into one of two diametrically opposing camps. One side consists of those who object to such ability as an opportunity for a windfall if the property owners are able to challenge the regulations, while the other side argues that a constitutionally infirm restriction should not be insulated from challenge merely because property has transferred hands.

One of the first opinions from the United States Supreme Court to address this issue was *Nollan v. California Coastal Commission*. In 1982, the California Coastal Commission (Commission) imposed a condition on beachfront property owners to provide access across their property in exchange for the Commission's approval of the owners' rebuilding plans.^[28] The property owners brought an action against the Commission, charging that this condition violated the Fifth Amendment's Takings Clause.^[29] The United States Supreme Court held that the Commission could not condition its grant of permission to rebuild on the Nollans' transfer of a public easement across their property.^[30]

In his dissent Justice Brennan argued that the Nollans were aware that the commission's approval was conditioned on preservation of adequate public access to the ocean, and that there existed no reasonable claim to any expectation of excluding members of the public from walking across their beach.^[31] However, the Court responded that the Nollans' rights were not altered because the policy was being implemented before they acquired the property.^[32]

B. Lucas v. South Carolina Coastal Council^[33]—*What Constitutes the Elements of Title in Property*

Related to the question of who can challenge a land use restriction, is the question determination of what rights pass from one property owner to the next. Proponents of a rule precluding an owner of previously regulated property from challenging the restriction have argued that "property" is defined not just by the condition in which the title to property is originally granted but also by years of regulation and land use reforms.^[34] Opponents of this overly expansive rule argue that property rights are defined by the state, circumscribed only by the state's background principles of property or nuisance law.^[35] Any greater burdens on property owners may constitute a taking for which just compensation is required under the Constitution.^[36]

Most recent cases acknowledge the United States Supreme Court's decision in *Lucas v. South Carolina Coastal Council* as the source for this latter rule.^[37] David Lucas paid \$975,000 for two residential lots on the Isle of Palms in Charleston County, South Carolina, with the intention of building single-family homes.^[38] Two years later, the South Carolina Legislature enacted the Beachfront Management Act (Act),^[39] which had the direct effect of barring Lucas from erecting any permanent habitable structures on his two parcels.^[40] A state trial court found Lucas's parcels were rendered "valueless."^[41] The trial court found that when Lucas purchased the lots, they were both zoned for single-family residential construction with restrictions on such use by either the State of South Carolina, the County of Charleston, or the Town of the Isle of Palms.^[42] The court concluded that Lucas' properties had been taken and ordered that he be paid just compensation of approximately \$1.2 million.^[43]

A divided South Carolina Supreme Court reversed, finding that the Act was designed to preserve South Carolina's beaches and that any new construction would threaten this public resource.^[44] In the dissenting opinion, two justices observed that the government could prohibit noxious uses—public nuisances—without having to pay compensation, but that the Act's primary purpose was not the prevention of a nuisance.^[45] The United States Supreme Court reversed the South Carolina Supreme Court's decision, holding:

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. This accords, we think, with our "takings" jurisprudence, which has traditionally been guided by the understandings of our citizens regarding the content of, and the State's power over, the "bundle of rights" that they acquire when they obtain title to property.^[46]

The Court continued:

We believe similar treatment must be accorded confiscatory regulations, *i.e.*, regulations that prohibit all economically beneficial use of land: Any limitation so severe 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.[\[47\]](#)

In his concurring opinion, Justice Kennedy stated that "[w]here a taking is alleged from regulations which deprive the property of all value, the test must be whether the deprivation is contrary to reasonable, investment-backed expectations."[\[48\]](#) However, the Court responded by observing that the property interest against which the loss of value is to be measured depends on the state's property laws[\[49\]](#) which determines a property owner's reasonable expectations. According to the Court, a state's property laws determine whether and to what degree the particular interest in land, with respect to which the takings claimant alleges a diminution in value, is accorded legal recognition and protection.[\[50\]](#)

Even though Lucas purchased his property before the challenged regulation was imposed, the Court's language indicates that the same decision would result had he purchased his property after wards.[\[51\]](#) The regulations did little more than "proffer the legislature's declaration that the uses Lucas desir[ed were] inconsistent with the public interest. . ."[\[52\]](#) Furthermore, while regulations explicitly restricting land uses that were never permitted might not constitute a taking of property, the regulatory limitations precluding Lucas' building on his property were not likely part of South Carolina's background principles of property and nuisance.[\[53\]](#) Therefore, the regulations were not inherent in the title to his land.[\[54\]](#)

III. AFTER *NOLLAN* AND *LUCAS*, WHAT IS PROPERTY?

After *Nollan* and *Lucas*, a property owner apparently could challenge land use regulations implemented prior to acquisition of the property. Furthermore, a state could not proscribe uses of property that were not generally precluded under the state's nuisance laws. This has proven untrue, however, as some courts have continued to hold that property owners acquiring their land postregulation have no such right to maintain challenges.[\[55\]](#)

The justifications for these holdings typically fall into one of two categories. The first is the "windfall" or "notice" category, which rationalizes that since the property owner knew of the restriction, perhaps even paying a discount, allowing the owner to challenge the restriction would bestow a windfall. Supporters of this category adhere to the view that "the purchasers got what they paid for."[\[56\]](#) A problem with this conclusion is that too much must be read into the purchase price. For instance, did the purchaser discount the price because fewer uses of the property are possible after the restrictions are imposed, or was the price discounted because the purchaser factored in costs of litigation and delays?[\[57\]](#) Presumably, the property owner is not permitted to challenge even a patently unconstitutional restriction if the result would be the realization of a profit.

The second category is based on the theory that a subsequent owner obtained the property circumscribed by all of the existing restrictions. The discussion is usually couched in terms of state background principles of property and nuisance law. Frequently, courts subscribing to this theory will cite *Lucas*, even when the results conflict with those of the Supreme Court majority that rejected redefining property based on regulatory history.[\[58\]](#) Proponents of a narrow interpretation of the Fifth Amendment's Takings Clause have advanced other theories for denying relief to a property owner, few of which have merited more than passing attention by the courts.[\[59\]](#)

No matter what the theory, if a state is able to redefine "property," and in the process take private property without paying just compensation, owners are deprived not only of the value of the property taken, but of a constitutional right no less important than any of the others contained in the Bill of Rights.[\[60\]](#) The Supreme Court in *Lucas* surely could not have intended such a result for the Fifth Amendment.

IV. AFTER *NOLLAN* AND *LUCAS*; THE COURTS RESPOND

A. *Massachusetts*—*Lopes v. City of Peabody*[\[61\]](#) and *Leonard v. Town of Brimfield*[\[62\]](#)

Shortly after *Lucas*, the Supreme Court accepted a case that presented it with the opportunity to address whether a property owner could challenge preexisting land use regulations.[\[63\]](#) The United States Supreme Court summarily remanded the case, leaving the Massachusetts high court to write the opinion.[\[64\]](#) In 1981, Americo Lopes acquired property to build a small house.[\[65\]](#) Six years before his purchase, the city had passed a zoning provision that precluded any development on the lot.[\[66\]](#) Lopes challenged the provision as an impermissible taking of his property.[\[67\]](#) The

appeals court deemed it significant that Lopes knew of the restriction when he purchased the property.^[68] The United States Supreme Court granted Lopes' petition for writ of certiorari and remanded the case to the state Court of Appeal in light of its opinion in *Lucas*.^[69]

The Massachusetts Supreme Court transferred the case from the lower court, ruling that Lopes had a right to challenge the continued application of the restriction.^[70]

The Court observed that:

A rule that a purchaser of real estate takes subject to all existing zoning provisions without any right to challenge any of them would threaten the free transferability of real estate, ignore the possible effects of changed circumstances, and tend to press owners to bring actions challenging any zoning provision of doubtful validity before selling their property. Moreover, such a rule of law would in time lead to a crazy-quilt pattern of the enforceability of a zoning law intended to have uniform applicability.^[71]

Lopes seemingly held that a person could challenge land use regulations imposed prior to acquisition of property. However, in *Leonard v. Town of Brimfield*,^[72] the Massachusetts Supreme Court placed such meaning in serious doubt.^[73] Mary Leonard owned 16 acres of land in the town of Brimfield.^[74] In accordance with the town's zoning by-law, she applied for a special permit to build on her land, which was located in an area designated as a flood plain zone.^[75] The board issued her a special permit but limited any construction to only 6 of her 16 acres.^[76] Ms. Leonard sued, alleging that enforcement of a flood plain zone restricted development of the property, depriving her of property without compensation in violation of the United States Constitution.^[77] Ms. Leonard sought damages for enforcement by the town of the flood plain restriction.^[78] After a trial court found for the city, the state supreme court transferred the case on its own motion.^[79]

The Massachusetts Supreme Court held that the effect of the contested by-law did not constitute a taking for which Leonard was entitled to compensation.^[80] Leonard stated that she intended to subdivide her property into discrete parcels, and because of the special permit restriction, she lost the market value of two of the parcels.^[81] The court held her plans to be merely unilateral expectations and not reasonable, investment-backed expectations based on existing conditions.^[82] The court's basis was that she could not have expected the right to subdivide the flood plain property.^[83] Significantly, the court held that because her property was within a designated flood plain zone, and at the time she purchased the property she had constructive notice of the zoning restrictions, the law prohibited her from challenging those restrictions.^[84]

The court recognized that in *Lopes* it held that a person who purchases land subject to a restriction has a right to challenge the continued application of the restriction.^[85] However, the court differentiated Ms. Leonard's property because it was "subject to the restrictions on building in a flood plain,"^[86] and concluded that she could "not complain about the loss of a right she never acquired."^[87] According to the court, Leonard never had the right to build in a flood plain.^[88] The court was unclear as to whether this was because building in a flood plain is part of the state's background principles of nuisance and property law, or because the town was enforcing a regulatory restriction. If it was because of nuisance law, the opinion might be consistent with *Lucas* and *Lopes*. However, if the development were impermissible because of the town's evolving scheme of regulations, the court in one stroke overruled *Lopes* and ignored *Lucas*. In essence, what the court gave to property owners with one hand in *Lopes*, it may have taken back with the other in *Leonard*.

B. New Jersey—Moroney v. Mayor Old Tappan^[89]

The Moroneys purchased an undersized lot which, according to requirements of local zoning ordinances, was too small for a single-family house.^[90] The Moroneys applied for a hardship variance which was denied.^[91] However, the lower court did conclude that there had been an inverse condemnation when the Moroneys were denied their hardship variance.^[92] The Borough appealed, arguing that the lot was useless before the Moroneys purchased it and that they were not entitled to compensation.^[93] The New Jersey appeals court disagreed, holding that "a right to relief possessed by the original owner passes to the successor in title . . . [and] [s]uch right is not lost simply because the succeeding owner bought or contracted to buy with knowledge of the lot-size restriction."^[94] Integral to this holding is the conclusion that property rights are not redefined each time property is transferred.

C. *New York I*—*Ward v. Bennett*[\[95\]](#)

In *Ward v. Bennett*, the New York Court of Appeals reaffirmed the right of property owners to challenge the denial of a permit to build a single-family residence on property acquired with knowledge of and expressly subject to existing property restrictions.[\[96\]](#)

In 1966, the Wards acquired property, which was subject to an extension of a street through their property.[\[97\]](#) The planned street was to overlap more than 85 percent of the property, but the city never built the road.[\[98\]](#) Twenty years after acquiring the property, the Wards requested a permit to build a single-family house on the property.[\[99\]](#) The Department of Buildings denied the application because of conflict with the mapped street.[\[100\]](#) Reversing the lower proceedings, the New York Court of Appeals held that the Wards were entitled to have their takings claim adjudicated.[\[101\]](#)

D. *Iowa*—*Hunziker v. State*[\[102\]](#)

In 1990, Erbin Hunziker and a group of land developers sold a lot in a 59-acre tract of subdivided farmland to Dr. Jon Fleming who planned to build a home on the lot.[\[103\]](#) Before construction on the home could begin, the state archaeologist learned that the lot contained a Native American burial mound.[\[104\]](#) Pursuant to statutes enacted by the Iowa Legislature in 1976 and 1978,[\[105\]](#) the state archaeologist prohibited the disturbance of the remains,[\[106\]](#) and required a buffer zone to be placed around the burial mound.[\[107\]](#) Because of the size of the restricted portion of the property, the city refused to issue a building permit for the lot.[\[108\]](#)

Because Dr. Fleming was unable to build a home on the lot, the developers refunded his purchase price in return for his interest in the lot, including the right to sue for a taking.[\[109\]](#) Hunziker and the other owners brought suit in state court, alleging that the state's action was a regulatory taking of private property without just compensation.[\[110\]](#) The trial court granted summary judgment in favor of the state.[\[111\]](#) The plaintiffs appealed to the Iowa Supreme Court, which affirmed the trial court on a vote of four to one.[\[112\]](#)

Interestingly, both the majority and the dissent relied upon the United States Supreme Court's decision in *Lucas* as authority for their respective positions.[\[113\]](#) The majority denied petitioners compensation because they had acquired the land after the enactment of the statutes, which the court deemed part of the state's property law prohibiting the development of any land in the state containing significant human remains.[\[114\]](#) Under the court's reasoning, because both the statutes and burial mound existed before petitioners purchased the lot, the right to develop the lot was not one of their property interests.[\[115\]](#) The dissent, also relying upon *Lucas*, reasoned that a regulatory taking occurred when the government applied the statutes to the lot in a manner that precluded all economically viable use.[\[116\]](#)

The United States Supreme Court denied Hunziker's petition for writ of certiorari.[\[117\]](#) As a result, the Court let the state opinion stand which seemingly applied *Lucas* while precluding a property owner from receiving just compensation when all economically viable use of property was extinguished by the mere passage of legislation.[\[118\]](#) The law, passed in the mid-1970's, essentially made all land containing "significant human remains undevelopable."[\[119\]](#) Under the Iowa Court's reasoning, it would be unlikely that anyone had obtained property prior to the original interment of the remains some thousands of years earlier, so it would be impossible to have ever acquired a right to build on the property.[\[120\]](#) Thus, Iowa succeeded where the South Carolina legislature had previously failed by reshaping the state's law of property to the detriment of all property owners.

E. *Wisconsin*—*Zealy v. City of Waukesha*[\[121\]](#)

Zealy owned 10.4 acres of land that had been annexed by the City of Waukesha in 1967.[\[122\]](#) Originally part of a 250-acre parcel zoned for agricultural use, after annexation, the land was rezoned to permit residential use.[\[123\]](#) In 1982, contemplating future residential development on the 10.4 acre parcel, Zealy granted an easement to the city for sanitary and storm sewers.[\[124\]](#) Three years later, the City rezoned 8.2 of the 10.4 acres, creating a conservancy district in which no residential or business development was permitted.[\[125\]](#) However, the new zoning did allow agricultural use.[\[126\]](#)

Zealy brought an inverse condemnation action against the city, claiming that its rezoning of his land constituted a regulatory taking without compensation.^[127] A principal focus of the litigation in the lower courts was whether the trial court should consider Zealy's parcel as a whole in determining whether a taking had occurred.^[128] The Wisconsin Supreme Court held, as part of its conclusion that there had been no taking of Zealy's property without just compensation, that the land could "still be used for its historical use. . . ."^[129] The court relied upon its decision in *Just v. Marinette County*,^[130] a 1972 decision preceding both *Lucas* and *Nollan*, holding that:

[D]epreciation of value is not based on the use of the land in its natural state but on what the land would be worth if it could be filled and used for the location of a dwelling. While loss of value is to be considered in determining whether a restriction is a constructive taking, value based upon changing the character of the land at the expense of harm to public rights is not an essential factor or controlling.^[131]

The court's reliance upon *Just* raises the question as to whether there could ever be a regulatory or categorical taking successfully prosecuted in Wisconsin where a property owner was denied the ability to make any use of property, as that use would necessarily change the character of the land. The court did not address the fact that no use contemplated by Zealy, whether residential or commercial, even remotely constituted a nuisance, nor would such an argument seem plausible after *Lucas*.^[132]

The effect of the court's decision is that permissible uses of property are not defined in terms of a state's background principles of property and nuisance. Rather, property is defined by an ephemeral composite of land use restrictions that fix or limit uses of property. The Court demonstrated the ease with which it could apply this process, holding that regulations prohibiting Zealy from making reasonable use of his property did not constitute a taking merely because the present permissible uses matched uses permitted at some historical point in time.^[133]

Recalling whether a state could pass legislation defining away any use of private property or even its very ownership, the answer in this case appears to be "yes."^[134] The rationale might be that originally—hundreds or even thousands of years ago—the land was put to no use, developed in no manner whatsoever. The land use regulations restricting all use would be consistent with the "historic use." In fact, the only thing the state would have succeeded in defining away would be protections guaranteed under the Takings Clause.

F. Michigan—K & K Construction, Inc. v. Department of Natural Resources^[135]

J.F.K. Company owned a number of parcels in Waterford Township in Oakland County.^[136] Joseph and Elaine Kosik, parents of the five children comprising J.F.K. Co., acquired the property in 1976.^[137] J.F.K. wished to build on one of the parcels covering 55 acres of the property.^[138] In 1988 the Department of Natural Resources (DNR) denied J.F.K.'s application for a development permit, based on a determination that approximately 28 acres of that parcel was protected wetlands.^[139] J.F.K. sued on the grounds that the area was not wetlands and the denial of the permit constituted a taking of its property.^[140]

In 1990, J.F.K. submitted a second application to fill a little more than three acres of the wetland.^[141] The DNR also denied this permit.^[142] In 1992, the Michigan Court of Claims determined that a taking of J.F.K.'s property occurred because the denial of the permit applications rendered the property worthless.^[143] The DNR appealed, claiming that it denied the permit based on a fundamental principle of Michigan property law, the preservation of wetlands.^[144] The Court of Appeal, citing *Lucas*, noted that "the state must identify *background principles of nuisance and property law* that prohibit the uses the landowner intends in the circumstances in which the property is found."^[145] The court also observed that neither building a restaurant on land, nor requesting to fill in wetlands constitutes a nuisance that the government may regulate against.^[146] The court concluded that the general principles of public interests found in the state constitution do not form a sufficient basis to take a person's land without just compensation on principles of nuisance or property law.^[147]

The DNR also appealed on the grounds that because J.F.K. acquired title after the enactment of the regulation, it could not challenge the regulation.^[148] The court of appeal disagreed.^[149] Because the court previously concluded that the regulation was not a part of the title itself based on principles of property and nuisance, "[t]he passage of the [regulation] cannot be understood as depriving J.F.K. Company of just compensation merely because the WPA was in effect when the quit claim-deed was executed. . . . [T]he timing of the regulation and the transfer of the land do not

dictate that plaintiffs are not entitled to just compensation."[\[150\]](#) Thus, just as a New Jersey court had held in *Moroney*, the Michigan court concluded that property rights are not redefined each time property is transferred.[\[151\]](#)

G. Federal Circuit—Preseault v. United States[\[152\]](#)

In a decision addressing the questions of what is included in title to property and who could maintain a suit for a taking, the Court of Federal Claims dismissed arguments by the government which would have profoundly impacted future takings law.[\[153\]](#) The Preseaults' home was located on a tract of land near the shore of Lake Champlain in Burlington, Vermont in which they had a fee simple interest.[\[154\]](#) A railroad right-of-way ran over three parcels within this tract.[\[155\]](#) Originally acquired by the Rutland-Canadian Railroad Company in 1899, over time, the right-of-way passed through several successor railroad companies.[\[156\]](#)

The controversy arose because the federal Rails-to-Trails Act[\[157\]](#) provided for the conversion of unused railroad rights-of-way for use as public recreational trails.[\[158\]](#) The Preseaults challenged the conversion of the right-of-way through their tract, claiming that because the railroad only had an easement, they held the reversionary interest upon abandonment of the easement.[\[159\]](#) The United States argued that the original conveyances in 1899 did not define the Preseault's property interests in the tract, rather, "the evolving enactment and implementation of federal railroad law between 1899 and the date . . . the Preseaults acquired the parcels" defined their interests.[\[160\]](#)

The court categorically rejected the thesis that general legislation enacted after the creation of the property interests "somehow redefined state-created property rights and destroyed them without entitlement to compensation."[\[161\]](#) Criticizing the government's reliance upon a few inapt extractions from *Lucas*, the court emphasized that the *Lucas* court relied on *state-defined nuisance rules*.[\[162\]](#)

Nothing in *Lucas* suggests that the background principles of a state's property law include the sweep of a century of federal regulatory legislation, and indeed much of what the Supreme Court said then, as well as in *Preseault II*, about property rights indicates to the contrary. Nor is there any suggestion in this case that the Preseaults' use of their property could be considered in any way to be a public nuisance under traditional nuisance concepts, justifying the intervention of state authorities.[\[163\]](#)

The Court also held that the Preseaults could bring their takings claim despite having acquired the property after the implementation of federal regulations.[\[164\]](#) The Court observed that, until there was a physical occupation, the only claim that could have been brought in 1920—the time the federal scheme of regulation was implemented—was a claim based upon a regulatory taking.[\[165\]](#) However, the concept of regulatory takings was not born until two years later when Justice Holmes uttered his famous statement about regulation that "goes too far."[\[166\]](#) Furthermore, the court observed that "any property owner who was prescient enough to allege a regulatory taking following the enactment of the Transportation Act of 1920, in addition to having some doctrinal explaining to do, presumably would have been met by an equally prescient Government with the defenses of absence of ripeness and failure to exhaust administrative remedies."[\[167\]](#) The court of appeals concluded that the timing of land use regulations and ownership are simply irrelevant to the question of whether a property owner can challenge the regulations as effecting a taking of property without just compensation.[\[168\]](#)

H. New York Court of Appeals - 4, United States Supreme Court - 0

On February 18, 1997, the New York Court of Appeals decided four cases. One involved the calculation of the value of condemned property;[\[169\]](#) two involved regulations that restricted uses of property;[\[170\]](#) and the other involved a physical invasion.[\[171\]](#) These cases involved distinct areas of land use law—condemnation, regulatory taking, and physical taking. However, the results in each case were the same: the property owners were charged with notice of existing restrictions and therefore could not challenge them as applied to their respective property. Through these four cases, the New York Court of Appeals formulated a rule which it appears intent on applying to all land use cases.[\[172\]](#)

I. Anello v. Zoning Board of Appeals[\[173\]](#)

In 1989, the Village of Dobbs Ferry enacted a steep-slope ordinance which precluded building on lots with a buildable area of less than 5,000 square feet.[\[174\]](#) Ms. Anello purchased her property in 1991, and under the ordinance, the

buildable portion of her lot was calculated as 4,200 square feet.[\[175\]](#) She sought a variance which the Zoning Board of Appeals denied.[\[176\]](#) The appellate court also denied her appeals, concluding that the Board's denial of the variance was not arbitrary or capricious.[\[177\]](#)

In 1997, the New York Court of Appeals affirmed the lower court's decision denying Ms. Anello any remedy, concluding that she never had the right to make such a use of her property.[\[178\]](#) The court observed:

[S]he never acquired an unfettered right to build on the property free from the steep-slope ordinance. [She] purchased the property in 1991, two years *after* the steep-slope ordinance was enacted. This statutory restriction thus encumbered petitioner's title from the outset of her ownership and its enforcement does not constitute a governmental taking of any property interest owned by her.[\[179\]](#)

Responding to the dissent's assertion that this rule would impede the alienability of property, the court stated that the rule should encourage prior owners to assert any compensatory takings claim they might have.[\[180\]](#) This was precisely one of the concerns expressed by the Massachusetts court in *Lopes*.[\[181\]](#) Thus, as a result of the decision in *Anello*, transferring a parcel of property will transform a compensable taking into one that is noncompensable.

2. *Gazza v. New York State Department of Environmental Conservation*[\[182\]](#)

In 1989, Joseph F. *Gazza* purchased a parcel of land in Suffolk County, New York, for \$100,000.[\[183\]](#) At the time of the purchase the respondent, New York State Department of Environmental Conservation (DEC), had previously inventoried approximately 65 percent of the 43,500-square-foot parcel as tidal wetlands.[\[184\]](#) A few months prior to purchasing the property, *Gazza* submitted an application to the DEC to construct a single-family home on the parcel.[\[185\]](#) The DEC denied the application but permitted *Gazza* to build a dock, catwalk, and small parking lot on the condition that he obtain permits from the town.[\[186\]](#)

Nevertheless, *Gazza* purchased the property and appealed the decision denying him a permit to build a home.[\[187\]](#) The lower court denied relief because there was still some use for the property and because he purchased the property with notice of the restrictions.[\[188\]](#) The intermediate appellate court affirmed the trial court's decision, observing that the key issue was *Gazza's* knowledge of the wetlands regulation burdening the property when he bought it.[\[189\]](#) The court concluded that a property owner was not entitled to challenge a regulation where he paid a discount for the property and knew that the requested property use would not be approved.[\[190\]](#)

The New York Court of Appeals affirmed the lower court's decision.[\[191\]](#) The court applied for the second time a new rule of law which directly contradicted not only *Lucas*, but years of takings jurisprudence. The court began by stating, "[o]ur courts have long recognized that a property interest must exist before it may be 'taken' . . . [similarly, a taking claim may not] be based upon property rights that have already been taken away from a landowner in favor of the public."[\[192\]](#) The court then concluded that a known regulation becomes part of a property's title as a pre-existing rule of state law;[\[193\]](#) therefore, *Gazza* never had a right to build on his property and could not base his takings claim on such an interest.[\[194\]](#)

The New York Court of Appeals' rule in *Gazza* prohibiting property owners from bringing as-applied challenges to preexisting regulations is directly in conflict with *Lucas*.[\[195\]](#) The conclusion to be drawn from *Gazza* and the New York rule is that the protections of the Fifth Amendment for regulatory takings do not apply once affected property is transferred.[\[196\]](#) Given such a principal of law, there would be very little to prevent the government from regulating property in a manner that could constitute a potential regulatory taking. Combined with significant ripeness hurdles which must be overcome by property owners seeking to challenge the regulations as applied, it would be inevitable that much of the property would be transferred before a takings challenge could be brought.[\[197\]](#)

The possibility of such an outcome should not be dismissed. In a concurring opinion, Justice Wesley disagreed that *Gazza* should not be able to bring a claim merely because he purchased the property after the restriction took effect.[\[198\]](#) He believed that the results of the court of appeals' new rule could have a devastating effect on property values.[\[199\]](#)

3. *Basile v. Town of Southampton*[\[200\]](#)

In 1990, the Town of Southampton acquired ownership by condemnation of a 12-acre parcel previously owned by Basile.^[201] The land was classified as 95 percent wetlands and subject to a covenant that the town planning board must approve any building.^[202] A dispute over valuation ensued.

The court of appeals, applying its new rule redefining property, held that Basile could not benefit from a general rule that property would be appraised based on its unregulated value.^[203] The court stated that "[w]hatever taking claim the prior landowner may have had against the environmental regulation of the subject parcel, any property interest that might serve as the foundation for such a claim was not owned by claimant here who took title after the redefinition of the relevant property interests."^[204] The court also acknowledged that private covenants already encumbered the property, although that fact played little, if any, part in the court's application of its rule.^[205]

4. *Soon Duck Kim v. City of New York*^[206]

Perhaps the most extraordinary application of the New York Court of Appeals' new rule came in *Soon Duck Kim v. City of New York* when the court used the rule to justify a permanent physical invasion of private property without compensation.^[207] In 1978, the city raised the legal grade of a section of street in Queens from 9.1 to 13.5 feet and filed a map reflecting the regrading.^[208] Ten years later, the Kims purchased property abutting the street, and two years after that the city again regraded the street, raising it nearly 4.5 feet.^[209] The regrading left the street more than 4 feet above the adjoining property.^[210] The city notified the property owners that they had to regrade their property.^[211] However, when consent was not received, the City raised the property by placing 2,390 square feet of side fill on the property.^[212]

The property owners challenged the permanent physical occupation. Seemingly eager to expand the application of its new rule beyond regulatory takings to physical occupations as well, the court of appeals began with an inquiry as to the rights and obligations contained in the plaintiff's title.^[213] The court went so far as to declare that it did not need to address whether this was a regulatory or physical taking.^[214]

The court stressed that the Kims were under an obligation to "fill any sunken lot."^[215] The court began by stating that New York property owners must provide lateral support for roadways,^[216] and then extended this obligation to include newly raised roads.^[217] The court did not recognize this as an expansion of rules relating to property adjoining roadways and indicated that such an obligation was simply an inherent part of property ownership in New York City.^[218]

However, in his dissent, Justice Smith correctly observed that the majority's decision was inconsistent with the United States Supreme Court decision in *Loretto v. Teleprompter Manhattan CATV*.^[219] Justice Smith also observed that the court turned its back on the requirement in *Lucas* that the obligations could be valid only if the limitation on the property existed in background principles of state law.^[220] Applying this decision, the state could construct a new elevated highway through a residential subdivision and then take, without compensation, every property required to support the superstructure.

V. THE MISSING OPINION

These cases raise an obvious question: when will the United States Supreme Court address whether property owners can challenge land use restrictions imposed prior to the time they acquired the property? Each of the earlier cases cited above offered the Court an opportunity to address this question.^[221] The Court's remand in *Lopes* seems scant authority for a question with extraordinary implications for all property owners.

While any opinion would seem better than none, the field of regulatory takings cries out for an opinion which addresses the following issues: (1) the implications of restricting challenges to existing owners of property on market efficiency and alienability; (2) the difficulty of bringing regulatory takings claims because of ripeness requirements; (3) the implication of a rule which would, in essence, legitimize unconstitutional land use regulations if not brought by the pre-regulated owner; and (4) the legitimacy of a rule that discriminates between owners who owned property prior to the imposition of land use restrictions and those who obtained property after the restrictions are enacted.

A. Market Efficiency, Alienability of Property, and Windfalls

In *Lopes v. City of Peabody*,^[222] the Massachusetts Supreme Court observed that the free transferability of real estate was threatened by refusing to permit a property owner to challenge a zoning enactment implemented prior to the owner's acquisition of the land.^[223] Although the Court did not explain how such a rule would burden the alienability of property, possible reasons readily come to mind.

As a basic principle, relatively unrestricted alienability generally enhances efficiency of land use.^[224] Placing the property in the hands of those willing and capable of maximizing its utility enhances the intrinsic value of property.^[225] By implication, the general wealth of the community is improved. However, when regulations burden property by decreasing possible uses of the property, the property becomes less desirable because the owner is no longer capable of maximizing its utility.^[226] All other things being equal, a rational participant in the market will favor property less intensively regulated in order to maximize return on investment.^[227] Professor Eagle notes that free alienability encourages a property owner to guard the property's value.^[228] However, as he correctly observes, property owners may not appreciate the effects of the regulations or be in a position to challenge them.^[229]

Given the prospect of intensively regulated, and therefore less desirable, property in the marketplace, the owner has two options. The owner can either challenge the regulation or reduce the price of the property. However, if the owner is not in a position to be able to develop the property, either because such plans would be premature or because the owner does not have the resources to develop the property, challenging the regulation could prove difficult if not impossible.^[230] Even if the property owner planned to develop the property or challenge the regulation to preserve the property's value, the costs of such a challenge can be substantial. As a result, cost of ownership may increase to the point where recovering costs of the property upon resale would be difficult, if not impossible.^[231] The property owner might consider holding onto the property while another property owner challenged the regulation's constitutionality, but with no assurances that such a challenge would ever be mounted or even successful, the owner would be left holding regulated property with no sure prospects for relief. Alternatively, if the owner reduced the price of the property, the economic costs of the regulation would be internalized.^[232] By assuming the economic costs, the property owner suffers a loss which is almost certainly not compensable.^[233]

Over time, as new regulations are applied to property, a rule limiting the rights of a property owner to challenge existing restrictions would impose increasingly onerous burdens on owners. If the owners are unable or decline to challenge any of the regulations, some owners may market properties subject to extraordinary restrictions. Under a rule precluding subsequent acquirers of property from challenging existing regulations, the rules would become virtually unchallengeable and a permanent part of the title. Depending on which regulations were successfully challenged, some properties would be less severely regulated than others.^[234] The seemingly random application of land use restrictions upon otherwise similarly situated properties would have a dramatic effect on the property marketplace. Property relatively free from regulation might command a far greater price than heavily regulated property, even if intrinsic qualities of the property would make it more valuable.^[235] On the other hand, heavily regulated property would lose its desirability until it eventually became valueless.

The New York Court of Appeals went to great lengths to point out that a rule precluding subsequent owners from challenging previously enacted land use restrictions would prevent landowners from achieving a windfall at taxpayers' expense.^[236] However, in many instances, such a rule would achieve precisely the opposite result.

Suppose, for example, that two adjoining properties, *Eastacre* and *Westacre*, are regulated in precisely the same fashion. The owner of *Eastacre* sells the property at a steep discount, reflecting the regulated status of the property and the new owner's inability to challenge the land use limitations. The owner of *Westacre* then challenges the regulations as applied to his property. The court rules that the regulations are not only unconstitutional as applied to *Westacre* but also as applied to any property. The court strikes the regulations and they no longer apply to either *Eastacre* or *Westacre*. The new owner of *Eastacre* will have achieved an even greater windfall than might have been possible without the rule. Without the rule, the buyer and seller of *Eastacre*, appreciating that either could challenge the regulation, would have negotiated a price reflecting the ability of the new owner to challenge the regulation and potentially enhance the value of the property. In essence, the regulatory discount would be discounted by the probability of success less the costs of the challenge. A rule precluding the new owner from challenging the regulations

dramatically depresses the value of the land and maximizes the seller's loss.

B. Land Use Regulations and Ripeness

A rule limiting challenges to a restrictive land use regulation, at the time the regulation becomes effective, imposes undue hardships on property owners by forcing them to file immediate legal challenges or risk the loss of a valuable interest in their property. A property owner may challenge a regulation either *facially* or *as applied*.^[237] A facial challenge relates to the mere enactment of the statute. The property owner may facially challenge the restrictions by alleging their impropriety notwithstanding their effect upon any property.^[238] When someone challenges a zoning ordinance on its face, a number of circuits have held that it is not necessary to seek a variance.^[239] Intuitively, this makes sense because a facial challenge raises the allegation that the regulatory scheme would be unconstitutional *no matter how it is applied*.^[240] Nonetheless, if the property owner makes a facial challenge, the burden can be extraordinary.^[241] The United States Supreme Court has required that the regulation must deny an owner economically viable use of his land before the regulation can be regarded as a taking.^[242] Regulations have withstood facial challenges when they were held to substantially advance legitimate governmental goals.^[243] In order to challenge the regulation, the property owner must then convert the *facial* challenge to an *as applied* challenge by attempting to develop the property.^[244]

Even if the challenge is *as applied*, the plaintiffs still face a formidable challenge. Ripeness is a significant limitation to mounting such a challenge to a regulation. As the United States Supreme Court observed in *Williamson County Regional Planning Commission v. Hamilton Bank*,^[245] a claim is not ripe until the government has made a final decision regarding the implementation of the regulations on the property.^[246] In *MacDonald, Sommer & Frates v. County of Yolo*,^[247] the Court explained that this ripeness requirement was designed to judge the constitutionality of regulations that potentially limit development only after the nature and extent of the development is known.^[248]

Thus, property owners seeking to challenge the land use regulation as applied to their property have to be in a position where application of the restriction precluded the intended uses of the property. In most instances, this would require some sort of meaningful development permit applications.^[249] Of course, this supposes that the owners intended to build in the immediate future. Such is not the case where owners hold land for investment or where conditions do not merit immediate development. To have ripe taking claims, such property owners may be forced to enter into premature or "artificial" development schemes by making permit applications because such applications would be the only way to challenge the regulation and to preserve their property rights.^[250]

However, submitting a development permit is no small feat, particularly where land use restrictions burden the property, thus necessitating the challenge in the first place. An application for a development permit may require the preparation of numerous documents, such as geologic surveys, archaeological surveys, and environmental impact reports.^[251] The costs may amount to tens if not hundreds of thousands of dollars, depending on the scale of the project.^[252] Even then, there is no certainty that one application will be sufficient or that the property owner will be able to successfully prosecute a takings challenge based on the denial of the one application.^[253]

Another issue arising from the rule is its effect on the orderly administration of justice as property owners are forced to challenge every new regulation or risk the loss of value of increasingly burdened property.^[254] This supposes that the property owners will overcome the ripeness obstacles in their path. The potential for a flood of permit applications should concern city and county governments as affected property owners attempt to ripen their claims by submitting development requests where, but for this rule, property owners might not have even contemplated development.^[255]

C. Time Cannot Cure Constitutional Infirmities

In many states, mere acquiescence for whatever period of time does not legalize a usurpation of power in violation of rights protected by constitutional provisions.^[256] However, a rule precluding a subsequent owner from challenging an existing land use regulation would stand this widely accepted principle on its head. Under such a rule, passing title to a subsequent owner would cure a land use restriction's constitutional infirmities. Only a person owning property when the legislature enacted the restriction could challenge it, assuming the owner overcomes the formidable obstacle of ripeness.

Under such a regimen, the alienation of property naturally occurring over the passage of time would result in the inability of any affected property owners to challenge even a land use restriction that is patently unconstitutional as applied. The definition of property rights would essentially be redefined by the government, thus accomplishing a defacto transfer of ownership interests to the state unfettered by constitutional limitations—the very problem of which Justice Holmes warned about in *Pennsylvania Coal v. Mahon*.^[257] This also appears to be the case in *Hunziker v. State* where the Court held that a property owner never had the right to build on a site containing significant human remains.^[258]

To the extent that a transfer of property insulates a land use regulation from being challenged, does the protection apply only to the sale of property or does it also apply to transfers that occur as a result of marriage, divorce, death, or creation of trusts? The New York Court of Appeals avoided resolving this issue.^[259] However, a broad rule that redefines property and prevents subsequent owners from challenging land use restrictions probably would apply with equal force to *any* subsequent owner.^[260]

D. The Patchwork Application of Land Use Regulations

A rule precluding a subsequent landowner from challenging an existing land use regulation would foster the application of land use regulations in a patchwork fashion. It is not difficult to imagine a residential development where some property owners are able to challenge a land use regulation while their adjacent neighbors' claims are barred. Adding a few different regulations over a period of years could easily result in an extraordinary range of legal possibilities, depending on when and how often owners transfer a particular property. This rule would result in situations where one property owner could challenge regulation A but not B, another could challenge both, and still a third could not challenge either.^[261]

VI. CONCLUSION

The Supreme Court's opinion in *Lucas* should have signaled an end to some states redefining property. Following the Supreme Court's decision in *Nollan*, the right of a subsequent acquirer of property to challenge existing land use regulations should have been beyond question. However, as the cases discussed in this article demonstrate, some courts do not correctly apply *Lucas* and *Nollan*. In the four New York cases—*Anello*, *Gazza*, *Basile*, and *Soon Duck Kim*—the emerging pattern seems less a misapplication than a categorical repudiation of *Lucas* specifically, and regulatory takings jurisprudence in general.

If the Fifth Amendment's Takings Clause is to have any meaning, decisions affecting its application must be universally understood and accepted. *Lucas* and *Nollan* should have been sufficiently clear, but apparently they were not. The remedy is not further uncertainty perpetuated by silence. Rather, our Supreme Court must expressly declare that *no person* shall be deprived of property without due process, and private property shall not be taken for public use, without just compensation. There can be no exceptions to the Takings Clause for new owners, nor can property be redefined any time a statute or ordinance is passed or a zoning decision made. Such conditions risk reducing the Takings Clause to a hollow shell.^[262]

The Supreme Court can not continue to on opportunities presented by such cases as *Hunziker*, *Zealy*, or *Lopes*. The four New York cases—*Anello*, *Gazza*, *Basile*, and *Soon Duck Kim*—represented an opportunity for the Court to reaffirm the vitality of *Lucas*. The Court needs to declare that a state may neither legislatively alter the definition of property such that property owners are deprived of valuable property without just compensation, nor preclude property owners from challenging land use restrictions imposed prior to the time the property was acquired. The United States Supreme Court must address this issue, devoting more of the its attention to the subject than a single footnote, so that property owners cannot be deprived of their Fifth Amendment rights the moment they buy or sell their property.

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STATES SUPREME COURTS, AND NEW YORK COURT OF APPEALS. I AM INDEBTED TO PROFESSOR RAYMOND COLETTA OF MCGEORGE SCHOOL OF LAW, PROFESSOR STEVEN EAGLE OF GEORGE MASON SCHOOL OF LAW, AS WELL AS JAMES S. BURLING, ROBIN L. RIVETT, AND M. REED HOPPER OF PLF FOR THEIR GRACIOUS COMMENTS. [Return to text.](#)

[1] See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1029 (1992). See discussion *infra* notes 33-54 and accompanying text. [Return to text.](#)

[2] *Id.*; see also *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980) ("[P]roperty interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . .") (citation omitted). [Return to text.](#)

[3] See *Lucas*, 505 U.S. at 1029. [Return to text.](#)

[4] See *id.* at 1029-30. [Return to text.](#)

[5] *Id.* at 1033 (Kennedy, J., concurring). [Return to text.](#)

[6] *Id.* at 1035 (Kennedy, J., concurring). [Return to text.](#)

[7] See *id.* [Return to text.](#)

[8] In *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 833 n.2 (1987), the Supreme Court noted that property rights are not altered because property is acquired after a restrictive policy is implemented. [Return to text.](#)

[9] See *id.* [Return to text.](#)

[10] For a discussion of the suggestion that courts are not following the *Nollan* and *Lucas* holdings, see Mark P. McIntyre, *The Taking of Single Lots—How New York's Wetland Laws Violate the U.S. Constitution*, 15 N.Y. ENVTL. L. 4, 31 (1995).

By declining, so far, to revise the procedural rules that apply to New York wetland takings cases, the Court of Appeals, like many of its sister state high courts, has not changed state law to accommodate the property rights that the U.S. Supreme Court articulated in *Nollan* and *Lucas* Many state courts have reacted with skepticism and resistance to the Supreme Court's substantive due process approach to government regulation and private property California's reaction to emerging United States Supreme Court takings doctrine suggests a balkanization of regulatory takings law.

Id. at 31-32. [Return to text.](#)

[11] 678 N.E.2d 870 (N.Y. 1997). See discussion *infra* notes 173-81 and accompanying text. [Return to text.](#)

[12] 679 N.E.2d 1035 (N.Y. 1997). See discussion *infra* notes 182-99 and accompanying text. [Return to text.](#)

[13] 678 N.E.2d 489 (N.Y. 1997). See discussion *infra* notes 200-205 and accompanying text. [Return to text.](#)

[14] 90 N.Y.2d 1 (1997), *forthcoming* 681 N.E.2d 312 (N.Y. 1997). See discussion *infra* notes 206-20 and accompanying text. [Return to text.](#)

[15] See *generally infra* notes 169-220 and accompanying text. [Return to text.](#)

[16] See MIGUEL DE CERVANTES SAAVEDRA, *DON QUIXOTE* (1980 ed.). Cervantes masterfully narrates the tale of a gentleman, Don Quixote, who, driven to madness by tales of chivalry, abandons his home in search of adventure. The errant knight would charge with his lance at windmill, convinced that they were in fact giants. [Return to text.](#)

[17] Initially the property owners could make a facial challenge alleging that the ordinance, no matter how it was

applied, violated the Constitution. The remedy would result in invalidating the ordinance and possibly the payment of just compensation for a temporary taking. This type of challenge is difficult, typically because of short statutes of limitations. Alternatively, after availing themselves of any administrative requirements, the property owners could bring an "as applied" challenge, alleging that the ordinance took their property without payment of just compensation. The payment of just compensation for a temporary or permanent taking, depending on whether the ordinance was invalidated or rescinded, is a possible remedy in this case. *See infra* notes 224-44 and accompanying text. Of course, this assumes that the claim is ripe for adjudication. For a discussion of ripeness requirements in the context of land use cases, see *infra* notes 237-55 and accompanying text. [Return to text.](#)

[18] For instance, could a state pass legislation defining away any use of private property or even its very ownership? [Return to text.](#)

[19] *See* U.S. CONST. amend. V. [Return to text.](#)

[20] For a more in depth treatment see *Lucas*, *infra* notes 33-54 and accompanying text. [Return to text.](#)

[21] These states include Iowa (*Hunziker v. State*, 519 N.W.2d 357 (Iowa 1994)), Massachusetts (*Leonard v. Town of Brimfield*, 666 N.E.2d 1300 (Mass. 1996)), and New York (*Anello v. Zoning Board of Appeals*, 678 N.E.2d 870 (N.Y. 1997)) to name a few. [Return to text.](#)

[22] An explanation for this theory is that a property owner should not be permitted a windfall, purchasing regulated property at a bargain price and profiting when the regulation is overturned or granted compensation for the taking. *See, e.g.*, *Gazza v. New York State Dep't of Env'tl. Conservation*, 679 N.E.2d 1035 (N.Y. 1997) (concluding that a property owner who acquires property with a known regulation may not bring a takings claim based on the preexisting regulation). For a detailed discussion of *Gazza*, see *infra* notes 182-99 and accompanying text. [Return to text.](#)

[23] Examples of such states include New Jersey (*Moroney v. Mayor Old Tappan*, 633 A.2d 1045 (N.J. Super. A.D. 1993)) and Michigan (*K & K Construction, Inc. v. Department of Natural Resources*, 551 N.W.2d 413 (Mich. App. 1996)). [Return to text.](#)

[24] *See, e.g.*, *Lopes v. City of Peabody*, 629 N.E.2d 1312 (1994) (holding that a landowner could challenge land use regulations that were imposed prior to the landowner's acquisition of the property). [Return to text.](#)

[25] *See Lopes*, *infra* notes 64-71 and accompanying text. *But see* *Leonard v. Town of Brimfield*, 666 N.E.2d 1300 (1996), *infra* notes 72-88 and accompanying text. [Return to text.](#)

[26] *See Nollan v. California Coastal Comm'n*, 483 U.S. 825, 833-34 n.2 (1987). [Return to text.](#)

[28] *See id.* at 828. [Return to text.](#)

[29] *See id.* at 829. [Return to text.](#)

[30] *See id.* at 837. [Return to text.](#)

[31] *See id.* at 856-57 (Brennan, J., dissenting). [Return to text.](#)

[32] *See id.* at 833 n 2. [Return to text.](#)

[34] *See Preseault v. United States*, 100 F.3d 1525, 1537 (1996) (rejecting the government's suggestion that property interests are defined not by original conveyances but by evolving enactment and implementation of federal law). *See also* *Anello v. Zoning Board of Appeals of Village of Dobbs Ferry*, 89 N.Y.2d 535 (1997) (adopting a rule that property owners' titles are encumbered by all existing statutory restrictions). [Return to text.](#)

[35] *See, e.g.*, *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) (holding that property rights are defined by state property and nuisance law). [Return to text.](#)

[36] *See id.* [Return to text.](#)

[37] *See* Preseault v. United States, 100 F.3d at 1538; Loveladies Harbor, Inc. v. United States, 28 F.3d 1171, 1179 (Fed. Cir. 1994); Healing v. California Coastal Comm'n, 27 Cal. Rptr. 2d 758, 775-76 (1994); Lopes v. City of Peabody, 629 N.E.2d 1312, 1313 (1994); K & K Construction, Inc. v. Department of Natural Resources, 551 N.W.2d 413, 417 (Mich. Ct. App. 1996); Zealy v. City of Waukesha, 534 N.W.2d 917, 921 (Wis. Ct. App., 1995). *See also* Jonathan E. Cohen, *Comment: A Constitutional Safety Valve: The Variance in Zoning and Land-Use Based Environmental Controls*, 22 B. C. ENV. AFF. L. REV 307, 326-27 (1995); Fred P. Bosselman, *Limitations Inherent in the Title to Wetlands at Common Law*, 15 STAN. ENVTL. L.J. 247, 253 (1996). [Return to text.](#)

[38] *See* Lucas, 505 U.S. at 1006-07. [Return to text.](#)

[39] S. C. CODE ANN. § 48-39-250 - § 48-39-360 (Supp. 1990). [Return to text.](#)

[40] *See* Lucas, 505 U.S. at 1007. [Return to text.](#)

[41] *Id.* [Return to text.](#)

[42] *See id.* at 1009 (citing App. to Pet. for Cert. 36). [Return to text.](#)

[43] *See id.* (citing App. to Pet. for Cert.). [Return to text.](#)

[44] *See id.* at 1009-10. [Return to text.](#)

[45] *See id.* at 1010 (citing *Lucas*, 404 S.E.2d at 906). [Return to text.](#)

[46] *Lucas*, 505 U.S. at 1027 (footnote omitted). [Return to text.](#)

[47] *Id.* at 1029. [Return to text.](#)

[48] *Id.* at 1034 (Kennedy, J., concurring).

There is an inherent tendency towards circularity in this synthesis, of course; for if the owner's reasonable expectations are shaped by what courts allow as a proper exercise of governmental authority, property tends to become what courts say it is. Some circularity must be tolerated in these matters, however, as it is in other spheres.

Id. (citation omitted). [Return to text.](#)

[49] *See id.* at 1016. [Return to text.](#)

[50] *See Lucas*, 505 U.S. at 1016-17 n.7. [Return to text.](#)

[51] *See id.* at 1026. [Return to text.](#)

[52] *Id.* at 1031. The Court responded to Justice Blackmun's dissent:

In Justice Blackmun's view, even with respect to regulations that deprive an owner of all developmental or economically beneficial land uses, the test for required compensation is whether the legislature has recited a harm-preventing justification for its action Since such a justification can be formulated in practically every case, this amounts to a test of whether the legislature has a stupid staff. We think the Takings Clause requires courts to do more than insist upon artful harm-preventing characterizations.

Id. at 1025-26 n.12. [Return to text.](#)

[53] The Court cited examples of instances where a property owner might not be entitled to compensation such as where

the owner engages in land filling operations that floods another's property or where a company is forced to remove a nuclear generating plant built on a fault line. As the Court observed:

Such regulatory action may well have the effect of eliminating the land's only economically productive use, but it does not proscribe a productive use that was previously permissible under relevant property and nuisance principles. The use of these properties for what are now expressly prohibited purposes was *always* unlawful, and (subject to other constitutional limitations) it was open to the State at any point to make the implication of those background principles of nuisance and property law explicit.

Lucas, 505 U.S. at 1029-30 (emphasis in original). [Return to text.](#)

[54] "It seems unlikely that common-law principles would have prevented the erection of any habitable or productive improvements on petitioner's land; they rarely support prohibition of the 'essential use' of land." *Id.* at 1031 (citing *Curtin v. Benson*, 222 U.S. 78, 86 (1911)). [Return to text.](#)

[55] See *Hunziker v. State*, 519 N.W.2d 357 (Iowa 1994); *Anello v. Zoning Board of Appeals*, 678 N.E.2d 870 (N.Y. 1997). [Return to text.](#)

[56] Typical of these decisions is *Gazza v. New York State Dep't of Env'tl. Conservation*, 679 N.E.2d 1035 (N.Y. 1997). In *Gazza*, the New York Court of Appeals held that a property owner was not entitled to challenge a regulation where he paid a steep discount for the property, while fully knowing that the requested property use would not be approved. A discussion of *Gazza* appears at *infra* notes 182-99 and accompanying text.

Perhaps the fuel for this argument comes from the assertion that there is no taking of private property in light of the owner's "reasonable investment-backed expectations." *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978). See, e.g., *Leonard v. Town of Brimfield*, 666 N.E.2d 1300 (Mass. 1996), discussed in detail, *infra* notes 72-88. See also Justice Kennedy's concurring opinion in *Lucas*, discussed *supra* note 48 and accompanying text. [Return to text.](#)

[57] In *Steinbergh v. City of Cambridge*, 604 N.E.2d 1269 (Mass. 1992), the Supreme Judicial Court of Massachusetts observed that "if, as seems reasonably inferable, their investment expectations were based on the ultimate invalidation of the regulation in a judicial proceeding, the plaintiffs' investment expectations had to reflect the anticipated delay in the litigation process." *Id.* at 1274. [Return to text.](#)

[58] See, e.g., *Hunziker v. State*, 519 N.W.2d 367, 371 (Iowa 1994), discussed *infra* notes 102-120 and accompanying text. [Return to text.](#)

[59] One such proposition, advancing beyond Justice Brennan's dissent in *Lucas*, is to expand the background principles to avoid the possibility that property taken might require the payment of just compensation. One of the more extreme examples of this was recently raised in the Amicus Curiae brief in *Gazza v. New York Dep't of Env'tl. Conservation*, 679 N.E.2d 1035 (N.Y. 1997), suggesting that there seems to be no reason why a state could not have among its "background principles . . . of property" a common-law rule that property ownership never includes a right to violate the laws enacted by the Legislature. If New York has such a common law "background" principle—that property owners are forbidden to violate state statutes—then New York taxpayers would never have to be saddled with the burdens of the "categorical" rule for "total" takings. [Return to text.](#)

[60] As the Court observed in *Lucas*, "a regulation specifically directed to land use no more acquires immunity by plundering landowners generally than does a law specifically directed at religious practice acquire immunity by prohibiting all religions." *Lucas*, 505 U.S. at 1027 n.14. [Return to text.](#)

[63] See *Lopes v. City of Peabody*, 600 N.E.2d 171 (Mass. 1992), *cert. granted, vacated, and remanded*, 113 S. Ct. 1574 (1993). [Return to text.](#)

[64] See *Lopes*, 629 N.E.2d 1312 (Mass.1994). [Return to text.](#)

[65] *See id.* at 1313. [Return to text.](#)

[66] *See id.* [Return to text.](#)

[67] Lopes sought to remove the regulatory restrictions which prevented him from building on his property but did not seek damages for a taking. *See id.* at 1314 n.5. [Return to text.](#)

[68] *See id.* at 1314. [Return to text.](#)

[69] *Lopes*, 113 S. Ct. 1574 (1993). [Return to text.](#)

[70] *See Lopes*, 629 N.E. 2d at 1314-15. [Return to text.](#)

[71] *Id.* at 1315. [Return to text.](#)

[72] 666 N.E.2d 1300 (Mass. 1996). [Return to text.](#)

[73] In fact, because of ambiguities in the opinion, it is unclear what remains of the *Lopes* opinion. [Return to text.](#)

[74] *See Leonard*, 666 N.E.2d at 1301. [Return to text.](#)

[75] *See id.* at 1302. [Return to text.](#)

[76] *See id.* [Return to text.](#)

[77] *See id.* [Return to text.](#)

[78] *See id.* [Return to text.](#)

[79] *See id.* [Return to text.](#)

[80] *See Leonard*, 666 N.E.2d. at 1304. [Return to text.](#)

[81] *See id.* at 1303. [Return to text.](#)

[82] *See id.*(quoting *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005 (1984)). [Return to text.](#)

[83] *See id.* at 1303. The court observed, "[f]urthermore, the trial judge found that the parcel at issue is a single sixteen-acre parcel, not individual lots within this parcel as the plaintiff contends, and that the plaintiff had taken no action to subdivide the property." *Id.* [Return to text.](#)

[84] *See id.* [Return to text.](#)

[85] *See id.* at 1303 n.3 (citation omitted). [Return to text.](#)

[86] *Id.* at 1303. [Return to text.](#)

[87] *Id.* (citation omitted). Because the court had determined that the property was not subdivided and that the land use restrictions had only diminished the value of the sixteen-acre parcel as a whole, the court did not have to decide the issue of whether Leonard was barred from claiming a taking based on the preexisting permit restriction. What is perhaps so extraordinary about the opinion is not that it focused so heavily on an issue that the court decided not to address but, rather, that having done so, the court potentially recharacterized its holding in *Lopes*. [Return to text.](#)

[88] *See id.* [Return to text.](#)

[90] *See id.* at 1046-47. [Return to text.](#)

[91] *See id.* at 1046. [Return to text.](#)

[92] *See id.* at 1046-47. [Return to text.](#)

[93] *See id.* at 1047. [Return to text.](#)

[94] *Id.* at 1048 (citation omitted). [Return to text.](#)

[96] *See id.* at 788. [Return to text.](#)

[97] *See id.* [Return to text.](#)

[98] *See id.* [Return to text.](#)

[99] *See id.* [Return to text.](#)

[100] *See id.* [Return to text.](#)

[101] *See id.* [Return to text.](#)

[103] *See id.* at 368. [Return to text.](#)

[104] *See id.* [Return to text.](#)

[105] Iowa Code §§.7, 305A.9 (renumbered as Iowa Code §§263B.7, 263B.9 (1993)). [Return to text.](#)

[106] *See Hunziker*, 519 N.W.2d at 368. [Return to text.](#)

[107] *See id.* at 368, 370. [Return to text.](#)

[108] *See id.* at 368-369. [Return to text.](#)

[109] *See id.* at 369. [Return to text.](#)

[110] *See id.* [Return to text.](#)

[111] *See id.* [Return to text.](#)

[112] *See id.* at 371. [Return to text.](#)

[113] As support for its holding that there had been no taking, the court stated that "implicit in the [*Lucas*] 'bundle of rights' analysis is that the *right* to use the land in the way contemplated is what controls. Here, when the plaintiffs acquired title, there was no right to disinter the human remains and build in the area where the remains were located." *Hunziker*, 519 N.W.2d at 371 (emphasis in the original). However, the dissent, relying on broad language in the *Lucas* opinion, argued that "[t]he law established by *Lucas* actually supports the claim of plaintiffs in the case at bar." *Id.* at 372 (Snell, J., dissenting). [Return to text.](#)

[114] *See id.* at 371. [Return to text.](#)

[115] *See id.* [Return to text.](#)

[116] *See id.* at 373. [Return to text.](#)

[117] *See Hunziker v. State*, 514 U.S. 1003 (1995). [Return to text.](#)

[118] *See Hunziker v. State*, 519 N.W.2d 367 (Iowa 1994). [Return to text.](#)

[119] *See supra* notes 105-08 and accompanying text. [Return to text.](#)

[120] *See Hunziker*, 519 N.W.2d at 371. The enormity of such an opinion can never be known. At least, it will be so until all of the "significant human remains" are located, a task that could potentially affect every parcel in the state, given the migratory practices of early American inhabitants. [Return to text.](#)

[122] *See id.* at 529. [Return to text.](#)

[123] *See id.* at 529-30. [Return to text.](#)

[124] *See id.* at 530. [Return to text.](#)

[125] *See id.* The remaining 2.1 acres were zoned for residential (1.57 acres) and business (.57) use. *See id.* [Return to text.](#)

[126] *See id.* [Return to text.](#)

[127] *See id.* [Return to text.](#)

[128] *See id.* [Return to text.](#)

[129] *Id.* at 534. [Return to text.](#)

[130] 201 N.W.2d 761 (Wis. 1972). [Return to text.](#)

[131] *Zealy*, 548 N.W.2d at 534 (quoting *Just*, 201 N.W.2d at 771). [Return to text.](#)

[132] As the Court in *Lucas* observed, "[t]he fact that a particular use has long been engaged in by similarly situated owners ordinarily imports a lack of any common-law prohibition (though changed circumstances or new knowledge may make what was previously permissible no longer so (sic) [citation omitted]). So also does the fact that other landowners, similarly situated, are permitted to continue the use denied to the claimant." *Lucas*, 505 U.S. at 1031. [Return to text.](#)

[133] *See Zealy*, 548 N.W.2d at 534. [Return to text.](#)

[134] *See supra* note 18. [Return to text.](#)

[136] *See id.* at 415. [Return to text.](#)

[137] *See id.* [Return to text.](#)

[138] *See id.* [Return to text.](#)

[139] *See id.* [Return to text.](#)

[140] "Plaintiffs initially sought a declaratory ruling that the area is not wetlands and also sought injunctive relief against defendant's enforcement of the [Wetland Protection Act] and damages under the WPA." *Id.* at 415-16. [Return to text.](#)

[141] *See id.* [Return to text.](#)

[142] *See id.* at 416. [Return to text.](#)

[143] *See id.* [Return to text.](#)

[144] *See id.* at 417. [Return to text.](#)

[145] *Id.* (citing *Lucas*, 505 U.S. at 1030-31) (emphasis added). [Return to text.](#)

[146] *See id.* [Return to text.](#)

[147] *See id.* [Return to text.](#)

[148] *See id.* at 417. [Return to text.](#)

[149] *See id.* (citing *Nollan*, 483 U.S. at 833 n.2). [Return to text.](#)

[150] *Id.* at 417-18. [Return to text.](#)

[151] *See id.* at 418. [Return to text.](#)

[153] *See id.* at 1533. The Court observed that

[E]nactment of broad general legislation authorizing a federal agency to engage in future regulatory activity is not the type of government action that alone supports a taking claim. If Congress intended the 1920 Act to have such an effect, contrary to all established assumptions about general legislation, and with the result of directly obligating the Government to a potentially enormous liability of unknown dimensions for takings throughout the United States, there surely would have been some indication of that intent in the legislative history, if not in the legislation itself. The Government points to none, because none exists.

Id. at 1538. (citations omitted) [Return to text.](#)

[154] *See id.* at 1531. [Return to text.](#)

[155] *See id.* [Return to text.](#)

[156] *See id.* [Return to text.](#)

[157] Pub.L.No. 98-11, 97 Stat. 48 (codified as amended at 16 U.S.C. §1247 (1994)). Congress enacted the Rails-to-Trails Act on March 28, 1983. [Return to text.](#)

[158] The purpose of the Act was to create a national network of public recreational biking and hiking trails. *See Presault*, 100 F.3d at 1529. [Return to text.](#)

[159] *See id.* at 1536. [Return to text.](#)

[160] *Id.* at 1537. [Return to text.](#)

[161] *Id.* at 1530. [Return to text.](#)

[162] *See id.* at 1538 [Return to text.](#)

[163] *Id.* at 1539. [Return to text.](#)

[164] *See id.* at 1537. [Return to text.](#)

[165] *See id.* at 1537-38. [Return to text.](#)

[166] *Id.* at 1538 (citing *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1992)). [Return to text.](#)

[167] *Id.* [Return to text.](#)

[168] *See id.* at 1540. "Under the governing law of the State, the Preseaults, successors in title to those who owned the

property when the easements were created, owned the same title and interest as they, and are entitled to the same protections the law grants." *Id.* [Return to text.](#)

[169] *See* Basile v. Town of Southhampton, 678 N.E.2d 489 (N.Y. 1997). [Return to text.](#)

[170] *See* Anello v. Zoning Board of Appeals, 678 N.E.2d 870 (N.Y. 1997); Gazza v. New York State Dep't of Env'tl. Conservation, 679 N.E.2d 1035 (N.Y. 1997). [Return to text.](#)

[171] *See* Soon Duck Kim v. City of New York, 681 N.E.2d 312 (N.Y. 1997). [Return to text.](#)

[172] For the foreseeable future, New York is free to apply its new rule. For on October 6, 1997, the United States Supreme Court declined to review these cases. *See infra* notes 182, 200, and 206. [Return to text.](#)

[174] *See id.* at 870. [Return to text.](#)

[175] *See id.* [Return to text.](#)

[176] *See id.* [Return to text.](#)

[177] *See id.* at 871. [Return to text.](#)

[178] *See id.* at 872. [Return to text.](#)

[179] *Id.* at 871. [Return to text.](#)

[180] *See id.* [Return to text.](#)

[181] *See supra* notes 64-71 and accompanying text. The problem of alienability is discussed *infra* notes 224-36 and accompanying text. [Return to text.](#)

[183] *See id.* at 1036. [Return to text.](#)

[184] *See id.* [Return to text.](#)

[185] *See id.* [Return to text.](#)

[186] *See id.* [Return to text.](#)

[187] *See id.* [Return to text.](#)

[188] *See* Gazza v. New York State Dep't of Env'tl. Conservation, 605 N.Y.S.2d 642, 645 (N.Y. Sup. Ct. 1993) (finding that because Gazza knew of the limitations on the parcel, he could not have had a reasonable investment-backed expectation that he would be able to build a house there). [Return to text.](#)

[189] *See* Gazza v. New York Dep't of Env'tl. Conservation, 634 N.Y.S. 2d 740, 744 (N.Y. App. Div. 1995). [Return to text.](#)

[190] *See id.* at 746. [Return to text.](#)

[191] *See* Gazza v. New York State Dept of Env'tl. Conservation, 679 N.E.2d 1035, 1043 (N.Y. 1997). [Return to text.](#)

[192] *Id.* at 1039. [Return to text.](#)

[193] *See id.* [Return to text.](#)

[194] *See id.* [Return to text.](#)

[195] The New York court quoted the *Lucas* court for the principle that a property owner must expect the uses of property to be restricted. However, the court's reference to *Lucas* stopped short, omitting that portion of the *Lucas* opinion where the Supreme Court continued

In the case of land, however, we think the notion pressed by the Council that title is somehow held subject to the "implied limitation" that the State may subsequently eliminate all economically valuable use is inconsistent with the historical compact recorded in the Takings Clause that has become part of our constitutional culture.

Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1028 (1992). [Return to text.](#)

[196] In an interesting note, the court of appeals observed, "[t]he entirely separate inquiry of whether an existing taking claim may be donated, sold, inherited or otherwise assigned is not before this Court." *Gazza*, 679 N.E.2d at 1039 n.4. For a discussion of whether the new rule would apply to noncommercial transactions, see *infra* notes 259-60 and accompanying text. [Return to text.](#)

[197] The problems of ripeness in the context of challenges to regulatory takings are discussed *infra* notes 244-49 and accompanying text. [Return to text.](#)

[198] See *Gazza*, 679 N.E.2d at 1043. (Wesley, J., concurring). Justice Wesley believed that the property still had value so there was not a taking. However, he disagreed with the majority which applied its broad rule precluding owners from challenging regulations as applied. See *id.*

[A] subsequent purchaser should also be able to challenge an otherwise valid regulation if it results in a taking without compensation. There are many reasons why a prior owner might not have pursued a taking claim. For example, a prior owner may have lacked the financial resources to develop the property or to commence an action on a taking claim. Under the reasoning of the majority, the prior owner would nonetheless have had to keep abreast of regulatory enactments and, if an enactment appeared to deprive the property of its economic value, to challenge the statute. Otherwise, the property may have been rendered worthless without the government paying any compensation for the property. By conveying the property to another party who may be willing and able to develop it or to seek compensation for the taking of its value, the prior owner has instead, under the majority's holding, ensured the destruction of the property's economic value.

Id. (Wesley, J., concurring). [Return to text.](#)

[201] See *id.* at 489. [Return to text.](#)

[202] See *id.* at 490. [Return to text.](#)

[203] See *id.* at 489. [Return to text.](#)

[204] *Id.* at 490-91. [Return to text.](#)

[205] See *id.* at 491. Justice Wesley, concurring, disagreed with the Court's new rule preventing Basile from "claiming the value of her property without the wetlands regulations solely because she took title after the enactment of those regulations." *Id.* However, he noted that she nonetheless took title subject to the covenants filed by the previous owner which "substantially restrict the value and use of the property." *Id.* The covenants therefore made the rule redundant. [Return to text.](#)

[207] See *id.* [Return to text.](#)

[208] See *id.* at 4. [Return to text.](#)

[209] See *id.* [Return to text.](#)

[210] *See id.* [Return to text.](#)

[211] *See id.* [Return to text.](#)

[212] *See id.* [Return to text.](#)

[213] *See id.* [Return to text.](#)

[214] *See id.* [Return to text.](#)

[215] *Id.* [Return to text.](#)

[216] *See id.* [Return to text.](#)

[217] *See id.* [Return to text.](#)

[218] *See id.* at 11. In his dissent; however, Justice Smith disagreed that a rule requiring the Kims to provide lateral support to a newly raised road could ever be found in New York's common law. *See id.* at 17 (Smith, J., dissenting). [Return to text.](#)

[219] *See id.* at 17 (Smith J., dissenting) (citing *Loretto v. Teleprompter Manhattan CATV*, 458 U.S. 419 (1982)). In *Loretto*, the United States Supreme Court stated:

[W]e have long considered a physical intrusion by government to be a property restriction of an unusually serious character for purposes of the Takings Clause. Our cases further establish that when the physical intrusion reaches the extreme form of a permanent physical occupation, a taking has occurred . . . [and] [w]hen faced with a constitutional challenge to a permanent physical occupation of real property, this Court has invariably found a taking.

Loretto, 458 U.S. at 427. [Return to text.](#)

[220] *See Soon Duck Kim*, 90 N.Y.2d at 19 (citing *Lucas*, 505 U.S. at 1031). [Return to text.](#)

[221] In two of these cases, the United States Supreme Court already passed on the opportunity. The Court remanded *Lopes* without any opinion, see *Lopes*, 113 S.C. 1574 (1993), and denied the petition for writ of certiorari in *Hunziker*, see 115 S. Ct. 1313 (1995); see also *Moroney v. Mayor of Old Tappan*, 633 A.2d 1045 (1993); *Ward v. Bennett*, 592 N.E.2d 787, 788 (1992). Until recently, only *K & K Const., Inc. v. Department of Natural Resources*, 551 N.W.2d 413 (Mich.Ct.App. 1996), and *Presault v. United States*, 100 F.3d 1525 (Fed. Cir. 1996), appeared even remote candidates for addressing the questions. However, on February 18, 1997, the New York Court of Appeals presented the United States Supreme Court a golden opportunity when it created a *per se* rule precluding property owners from challenging regulatory and physical takings of their property without compensation. [Return to text.](#)

[222] 629 N.E.2d 1312 (Mass. 1994). [Return to text.](#)

[223] *See id.* at 1315. [Return to text.](#)

[224] *See* Robert C. Ellickson, *Property in Land*, 102 YALE L.J. 1315, 1376 (1993). [Return to text.](#)

[225] *See id.* [Return to text.](#)

[226] An entirely different result is reached where property owners willingly impose limitations upon their own use of land, such as in the case of covenants. Presumably, there is an equal or greater gain in the value of the property, else the owners would not have entered into the restrictions. *See* Richard A. Epstein, *The Seven Deadly Sins of Takings Law: The Dissents in Lucas v. South Carolina Coastal Council*, Loy L.A. L. Rev. 955, 963-64 (1993). [Return to text.](#)

[227] See STEVEN J. EAGLE, REGULATORY TAKINGS § 8-2(c), at 312 (1996). Of course, not every prospective purchaser follows this market rule. See, e.g., *Florida Rock Indus., Inc. v. United States*, 18 F.3d 1560 (Fed. Cir. 1994) [hereinafter *Florida Rock IV*].

A speculative market may exist in land that is regulated as well as in land that is not, and the precise content of regulations at any given time may not be particularly important to those active in the market. As this court observed in *Florida Rock II*, 791 F.2d 893 at 902-03, yesterday's Everglades swamp to be drained as a mosquito haven is today's wetland to be preserved for wildlife and aquifer recharge; who knows what tomorrow's view of public policy will bring, or how the market will respond to it.

Florida Rock IV, 18 F.3d at 1566. [Return to text.](#)

[228] See EAGLE, *supra* note 227. [Return to text.](#)

[229] "The owner who is not actively planning a conversion to a newly restricted use probably would never learn of it, since he is apt to have only constructive notice, or at best, a booklet outlining changes in county zoning in dense legal prose." *Id.* [Return to text.](#)

[230] See *infra* Part V.B. [Return to text.](#)

[231] "Even assuming actual knowledge, the time for appeal is apt to be short, the difficulty and expense of litigation substantial, and the knowledge of how the change might affect the rights of a prospective buyer almost non-existent." EAGLE, *supra* note 227. [Return to text.](#)

[232] This reduction in price could have an effect on the entire community, a cost not typically considered when regulations are implemented. For instance, reducing valuation of property can reduce property tax revenues. [Return to text.](#)

[233] In this instance, the owner has suffered a loss as part of the larger property interest. Often referred to as part of a stick in the bundle, courts are loathe to find the owner entitled to compensation. Such was the case in *Zealy v. City of Waukesha*, 548 N.W.2d 528 (1996). See *supra* note 121-34 and accompanying text. [Return to text.](#)

[234] A question which has never been addressed is whether a regulation which is held to be unconstitutional would be applied to an acquirer of property after imposition of the regulation but prior to its challenge. [Return to text.](#)

[235] For example, a site with a spectacular view would command a greater price than one overlooking a landfill. Property with convenient access is probably more valuable than property far from principal roadways. However, neither property in these examples is be more valuable if all or most development were precluded. [Return to text.](#)

[236] See *Gazza v. New York State Dept. of Env'tl. Conservation*, 679 N.E.2d 1035, 1040 (N.Y. 1997). [Return to text.](#)

[237] "There are two quite different ways in which a statute or ordinance may be considered invalid 'on its face'—either because it is unconstitutional in every conceivable application, or because it seeks to prohibit such a broad range of protected conduct that it is unconstitutionally 'overbroad.'" *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 796 (1984). [Return to text.](#)

[238] See *Pennell v. City of San Jose*, 485 U.S. 1, 11 (1988) (finding a facial due process challenge to a rent control ordinance ripe although takings claim is not). [Return to text.](#)

[239] See *Pearson v. City of Grand Blanc*, 961 F. 2d 1211 (6th Cir. 1992); *Eide v. Sarasota County*, 908 F.2d 716 (11th Cir. 1990); *Smithfield Concerned Citizens for Fair Zoning v. Town of Smithfield*, 907 F.2d 239 (1st Cir. 1990) (finding that based on *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) ripeness is satisfied); *Southern Pac. Transp. Co. v. City of Los Angeles*, 922 F.2d 498 (9th Cir. 1990); *Beacon Hill Farm Assoc. II Ltd. Partnership v. Loudoun County Bd. of Supervisors*, 875 F. 2d 1081 (4th Cir. 1989) (deeming a facial challenge permissible whether or not a final determination as to the extent of the regulation); *Greenbriar, Ltd. v. City of Alabaster*, 881 F. 2d 1570 (11th Cir.

1989) (determining that substantive due process is denied the moment a governmental decision affecting property has been made in an arbitrary and capricious manner); *Xikis v. City of New York*, No. CV 89-2000 (ADS), 1990 WL 156155, at *1 (E.D.N.Y. Sept. 28, 1990). The purpose of the ripeness doctrine is "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements." *Abbott Lab. v. Gardner*, 387 U.S. 136, 148 (1967). [Return to text.](#)

[240] *See Members of the City Council*, 466 U.S. at 797-98 ("[A] holding of facial invalidity expresses the conclusion that the statute could never be applied in a valid manner."). [Return to text.](#)

[241] *See Hodel v. Virginia Surface Mining and Reclamation Assoc.*, 452 U.S. 264 (1981). A facial challenge presents no concrete controversy "concerning either application of the Act to particular surface mining operations or its effect on specific parcels of land. Thus, the only issue properly before the District Court and, in turn, this Court, is whether the 'mere enactment' of the Surface Mining Act constitutes a taking." *Id.* at 295.

In *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470 (1987), the Court described this type of challenge as an especially steep uphill battle. *See id.* at 495. [Return to text.](#)

[242] *See Keystone*, 480 U.S. at 495 (quoting *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980)). [Return to text.](#)

[243] *See, e.g., Agins*, 447 U.S. at 262 (holding regulation facially valid since it substantially advanced a legitimate government goal). [Return to text.](#)

[244] *See id.* "At this juncture, the appellants are free to pursue their reasonable investment expectations by submitting a development plan to local officials. Thus, it cannot be said that the impact of general land-use regulations has denied appellants the 'justice and fairness' guaranteed by the Fifth and Fourteenth Amendments." *Id.* at 262-63. [Return to text.](#)

[245] 473 U.S. 172 (1985). [Return to text.](#)

[246] *See id.* at 186. [Return to text.](#)

[247] 477 U.S. 340 (1986). [Return to text.](#)

[248] *See id.* at 351. [Return to text.](#)

[249] *See Agins*, 447 U.S. at 260 (finding no concrete controversy before the court where appellants have not submitted a plan for development of their property as the ordinances permit); *MacDonald*, 477 U.S. at 357. [Return to text.](#)

[250] Of course, requiring a final decision gives every incentive to government planners to "prolong the procedures as long as possible, for in delay they purchase unilateral insulation from accountability for their past conduct." Epstein, *supra* note 226, at 961. [Return to text.](#)

[251] In California, as in most states, land development is subject to comprehensive environmental regulations. *See generally* PRACTICE UNDER THE CALIFORNIA ENVIRONMENTAL QUALITY ACT (CEB Practice Guide 1996). The Environmental Impact Reports required before construction can begin cover an extraordinary number of issues. *See, e.g., A Local and Regional Monitor v. City of Los Angeles* (UC Land Associates), 16 Cal. App. 4th 630, 642 (Cal. App. 2 Dist. 1993) (noting that the environmental impact report for one multi-phased project "discussed the project in terms of earth (grading, drainage, geologic hazards, and seismic), air (quality, and stationary sources), animal life, noise, light/glare, circulation (transportation, access, and driveway), energy conservation, water conservation, service system (storm drain age, sewers, and solid waste disposal), aesthetics, public services (fire, police, and emergency), land use, 'risk of upset/human health,' jobs, and housing"). In *Hunziker v. Iowa*, 519 N.W.2d 367, 369 (Iowa 1994), the property owners were prevented from using their property because an archaeological study revealed the presence of ancient human remains on the lot. [Return to text.](#)

[252] In one recent California case, the trial court noted that the property owner's development costs were nearly \$1 million to process a tentative map and prepare a final map in order to subdivide its property. Furthermore, under

development regulations, the property owner was required to pay additional impact and other fees of approximately \$1 million and to obtain security of approximately \$9 million "to secure faithful performance and payment to laborers and materials suppliers for public improvements and grading in order to obtain its final map." *Penn Pacific Properties, Inc. v. City of Oceanside*, No. N 54 355 (Sup. Ct. Ca San Diego, Aug. 19, 1996). [Return to text.](#)

[253] For a discussion of the "struggle" between courts in an attempt to resolve how many applications are required before a takings challenge to a land use regulation can be brought, see Michael M. Berger, *The "Ripeness" Mess in Federal Land Use Cases or How the Supreme Court Converted Federal Judges into Fruit Peddlers* in INSTITUTE ON PLANNING, ZONING, AND EMINENT DOMAIN § 7.03[2] (Southwestern Legal Foundation 1991). [Return to text.](#)

[254] *See Lopes*, 629 N.E.2d at 1315. [Return to text.](#)

[255] The owner in *Zealy* appears to have been caught in this bureaucratic entanglement. He negotiated with the city to provide sewer services to his property in contemplation of future residential development. However, because he had not actually started development, the Court dismissed his challenge to the rezoning action based on reliance. *See Zealy*, 548 N.W.2d at 534. [Return to text.](#)

[256] *See Weinberger v. Board of Public Instructions*, 112 So. 253, 255 (Fla. 1927); *Trust Co. v. City of Chicago*, 96 N.E.2d 499, 505 (Ill. 1951); *Pressman v. D'Alesandro*, 125 A.2d 35, 40 (Md. 1956); *Farmer v. Town of Billerica*, 409 N.E.2d 762, 763 (Mass. 1980); *Dearborn TP. v. Dail*, 55 N.W.2d 201, 204 (Mich. 1952); *Filister v. City of Minneapolis*, 133 N.W.2d 500, 503 (Minn. 1964); *Rathbone v. Wirth*, 45 N.E. 15, 20 (N.Y. 1896); *Alliance for Progress, Inc. v. New York State Div. of Hous. & Community Renewal*, 532 N.Y.S.2d 821, 825 (N.Y.Sup.Ct. 1988); *Hamann v. Heekin*, 102 N.E. 730, 732 (Ohio 1913); *Pierce v. King County*, 382 P.2d 628, 634 (Wash. 1963). *See also* *Shepherd v. San Jacinto Junior College Dist.*, 363 S.W.2d 742, 762 (Tex. 1962) (Calvert, J. dissenting). [Return to text.](#)

[257] *See* 260 U.S. at 415. [Return to text.](#)

[258] *See supra* notes 102-20 and accompanying text. [Return to text.](#)

[259] *See Gazza*, 679 N.E.2d at 1038 n.3. [Return to text.](#)

[260] Courts are unlikely to fashion a categorical rule precluding many regulatory takings challenges. However, they may permit property owners to sell the right to sue for the regulatory taking. This proposition seems all the more unlikely in light of the court's observation that

once taken, those property interests are no longer owned by the private landowner and may not be sold by such party. Rather, a promulgated regulation forms part of the title to property as a pre-existing rule of State law. While the *remaining property* interests may still be freely transferred by the landowner, a purchaser's title is necessarily limited to and by those property interests alone.

Id. at 1039.

A reasonable interpretation of this passage is that a land use regulation as applied to property does not create a separate property interest in a takings suit that could be sold apart from the rest. It is not unreasonable to expect that had the question of whether the ability to sue for a regulatory taking could be sold were before the court, the court would have found no such right to exist. [Return to text.](#)

[261] *See Lopes*, 629 N.E.2d at 1315. [Return to text.](#)

[262] *See* Epstein, *supra* note 226, at 957. [Return to text.](#)

RETROACTIVE LIABILITY UNDER THE SUPERFUND: TIME TO SETTLE THE ISSUE

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I. INTRODUCTION

Over the past two years, reauthorization of Superfund legislation has been a hotly debated topic.^[1] A primary issue in these debates has been to what extent should retroactive liability be limited under the law.^[2] Before Congress acted on any proposal to limit retroactive liability, a federal district court judge issued a controversial ruling holding that the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)^[3] did not apply retroactively to impose liability for waste disposed prior to the law's enactment in 1980. The controversial case was *United States v. Olin*,^[4] decided by Senior District Court Judge Hand in May 1996. Even though this decision was later reversed on appeal, this case briefly gave hope to those who did not favor retroactive liability.^[5]

In *Olin*, the United States filed an action under CERCLA against the Olin Corporation, a Virginia corporation that operates a chemical plant in Alabama.^[6] A proposed consent decree was filed with the complaint.^[7] After reviewing the parties' briefs on constitutional and statutory issues relating to CERCLA, Judge Hand denied the consent decree and dismissed the case on two grounds.^[8] First, Congress did not clearly express an intent that the liability provision of CERCLA should be applied retroactively, as required by the decision in *Landgraf v. USI Film Products*.^[9] Second, the application of CERCLA violated the Commerce Clause as interpreted in *United States v. Lopez*.^[10]

Even though the circuit court struck down the *Olin* decision on appeal,^[11] a number of industry and insurance groups were supportive of the lower court decision and believed that the court correctly stated the law regarding retroactive liability.^[12] For example, the Washington Legal Foundation, the American Insurance Association, the National Association of Independent Insurers, and the Reinsurance Association of America publicly expressed their support for the lower court ruling.^[13] Moreover, some Republicans in Congress called the original decision a "watershed event in Superfund reform."^[14] Even though Judge Hand attempted to restrict retroactive liability, this issue may not be resolved until Congress amends the Superfund law or the United States Supreme Court addresses the precise issue of retroactive liability under CERCLA.

This article addresses the issue of retroactive liability in hopes of proffering a legislative solution to the divisive issue. Part II examines the history of CERCLA. Part III analyzes the reasoning of the *Olin* decision, how other courts reacted, and its reversal in *Olin II*. Part IV examines the ongoing debate in Congress. Part V concludes by suggesting a legislative solution to this issue, and calling for legislation affirming CERCLA retroactive liability.

II. A LEGISLATIVE AND CASE LAW HISTORY OF CERCLA

A. Initial Purpose and Passage of CERCLA

Although various laws existed in 1979 that addressed many impacts hazardous substances had on the environment,^[15] Congress recognized that a gap existed in those regulations.^[16] That gap encompassed the problems caused by inactive or abandoned waste disposal sites described as the most serious health and environmental problem of the decade.^[17] Thus, CERCLA was passed to provide for the cleanup of inactive hazardous wastes sites.^[18] CERCLA was actually an amalgamation of several bills.^[19] Although little consensus existed on certain aspects of the combined Senate and House bill,^[20] Congress realized the importance of legislation that would immediately address the problem of inactive or abandoned waste sites.^[21] Therefore, both the House and the Senate passed the compromise bill, CERCLA.^[22]

B. Early Interpretations of Retroactivity

While CERCLA was enacted in 1980, the issue of retroactive liability was not raised in the courts until 1983 when *Brown v. Georgeoff*^[23] was heard.^[24] *Georgeoff* addressed the question of imposing liability on contributors for pre-enactment waste activities.^[25] Although no court had yet ruled on the issue of retroactive liability under CERCLA, Judge Dowd facilitated his decision in *Georgeoff* by applying the general reasoning that previous courts used when deciding the issue of retroactivity under other statutes.^[26] Using Judge Sirica's framework in *Windsor v. State Farm Insurance Co.*,^[27] Judge Dowd first examined the language of CERCLA, specifically examining Section 107.^[28] The State argued that the past tense verb usage "must be construed to apply to conduct occurring before the enactment."^[29] Judge Dowd noted that other sections of CERCLA supported the view that CERCLA should be applied to pre-enactment conduct.^[30] Due to CERCLA's ambiguous wording, Judge Dowd examined the legislative history of the statute.^[31] He concluded that "[t]he Congressional intent to make industry pay for the cleanup costs must be interpreted as an intent to authorize lawsuits which impose liability retroactively upon transporters."^[32]

Another early case that addressed retroactive liability was *United States v. Northeastern Pharmaceutical & Chemical Co. (Northeastern Pharmaceutical)*.^[33] In *Northeastern Pharmaceutical*, the court concluded that Sections 104,^[34] 106(a),^[35] and 107(a)^[36] of CERCLA were intended to apply retroactively.^[37] Equally important, the court recognized that "Congress intended to have the chemical industry, past and present, pay for the costs of cleaning up inactive hazardous waste sites."^[38]

In its analysis of section 107, the *Northeastern Pharmaceutical* court relied on *Usery v. Turner Elkhorn Mining Co.*^[39] In *Usery*, the Supreme Court ruled that general retroactive liability is constitutional.^[40] Following the *Usery* case, "CERCLA's imposition of liability for past acts is rational and satisfies the Due Process Clause of the Fifth Amendment."^[41]

Although the *Northeastern Pharmaceutical* court ruled that Sections 104, 106(a), and 107(a) applied retroactively, it also ruled that those sections did not apply retroactively to response costs incurred before December 11, 1980.^[42] The court's conclusion was based on the absence of explicit statutory language that would make the defendants liable for pre-CERCLA costs.^[43] This decision was reversed on appeal in 1986.^[44] During the period between the initial hearing of *Northeastern Pharmaceutical* and its appeal, other cases addressed similar questions of retroactive liability.^[45] The most important case decided in this period was *United States v. Shell Oil Co.*^[46]

In *Shell Oil*, the district court addressed two issues regarding the retroactive application of CERCLA. First, pursuant to CERCLA are parties liable for pre-enactment actions?^[47] Second, does CERCLA hold responsible parties liable for pre-enactment government incurred response costs?^[48] In response to the first issue, Judge Carrigan pointed to other court decisions where liability was imposed on responsible parties for acts committed before CERCLA's enactment.^[49] As for the second issue, Judge Carrigan drew his own conclusion based on the retroactive nature of CERCLA and the act's legislative history, finding that responsible parties are liable for pre-enactment government response costs.^[50]

Judge Carrigan examined both statutory provisions^[51] and legislative history to support his conclusions.^[52] Thus, the court in *Shell Oil* was the first to rule that pre-enactment incurred government response costs were recoverable under CERCLA. On appeal, the circuit court in *Northeastern Pharmaceutical*^[53] adopted the reasoning applied by the *Shell Oil* court when it held that "the district court erred in finding that CERCLA does not authorize recovery of pre-enactment response costs."^[54] This effectively reversed the judgment that pre-enactment response costs were not recoverable.

C. The Reauthorization of CERCLA and its Aftermath

While courts were grappling with the issue of retroactive liability, Congress began to consider reauthorizing CERCLA. Congress realized that the problems created by abandoned and inactive waste sites were worse than originally anticipated.^[55] CERCLA allotted only \$1.6 billion for the Superfund,^[56] and Congress recognized that this amount would be insufficient to fund the enormous cleanup that was needed.^[57] Congress decided that the program needed to continue,^[58] but how much the Superfund increase would be and who would pay for such an increase was still undetermined.^[59] Thus, several bills were presented to amend CERCLA.^[60]

The taxing authority of the Superfund expired in September 1985.^[61] Congress realized that timely passage of legislation was needed if necessary cleanups were to continue.^[62] However, because it had not come to an agreement on reauthorization, Congress passed a two month, \$150 million extension to allow the cleanups to continue.^[63] A second loan providing \$48 million was passed in August 1986.^[64]

A congressional committee began meeting in February and continued to meet until the bill was passed in both the Senate and House.^[65] Finally, on October 17, 1986, approximately one year past the expiration of the Superfund taxing authority, President Reagan signed the act, thereby amending CERCLA and establishing the Superfund Amendments and Reauthorization Act (SARA).^[66]

SARA greatly impacted several components of CERCLA.^[67] Had Congress been dissatisfied with the application of retroactivity under CERCLA, this issue would have been addressed through the reauthorization. However, Congress did not restrict retroactive liability in SARA.^[68] Thus, after CERCLA was amended in 1986, numerous cases continued to hold that CERCLA imposed retroactive liability.^[69] Moreover, some commentators claim that CERCLA, with its imposition of retroactive liability, has been successful.^[70] Although the legality of retroactive liability was infrequently raised after the enactment of SARA, a discussion of retroactive liability did occur when Congress engaged in discussions of the proposed reauthorization in 1995.^[71] However, discussions did not focus on whether retroactive liability *could* be imposed, but instead on whether CERCLA *should* be amended to *abolish* retroactive liability.^[72] The issue appeared to be settled until 1996 when *Olin* rekindled the debate about the existence of retroactive liability.^[73]

III. UNITED STATES V. OLIN CORPORATION

A. A Review of the District Court's Reasoning

In *Olin*, District Court Judge Hand came to a conclusion which contradicted the case history of CERCLA.^[74] Judge Hand concluded "Section (a) and Section 106(a) . . . are not retroactive."^[75] What started as an ordinary case to recover cleanup costs became a milestone case that shocked legal commentators across the country.^[76]

Judge Hand provides a lengthy argument for his decision. First, Hand maintains that the Eleventh Circuit had not "squarely addressed" the issue of retroactive.^[77] Next, although Judge Hand recognizes the multitude of federal cases that have directly addressed the issue of CERCLA's retroactivity,^[78] he asserts that all of these cases were decided before the Supreme Court's decision in *Landgraf v. USI Film Prods.*^[79] While Judge Hand notes that the defendants argued that *Landgraf* should be influential, he also notes that the Justice Department countered that CERCLA's retroactivity is "well-settled" and not affected by *Landgraf* because the decision "announced no new constitutional rules, and in no way impacts this case law."^[80] Judge Hand concludes that *Landgraf* was significant in terms of retroactive liability.^[81] He suggests that "not all the courts which have applied CERCLA to pre-enactment conduct have agreed that it is retroactive."^[82]

Next, Judge Hand asserts that because *Landgraf* "addresses a rule of statutory construction,"^[83] the Justice Department cannot credibly argue that "[t]he result in *Landgraf* is unremarkable."^[84] Judge Hand suggests that the Justice Department easily dismissed *Landgraf* because the case "demolishes the interpretive premises on which prior cases had concluded CERCLA is retroactive."^[85] As an example, Judge Hand proffers the finding of *Brown v. Georgeoff*.^[86] While the court in *Georgeoff* recognized a historical "presumption favoring a prospective only application of a statute,"^[87] Judge Hand describes how the court applied a presumption in favor of retroactivity.^[88] Because *Landgraf* disapproved of the premises for the decision in *Georgeoff*, Judge Hand argues that "*Georgeoff* and the cases which rely on its analysis—and which do not do their own analysis—cannot be considered persuasive."^[89] Judge Hand continues by noting that only two other cases do their own analysis of retroactivity,^[90] *United States v. Shell Oil Co.*^[91] and *United States v. Northeastern Pharmaceutical & Chemical Co., Inc.*,^[92] and both cases approvingly refer to *Georgeoff*.^[93] Furthermore, Judge Hand enumerates various problems with the reasoning in *Shell* and *Northeastern Pharmaceutical*.^[94]

Yet Judge Hand recognizes that "prior to *Landgraf*, lower federal courts would have tended to minimize the importance of the presumption against retroactivity."^[95] He concludes that *Landgraf* "does at least clarify the analysis of retroactivity and, therefore, does 'impact this case.'"^[96]

Judge Hand next offers a summary of the majority opinion of *Landgraf*, stating that the opinion requires a court

1) to determine a) whether Congress has expressly stated the statutes reach and b) if not, whether the text and legislative history have 'clearly prescribed' Congress' intent to apply the provision retroactively; 2) if not, whether the provision actually has 'retro active effect' on the party or parties in the litigation, and 3) if so, to apply the traditional presumption against retroactivity—absent a clear congressional intent to the contrary.^[97]

In accordance with the *Landgraf* framework, Judge Hand begins by addressing the first question, "Has Congress Expressed Its Intent On CERCLA Retroactivity?"^[98] The judge offers a lengthy discussion of both the statutory language^[99] and legislative history^[100] before concluding that both "fail to demonstrate a clear congressional intent for retroactivity."^[101] Hence, following *Landgraf's* framework, a presumption against retroactive liability for CERCLA exists.^[102]

Because the court ruled that no Congressional intent for CERCLA's retroactive liability existed, the court next examined the question, "Does CERCLA Have a Retroactive Effect?"^[103] In the *Olin* decision, Judge Hand determined that CERCLA "certainly has 'retroactive effect' because . . . it easily falls within the explanatory language of that term."^[104] Yet the *Olin* court applied *Landgraf's* decision about compensatory damages to the financial liabilities under CERCLA, ruling that the damages in this provision do not apply when there is an absence of Congressional intent.^[105]

In the final step of the *Landgraf* analysis, Judge Hand asks, "Should the Presumption Against Retroactivity be Applied?"^[106] In *Landgraf*, the court examined whether a particular section of an act "should govern cases arising before its enactment."^[107] The *Olin* court argued that CERCLA posed the threat of punitive damages,^[108] and "liability under CERCLA would require compensation for actions which when taken violated no federal or state law."^[109] Based on this reasoning, the *Olin* court decided that CERCLA liability is the type of liability that "does not apply retroactively without clear congressional intent."^[110]

Judge Hand's *Olin* decision continued by criticizing the Justice Department's reliance on *Northeastern Pharmaceutical*, a case that characterizes CERCLA as "overwhelmingly remedial and retroactive" and as having a "backward focus."^[111] He suggests that legislation "cannot be remedial if the conduct being 'remedied' was lawful at the time of its occurrence,"^[112] and asserts that the "backward focus" of CERCLA is not persuasive.^[113] Finally, Judge Hand asserts that the Justice Department's argument "boils down to a claim that CERCLA must be read to be retroactive," and he presents an argument against the Justice Department's claim.^[114]

Judge Hand ultimately concludes that neither the Justice Department nor the pre- *Landgraf* cases established that Section 107(a) is "the sort of provision that must be understood to operate retro actively because a contrary reading would render it ineffective."^[115] Therefore, the court ruled that "Section 107(a) and Section 106(a) as linked to it in this case are not retroactive."^[116]

B. Other Courts' Reactions to the Olin Reasoning

Several questionable aspects regarding *Olin's* reasoning existed. First, the analogy between *Landgraf* and *Olin* was questionable. While *Olin* addressed retroactivity pertaining to hazardous waste damage, *Landgraf* examined retroactivity pertaining to civil rights.^[117] Most importantly, the damaging effects in each situation are quite different. In *Olin*, the effects of the past action are still harmful to those individuals who live near the areas of abandoned waste sites. In contrast, in the civil rights case, *Landgraf*, the effects of the action would probably have been more damaging in the past. Thus, one important difference between *Landgraf* and *Olin* is that the effects of the damages of the past action is more presently harmful in cases involving environmental waste.^[118]

Furthermore, Congress reauthorized CERCLA twice and did not attempt to change the liability provisions, even though many cases had arisen questioning retroactive liability.^[119] While Congress had the opportunity to change the liability provisions both in 1986 and 1990, they did not implement any changes because the matter seemed to be settled.^[120] Since Congress did not take steps to change the court's interpretation imposing retroactive liability implied that the court's imposition of such liability was in fact consistent with the Congressional intent.

While waiting for the appeal, several cases highlighted deficiencies in Judge Hand's argument. In *Nevada v. United States and Atlantic Richfield Co.*,^[121] Judge Hagen, in applying the *Landgraf* framework, concluded that Congress "clearly intended CERCLA to reach backward and impose liability upon those who are responsible for ongoing environmental deterioration resulting from wastes which had been dumped in the past."^[122]

In reaching this decision, Judge Hagen first noted that instead of setting forth a new rule of law regarding retroactivity, *Landgraf* simply clarified that earlier decisions "did not erode the traditional presumption against retroactivity."^[123] Moreover, Judge Hagen stated that *Landgraf* requires "clear evidence of Congressional intent" as opposed to a "clear statement of Congressional intent."^[124] Judge Hagen next determined that the "negative implication analysis set forth in *United States v. Shell Oil*, 605 F. Supp. 1064 (D. Colo. 1985) . . . is far more persuasive in the CERCLA case than it was in the *Landgraf* case."^[125] Judge claimed that "it is clear that the entire scheme of the statute contemplates retroactive liability for response costs, but not for natural resource damages."^[126] However, *Shell Oil* does not discuss the distinction of natural resource damages.^[127]

Judge Hagen further ruled that the *Shell Oil* court "clearly applied the presumption and found it outweighed by overwhelming evidence of congressional intent on retroactivity."^[128] Finally, Judge Hagen concluded that "the clear intent of Congress was to provide for retroactive application of the CERCLA liability provision."^[129] Judge Hagen did not comment on the *Olin* decision itself because that case had not yet been published at the time Judge Hagen made his ruling.

However, other courts did specifically find the *Olin* decision flawed. On July 15, 1996, the *Gould Inc. v. Battery & Tire Serv.*^[130] court rejected the *Olin* decision,^[131] and on August 22, 1996, the *United States v. Alcan Corp.*^[132] court offered a one-sentence order that rejected the defendant's arguments that relied on *Olin*.^[133] Finally, on September 27, 1996, in *United States v. Rohm and Haas Co.*,^[134] the court disagreed with *Olin* by ruling that Congress intended CERCLA to be applied retroactively.^[135] These decisions underscore that courts should not follow in the footsteps of *Olin*, but instead should follow the well-established precedent that CERCLA is retroactive. The Eleventh Circuit agreed with these other courts when it reversed the *Olin* decision.

C. The *Olin* Appeal

On March 25, 1997, the 11th Circuit reversed the *Olin* decision.^[136] In *Olin II*, the court flatly rejected the conclusion that *Lopez* altered the constitutional standard for federal statutes regulating intrastate activities.^[137] In reaching this decision, the *Olin II* court first categorized the activity at issue. Rejecting the government's argument,^[138] the court determined that the issue was "disposal of hazardous waste at the site of production."^[139] In determining that this issue affected interstate commerce, the court relied on a Senate committee report, which cited improper on-site waste disposal as a significant factor in chemical contamination in agriculture losses and the *Lopez* decision.^[140]

Following *Landgraf*, the *Olin II* court also reviewed CERCLA's language, structure, purpose, and legislative history to determine if retroactive liability applies. Based on its analysis, the *Olin II* court concluded that the district court mistakenly found no insight into Congress' intent.^[141] The *Olin II* court made this determination based on legislative history, which "confirms that Congress intended to impose retroactive liability for cleanup."^[142] This decision supports the Eleventh Circuit's implicit holding of retroactive liability found in several cases, including *Redwing Carriers v. Saraland Apartment*,^[143] *Florida Power & Light Co. v. Allis Chalmers Corp.*,^[144] and *South Florida Water Management District v. Montalvo*.^[145] In each of these cases, the acts which gave rise to the contamination occurred before CERCLA was enacted. In *Olin*, the Eleventh Circuit specifically states that the district court's ruling on retroactive liability "runs contrary to all other decisions on point."^[146] In reaching this conclusion, the *Olin II* court rendered many companies' one ray of judicial hope obsolete.

Until the United States Supreme Court makes a decisive ruling about retroactive liability, companies will continue to argue against retroactive liability. Unless the highest court renders a final decision on this issue, many companies may be reluctant to settle claims regarding retroactive liability, which may delay cleanups across the country. Since a decision from the United States Supreme Court is at least a year away, it is imperative that Congress take a clear stand with respect to retroactive liability as soon as possible.

IV. THE CONGRESSIONAL APPROACH TO RETROACTIVITY

Even though the courts appear settled on whether retroactive liability exists under CERCLA, Congress is divided over whether to keep retroactive liability.^[147] Whether one takes the existence of the Congressional debate as supporting the validity of retroactivity, or simply view Congress as confused or trying to correct an erroneous misinterpretation of CERCLA, at some point in the near future, a legislative solution to the question is necessary.

While the debates in Congress over reauthorization of the Superfund do not focus exclusively on the issue of retroactivity under the Act, certain retroactive application of CERCLA liability laws provided the major focus for the last set of arguments in Congress in 1996 that this article examines.^[148] In the ongoing debate over reauthorization, the issue of retroactivity is considered one of the divisive "linchpins" of the program.^[149]

In 1995, Republican Representative Michael G. Oxley of Ohio and Republican Senator Robert C. Smith of New Hampshire, generated two proposals in the House and the Senate, respectively, which aimed to eliminate retroactive liability.^[150]

Senator Smith's proposal initially aimed to eliminate the retroactive liability provision for companies that dumped waste prior to 1980, the year the Superfund was enacted.^[151] In addition, Senator Smith wanted to change the section of the current liability system that holds only one business responsible for payment of an entire site's cleanup.^[152] Senator Smith's proposal would have repealed that section, holding each polluter responsible only for his proportionate share.^[153]

Also, Senator Smith placed greater emphasis on cost efficiency in clean-up efforts.^[154] His bill would have required the Environmental Protection Agency (EPA) to choose the clean-up remedy that provides the most inexpensive protection for human health and the environment.^[155] Another major provision of Senator Smith's bill would have placed a cap on the number of new sites that the EPA could add to the list of Superfund sites.^[156] In each of the three years after enactment, the EPA would only be able to add thirty new sites.^[157] Finally, Senator Smith's bill gave states more power and potential responsibility with regard to Superfund sites within their borders.^[158] According to Senator Smith's bill, states would have been able to choose whether to veto placing a site on the national priorities list, and following federal cleanup standards, cleanup the site on their own.^[159]

Representative Oxley's bill, though with similar objectives as Senator Smith's, had its own particular provisions. One difference was a provision directed at small businesses and municipalities that could have affected up to 250 Superfund sites, along with the multitude of businesses that dump into those sites.^[160] This provision would have fully exempted some parties from liability if, after June 1995, they had dumped waste at a site that had already accepted municipal solid waste from another party or parties.^[161]

Another provision of Representative Oxley's bill provided a different kind of exemption for some small businesses.^[162] A business could have become exempt from all liability if it contributed less than one percent of the waste to a Superfund site prior to 1987.^[163] Representative Oxley chose the 1987 date since that is when record-keeping requirements were fully implemented.^[164] The 1987 date pleased many insurance companies because it is also the year that they changed their policies to avoid paying future Superfund-related claims.^[165] In addition, Representative Oxley's bill also allowed for government rebates that would come out of the Superfund,^[166] and companies that dumped waste before 1987 could apply for reimbursement.^[167]

While neither party in Congress was willing to give up in the early stages of drafting and reviewing the proposed bills, each acknowledged that future negotiations regarding the Superfund program were dependent on the outcome of the 1996 November election.^[168]

Members of both parties of Congress accepted that any changes to the Superfund program regarding retroactive liability would rely prominently on bipartisan compromise, and would proceed gradually, if at all.^[169] However, after more than a year of concentrated efforts^[170] to obtain a bipartisan compromise on Senate Bill 1285, the Republican-developed Superfund bill proposed by Senator Smith was pronounced dead during the week of July 15, 1996.^[171] This signified the end of hope for bipartisan agreement for Superfund revision until after the November 1996 elections. Both Democrats and Republicans waited to see if their side might gain more of an upper hand on the issue after the

elections.[\[172\]](#) A Dole victory might have led the Republican's to achieve their desired repeal of retroactive liability, while a win for Clinton would imply a more moderate, but still bipartisan, drafting of a compromise.[\[173\]](#)

Now in his second term as President, President Clinton once again must work with a Republican-led Congress. This time, he is even more likely to emphasize moderation on issues, in an attempt to stress bipartisan compromise and balance, especially on sticky topics like the environment.[\[174\]](#) One of the most binding features of the Clinton presidency is the Republican Congress' priority to balance the federal budget.[\[175\]](#) With that priority as a guideline, it is likely to dictate future legislation. Where the Superfund is concerned, debates over making site cleanup even more cost effective, and continuing the push to reduce liability standards to avoid expensive litigation, are not going to go away. Moreover, with less money to spend, President Clinton will be under continual pressure to pursue moderate measures.[\[176\]](#) Republicans will also be stressing moderation and compromise since they realize that they must reach a middle ground with the President and his administration if they want to successfully carry out their own agenda.[\[177\]](#)

Environmental policy will be a challenge for the President and Congress. The ideal middle ground hoped for in other areas is especially distant here due to warring interest groups and fiscal tightening. Environmental policy success lies in creative approaches to old issues, on a more incremental level.[\[178\]](#) In fact, the first Superfund reform bill of 1997 did not explicitly address the issue of retroactive liability.[\[179\]](#) The primary features of the bill were (1) the creation of a fair-share allocation of multiparty sites to replace joint and several liability; (2) the elimination of liability for small contributors; and (3) the provision of \$60 million in funding to states and localities to spur the cleanup and redevelopment of sites.[\[180\]](#) Even some of the strongest supporters for the elimination of retroactive liability began the year by conceding that such repeal does not have a chance of surviving Democratic opposition.[\[181\]](#) To date, this bill is still facing committee hearings.[\[182\]](#)

On November 9, 1997 Representative Oxley modified his 1986 bill and reintroduced it as the Superfund Reform Act.[\[183\]](#) Like its predecessor, this bill curtails retroactive liability. For example, retroactive liability would not occur for: (1) releases occurring in connection with arranging for disposal, treatment, transport, or acceptance of hazardous substances prior to 1987 at non-federally owned National Priority Listed facilities; (2) releases at facilities which only handle municipal solid waste or sewage sludge; or (3) de minimis releases.[\[184\]](#) The bill has just begun the committee hearing process.[\[185\]](#)

V. CONCLUSION: A LEGISLATIVE SOLUTION

Despite the fact that current legislative proposals do not provide for a repeal of retroactive liability, the issue is still a matter of concern to many in Congress.[\[186\]](#) As noted previously, this issue is one that needs immediate resolution. Adding to the pressures to overhaul the program, is the unknown future role of industry taxes that have, until recently, helped to pay for the cleanup program.[\[187\]](#) The taxes actually expired December 31, 1995,[\[188\]](#) though the program can be successfully funded by a surplus until fiscal year 2000.[\[189\]](#) However, some parties involved do not want to reauthorize these taxes until there is greater certainty that Congress will successfully overhaul the Superfund program.[\[190\]](#) This pending funding limitation, suggested by leaders of the authorizing committees, is aimed to pressure Congress to revise the Superfund program.[\[191\]](#)

The legitimacy of retroactive liability cannot be delayed while Congress waits to make a decision on the future role of industry taxes. Congress needs to settle the issue of retroactive liability by amending the act with language such as: "Liability under this act is retroactive." Even though many Republicans oppose maintaining the provision for retroactive liability on the grounds that it is unfair to punish companies for actions that, when carried out, were fully legal,[\[192\]](#) the limitations introduced in House Rule 3000 should not alter how courts presently apply retroactive liability. Even though several Republicans argue that being more lax with liability standards will slow down the clutter of litigation that now consumes the time and focus of many companies, preventing them from overseeing the actual cleanup of their sites,[\[193\]](#) any laceration may result in individual tax payers paying for the clean up.[\[194\]](#)

There is another equally persuasive unfairness argument. A number of companies have had substantial retroactive liabilities imposed upon them, but they have already resolved most of them.[\[195\]](#) Therefore, not only do they have little to gain from the repeal, but they have been placed at a disadvantage vis-à-vis their competitors who have not been good corporate citizens and who have managed to thus far evade their liability for hazardous sites created prior to 1980.[\[196\]](#)

Thus, in terms of fairness, the case for retaining retroactivity seems to be stronger.

An additional consideration concerns companies involved with lawsuits against their insurers for remediation costs from settlements with the EPA. These companies might find that courts will hold that since there is no retroactive liability, settlements paid for a form of liability that does not exist are merely gratuitous.^[197] Such a result would be extremely unfair.

Easing up on liability standards for companies sends a strong message to polluters that they can easily shake the blame for pollution and environmental damage and simply let the federal government pay for the costs of cleaning up polluted sites.^[198] In addition, a full repeal of retroactive liability is not cheap. The Congressional Budget Office reported that repealing retroactive liability would cost the federal government from \$800 million to \$1.3 billion a year.^[199] As a result, taxpayers would likely become the targets to bear the burden of cleaning up many sites, even when the company responsible for the costly damages is known.^[200] Much of the tax burden for Superfund has thus far fallen on the chemical and petroleum companies. When these taxes are reauthorized, if there is not retroactive liability, a most logical source of money will be could come from an increase chemical and petroleum companies' taxes.

Major opponents of repealing retroactive liability, like Carol Browner, administrator of the EPA, allege that a repeal would only prolong the cleanup process, require more money from taxpayers, and send the wrong message to polluters.^[201] If correct, such allegations further support the need for Congress to pass a simple amendment to CERCLA, clearly stating that the liability under the act is retroactive.

The legitimacy of retroactive liability will not be resolved until the United States Supreme Court speaks or Congress takes action. A careful review of *Olin* and subsequent cases leads to the conclusion that if the issue reaches the Supreme Court, the Court will likely uphold retroactive liability. However, an appeal of *Olin* to the highest court for resolution of this issue will take at least another year. There is no point in waiting over a year for the court to act; Congress should take action itself by affirming the act's retroactive liability.

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[1] *See infra* Part III. [Return to text.](#)

[2] *See id.*

3. Pub. L. No. 95-510, 94 Stat. 2767 (1980) (codified as amended at 42 U.S.C. §§ 9601-9675) (1994)). [Return to text.](#)

[4] 927 F. Supp. 1502 (S.D. Ala. 1996), *rev'd*, 107 F.3d 1506 (11th Cir. 1997). [Return to text.](#)

[5] *See infra* notes 12-14 and accompanying text. [Return to text.](#)

[6] *See* 927 F. Supp. at 1504. [Return to text.](#)

[7] *See id.* [Return to text.](#)

[8] *See id.* [Return to text.](#)

[9] 511 U.S. 244 (1994) (deciding that since Congress did not expressly allow for retroactive application of the Civil Rights Act of 1991, the Act could not be applied retroactively in a Title VII case). [Return to text.](#)

[10] 514 U.S. 549 (1995) (holding that Congress exceeded its commerce clause authority when it passed the Gun-Free School Zones Act since possess of a gun was not an economic activity that substantially affected interstate commerce). [Return to text.](#)

[11] *See Olin*, 107 F.3d 1506 (11th Cir. 1997) (reversing the district court by holding that there was no commerce clause violation and that CERCLA liability costs do apply retroactively). [Return to text.](#)

[12] *See Insurers Have Their Say*, HAZARDOUS WASTE NEWS, Sept. 16, 1996, available in 1996 WL 7981946. [Return to text.](#)

[13] *See id.* [Return to text.](#)

[14] Mark D. Tucker, *Retroactive Liability is Challenged*, NAT'L. L.J., Oct. 14, 1997, at C1. [Return to text.](#)

[15] *See, e.g.*, Clean Air Act (CAA), 42 U.S.C.A. § 7041 (1997) (regulating air pollution emissions); Clean Water Act (CWA), 33 U.S.C.A. § 1251 (1997) (regulating toxic water pollutants); Toxic Substances Control Act (TSCA), 15 U.S.C.A. § 2601 (1997) (regulating potentially toxic chemicals used in commerce); Solid Waste Disposal Act (SWDA), *as amended by* the Resource Conservation and Recovery Act (RCRA), 42 U.S.C.A. § 6901 (1997) (establishing a comprehensive system to regulate hazardous waste from its creation to its disposal). [Return to text.](#)

[16] *See* S. REP. NO. 69-848, at 101-12 (1980), *reprinted in* 1 A LEGISLATIVE HISTORY OF THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT OF 1980 (SUPERFUND) [hereinafter 1 LEGISLATIVE HISTORY] ("[T]he regulations do not address those situations where an owner is unknown or is unable to pay the cleanup costs, nor do they address the cleanup of spills, illegal dumping or releases generally."). [Return to text.](#)

[17] *See* 1 LEGISLATIVE HISTORY, *supra* note 16, at 2 ("The legacy of past haphazard disposal of chemical wastes and the continuing danger of spills and other releases of dangerous problems pose what many call the most serious health and environmental challenge of the decade."). [Return to text.](#)

[18] *See id.* (stating that CERCLA was to "provide for liability, compensation, cleanup, and emergency response for hazardous substances released into the environment and the cleanup of inactive hazardous waste disposal sites."); *Administration Testimony to the Subcomm. on Env't Pollution & Resource Protection, Comm. on Env't & Public Works*, 96th Cong. (1980) *reprinted in* 1 LEGISLATIVE HISTORY, *supra* note 16, at 55 (statement of Sen. John C. Culver) ("In these hearings, we are searching for solutions to the problems of how to cleanup old hazardous waste dump sites that now threaten our environment, and for ways to cleanup future spills of hazardous wastes."); *id.* at 100 (statement of Thomas C. Jorling, Assistant Administrator, Water & Waste Managt., EPA) ("The proposed legislation addresses releases to the environment of oil, hazardous substances, and hazardous wastes from spills and from inactive and abandoned disposal sites."). [Return to text.](#)

[19] *See* H.R. 7020, 96th Cong. (1980), *reprinted in* 2 A LEGISLATIVE HISTORY OF THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT OF 1980 (SUPERFUND), at 391-463 [hereinafter 2 LEGISLATIVE HISTORY] (describing the Hazardous Waste Containment Act of 1980).

[A]n act to amend the Solid Waste Disposal Act to provide authorities to respond to releases of hazardous waste from inactive hazardous waste sites which endanger public health and the environment, to establish a Hazardous Waste Response Fund to be funded by a system of fees, to establish prohibitions and requirements concerning inactive hazardous waste sites, to provide liability of persons responsible for release of hazardous waste at such sites, and for other purposes.

Id.; H.R. 85, 96th (1980), *reprinted in* 2 LEGISLATIVE HISTORY, at 1016-1114 (describing the Comprehensive Oil Pollution Liability and Compensation Act as "a bill to provide a comprehensive system of liability and compensation for oil-spill damage and removal costs, and for other purposes."); S. 1480, 96th Cong. (1980), *reprinted in* 1 LEGISLATIVE HISTORY, *supra* note 16, at 462-552 (describing the Environmental Emergency Response Act as "a bill to provide for liability, compensation, cleanup, and emergency response for hazardous substances released into the

environment and the cleanup of inactive hazardous waste disposal sites."). [Return to text.](#)

[20] *See* Letter from Robert T. Stafford & Jennings Randolph to Rep. James J. Florio (Dec. 2, 1980), in 1 LEGISLATIVE HISTORY, *supra* note 16, at 774-75.

On Monday, November 24, the Senate passed a compromise "superfund" bill That the bill passed at all is a minor wonder Specific mention has been made of adding an oil spill provision. That was suggested in the Senate, but agreement could not be reached on a specific provision, so none was offered Some disagreed with increasing the size of the Fund. Others disagreed with the creation of a private right of action, whether against a Fund or against a spiller. Others disagreed with preemption provisions. Others disagreed with limitations on liability, especially as they related to inland oil barges. In short, we could not even reach a consensus, much less unanimity.

Id. [Return to text.](#)

[21] *See* 1 LEGISLATIVE HISTORY, *supra* note 16, at 762 (statement of Sen. Domenici) ("[T]he problem of hazardous substances must be addressed, and this body is acting in a responsible manner by passing legislation in this Congress."); *id.* at 765 (statement of Sen. Weicker) ("[W]e cannot let any time pass before we take the problem of hazardous wastes head on. We must pass the superfund bill now."); *id.* at 767 (statement of Sen. Riegle) ("I . . . hope the House will act on it before adjournment. We cannot afford to wait any longer in establishing the necessary framework and funding to meet the hazards posed by toxic wastes."); *id.* at 784 (statement of Rep. Florio) ("The time is now to deal with this problem The concern is whether we are going to have legislation or whether we are not going to have legislation."). [Return to text.](#)

[22] The Senate passed the compromise bill on Nov. 24, 1980. *See* 1 LEGISLATIVE HISTORY, *supra* note 16, at 560. The House passed the compromise bill on December 3, 1980. *See* 1 LEGISLATIVE HISTORY, *supra* note 16, at 776. For further discussion of the legislative history of the bills, *see* Frank P. Grad, *A Legislative History of the Comprehensive Environmental Response, Compensation, and Liability Act ("Superfund")*, 8 COLUM. J. ENVTL. L. 1 (1982). [Return to text.](#)

[23] 562 F. Supp. 1300 (N.D. Ohio 1983). [Return to text.](#)

[24] However, several earlier cases had compared CERCLA to RCRA to illustrate RCRA's inadequacies. *See generally* *United States v. Waste Indus.*, 556 F. Supp. 1301, 1317 (E.D.N.C. 1982) ("Congress recognized . . . a gap existed in the regulatory scheme fashioned through the RCRA. That gap involved the problems caused by inactive waste disposal sites . . . [t]he Superfund legislation was designed to fill that void."). *See also* *United States v. Wade*, 546 F. Supp. 785 (1982); *Philadelphia v. Stepan Chem. Co.*, 544 F. Supp. 1135 (E.D. Pa. 1982); Grad, *supra* note 22, at 35 ("CERCLA picks up where RCRA leaves off, i.e., when untoward emergencies occur, or when spills occur at current or no longer active sites by making provisions for protection after a site has been closed."). [Return to text.](#)

[25] In *Georgeoff*, the state attempted to cleanup the hazardous waste disposal site owned by Summit National Liquid Services (SNLS), commonly known as Deerfield Dump (Dump). *See* 562 F. Supp. at 1300. The state alleged that an assortment of hazardous wastes had been left at the Dump. *See id.* The Dump went through a series of owners after SNLS went out of business in 1979; however, the waste left at the Dump continued to pose a threat to the source of drinking water in the area. *See id.* [Return to text.](#)

[26] *See id.* at 1303 (quoting J. Story in *Society for Propagating the Gospel v. Wheeler*, 22 F.Cas. 756, 767 (C.C.D.N.H. 1814) (No. 13, 156) (defining a retroactive law as one that "creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions or considerations already past . . ."). [Return to text.](#)

[27] *See* 509 F. Supp. 342 (D.D.C. 1981).

The Court's analysis must begin with the fundamental rule of law that the meaningful intent of a statute is to be sought first in the language it is framed. If the language is plain and unambiguous, then there is no need to enlist the rules of interpretation, and the duty of the Court is to enforce the act according to its terms When the imperative character necessary to demonstrate retroactive intent cannot be assigned to the words of the Act, the Court must look at the

various indica of Congressional intent.

Georgeoff, 562 F. Supp. at 1308. [Return to text.](#)

[28] *See Georgeoff*, 562 F. Supp. at 1308-09. Section 9607 provides for liability under CERCLA:

(a) Covered persons; scope; recoverable costs and damages; interest rate; "comparable maturity" date

(1) the owner and operator of a vessel or a facility,

(2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,

(3) any person who by contract, agreement, or otherwise arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and

(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for—

(A) all cost of removal or remedial action incurred by the United States Government or a States or an Indian tribe not inconsistent with the national contingency plan;

(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;

(C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing injury, destruction, or loss resulting from such a release; and

(D) the costs of any health assessment or health effects study carried out under section 9604(i) of this title.

42 U.S.C.A. § 9607 (1983). [Return to text.](#)

[29] 562 F. Supp. at 1310. [Return to text.](#)

[30] *See id.* at 1311. Judge Dowd describes the frequent references to "inactive" waste disposal sites and concludes that Congress intended to focus on the past, rather than future conduct. *See id.* (citing 42 U.S.C. § 9601 (20) (A) (iii) which states in the Preamble the purpose "to provide for . . . the cleanup of inactive hazardous waste disposal sites). [Return to text.](#)

[31] *See id.* at 1311-12 ("A more generalized examination of the Congressional debates concerning CERCLA indicates an unequivocal Congressional intent to effect the complete cleanup of existing hazardous waste facilities."). Quoting from Senator Tsongas, the court states that "the need for an emergency Federal response to deal with abandoned waste sites and chemical spills is real, and it is immediate." *Id.* Furthermore, Judge Dowd notes Senator Danforth's statement that "[w]e have no time to lose . . . I believe the clear consensus is that we must cleanup abandoned hazardous dump sites as soon as possible." *Id.* [Return to text.](#)

[32] *Id.* at 1313-14. Judge Dowd also concluded that the liability provisions of CERCLA may be applied retroactively to transporters. *See id.* at 1314. [Return to text.](#)

[33] 579 F. Supp. 823 (W.D. Mo. 1984), *aff'd in part, rev'd in part*, 810 F.2d 726 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987). According to the initial findings of fact in the case, Northeastern Pharmaceutical's president and vice-president "[k]new [the company's] manufacturing process produced by products that contained toxic substances, including dioxin, that could be harmful to human health." *Id.* at 833. In July 1971, a plant supervisor put drums containing hazardous wastes in a trench on the Denny farm. *See id.* In 1979, the EPA received an anonymous tip that waste materials had been disposed at the Denny farm. *See id.* The court stated that

[b]ecause of the region's soil conditions, there was a substantial likelihood of the hazardous wastes in the Denny farm site entering the environment and going into the ground farm site entering the environment and going into the ground water system; whereupon, the contaminants may have come into contact with members of the public who may have been adversely affected by their exposure to these wastes.

Id. [Return to text.](#)

[34] 42 U.S.C. § 9604 (granting the federal officials general authority to respond to hazardous waste pollution by cleaning up the source and lessening its effects). [Return to text.](#)

[35] 42 U.S.C. § 9606. This section provides for abatement actions:

(a) Maintenance, jurisdiction, etc.

In addition to any other action taken by a State or local government, when the President determines that there may be imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility, he may require the Attorney General of the United States to secure such relief as may be necessary to abate such danger or threat, and the district court of the United States in the district in which the threat occurs shall have jurisdiction to grant such relief as the public interest and the equities of the case may require. The President may also, after notice to the affected State, take other action under this section including, but not limited to, issuing such orders as may be necessary to protect public health and welfare and the environment.

Id. [Return to text.](#)

[36] *See supra* note 28 (discussing CERCLA's liability provision). [Return to text.](#)

[37] *See Northeastern Pharmecuetical*, 579 F. Supp. at 839 ("There can be little doubt that sections 104 and 107(a) were intended to apply retroactively."); *see also Georgeoff*, 562 F. Supp. at 1302-12; *Waste Indus.*, 556 F. Supp. at 1316-17; *Wade*, 546 F. Supp. at 792-93; *Stepan Chem. Co.*, 544 F. Supp. at 1140-41. In *Northeastern Pharmecuetical*, the court states that "section 106(a) applies to inactive sites and that the same persons listed as liable under section 107(a) are liable under section 106(a) . . . [t]o read sections 104, 106(a), and 107(a) otherwise would be to emasculate the purpose of CERCLA and the intent of Congress." 579 F. Supp. at 839. [Return to text.](#)

[38] 579 F. Supp. at 840 (citing 126 CONG. REC. S14962-963 (daily ed. Nov. 24, 1980) (remarks of Sen. Randolph); *id.* at S14966 (remarks of Sen. Stafford); *id.* at S14972 (remarks of Sen. Tsongas); 126 CONG. REC. H11799 (daily ed. Dec 3, 1980) (remarks of Rep. Jeffords)). [Return to text.](#)

[39] 428 U.S. 1 (1976) (deciding black lung benefit provisions of Coal Mine Health and Safety Act of 1969 were constitutionally sound). [Return to text.](#)

[40] *See* 428 U.S. at 16 ("[O]ur cases are clear that legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations . . . This is true even though the effect of the legislation is to impose a new duty or liability based on past acts."). The court reasoned that "the imposition of liability for the effects of disabilities bred in the past is justified as a rational measure to spread the costs of employees' disabilities to those who have profited from the fruits of their labor." *Id.* at 18. [Return to text.](#)

[41] 579 F. Supp. at 841 ("Congress rationally considered the imposition of liability for the effects of past disposal practices as a means to spread the costs of cleanup on those who created and profited from the waste disposal-generators, transporters, and disposal site owners/ operators."). *See also Georgeoff*, 562 F. Supp. at 1312; S. Rep. No. 848, at 33-34 (1980), *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 6119. [Return to text.](#)

[42] *See* 579 F. Supp. at 841. Other cases agreeing that response costs incurred before CERCLA enactment were unrecoverable include *United States v. Morton-Thiokol, Inc.*, No. 83-4787 (D.N.J. July 2, 1984), and *United States v.*

Wade, 546 F. Supp. 785 (E.D. Pa. 1982) (*Wade I*). [Return to text.](#)

[43] *See* 579 F. Supp. at 843 ("It is difficult to believe that if Congress had intended to make the defendants liable for pre-CERCLA expenses, it would not have said so explicitly and clearly in the statutory language, committee reports, or floor debates."). [Return to text.](#)

[44] *See* *United States v. Northeastern Pharm. & Chem. Co.*, 810 F.2d 726 (8th Cir. 1986). [Return to text.](#)

[45] *See* *Jones v. Inmont Corp.*, 584 F. Supp. 1425, 1428 (N.D. Ohio 1984) ("Past generators of hazardous wastes are responsible parties under [the liability] provision."); *United States v. Onatti & Goss*, 630 F. Supp. 1361 (D.N.H. 1985) (holding that the retroactive application of CERCLA Sections 106-107 does not violate the Constitution). [Return to text.](#)

[46] 605 F. Supp. 1064 (D. Colo. 1985). *Shell Oil* addressed the disposal of wastes at the Rocky Mountain Arsenal owned by the United States. *See id.* The Army used the Arsenal for "manufacture, testing, demilitarization, disposal, and other handling of various chemical agents and munitions." *Id.* The United States has leased property to Shell since 1947 for the "manufacture, packaging, and other handling of pesticides, herbicides, and other chemicals." *Id.* at 1067. Both the Army's wastes and all of some portion of Shell's wastes were disposed of through a common system. *See id.* When the waste disposal systems failed, it released into the environment "hazardous substances comprised of co-mingled wastes generated by the Army, Shell, and other Arsenal tenants. The released chemicals have killed migratory and other birds, fish and wildlife, have contaminated air, land, groundwater, lakes, and other surface waters within the Arsenal, and have contaminated or threaten to contaminate the environment outside the Arsenal." *Id.* By administrative order in 1975, the State of Colorado instructed the Army and Shell to stop the discharge of specific chemicals and cleanup the sources of specific chemicals. *See id.* [Return to text.](#)

[47] *See id.* at 1072. [Return to text.](#)

[48] *See id.* [Return to text.](#)

[49] *See id.* Those cases to which Judge Carrigan refers are the following: *United States v. South Carolina Recycling and Disposal, Inc.*, 653 F. Supp. 984 (D.S.C. February 23, 1984), *aff'd in part*, *United States v. Monsanto*, 858 F.2d 100 (4th Cir. 1988); *United States v. Conservation Chem. Co.*, 589 F. Supp. 59 (W.D. Mo. 1984); *United States v. Northeastern Pharm. & Chem. Co.* 579 F. Supp. 823 (W.D. Mo. 1884); *United States v. A.&F. Materials Co.*, 578 F. Supp. 1249 (S.D. Ill. 1984); *United States v. Price*, 577 F. Supp. 1103 (D.N.J. 1983); *Brown v. Georgeoff*, 562 F. Supp. 1300 (N.D. Ohio 1983); *United States v. Outboard Marine Corp.*, 556 F. Supp. 54 (N.D. Ill. 1982); *United States v. Reilly Tar & Chem. Corp.*, 546 F. Supp. 1100 (D.Minn. 1982); *United States v. Wade*, 546 F. Supp. 785 (E.D. Pa. 1982). [Return to text.](#)

[50] *See Shell Oil*, 605 F. Supp. at 1073 ("I conclude that the unavoidably retroactive nature of CERCLA, and Congress' decision in CERCLA to impose the cost of cleaning up hazardous waste sites on the responsible parties rather than on taxpayers, strongly indicate Congressional intent to hold responsible parties liable for pre-enactment government response costs."). [Return to text.](#)

[51] *See id.* at 1073-77. Because this case is often cited, the reasoning behind Judge Carrigan's conclusion is extremely important. Judge Carrigan discusses both the government and Shell's arguments. First, Shell argued that the use of "shall" in § 107(a)(4) that any person who accepts shall be liable implies intent of prospective application of the liability provision. *See id.* at 1073. The government responded by arguing that all other verbs in section 107(a) are in the past tense. *See id.* at 1073. Judge Carrigan concluded the "congressional intent to either impose or withhold liability for response costs incurred before CERCLA cannot be divined from the verb tenses in § 107(a)." *Id.*

Second, Shell contended that, if costs are to be recoverable, response and remedial actions must be compatible with the revised NCP (National Contingency Plan). *See id.* at 1074. In response, the government argued that in the definition section 101(31) of CERCLA, NCP refers to both the original and revised NCP. *See id.* Thus, the government claimed, recovery would not be limited to post-CERCLA response costs. *See id.* Judge Carrigan concludes that the "NCP consistency requirement does not preclude recovery of costs incurred before CERCLA's enactment." *Id.* at 1075.

Third, *Shell* noted that section 302(a) states "[u]nless otherwise provided, all provisions of this Act shall be effective on the date of enactment of this Act." *Id.* The government asserted that this date simply provides the date when an action can first be brought and time begins for issuing regulations. *See id.* at 1064. Judge Carrigan agreed and "[did] not interpret § 302(a) to limit liability for response costs to those incurred after December 11, 1980." *Id.* Furthermore, the government argued, while § 107(a) does not specifically address time limits for recovery for incurred costs, §§ 107(f) and 111(d) provide specific time limits on recovery for pre-enactment natural resource damages. *See id.* Thus, if Congress had wanted to restrain the recovery for pre-enactment response costs, it would have explicitly stated so. *See id.* Judge Carrigan concluded, "Section 107(f) provides that there may be no recovery for damage to natural resources occurring wholly before enactment . . . Accordingly, one must conclude that funds so spent before enactment are recoverable." *Id.* at 1076.

After examining the arguments, Judge Carrigan offered this reasoning for his conclusion:

Construing section 107(a) to preclude recovery of pre-enactment response costs would carve out an exception to the general retroactive scheme of the statute for those most severe situations where as here, the government's response commenced prior to enactment of the statute. I cannot believe that Congress could have intended to protect the public by imposing liability on the responsible parties, yet except the sites where response had already commenced because the situations were the most imminently threatening. Such an interpretation would penalize the government for prompt response and provide an undeserved windfall to the parties who had created, then abandoned, some of the most egregious sites. I decline to presume that Congress intended this irrational result.

Thus, I conclude from the statute's explicit limitation on recovery of certain natural resource damages, and its failure to limit retroactive recovery of response costs, that CERCA authorizes recovery of response costs, whether incurred before or after its enactment. I hold that Congress, in CERCLA, has overridden the presumption against retroactive application of statutes. The legislative history fully supports this conclusion.

Id. at 1076-77. [Return to text.](#)

[52] *See id.* at 1077-79. Again, Judge Carrigan lays out *Shell's* argument. First, *Shell* highlighted the deletion of Section 3072, a provision that authorized the recovery of pre-enactment response costs, from H.R. 7020. *See id.* at 1077 ("Section 3072 of H.R. 7020, 96th Cong., 2d Sess. (1980) (as introduced) provided: 'The provisions of this subpart and subpart C shall apply to releases of hazardous waste without regard to whether or not such releases occurred before, or occur on or after, the date of the enactment of the Hazardous Waste Containment Act of 1980.'). Judge Carrigan asserts that this provision "applied to liability for response costs without distinguishing between costs incurred before and after enactment; the provision addressed only the time when the releases occurred. . . . There is accordingly no reason to read the deletion as evidence of intent to preclude recovery of pre-CERCLA response costs." *Id.*

Next, *Shell* claimed that the deletion of § 4(n) from the enacted compromise bill shows Congress' intent not to authorize recovery for pre-response costs. The pertinent portion of this section (from S. 1480, as introduced), as cited by Judge Carrigan, read as follows:

(n)(1) No person (including the United States, the Fund, or any State) may recover under the authority of this section, nor may any money in the Fund be used under Section 6 of this Act for the payment of any claim, for damages specified under subsection (a)(2)(A), (B), (C),(D),(G), or (E) (other than for loss resulting from personal injury) of this section, nor may any money in the Fund be used under section 6(a) (1) (E) or (F) of this Act, where such damages and the release of a hazardous substance from which such damages resulted have occurred wholly before the enactment of this Act.

Id. at 1078. Judge Carrigan determined that *Shell's* interpretation of the § 4(n) was wrong. He asserted that the time limitations imposed by § 4(n) were included in CERCLA as the §§ 107(f) and 111(d) restrictions of natural resource damages. *See id.* at 1079. Therefore, he states, "the scheme of § 4(n) in limiting recovery for pre-enactment damages, but not response costs, was maintained in the final statute. The legislative history of § 4(n), including the comments emphasizing that recovery of removal costs is not to be limited by retroactivity concerns, therefore applies to the statute as passed." *Id.*

After reviewing Shell's arguments, Judge Carrigan states his reasoning for his conclusion that CERCLA authorizes recovery of pre-enactment response costs.

I conclude that the whole purpose and scheme of CERCLA is retrospective and remedial. Where Congress has intended a liability provision to have only prospective operation, as in the case of natural resource damages, Congress has so stated explicitly. (Sections 107(f) and 111(d), 42 U.S.C. §§ 9607(f) and 9611(d).) Congress did not explicitly limit or deny liability for response costs incurred before enactment. Consistent with the statutory scheme, I conclude that CERCLA authorizes recovery of pre-enactment response costs.

Id. [Return to text.](#)

[53] 810 F.2d 726 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987).

54 *Id.* at 737. [Return to text.](#)

[55] *See Amending and Extending the Comprehensive Environmental Response, Compensation and Liability Act of 1980, Hearings before the Comm. on Env't and Public Works*, 98th Cong., 2d Sess. 2 (1984) (statement of Sen. Randolph) ("We have gained . . . a fuller appreciation of the dangers to our citizens and communities by hazardous substances . . . Early in the implementation of Superfund, it became apparent that the problem was more widespread than even the members of the committee had realized."); *id.* at 16 (statement of Sen. Bradley) ("We now know that the magnitude of hazardous waste problems is even larger than we earlier feared."). [Return to text.](#)

[56] 42 U.S.C.A. § 9611 (1982). [Return to text.](#)

[57] *See supra* note 55, at 2 (statement of Sen. Randolph) ("This 5-year program, with the authorization of \$1.6 billion is inadequate."); *id.* at 10 (statement of Sen. Bradley) ("The \$1.6 billion currently available is clearly insufficient to make a significant dent in the task of cleaning up these dump sites."). [Return to text.](#)

[58] *See supra* note 55, at 1-1252. This collection of eight hearings before the Committee on Environment and Public Works addresses numerous issues pertaining to Superfund Reform. For example, the committee heard testimony on the health effects of Hazardous wastes on the April 11, 1984 hearing. *See id.* at 1-60. For the May 24, 1984 hearing, see *id.* at 657-900. Issues such as citizen participation were generally addressed at the May 16, 1984 hearing. *See id.* at 167-341. [Return to text.](#)

[59] *See supra* note 55, at 130-37 (testimony of Norman Nosenchuck, Director, Div. of Solid/Hazardous Waste, Dept. of Env'tl. Conservation) (addressing the cost of cleanup per site in New York); *id.* at 161-66 (testimony of Charles Wilhelm and the position paper of the Association of State and Territorial Solid Waste Management Officials) ("The amount of the Fund should be increased to at least \$9 billion . . ."); *id.* at 241-59 (statement of Vance Hughes, Legislative Director of Clean Water Action Project) ("We recommend that the Senate adopt a non-expiring fund concept . . . We believe that it will be necessary for the fund to 'collect' \$15 billion over the next five years."); *id.* at 287-335 (testimony of Jane L. Bloom, National Resources Defense Council) ("[T]he size of the Fund must be increased to at least \$9 billion over 5 years and preferably to \$2.4 billion per year as long as the job takes."); *id.* at 369-98 (discussing support of the Superfund through "waste end" taxes as opposed to feedstock taxes). The question of liability was largely addressed at the July 31, 1984 hearing. *See id.* at 947-1146. [Return to text.](#)

[60] *See S.51, 99th Cong. (1985), reprinted in 2 A LEGISLATIVE HISTORY OF THE SUPERFUND AMENDMENTS AND REAUTHORIZATION ACT OF 1986*, at 413-54 [hereinafter SARA LEGISLATIVE HISTORY]. The Superfund Improvement Act of 1985 was a bill to extend and amend the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, and for other purposes. This bill was initially introduced on January 3, 1985, and it reauthorized the Superfund to \$7.5 billion. *See* 131 CONG. REC. S11995-S12034 (Sept. 14, 1985). The language of S.51 was inserted into H.R. 2500 since all tax bills must originate in the House. *See* 131 CONG. REC. S12158-S12168, S12184-S12209 (Sept 26, 1985). *See also* H.R. 2817, 99th Cong. (1985), *reprinted in 3 SARA LEGISLATIVE HISTORY*, at 1540-1677; 131 CONG. REC. 16573-75 (June 20, 1985); *id.* at 1535-39 (introducing J.R. 2817); H.R. 3852, 99th Cong. (1985), *reprinted in 5 SARA LEGISLATIVE HISTORY*, at 3567-4017; H.R.Res No. 331, 99th Cong. (1985); *id.* at 4019-22

(proposing H.R. 3852 as an amendment in the nature of a substitute); 131 CONG. REC. H11547-65 (Dec. 10, 1985), *id.* at 4269-4301 (passing the bill, which authorized \$10 billion for the Superfund); *id.* at H11595, *reprinted in* 5 SARA LEGISLATIVE HISTORY, at 4356 (inserting the text of H.R. 2817 in the place of the Senate-passed H.R. 2005). [Return to text.](#)

[61] *See supra* note 3, at 94 Stat. 2797 ("The taxes imposed by this section shall not apply after September 30, 1985. . ."). [Return to text.](#)

[62] *See* 131 CONG. REC. (Jan 3, 1985) (statement of Sen. Lautenberg)

[I]t is vital that the Congress take up consideration of the Superfund program as soon as possible. The Superfund program expires in September. It is imperative that Superfund be reauthorized with sufficient lead time so that the Environmental Protection Agency can gear up to run as expanded and accelerated program.

Id. [Return to text.](#)

[63] *See* H.J. Res. 573, 99th Cong. (1986), *reprinted in* 7 SARA LEGISLATIVE HISTORY, at 5402-5403. Passed on March 20, 1986, this extension provided a loan from the general fund. *See* Letters from Lee M. Thomas, EPA administrator, to Rep. John D. Dingell & Sen. Robert T. Stafford (Sept. 22, 1986), *reprinted in* 132 CONG. REC. H9627 (daily ed. October 8, 1986). The EPA Administrator, Lee Thomas, had informed Congress that if the EPA did not receive new funding by April 1, he would have to shut down the Superfund program. *See id.* [Return to text.](#)

[64] *See* H.J. Res. 713, 99th Cong., 2d Sess. (1986), *reprinted in* 7 SARA LEGISLATIVE HISTORY, at 5411-5412. [Return to text.](#)

[65] *See* 132 CONG. REC. H9032 (daily ed. Oct. 3, 1986), *reprinted in* 6 SARA LEGISLATIVE HISTORY 4817; *see* H.R. Conf. Rep. 962, 99th Cong. (1986), *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 3276, *reprinted in* 6 SARA LEGISLATIVE HISTORY, at 4818; 132 CONG. REC. S14,943 (daily ed. Oct. 3, 1986), *reprinted in* 6 SARA LEGISLATIVE HISTORY, at 5243. The bill passed the Senate the same day it was reported. *See* 132 CONG. REC. H9634 (daily ed. Oct. 8, 1986), *reprinted in* 6 SARA LEGISLATIVE HISTORY, at 5386-87. The House passed the bill on October 8. *See id.* [Return to text.](#)

[66] Pub. L. No. 99-499, 100 Stat. 1613 (1986). [Return to text.](#)

[67] *See* David J. Hayes & Conrad B. MacKerron, *Superfund II: A New Mandate, A BNA Special Report*, 17 Env't Rep. 1, 128 (BNA) (Feb. 13, 1987). ("The 1986 Superfund Amendments have dealt with many different problems that arose under the first five years of the program by generally increasing the government's authority to control the cleanup process and providing a greatly increased, stable source of funding."). SARA increased the Superfund to \$8.5 billion over five years for the Environmental Protection Agency and other federal agencies to cleanup abandoned and inoperative waste sites. *See id.* at 1. "The 8.5 billion for the hazardous waste cleanup program will be raised through a new \$2.5 billion broad based tax on business income and a sharply increased tax on petroleum" *Id.* at 2. SARA also added numerous revisions:

The revisions add strict cleanup standards strongly favoring permanent remedies at waste sites, stronger EPA control over the process of reaching settlement with parties responsible for waste sites, a mandatory schedule for initiation of cleanup work and studies, individual assessments of the potential threat to human health posed by each waste site, and increased state and public involvement in the cleanup decision-making process, including the right of citizens to file lawsuits for violations of the law.

Id. at 1.

In the summary of key changes to statute, the authors that SARA had the following effect:

[T]he Act recodified the liability concepts included in the Comprehensive Environmental Response, Compensation, and Liability Act of 1980. In particular, Congress has validated the principles of strict, joint, and several liability for

responsible parties. The Department of Justice persuaded Congress that these principles, which hold each responsible party potentially liable for the full cost of a cleanup, provide the necessary legal 'club' to induce parties to enter into cleanup settlements with the government. Congress did not explicitly incorporate these concepts in the language of the superfund, but it re-affirmed the applicability of strict, joint, and several liability throughout its consideration of the superfund amendments.

Id. at 19. [Return to text.](#)

[68] *See supra* note 67 (discussing liability under SARA). [Return to text.](#)

[69] *See* *United States v. Montrose Chem. Corp.*, 835 F. Supp. 534 (C.D. Cal. 1993), *rev'd*, *California V. Montrose Chem. Corp.*, 104 F.3d 1507 (9th Cir. 1997); *United States v. Monsanto Co.*, 858 F.2d 160 (4th Cir. 1988), *cert. denied*, 490 U.S. 1106 (1989); *United States v. Shell Oil Co.*, 841 F. Supp. 962 (C.D. Cal. 1993); *HRW Sys. Inc. v. Wash. Gas Light Co.*, 823 F. Supp. 318 (D. Md. 1993); *Abbot Lab. v. Thermo Chem., Inc.*, 790 F. Supp. 135 (W.D. Mich. 1991); *United States v. Kramer*, 757 F. Supp. 397 (D.N.J. 1991); *Kelley v. Thomas Solvent Co.*, 714 F. Supp. 1439 (W.D. Mich. 1989); *Amland Properties Corp. v. ALOCA*, 711 F. Supp. 784 (D.N.J. 1989); *United States v. Hooker Chem. & Plastics Corp.*, 680 F. Supp. 546 (W.D. N.Y. 1988); *United States v. Mottolo*, 695 F. Supp. 621 (D.N.H. 1988); *United States v. Miami Drum Serv. Inc.*, 25 E.R.C. 1469 (S.D. Fla. 1986); *United States v. Tyson*, 25 E.R.C. 1897 (E.D. Pa. 1986); *United States v. Dickerson*, 640 F. Supp. 448 (D. Md. 1986). [Return to text.](#)

[70] *See* Lewis M. Barr, *CERCLA Made Simple: An Analysis of the Cases Under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980*, 45 THE BUS. LAW. 923, 1000 (1990) ("Ten years after its enactment, and four years after its major refinement, CERCLA is working more or less as Congress intended."); *see also* William A. Montgomery Jr., *Constitutional Implications of CERCLA: Due Process Challenges to Response Costs and Retroactive Liability*, 31 WASH. U. J. URB. & CONTEMP. L. 279, 288 (1987) ("The control and cleanup of releases of hazardous substances into the environment is a legitimate governmental objective. The liability provisions of CERCLA are a rational means of attaining that end because it is fair to place liability on those who benefit from the creation of the hazardous waste."). *But see* George C. Freeman, Jr., *Inappropriate and Unconstitutional Retroactive Application of Superfund Liability*, 42 THE BUS. LAW. 215-248 (1986). [Return to text.](#)

[71] *See id.* [Return to text.](#)

[72] *See id.* [Return to text.](#)

[73] *See* *United States v. Olin*, 927 F. Supp. 1502 (S.D. Ala. 1996). [Return to text.](#)

[74] *See id.* Olin is a Virginia corporation that owned and operated a chemical plant in McIntosh, Alabama. *See id.* at 1503. The United States alleged that the Olin plant site was actually two sites. Site 1 includes 20 acres on the southern edge of the property, on which an active chemical-production facility operates. *See id.* at 1504. This site contains a number of "solid waste-management units," both active and inactive, many of which have been closed and treated for the removal of hazardous substances. *See id.* The government claims that "in 1952 Olin Mathieson began operating a mercury-cell chloralkali plant on Site 1 which generated and released wastewater containing mercury into Site 2 until 1974. This plant ceased operating in 1982." *Id.* at 1504. Furthermore, in 1955 "Olin Mathieson built a 'crop-protection-chemicals' plant which discharged waste water into Site 2 until 1974." *Id.*

Because these two plants ran from the 1950's to late 1982, "mercury and chloroform, which are alleged to be hazardous substances under 42 U.S.C. §9601(14), were released into Site 1." *Id.* Although most of the supposed contamination occurred before December 11, 1980, the government argued that a threat of continued releases at and from Site 1 existed. *Id.* at 1506. "According to the remedial investigation report, any contaminants still at Site 1 affect groundwater there mostly by migrating through the alluvial aquifer Indeed, the record reflects that any contamination at Site 1 is of such minimal proportions as not to constitute any hazard to the public." *Id.* at 1506-07. Along with the action against Olin, the Justice department filed a proposed consent decree. *See id.* at 1505. Before it would rule on the consent decree, the court requested two briefs. The defendant additionally raised the issue of CERCLA's retroactivity, claiming that "Congress did not intend for CERCLA to be retroactive and that if it did, CERCLA violates the Due Process Clause and unconstitutionally delegates legislative power to the EPA." *Id.* at 1507. The Justice Department

responded to the claims concerning retroactivity. Hence, Judge Hand examined these arguments about retroactivity to form his decision. *See id.* [Return to text.](#)

[75] *Id.* at 1519. Judge Hand also concluded that CERCLA violated the Commerce Clause as interpreted in *United States v. Lopez*, 514 U.S. 549 (1995). [Return to text.](#)

[76] *See, e.g.*, Mark D. Tucker, "Retroactive Liability" Is Challenged, NAT'L L.J., Oct. 14, 1996, at C1 (discussing Judge Hand's "unanticipated decision" that CERCLA could not be applied retroactively). This unusual decision brought about an impassioned response from the Department of Justice. *See, e.g., Congress Wanted CERCLA Applied Retroactively, Government Says in Brief*, 9 No. 9 MLRSF 4 (Aug. 9, 1996) ("A federal judge who found in May that CERCLA did not apply retroactively to waste sites created before its enactment seriously misinterpreted a recent Supreme Court decision on the Commerce Clause, the U.S. Department of Justice argued . . .").

While many commentators were surprised at the decision, they generally believed that the decision would be short-lived. *See, e.g., Superfund: Retroactive Liability Decision Seen Unlikely to Survive Certain Appeal*, SOLID WASTE REP., Aug. 1, 1996, available in 1996 WL 8264604. According to Adam Babich of the Washington-based Environmental Law Institute, the decision could create a "short flurry of activity." *Id.* However, he believed that decision would be short lived because Judge Hand "went the other way on an issue that was settled." *Id.* [Return to text.](#)

[77] *See* 927 F. Supp. at 1507 ("[A] panel of the Eleventh Circuit recently referred to CERCLA as being retroactive. *Virginia Properties Inc. v. Home Ins. Co.*, 74 F. 3d 1131, 1132 (11th Cir., 1996). The issue of retroactivity, however, was not before that court."). [Return to text.](#)

[78] *See id.* Judge Hand recognizes the following federal cases: *In the Matter of Penn. Cent.*, 944 F.2d 164 (3rd Cir. 1991); *Aetna Cas. & Sur. Co. v. Pintlar Corp.*, 948 F.2d 1507 (9th Cir. 1991); *O'Neil v. Picillo*, 883 F.2d 176 (1st Cir. 1989); *United States v. Monsanto Co.*, 858 F.2d 160 (4th Cir. 1988); *United States v. Northeastern Pharm. & Chem. Co.*, 810 F.2d 726 (8th Cir. 1986); *HRW Sys. v. Wash. Gas*, 823 F. Supp. 318 (D. Md. 1993); *United States v. Kramer*, 757 F. Supp. 397 (D.N.J. 1991); *Philadelphia v. Stepan Chem.*, 748 F. Supp. 283 (E.D. Pa. 1990); *Kelley v. Solvent Co.*, 714 F. Supp. 1439 (W.D. Mich. 1989); *O'Neil v. Picillo*, 682 F. Supp. 706 (D.R.I. 1988); *United States v. Hooker Chem. & Plastics*, 680 F. Supp. 546 (W.D.N.Y. 1988); *United States v. Dickerson*, 640 F. Supp. 448 (D. Md. 1986); *United States v. Onatti, Inc.* 630 F. Supp. 1361 (D.N.H. 1985); *Town of Boonton v. Drew Chem.*, 621 F. Supp. 663 (D.N.J. 1985); *United States v. Conservation Chem. Co.*, 619 F. Supp. 162 (W.D. Mo. 1985); *United States v. Shell Oil*, 605 F. Supp. 1064 (D. Colo. 1985); *Jones v. Inmont*, 584 F. Supp. 1425 (S.D. Ohio 1984); *United States v. S. C. Recycling Disposal Co.*, 653 F. Supp. 984 (D.S.C. 1984); *United States v. Northeastern Pharm. & Chem. Co.*, 579 F. Supp. 823 (W.D. Mo. 1984); *United States v. Price*, 577 F. Supp. 1103 (D.N.J. 1983); *Ohio v. Georgeoff*, 562 F. Supp. 1300 (N.D. Oh. 1983); *United States v. Wade*, 546 F. Supp. 785 (E.D. Pa. 1982). [Return to text.](#)

[79] 511 U.S. 244, 114 S. Ct. 1483, 128 L.Ed.2d 229 (1994). *See also Olin*, 927 F. Supp. at 1507. The defendants cited Freeman George Clemon, Jr., *A Public Policy Essay: Superfund Retroactivity Revisited*, 50 BUS. LAW. 663 (Feb. 1995). Freeman argues that section 107(a) of CERCLA could not meet the test of the statutory construction offered in Justice Stevens' majority opinion in *Landgraf*. *See id.* at 665. Moreover, Freeman claims that neither the text of the statute nor the legislative history could support the retroactive application. *See id.* [Return to text.](#)

[80] 927 F. Supp. at 1508. Judge Hand cites the Plaintiffs Memorandum on the Retroactivity of CERCLA and Due Process Issues. The plaintiff maintains that "[e]very court to face CERCLA retroactivity challenges has rejected the arguments advanced here. Indeed, courts have uniformly held that (1) Congress clearly and unequivocally intended retroactive application of CERCLA; and (2) such a liability scheme is rationally related to a legitimate governmental interest." *Id.* [Return to text.](#)

[81] *See id.* [Return to text.](#)

[82] *Id.* Judge Hand cites the following cases: *United States v. South Carolina Recycling & Disposal, Inc.*, 653 F. Supp. 984 (D.S.C. 1984), *aff'd in part and vacated in part*, 858 F.2d 160 (4th Cir. 1988), *cert. denied*, 490 U.S. 1106 (1989); *United States v. Diamond Shamrock Corp.* No. C80-1857, 1981 WL 137997, at *1 (N.D. Ohio May 29, 1981); *United States v. Price*, 523 F. Supp. 1055 (D.N.J. 1981), *aff'd*, 688 F.2d 204 (3d Cir. 1982). *South Carolina Recycling*

concluded that the act was not "retroactive," but applied CERCLA on the theory that because the previous disposal continued to cause or threatened to cause releases after the Act's effective date. *See* 653 F. Supp. at 984. [Return to text.](#)

[83] *Id.* [Return to text.](#)

[84] *Id.* [Return to text.](#)

[85] *Id.* at 1508-09. Judge Hand argues that *Landgraf* destroys the interpretive premises of previous cases by "attempting to clarify confusion regarding the interpretive rules applicable to retroactivity." *Id.* at 1508. "Our precedents on retroactivity left doubts about what default rule would apply in the absence of congressional guidance, and suggested that some provisions might apply to cases arising before enactment while others might not." *Id.* (comparing *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204 (1988) with *Bradley v. Richmond Sch. Bd.*, 416 U.S. 696 (1974)). The court continues: "In reaffirming the traditional presumption against retroactive legislation, *Landgraf* disproves language in *Bradley* which had appeared to reverse that traditional presumption." *Id.* at 1508-09. *Bradley* allowed an award of attorneys' fees "on the principle that a court is to apply the law in effect at the time it renders its decision, unless doing so would result in a manifest injustice or there is a statutory direction or legislative history to the contrary." 416 U.S. at 711. Furthermore, the *Landgraf* court states that "[a]lthough the language suggests a categorical presumption in favor of application of all new rules of law, we now make it clear that *Bradley* did not alter the well-settled presumption against application of the class of new statutes that would have genuinely 'retroactive' effect." *Landgraf*, 511 U.S. at 277. [Return to text.](#)

[86] Judge Hand claims that the court in *Georgeoff* "did exactly what *Landgraf* disapproves. *Georgeoff* began quite appropriately by 'initially determin[ing] the standard to be applied in determining whether a statute should be applied retroactively.'" 927 F. Supp. at 1509 (citing *Georgeoff*, 562 F. Supp. at 1306). [Return to text.](#)

[87] *Olin*, 927 F. Supp. at 1508. [Return to text.](#)

[88] *See id.* In a footnote, Judge Hand recounts the *Georgeoff* court's explanation of the presumption.

Since the principal basis for the presumption against retroactivity is the threat of raising a constitutional issue, the reduction of that constitutional issue must necessarily reduce the need to interpret CERCLA to avoid raising that constitutional issue. *The weight of the presumption therefore being reduced*, a more lenient approach in reviewing claims that the presumption has been over-ridden may be appropriate. After *Thorpe* and *Bradley*, the presumption against retroactivity has arguably been changed to a presumption in favor of retroactivity. That presumption can only be over-ridden where there is a clear legislative directive to limit the statute to a prospective application or the change in law would cause manifest injustice to the party adversely affected.(emphasis added).

Id. at 1507, n. 9. [Return to text.](#)

[89] *Id.* at 1509. [Return to text.](#)

[90] *See id.* Judge Hand states that "the rest of the cases basically rely on one or more of these three cases and other cases which cite these cases." *Id.* at 1509. [Return to text.](#)

[91] 605 F. Supp. at 1064. [Return to text.](#)

[92] 810 F.2d 726 (8th Cir. 1986). [Return to text.](#)

[93] *See* 605 F. Supp. at 1072; 810 F.2d at 733. [Return to text.](#)

[94] *See Olin*, 927 F. Supp. at 1509. First, Judge Hand states that "neither case explains how it is applying the presumption against retroactivity; but like *Georgeoff*, both cases demonstrate little regard for the presumption." *Id.* Judge Hand recognizes that the *Shell Oil* court analyzes the statutory provisions as well as the "general scheme and purpose" of CERCLA, and the court concludes that CERCLA is "unavoidably retroactive." 605 F. Supp at 1073. Judge Hand also cites *Landgraf* stating "that retroactive application of a new statute would vindicate its purpose more fully . .

. is not sufficient to rebut the presumption against retroactivity." *Landgraf*, 511 U.S. at 285-86. Judge Hand further criticizes the court in *Shell* because "[o]ther than its discussion of 'general purpose and scheme,' *Shell Oil* does not explain precisely what overrides the presumption against retroactivity." 927 F. Supp. at 1509. In regard to *Northeastern Pharma ceutical*, Judge Hand maintains that the case "treats the presumption itself lightly, devotes only one sentence to the statutory language, relies on *Shell Oil* and *Georgeoff* among other cases, and offers one paragraph about the statutory scheme." *Id.* at 1510. In a footnote, Judge Hand offers the discussion of the presumption by the Court in *Northeastern Pharmaceutical*:

The district court correctly found Congress intended CERCLA to apply retroactively. (citation omitted). We acknowledge there is a presumption against the retroactive application of the statutes. *See* *United States v. Security Industrial Bank*, 459 U.S. 70, 79 (1982). We hold, however, that CERCLA §302(a), is "merely a standard 'effective date' provision that indicated the date when an action can first be brought and when the time begins to run for issuing regulations and doing other future acts mandated by the statute." *United States v. Shell Oil Co.*, 605 F.Supp. 1064, 1075 (D. Colo. 1985); *cf. Von Allmen v. Conn.t Teachers Retirement Bd*, 613 F.2d 356, 359-60 (2d Cir. 1979) (veterans statute).

Although CERCLA does not expressly provide for retroactivity, it is manifestly clear that Congress intended CERCLA to have retroactive effect. The language used in the key liability provision, CERCLA §107, 42 U.S.C. § 9607, refers to actions in the past tense: "any persons who . . . at the time of disposal of any hazardous substances owned or operated," CERCLA § 107(a)(2), 42 U.S.C. § 9607(a)(2), "any person who arranged with a transporter for transport of disposal," CERCLA § 107(a)(3), 42 U.S.C. § 9607(a)(3), and "any person who . . . accepted any hazardous substances for transport to . . . sites selected by such person," CERCLA § 107(a)(4), 42 U.S.C. § 9607(a)(4).

Further, the statutory scheme itself is overwhelmingly remedial and retroactive. CERCLA authorizes the EPA to force responsible parties to cleanup inactive or abandoned hazardous substance sites, CERCLA § 106, 42 U.S.C. § 9606, and authorizes federal, state, and local governments and private parties to cleanup such sites and then seek recovery of their response costs from, responsible parties, CERCLA § 104, 107, 42 U.S.C. § 9604, 9607. In order to be effective, CERCLA must reach past conduct. CERCLA's backward looking focus is confirmed by the legislative history. . . .

Id. at 1510. [Return to text.](#)

[95] *Id.* [Return to text.](#)

[96] *Id.* at 1510-11. As support for this claim that *Landgraf* has an impact on *Olin*, Judge Hand offers the following footnote: "*See also* Leonard Charles, *The Civil Rights Act of 1991, Retroactivity, and Continuing Violations*, 28 U. RICHMOND L. REV. 1363 (1994) ("Prior to *Landgraf*, the Court had utilized two conflicting presumptions regarding the retroactivity of civil legislation."). *See* Nelson Lund, *Retroactivity, Institutional Incentives, and the Politics of Civil Rights*, 1995 PUB. INT. L. REV. 87 (1995); Duncan B. Hollis, *Employment Discrimination Law, Statutory Retroactivity*, 36 B.C. L. REV. 373, 385 (1995) ("Beyond the scope of the § 1981 cases, however, *Rivers*, in conjunction with *Landgraf*, does much to resolve the confusion surrounding what test a court should apply when a case implicates a statute enacted after the violative conduct occurred."). [Return to text.](#)

[97] 927 F. Supp. at 1511. While Judge Hand summarized the analysis, he also included major portions of the opinion. *See id.* at 1510-12. [Return to text.](#)

[98] *Id.* at 1512. [Return to text.](#)

[99] *See id.* at 1512-13. First, Judge Hand simply states, "CERCLA contains no language explicitly stating that it is retroactive." *Id.* at 1512. However, he acknowledges that *Landgraf's* "discussion of other (i.e., non-express) statutory language and legislative history establishes that these should be considered in determining congressional intent." *Id.* at 1512. Therefore, Judge Hand examines the non-express statutory language.

Because *Landgraf* instructs that answers to retroactivity issues can vary among the provisions, Judge Hand examines sections 106(a) and 107(a). First, in regard to section 106(a), Judge Hand states that "[a]lthough injunctive relief is ordinarily prospective, when it requires a party to spend funds related to actions taken prior to CERCLA's enactment,

such relief is nevertheless retroactive. Thus to the extent that the government's claims under 106(a) and 107(a) relate to actions taken prior to the effective date of CERCLA, they involve the issue of retroactivity." *Id.* at 1512-13.

Moreover, Judge Hand maintains that the Justice Department relies only on *Northeastern Pharmaceutical's* observation, citing that "[t]he language used in the key liability provision, CERCLA § 107 . . . refers to actions and conditions in the past tense." 810 F.2d at 733. In contrast, the Court proffers the decision in *Georgeoff*.

Despite these statutory arguments, the Court is unable to declare that the statute evidences the 'imperative character' required to overcome the presumption against retroactivity. Regardless, these provisions provide some evidence that Congress intended CERCLA to apply retroactively. The Court, therefore, will consider these statutory terms indicia, of a Congressional intent to allow retroactive application of CERCLA.

562 F. Supp. at 1311.

Judge Hand next states that the court in *Shell Oil* agrees with *Georgeoff's* decision that "the statutory language in CERCLA is not sufficient to establish retroactivity . . ." *Id.* at 1513. Therefore, the Court concludes that "the language of Section 107 provides 'no clear evidence of Congressional intent,' as required by *Landgraf*, that CERCLA's liability provisions be given retroactive effect." 927 F. Supp. at 1513.

Furthermore, Judge Hand states that Section 106 "contains no language indicating congressional intent to authorize relief that is retroactive." *Id.* The Justice Department argues that, "although it reaches pre-enactment conduct, legislation designed to alleviate a continuing public nuisance does not act retroactively." 562 F. Supp. at 1304. However, *Landgraf* rules out this attempt to dodge the issue of retroactivity. [Return to text.](#)

[100] *See Olin*, 927 F. Supp. at 1513-16. Judge Hand initially states that "CERCLA itself has almost no legislative history." *Id.* at 1513. He relies on arguments from Frank P. Grad, *Treatise on Environmental Law* Sec. 4A.02[2][a], at 4A-51 (1994). *See id.* at 1514. Grad states, "the actual bill which became Public Law No. 96-510 had virtually no legislative history at all" and that most of CERCLA's legislative history comes from "bills introduced which contributed to some extent to the final act." *Id.*

The Court acknowledges that in *Landgraf*, it considered a previous bill as part of legislative history. More importantly, the Court in *Landgraf* strongly regarded the fact that a bill that had explicitly provided for retroactivity has been vetoed the previous year. Because the later legislation did not contain the explicit provision for retroactivity, the *Landgraf* court inferred that "it seems likely that one of the compromises that made it possible to enact the 1991 version was an agreement not to include the kind of explicit retroactivity command found in the 1990 bill." *Landgraf*, 511 U.S. at 262.

Moreover, Judge Hand recognizes that the court in *Georgeoff* stated, "the precise issue of retroactivity . . . was not addressed in Congressional debates." 562 F. Supp. at 1311. The Justice Department highlights that one of the differences between CERCLA and the civil rights statute examined in *Landgraf* is that no other bill before CERCLA explicitly supported retroactivity. *See* 927 F. Supp. at 1508. Judge Hand responds to this argument by stating the absence of a vetoed bill discussing retroactivity "does not strengthen the case for retroactivity. It only means that what Justice and other courts have labeled the legislative history of CERCLA may not be as clear as was the legislative history of the Civil Rights Act considered in *Landgraf*." *Id.* at 1514. In an attempt to demonstrate clear intent of CERCLA's retroactivity, the Justice Department argues that the "history, as analyzed by the courts, demonstrates unequivocally that Congress was concerned about the past, pre-enactment acts of disposal." *Id.*

However, Judge Hand dismisses the Justice Department's argument by stating the following:

The argument of the Justice, relying as it does on past cases, fails to overcome the presumption against retroactivity because those prior cases do not follow the analysis of *Landgraf* and because they find clarity in legislative history which does not exist. Many of the past cases are unclear about two things which are distinguished in *Landgraf*: congressional intent and retroactive effect. As discussed below, *Landgraf* struggles with the term 'retroactive.' The majority excludes certain statutes from the presumption against retroactivity, specifically procedural and jurisdictional statutes.

511 U.S. at 244.

Approving of Justice Story's discussion in *Society for Propagation of the Gospel v. Wheller*, 22 F.Cas. 756 (No. 12, 156) (CCDNH 1814), the majority states that "[a] statute does not operate 'retroactively' merely because it is applied in a case arising from conduct antedating the statute's enactment . . ." 511 U.S. at 269. In other words, the fact that legislation might have retroactive effect does not necessarily mean that Congress clearly intended it to be so applied. [Return to text.](#)

[101] 927 F. Supp. at 1516. [Return to text.](#)

[102] *See id.* [Return to text.](#)

[103] *Id.* [Return to text.](#)

[104] *Id.* The Court continues by stating that "the Justice Department's attempt in this case to impose liability under § 107(a) largely on actions occurring prior to the statute's effective date 'would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed.'" *Id.* at 1516. [Return to text.](#)

[105] *See id.* Judge Hand states that "[w]hat *Landgraf* said about compensatory damages can be said about the financial liabilities under CERCLA for pre-enactment conduct: [t]he new damages remedy in Sec. 102, we conclude, is the kind of provision that does not apply to events antedating its enactment in the absence of clear congressional intent." *Id.* [Return to text.](#)

[106] *Id.* at 1516-19. [Return to text.](#)

[107] *Landgraf*, 511 U.S. at 280. The Court focuses on a particular section and then "distinguishes between a procedural provision of that section (jury trial right) which would 'presumably apply to cases . . . regardless of when the underlying conduct occurred,' and its punitive and compensatory damages provision." *Id.* at 281. While the *Landgraf* court interpreted punitive damages not to be retroactive, the court struggled with classifying the provision that authorized the recovery of compensatory damages because the "conduct itself was already unlawful—only the remedy was new. . . despite the differences between the compensatory damages provision." 927 F. Supp. at 1517. [Return to text.](#)

[108] *See Olin*, 927 F. Supp. at 1516. According to Judge Hand,

"§ 106 does provide for fines for failure to comply with an executive branch abatement order; such fines are clearly punitive. Section 107(c)(3) also authorizes punitive, treble damages. The EPA uses the threat of punitive damages as a negotiating tool. Given the very real threat of punitive damages, CERCLA retro activity poses very nearly the same 'ex post facto' danger referred to in *Landgraf*."

Id. at 1517. "According to *Landgraf*, a provision for punitive damages should not be construed as retroactive unless the language forces that conclusion." *Id.* at 1517. [Return to text.](#)

[109] *Id.* at 1516. [Return to text.](#)

[110] *Id.* The court in *Olin* stated "even on the compensatory damages issue, *Landgraf* says, 'it is the kind of provision that does not apply in the absence of clear congressional intent.' Certainly, under *Landgraf* principles, CERCLA liability is the kind that does not apply retroactively without clear congressional intent." *Id.* at 1517. [Return to text.](#)

[111] *Id.* [Return to text.](#)

[112] *Id.* at 1518. [Return to text.](#)

[113] *See id.* First, the court cites *Landgraf*, stating that "compensatory damages are quin tessentially backward-looking. Compensatory damages may be intended less to sanction wrongdoers than to make victims whole, but they do so by a

mechanism that affects the liabilities of defendants. They do not 'compensate' by distributing fund from the public differs, but by requiring particular employers to pay for harms they caused." *Id.* Second, the court again cites *Landgraf*, stating that the fact that "retroactive application of [this] statute would its purpose more fully . . . is not sufficient to rebut the presumption against retroactivity." *Id.* at 1518 (citing 511 U.S. at 285-86). [Return to text.](#)

[114] The court claims that only one sentence, in isolation, provides support for the Justice Department's argument. "Section 102 is plainly not the sort of provision that must be understood to operate retroactively because a contrary reading would render it ineffective." *Id.* at 1518. Judge Hand further acknowledges that Congress addresses present as well as future problems. *See id.* However, the court makes the following argument:

It does not follow . . . that the liability provision 'must be interpreted to be retroactively because a contrary reading would render it ineffective.' The Court continues by stating that in regard to pre-enactment releases. "the purpose of CERCLA can be covered through the Superfund. The EPA, however, has chosen to recover as much as possible from private parties, no doubt in part due to Congress' failure to provide sufficient resources to pay for cleaning all the sites, even as the need was thought to be in 1980. *See Georgeoff*, 562 F.Supp. at 1312-13. While *Georgeoff* takes the lack of funding as an indication of congressional intent to make CERCLA retroactive, lack of funding does not render the operation of the statute itself ineffective in the sense used in *Landgraf*.

Id. [Return to text.](#)

[115] 927 F. Supp. at 1519. [Return to text.](#)

[116] *Id.* [Return to text.](#)

[117] *See id.* at 1502; *Landgraf*, 511 U.S. at 244. [Return to text.](#)

[118] *See id.* [Return to text.](#)

[119] *See supra* notes 33-54, and accompanying text for a discussion of cases decided before the reauthorization of CERCLA. [Return to text.](#)

[120] *See id.* [Return to text.](#)

[121] 925 F. Supp. 691 (D.Nev. 1996). [Return to text.](#)

[122] *Id.* at 704 (citing *Shell Oil*, 605 F. Supp. at 1072). [Return to text.](#)

[123] *Id.* at 693. The earlier cases that the court refers to include *Bradley v. Richmond School Board*, 416 U.S. 696 (1969) (authorizing application of statutory attorney's fees provision to a prevailing party in litigation commenced before the provision's effective date) and *Thorpe v. Hous. Auth. of Durham*, 393 U.S. 268 (1969) (authorizing application of a regulation requiring local housing authority to give pre-eviction notice of reasons and opportunity to an eviction commenced before issuance of the regulation). *See Landgraf*, 511 U.S. at 276-80. [Return to text.](#)

[124] 925 F. Supp. at 693. [Return to text.](#)

[125] *Id.* at 694 ("Congress implicitly authorized retroactive application of the third category of liability, damages to natural resources, section 107(a)(4)(C).") (quoting *Shell Oil*, 605 F. Supp at 1076)). In contrast, *Olin* does not specifically address this section of *Shell*. [Return to text.](#)

[126] *Id.* at 695 ("[T]he distinction between retroactive damages liability and retroactive response cost liability was maintained in the final version of CERCLA as the §§ 107(f) and 111(d) limitations on recovery of natural resource damages."). [Return to text.](#)

[127] *See generally Shell Oil*, 605 F. Supp at 1064-86. [Return to text.](#)

[128] *Atlantic Richfield*, 925 F. Supp at 695 (citing *Shell Oil*, 605 F. Supp. at 1064, 1069, 1076-77). [Return to text.](#)

[129] *Id.* As support for this conclusion, Judge Hagen offered the following footnote:

See, e.g., Colloquy between Senators Stafford and Hart in Senate Debate on S. 1480, Nov. 24, 1980 (noting term "hazardous substances" in S. 1480 will cover existing abandoned radium-contaminated sites in Colorado); Remarks of Rep. Vento in House Debate on S. 1480, Dec. 3, 1980 (noting bill is designed in part "to cleanup our environment from past improperly disposed of hazardous wastes;" delay in passage of bill will "prolong the overall danger"); Remarks of Rep. Fisher in House Debate on S. 1480, Dec. 3, 1980 (noting bill will deal with "problems of toxic waste disposed of years ago"); Remarks of Rep. Martin in House Debate on S. 1480, Dec. 3, 1980 ("[A]bandoned orphaned collection of unlabeled crud . . . will not clear themselves up"); Remarks of Rep. Lent in House Debate on S. 1480, Dec. 3, 1980 (noting RCRA contains a gap "respecting the past disposal of chemical wastes . . . it is necessary to enact legislation to assist in the cleaning of these sites"); Remarks of Rep. LaFalce in House Debate on S.1480, Dec. 3, 1980 (noting bill "deal[s] with the problem of abandoned waste sites"); Remarks of Rep. Gore in House Debate on S. 1480, Dec 3, 1980 (pointing out that 3000 abandoned hazardous chemical waste sites in the U.S. "need to be dealt with"); Remarks of Rep. Brown in House Debate on S. 1480, Dec. 3, 1980 (establishing that in contrast to other environmental legislation, this bill deals with "who pays for cleaning up the environmental mess we have created"); Statement of Sen. Muskie ("Our present laws are not enough . . . We must correct those omissions in the law having to do with past hazardous waste disposal methods."); Letter, September 25, 1979, from Douglas M. Costle, Admin., U.S.E.P.A., to Jennings Randolph, Chairman, Senate Committee on Environment and Public Works, *reprinted in* S. Rep. No. 96-848, July 11, 1980 (providing for response at "abandoned and inactive" sites; bill "would establish liability for costs expended by the government to cleanup past disposal practices that today are threatening public health and the environment"; liability provisions are not retroactive because "they merely codify longstanding common law rules relating to liability for hazardous products and undertakings"); S. Rep. No. 96-848, July 11, 1980, additional Views of Senators Domenici, Bentsen, and Baker ("S. 1480 . . . substantially chang(es) existing common law (in some cases retroactively)").

Id. at 695 n.8. [Return to text.](#)

[130] 933 F. Supp. 431 (M.D. Pa. 1996). [Return to text.](#)

[131] *See id.* at 438. The Court came to the following conclusion:

[*Olin*] is the only Court to date to hold that CERCLA does not apply retroactively. Several courts, including the Third Circuit, have addressed the issue of CERCLA's retroactivity. *See In the Matter of Penn Central*, 944 F.2d 164 (3rd Cir. 1991). Furthermore, all of the cases this Court has cited in rejecting Defendants liability arguments have applied CERCLA retroactively without formally ruling on the issue. Accordingly, we are unpersuaded by a single Alabama District Court case which is surrounded by a myriad of opinions that apply CERCLA retroactively, either directly or implicitly. Thus, we will reject Defendants arguments on retroactivity grounds.

Id. [Return to text.](#)

[132] 96 F.3d 1434 (3d. Cir. 1996), *cert. denied*, 117 S. Ct. 2479 (1997). [Return to text.](#)

[133] *1 Federal Court Upholds Retroactive Application of Superfund; Holds Alcan Corp Liable for 1985 Oil Slick*, DOJ NEWS RELEASE, available in 1996 WL 481778. [Return to text.](#)

[134] 790 F. Supp. 1255 (E.D. Pa. 1992). [Return to text.](#)

[135] *See id.* This case examined several factors similarly to *Olin*. *See id.* First, the Court found that CERCLA's express language supports a finding of clear congressional intent to apply CERCLA retroactively. *See id.* The Court specifically found persuasive the past tense language used in 42 U.S.C. § 9607(a)(2), (a)(3), and (a)(4). Next, the court made the following ruling:

The legislative history of CERCLA supports a finding that Congress intended CERCLA to apply retroactively. The fact that inactive sites are discussed separately from new sites and the fact that inactive sites are discussed first suggests to this Court 1) that the existence of inactive sites such as Love Canal prompted Congress to pass CERCLA, and 2) that

CERCLA was intended to impose liability on those parties responsible for such inactive sites. To effectuate this result, CERCLA must be applied retroactively. To find otherwise would be to ignore a significant portion of the legislative history of the Act. Moreover, a contrary finding would frustrate the primary purpose of the Act.

Id. [Return to text.](#)

[136] 107 F.3d 1506 (1997) [hereinafter *Olin II*]. [Return to text.](#)

[137] *See id.* at 1510 ("[A]lthough Congress did not include in CERCLA either legislative findings or a jurisdictional element, the statute remains valid as applied in this case because it regulates a class of activities that substantially affects interstate commerce."). *Id.* [Return to text.](#)

[138] *See id.* The government argued that the issue was "releases of hazardous substances generally." *Id.* [Return to text.](#)

[139] *Id.* [Return to text.](#)

[140] *See id.* at 1510-11. The court only references *Lopez* when concluding that "the regulation of intrastate, on-site waste disposal constitutes an appropriate element of Congress' broader scheme to protect interstate commerce and industries thereof from pollution." *Id.* at 1511. [Return to text.](#)

[141] *See id.* at 1514. [Return to text.](#)

[142] *Id.* [Return to text.](#)

[143] 94 F.3d 1489 (11th Cir. 1996) (holding against original property owner already held responsible for cleanup costs under CERCLA in action against general and limited partners of current owner). [Return to text.](#)

[144] 85 F.3d 1514 (11th Cir. 1996) (deciding that the district court was correct in granting summary judgment in favor of manufacturers who were sued under CERCLA by buyer because electrical transformers contained polychlorinated biphenyls (PCBs)). [Return to text.](#)

[145] 84 F.3d 402 (11th Cir. 1996) (concluding that landowners who contracted for pesticide aerial spraying were not liable since they did not arrange for disposal as defined under CERCLA). [Return to text.](#)

[146] *Olin II*, 107 F.3d at 1511. [Return to text.](#)

[147] *See* Allan Freedman, *With Bipartisan Deal Elusive, Superfund Effort Dies*, 54 CONG. Q. WKLY. REP. 2044 (1996) [hereinafter Freedman I]. [Return to text.](#)

[148] *See id.* [Return to text.](#)

[149] *See* Allan Freedman, *GOP Woos Democrats in Talks Over New Superfund Plan*, 54 CONG. Q. WKLY. REP. 614 (1996). [Return to text.](#)

[150] *See Issue: Superfund*, 54 CONG. Q. WKLY. REP. 31 (1996). [Return to text.](#)

[151] *See* S. 1285, 104th Cong. § 701(b) (1995).

(iv) NO RETROACTIVE LIABILITY—

(I) Compensatory Restoration—There shall be no recovery from any person under of this section of the costs of compensatory restoration for a natural resource injury, destruction, or loss that occurred prior to December 11, 1980.

(II) Primary Restoration—There shall be no recovery from any person under this section for the costs of primary restoration if the natural resource injury, destruction, or loss for which primary restoration is sought and release of the hazardous substance from which the injury resulted occurred wholly before December 11, 1980.

Id. [Return to text.](#)

[152] See Allan Freedman, *Senate Plan Would Shift Costs, Narrow Scope of Superfund*, 53 CON. Q. WKLY. REP. 1923 (1995) [hereinafter Freedman II]. [Return to text.](#)

[153] See S. 1285, 104th Cong. § 501 (1995).

(B) CONDUCT PRIOR TO DECEMBER 11, 1980—

IN GENERAL—For any mandatory allocation facility that is otherwise excluded by subparagraph (A), an allocation process shall be conducted for the sole purpose of determining the percentage share of responsibility attributable to activity of each potentially responsible party prior to December 11, 1980.

Id. § 501(b).

(k) EQUITABLE FACTORS FOR ALLOCATION—The allocator shall prepare a non-binding allocation of percentage shares of responsibility to each allocation party and to the orphan share, in accordance with this section and without regard to any theory of joint and several liability based on—

(1) the amount of hazardous substances contributed by each allocation party; (2) the degree of toxicity of hazardous substances contributed by each allocation party; (3) the mobility of hazardous substances contributed by each allocation party; (4) the degree of involvement of each allocation party in the generation, transportation, treatment, storage, or disposal of hazardous substances; (5) the degree of care exercised by each allocation party with respect to hazardous substances, taking into account the characteristics of the hazardous substances; (6) the cooperation of each allocation party in contributing to any response action and in providing complete and timely information to the allocator; and (7) such other equitable factors as the allocator determines are appropriate.

Id. § 501(k). [Return to text.](#)

[154] See Freedman II, *supra* note 152, at 1923. [Return to text.](#)

[155] S. 1285, 104th Cong. § 701(c)(4) (1995).

(3) SELECTION OF RESTORATION METHOD—

When selecting appropriate restoration measures, including natural recovery, a trustee shall select the most cost-effective method of achieving restoration.

Id. [Return to text.](#)

[156] See Freedman II, *supra* note 152, at 1923. [Return to text.](#)

[157] S. 1285, 104th Cong. § 802 (1995).

(A) LIMITATION—

During each of the 3 12-month periods following the date of enactment of this subsection, the Administrator may add not more than 30 new vessels and facilities to the National Priorities List.

(B) PRIORITIZATION—

The Administrator shall prioritize the vessels and facilities under the subparagraph (A) on a national basis in accordance with the threat to human health and the environment presented by each of the vessels and facilities, respectively.

Id. [Return to text.](#)

[158] *See* Freedman II, *supra* note 152, at 1923. [Return to text.](#)

[159] S. 1285, 104th Cong. § 201(a) (1995).

(A) NONCOMPREHENSIVE DELEGATION STATES—

A non-comprehensive delegation State shall implement each applicable provision of this Act (including regulations and guidance issued by the Administrator) so as to perform each delegated authority with respect to a delegated facility in the same manner as would the Administrator with respect to a facility that is not a delegated facility.

(B) COMPREHENSIVE DELEGATION STATES—

(i) IN GENERAL—A comprehensive delegation State shall implement applicable provisions of this Act or of similar provisions of State law in a manner comporting with State policy, so long as the remedial action that is selected protects human health and the environment to the same extent as would a remedial action selected by the Administrator under Section 121.

Id. [Return to text.](#)

[160] *See* Allan Freedman, *Oxley Treads a Fine Line in Revising Superfund*, 53 CONG. Q. WKLY. REP. 2990 (1995) [hereinafter Freedman III]. [Return to text.](#)

[161] *See* H.R. 2500, 104th Cong. § 202(a) (1995).

(A) EXEMPTION FROM LIABILITY—Subject to subparagraph (B), no person (other than the United States or a department, agency or instrumentality of the United States) shall be liable for costs or damages referred to in subsection (a) with respect to a release or threatened release of a hazardous substance from a facility that—

(i) on June 15, 1995, was listed on the National Priorities list; and

(ii) on or before June 15, 1995, was authorized by the appropriate State or local government to accept, and did accept for disposal household waste (from single and multiple dwellings, hotels, motels, and other residential sources).

Id. [Return to text.](#)

[162] *See* Freedman III, *supra* note 160, at 2990. [Return to text.](#)

[163] *See* H.R. 2500, 104th Cong. § 203(a) (1995).

(1) DE MINIMIS CONTRIBUTOR EXEMPTION FROM RETROACTIVE LIABILITY—In the case of a facility or vessel not owned by the United States listed on the National Priorities List, no person described in paragraph (3) or (4) or sub section (a) (other than the United States or a department, agency or instrumentality of the United States) shall be liable under subsection (a) for any costs under this section if no activity of such person described in such paragraph (3) or (4)—

(A) occurred after January 1, 1987, and

(B) resulted in the disposal or treatment of more than 1 percent of the volume of materials containing hazardous substances at such facility or vessel.

Id. [Return to text.](#)

[164] *See* Allan Freedman, *Businesses May Escape Cleanup Costs*, 53 CONG. Q. WKLY. REP 2174 (1995). [Return to text.](#)

[165] See Freedman II, *supra* note 152, at 1923. [Return to text.](#)

[166] See Freedman III, *supra* note 160, at 2990. [Return to text.](#)

[167] See H.R. 2500, 104th Cong. § 201(a) (1995).

(g) REIMBURSEMENT FOR RETROACTIVE LIABILITY—(1) In the case of a facility or vessel not owned by the United States listed on the National Priorities Lists, a person (other than the United States or any department, agency, or instrumentality of the United States) shall be eligible for reimbursement from the Fund for 50 percent of any costs referred to in Section 107(a) paid or incurred by such person after October 18, 1995, to the extent that—

(A) such person's liability under Section 107 is attributable to a status or activity of such person (as described in paragraph (1), (2), (3), or (4) of subsection (a) that existed or occurred prior to January 1, 1987, and

(B) such costs are attributable to response activities carried out after October 18, 1995.

Id. [Return to text.](#)

[168] See *id.* [Return to text.](#)

[169] See Allan Freedman, *Superfund Negotiators Hope For Bipartisan Compromise*, 54 CONG. Q. WKLY. REP. 1041 (1996). [Return to text.](#)

[170] See *Issue: Superfund*, 54 CONG. Q. WKLY. REP. 2440 (1996). [Return to text.](#)

[171] See Freedman I, *supra* note 147, at 2044 (1996). [Return to text.](#)

[172] See *id.* [Return to text.](#)

[173] See *id.* [Return to text.](#)

[174] See David Hosansky, *President Expected To Travel Center Lane to 21st Century*, 54 CONG. Q. WKLY. REP. 3222 (1996). [Return to text.](#)

[175] See *id.* [Return to text.](#)

[176] See *id.* at 3224. [Return to text.](#)

[177] See *id.* [Return to text.](#)

[178] See Allan Freedman, *President Expected To Travel Center Lane to 21st Century*, 54 CONG. Q. WKLY. REP. 2818 (1996). [Return to text.](#)

[179] Senate Bill 8, the Superfund Cleanup Acceleration Act, was introduced before the Senate on January 21, 1997, by Senator Bob Smith and his co-sponsor, Senator John Chafee of Rhode Island. See *Bill Introduces Fair-Share Cleanup Liability*, 4 INS REG 9, available in 1997 WL 7880063. [Return to text.](#)

[180] See *id.* [Return to text.](#)

[181] See Miles Moore, *GOP Makes 2nd Try at Superfund Reform*, TIRE BUS., Feb. 3, 1997. [Return to text.](#)

[182] See *Bill Summary & Status for the 105th Congress* (visited January 4, 1998) . As of Sept. 4, 1997, hearings on Senate Bill 8 were occurring in the Committee on Environment and Public Works. See *id.* [Return to text.](#)

[183] See H.R. 3000, 105th Cong. (1997). Thirty-nine representatives co-sponsored this bill. See *id.* Including this bill

and Senate Bill 8, members of Congress have introduced at least fifteen other bills to amend CERCLA. *See Bill Summary & Status for the 105th Congress*, (viewed Jan. 17, 1998) . [Return to text.](#)

[184] *See id.* § 201(a). In addition, this bill absolves of liability certain owners or operators who acquired the contaminated facility by inheritance or bequest. It also limits liability for certain owners or operators who are tax-exempt organizations and certain municipalities and other owners of National Priority Listed landfills. The bill exempts from liability: (1) construction contractors whose liability is based solely on a contracted construction activity at the facility; (2) certain railroad owners or operators of spur tracks; or (3) persons whose liability is based on a status as a holder of a pipeline right-of-way or easement or of a gas or oil lease if such a person does not cause or contribute or consent to the release or threat of release. *See id.* [Return to text.](#)

[185] *See Bill Summary & Status for the 105th Congress* (visited January 4, 1998) . On Nov. 9, 1997 the bill was referred to the Committee on Commerce, the Committee on Transportation and Infrastructure, and Ways and Means. *See id.* [Return to text.](#)

[186] "I would like to eliminate retroactive liability It is 'fundamentally un-American I will die hard on this issue,' says Representative Shuster." Mark Hoffman, *Superfund Reform Redux: Calls to Repeal Retroactive Liability Continue*, *Legislators Say*, 2 BUS. INS., 1997 WL 8293787. [Return to text.](#)

[187] *See Freedman I, supra* note 147, at 2044. [Return to text.](#)

[188] *See id.* [Return to text.](#)

[189] *See id.* [Return to text.](#)

[190] Rep. Archer, Chair of the House Ways & Means Comm., said that he will do what he can to ensure that taxes to refinance the Superfund will not be re-authorized until the program has been completely reformed. *See Hoffman, supra* note 186. [Return to text.](#)

[191] *See Freedman I, supra* note 147, at 2044. [Return to text.](#)

[192] *See id.* [Return to text.](#)

[193] *See id.* [Return to text.](#)

[194] *See infra* note 200 and accompanying text. [Return to text.](#)

[195] *See Tucker, supra* note 76, at C1. [Return to text.](#)

[196] *See id.* [Return to text.](#)

[197] *See id.* [Return to text.](#)

[198] *See Allan Freedman, Superfund Cleanup*, 54 CONG. Q. WKLY. REP. 544 (1996). [Return to text.](#)

[199] *See Allan Freedman, Superfund Rewrite Focuses on Retroactive Liability*, 53 CONG. Q. WKLY. REP. 1173 (1995). [Return to text.](#)

[200] *See id.* [Return to text.](#)

[201] *See Allen Freedman, Administration Opposes GOP's Superfund Bill*, 54 CONG. Q. WKLY. REP. 1167 (1996). [Return to text.](#)

"WHO YA GONNA C(S)ITE?" GHOSTBUSTERS AND THE ENVIRONMENTAL REGULATION DEBATE

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I. INTRODUCTION

Ghostbusters,^[1] the phenomenally successful^[2] Bill Murray/Harold Ramis/Dan Ackroyd comedy is generally considered to be an amusing takeoff on horror films of the thirties and forties, a kid's movie, or a satire on academia, intellectuals, city government, yuppies, tax professionals, and apathetic New Yorkers.^[3] What no one has considered this movie to be is a thoughtful introduction to environmental law and policy, suitable for discussion in a law school class,^[4] or a serious examination of the competing interests in the environmental regulation debate. Yet, the film's premise is that ghosts, like television advertising, marshmallows, and non-biodegradable packaging materials, can be classed as pollutants—messy, disruptive, loud, dangerous entities that need to be rounded up effectively and confined forever.^[5] Further, a government's inability to admit that an environmental danger, represented here by psychic pollutants, might exist^[6] increases the likelihood that such a danger may damage the environment, just as the government's unwillingness to recognize the true dangers of the pollutants at Love Canal put nearby inhabitants at risk.^[7] Thus, the film contends that the traditional reaction of the independent-thinking American to a danger which government is unable or unwilling to respond to is a kind of justified vigilantism. Too much government, like too much dependence on government, creates an environment suitable for disaster.

Discussion of this theme serves as an entertaining and stimulating entrée into the world of environmental law.^[8] Unlike such films as *Incident at Dark River*,⁹ *C.H.U.D.*,^[10] *Silkwood*,^[11] *Dead Ahead: The Exxon-Valdez Story*,^[12] *Chernobyl: The Final Warning*,^[13] and *The China Syndrome*,^[14] which depict the impact widespread pollution and the misuse of chemicals and radiation may have on everyone,^[15] *Ghostbusters* demonstrates the impact of concentrating massive amounts of waste in a small area to allow the greatest good for the greatest number. The vapors, entities, and slimers that the Ghostbusters accumulate in their storage facility represent the tragedy of the commons^[16] and are the ghosts of our past environmental misdeeds; out of sight, and presumably out of mind.^[17] That the EPA official who investigates their operation does not believe in the existence of psychic phenomena, preferring to believe the Ghostbusters' services are a fraud, emphasizes the communication problems between individuals and government.^[18]

The urge to make disposal and storage sites as safe as possible delays action indefinitely, as various special interest groups go through a political, social, and legal dance.^[19] Further, the enormity of the problem posed in *Ghostbusters*—the unanticipated eruption of an overwhelming threat for which neither academia nor government is prepared—makes it a parable for Judgment Day, through the actions of humankind creating the architecturally elaborate portal through which psychic entities enter the material world. Faced with such technologically facilitated, thoughtlessly induced catastrophe,^[20] only through independent action can traditionally individualistic Yankees save the world.

This Essay examines the law and policy likely to be invoked when governments and individuals face an unexpected and unde fined environmental threat. Who decides which procedures will be followed to meet that threat? By what process? Who determines whether those procedures should be abandoned in favor of another approach? Should competing regulatory schemes be allowed to muddy the waters, perhaps ultimately preventing any action at all if the parties involved make the wrong choice of forum or law? What course of action might various parties take to enjoin the Ghostbusters' activities? Which actions might be successful and why? The plethora of choices and arguments over potential jurisdiction^[21] in *Environmental Protection Agency v. Peter Venkman et al., d/b/a Ghostbusters* and related cases demonstrate the confusion in which current environmental law can be mired.^[22] As the following sections of this Essay demonstrate, negotiating the forest of environmental orders, regulations, decisions, and statutes for anyone

involved can be lengthy and complex. Each Legislative Act closes certain legal avenues as it opens others. Part II discusses the parties and issues involved in the film. This is followed by Part III which reviews the new environmental problems unique to *Ghostbusters*. Part IV then highlights causation, liability and remedy issues, and Part V follows with an overview of regulations to prevent environmental accidents. After Part VI evaluates how emergency problems are handled, Part VII discusses the symbolic pollution presented in *Ghostbusters II*. This essay concludes by discussing the distrust of government which results in the vigilante ghostbusting, and more generally, vigilante action in the environmental arena.

II. PARTIES AND ISSUES

A. *The Premise of the Film*

Early in the film, the three future Ghostbusters reveal their philosophies. Peter Venkman (Bill Murray), the con artist of the group, wants success, almost at any price. He is a self-promoting entrepreneur^[23] who we fear would cheerfully create environmental havoc,^[24] and then charm^[25] the government into hiring him to clean it up for an exorbitant fee.^[26] Ray Stantz (Dan Ackroyd), is the enthusiastic doer, who sees a problem and sets out to solve it. On hearing of an oil spill, he's the one most likely to jump into his Jeep to race down to the beach to clean sludge off ducks. Like his namesake,^[27] Egon Spengler (Harold Ramis) is the intellectual who buries himself in his work. As he tells Janine, the Ghostbusters' receptionist, his hobbies are collecting spores, molds, and fungus.^[28] When she flirtatiously tells him that she likes to read, he barks back that "print is dead."^[29] For him, much of the disruption that technology brings is inevitable; the best course is to understand it, control what one can, and be philosophical about the rest. Such an attitude is useful considering the fate that befalls these heroes in the opening minutes of the film.

After the University tosses the Ghostbusters off the campus for what it considers highly questionable scientific practices,^[30] the three psychic investigators decide to make use of their specialized knowledge by becoming professional ghostbusters, psychic investigators who will rid clients of pesky poltergeists for a hefty fee.^[31] They acquire a dilapidated former fire station which they convert into a storage facility, and an old, environmentally unsafe, ambulance,^[32] which they decorate with sirens, lights, and "Fatso," their famous "No ghosts allowed" emblem.^[33] Their ghost-capturing equipment consists of unlicensed nuclear accelerators, which they carry on their backs^[34] and operate by focussing the emitted beams of radioactive energy at the disruptive entities. None of the Ghostbusters has much experience with this technology, although Egon points out that they should never cross the beams since that would result in a major explosion, to which Venkman responds, "Important safety tip." Once they capture ghosts in their traps, they imprison them in their storage facility. Disposal and storage become intertwined since the Ghostbusters have no offsite storage plans.

Fully equipped, the Ghostbusters embark on their mission to rid the world of ghosts entering the physical plane through what Egon defines as "Spook Central," an apartment building on Central Park, and a unique example of point-source pollution.

B. *Initial Concerns: Siting, Zoning, and Dangerous Practices at a LULU (Locally Undesirable Land Use) Site*

1. *Threshold Questions*

The Ghostbuster facility is housed in a former fire station, in which the Ghostbusters also reside.^[35] The surrounding area seems to have a mixture of small businesses and warehouses.^[36] One may well ask whether the area is zoned for uses that include waste storage facilities. If not, the city might object that the facility is a public nuisance. The neighbors may argue that the Ghostbusters' facility is a private nuisance^[37] due to their strange activities including the comings and goings of various employees and visitors, the sirens on the Ghostbusters vehicle,^[38] and the oddity of some of their clientele.^[39]

Many, if not all, of the public nuisance issues would have been appropriately explored through hearing and licensing procedures set forth in relevant agency regulations.^[40] Another issue, which a hearing may examine, is the wisdom of locating a facility in such a densely populated and economically depressed area.^[41] Further, various experts could have explored the nature of the waste to be stored in the facility. Given its sliminess, is the waste more like liquid waste or more like solid waste? Does contact with the radioactive streams emitted by the "positron colliders" make it gaseous?

Can it be stabilized in one form sufficiently to be stored indefinitely? For Resource Conservation and Recovery Act (RCRA) purposes, this question might be irrelevant.[\[42\]](#) If another statute applies, these questions may need resolution for a determination of agency jurisdiction.

For the local inhabitants, a hearing on this private nuisance is the obvious first step. One of their strategies might be to take the position that the noise and disruption substantially limit the private enjoyment of their property.[\[43\]](#) These concerns are discussed in later sections of this article.[\[44\]](#) Note, however, that one of the unsatisfactory characteristics of the nuisance suit is its likelihood of failure.[\[45\]](#)

One of the threshold questions in determining which government agency, if any, has jurisdiction over the Ghostbusters' activities is deciding the nature of the waste.[\[46\]](#) The factors that complicate this determination are (1) the initial lack of evidence that the waste exists; (2) the continued reluctance of the EPA (represented by Walter Peck) to admit that it exists; and (3) the mixed nature of the waste. The Ghostbusters implicitly demonstrate their recognition of these factors by bypassing any licensing procedures, an act that symbolizes their lack of respect for authority. We ultimately share this lack of respect after meeting Peck and also share the Ghostbusters' impatience with the rules that authority imposes as the price for living under its protection. Because the authority demonstrates its inability to identify and protect the community from the spirit world's dangers, under the Ghostbusters' theory, government loses the respect necessary to demand cooperation and obedience.

2. An Examination of Ghostbusting Activities

The differences among the three Ghostbusters are nowhere more evident than in their initial reactions to locating their facility in the abandoned firehouse. True to his belief that he should be the only individual profiting outrageously from any likely investment possibility, Venkman objects that "it's a little pricey for a unique fixer-upper opportunity." Spengler is more direct: "I think this building should be condemned. There's serious metal fatigue in all the load-bearing members; the wiring is substandard; it's completely inadequate for our power needs, and the neighborhood is like a demilitarized zone."[\[47\]](#) But as Stantz cheerfully slides into view, he pointlessly shouts, "Hey, does this pole still work?"

Based on Spengler's knowledge of engineering, the three already have notice that their place of business is less than adequate for its intended use; although perhaps not badly located. Although the wiring may have been updated by the time they open for business, the new owners do not appear to have corrected any structural problems. Nor do any backup systems appear available for the storage facility.[\[48\]](#) Thus, when Peck obtains a court order[\[49\]](#) to shut down electrical power to the Ghostbusters' grid, some of the resulting destruction may be due to the structural weakness of the building and storage facility. However, exactly how much damage is attributable to that weakness might be difficult to determine after the explosion.[\[50\]](#)

One of the objections that either a governmental regulatory body or the Ghostbusters' neighbors might raise is the Ghostbusters' documented lack of familiarity with the equipment they use so blithely to combat the psychic plague. In the elevator of a ghost-infested hotel, while standing under a prominently displayed "No Smoking" sign, Venkman points out that each of them is "wearing an unlicensed nuclear accelerator on his back."[\[51\]](#) Stantz responds: "You know, it's just occurred to me that we've never had a completely successful test of this equipment."[\[52\]](#)

Like other disaster victims, the hotel manager is dismayed at the unanticipatedly high cost of capturing the "free floating apparition or full roaming vapor." Presumably envisioning the reaction of the insurance company[\[53\]](#) to a claim for exorcism and repair of the building and contents, he tells the trio, "I had no idea it would be so much. I won't pay it." "That's okay," responds Stantz, "We'll just let him out right over here."[\[54\]](#) In a panic the man quickly agrees to their terms.

In addition to lacking experience, the Ghostbusters also fail to follow elementary safety precautions, presumably expecting a certain amount of deference from clients as well as the government in regard to their methods. All of them, as well as their newest recruit, Winston Zeddemore (Ernie Hudson), smoke profusely in the storage facility, which is festooned with "caution" and "danger" signs. Venkman, clearly more interested in money than in the service they are selling, downplays the extent of their problems, even the existence of ghosts, until they confront him physically. Nor is Zeddemore a believer at first.[\[55\]](#) During his job interview, Janine asks him in a bored tone whether he believes in

"UFOs, astral projections, mental telepathy, ESP, clairvoyance, spirit photography, telekinetic movement, full trance mediums, the Loch Ness Monster and the theory of Atlantis." Responds a practical Winston, "Uh . . . if there's a steady paycheck in it, I'll believe anything you say." Yet Winston, the intelligent and observant non-scientist, is the first Ghostbuster to identify the cause of the problem: the return of the dead and the coming of Judgment Day. Like the heroes of *Incident at Dark River*,^{[5]6} *Silkwood*,^{[5]7} and *The China Syndrome*,^[58] he represents the ordinary citizen victim who finally notices the signs of environmental catastrophe. Basing his analysis on common sense and a general knowledge of *The Bible* he calls them by their rightful name, uninfluenced by politics or special interests.

3. *The Case for Private Nuisance*

While causation in a case of environmental harm is difficult to prove, a negligent act is much easier to identify. For the Ghostbusters' neighbors, several tort theories might offer some relief from the noise as well as the possible danger.^[59]

a. Negligence

The immediate cause of the release of pollutants into the local atmosphere (not to mention all of New York City) is Peck's order to shut down the electric grid that confines the psychic wastes. However, but for the Ghostbusters' act in setting up their hazardous waste facility, and their failure to comply with EPA regulations, that release would not have occurred. Opening such a facility in a heavily populated area is a dubious environmental decision.^[60] Further, the Ghostbusters are in a unique position to understand the danger:

The courts have held that where someone has special or superior knowledge, as is expected of hazardous waste facility operators, a higher standard of care must be met. As a result, where there has been a release, carelessness or the act of negligence is not as difficult to prove. In addition, most jurisdictions regard an unexcused violation of state statute or regulation as negligence *per se*. Because it is established by virtue of the violation, negligence need not be shown. Only the causal element must be argued: whether the negligent act actually caused the injury claimed.^[61]

b. Nuisance

The distinction between public and private nuisance is a difficult one to determine. Among the questions the neighbors would have to decide are whether the Ghostbusters operation is inherently a nuisance because of its noise, the increased traffic, and the nature of the business conducted, or whether it only becomes a nuisance after the release of the psychic wastes. If they take the former position, arguably only a few residents are affected, and the business may qualify as a private nuisance. Further, of those residents, it may be that only property owners have standing to challenge the Ghostbusters' use of their property.^[62] Objecting neighbors would have to demonstrate that the noise, traffic, and general disruption in the area substantially limit their quiet enjoyment of their property. Once the release takes place however, it affects the entire city and becomes a public nuisance. In the first case, the neighbors would have to sue; in the latter the city officials are charged with bringing the suit against the Ghostbusters, assuming they are liable for the disaster.^[63] Based on the subsequent actions of a government employee, Ghostbuster liability is by no means certain.

The neighbors could have tried to obtain an injunction against the operation of the facility before it opened, charging that it is an inherently dangerous operation. However, we have no evidence that they knew of the Ghostbusters' plans; we have no proof that the trio had informed their real estate agent of their intentions either.

Nuisance theory requires a balancing of the risks inherent in the facility operation, in the ability to control those risks, and in the public utility associated with the facility. Proof that a facility is a state-of-the-art design with a low degree of risk when maintained in accordance with acceptable operating procedures should be sufficient to overcome a pre-construction nuisance action.^[64]

While the Ghostbusters' storage facility seems capable of containing the psychic wastes, we know nothing about a backup system. We also have no evidence that any other similar business is in operation. Therefore, whether the storage facility design is "state-of-the-art" is open to discussion, absent a finding that ghostbusting is essentially the same type of activity as toxic waste storage and disposal.

Whether a nuisance action could succeed after the release is also debatable. "It can be argued that the potential for future harm has been established by the release, and the facility has shown itself to be sufficiently dangerous and the controls against risk sufficiently tenuous to justify a permanent injunction against future operation."[\[65\]](#) The Ghostbusters' defense would, of course, be that Peck caused the release through an independent and ill-advised action, and that nothing in the design of the Ghostbusters' facility prevents its safe operation absent bureaucratic stupidity. They would need to demonstrate, however, that shutting down the grid could not be accomplished accidentally, for example through an electrical power failure.[\[66\]](#)

III. IDENTIFYING AND APPROACHING NEW ENVIRONMENTAL PROBLEMS

While Venkman and Zeddemore may not be convinced of the existence of a ghostly plague at first, the media eagerly covers the Ghostbusters' activities. The clients who hire the Ghostbusters seem eager for their service.[\[67\]](#) The doubters are the EPA, and to some extent the municipal government, which is uncertain what to believe.[\[68\]](#) Like many people in positions of authority, Peck tries to apply existing law to what he judges to be an unexceptional situation; the failure of the Ghostbusters to adhere to perfectly adequate environmental regulations. His analysis is correct as far as he knows, and his legitimate concerns are the health and safety of the local population. Unfortunately, the ghostly plague presents an example of an ecological crisis that moves far more quickly than the ability of the affected regulatory body to respond to it. To that extent, it demonstrates the inadequacy of existing environmental law and policy.

A. The Introduction and Licensing of New Technologies to Address Previously Unidentified Environmental Problems

The question of new environmental threats is an interesting and intricate one. Through what mechanisms do and should we recognize previously unconsidered ecological problems? At what point do we seek government regulation of the technology used to combat these problems? And how much regulation is too much given the possibility that no one, including the regulators, understands the extent of the problem?[\[69\]](#)

In the *Ghostbusters'* case, psychokinetic energy is a previously unrecognized threat to health and welfare. Its effects are also rapidly increasing. So, the time most government agencies require to organize, carry out, and report on such a threat is likely to delay necessary remedial action until well after the problem reaches crisis proportions. Indeed, the threat begins overwhelming the Ghostbusters to the extent that they begin considering opening another storage facility because the current facility is likely to break down as a result of the increased ghost population it confines.[\[70\]](#)

The debate between those who deny the existence or extent of an environmental problem and those who recognize it, and may tend to overstate it, is a classic and recurring debate in environmental law and policy. For example, at Love Canal, the inhabitants had great difficulty convincing the government and the public that the problem was as monumental as it later proved to be.[\[71\]](#) Even when government and the public are essentially in agreement, the argument is frequently over the extent of the pollution and the financial responsibility of the polluters. The debate can drag on for years and leave bitter memories as well as economic and personal hardship.

"The problem in these mining communities is people have been used to living with this [pollution] for 100 years[.]" "It's not an acute toxicity problem—people getting cancer and dying—so they don't understand why there's a risk." But the risk is real, the EPA says, especially lead poisoning in kids exposed to soil tainted by mine and smelter waste. Many don't believe it. They point to studies that have not found dangerously elevated lead levels in children's blood. Generations of youngsters have played in Leadville's dirt with no ill effects. And residents say that for all the warnings, the EPA has never proved lead occurring in its natural state—different from lead in paint, water or exhaust—is harmful when ingested. For many, the last straw was when the EPA, unable to find high lead levels in children, began an experiment to force-feed pigs soil with lead in it.[\[72\]](#)

Even the suggestion that land may be tainted can lead to falling property values[\[73\]](#) and disastrous drops in stock prices,[\[74\]](#) further fueling unwillingness on the part of some to admit to the possibility of an environmental hazard. The hidden costs of cleanup and bureaucratic intransigence, when revealed, further discourage a public disgusted by ever-higher taxes and costly regulations that seem to provide no benefit. For example,

[i]n 1991 Congress ruled that all sewage treatment plants must remove at least 30% of the organic waste

from incoming sewage. For some cities, like Anchorage, Alaska, this is nearly impossible to achieve because the city has little organic matter to remove in the first place. The EPA was not flexible; it told Anchorage it must meet its 30% standard. The city could have spent \$135 million on a new sewage treatment plant to meet the standard, but it discovered a much cheaper option. It invited two local fish processing plants to dump 5,000 pounds of fish viscera into the sewer system. The fish waste was easy to remove and Anchorage easily met the 30% rule.[\[75\]](#)

B. Problems of Preemption and Regulatory Oversight: The First Walter Peck Interview

Ghostly encounters increased drastically within a few weeks of starting their business, and the Ghostbusters increased their business a thousand-fold, as a result. The Ghostbusters quickly become objects of media adoration, thanks to both Venkman's remarkable huckstering ability and the successful capture of various malevolent entities. Their fame leads to a visit from Walter Peck.[\[76\]](#) Peck neither shows credentials or identifies himself, though he behaves like a bureaucrat, demands to see the facility, and becomes angry when Venkman refuses to oblige. Peck's high-handed attitude clearly supports the opinion many people have about the officiousness and meddling that some government employees seem to display. Peck leaves in a fury after trading insults with Venkman.

*Venkman's independent stance shows the reluctance of individuals and newly emerging companies in unregulated industries to cooperate with a government they perceive as too bureaucratic, hysterical, expensive, demanding, and obsessed with detail.[\[77\]](#) Unfortunately, the Ghostbusters do not have a lawyer to tell them that refusing to cooperate with a government official, while it might be legally justified in some cases, is often a tactical error. Venkman may be (incorrectly)[\[78\]](#) relying on Peck's failure to notify him of the inspection to justify denying Peck's request. While the EPA generally takes the position that a warrant is required, inspection may be unannounced. In *Dow Chemical Co. v. United States*,[\[79\]](#) the Supreme Court held that other methods of acquiring information, such as aerial photography, are acceptable in order for the EPA to verify compliance.[\[80\]](#) A safer position for the Ghostbusters to take would be to question Peck's authority to inspect, arguing the EPA lacks jurisdiction. Validation of this position would come, if ever, only after expensive and tedious litigation. One option, however, might be to explore whether the EPA lacks jurisdiction based on its failure to designate the waste as hazardous under the appropriate statutory definition.[\[81\]](#)*

C. The Applicability of the Low Level Radioactive Waste Act

The initial Venkman/Peck interview poses some interesting environmental law and policy questions. What environmental statutes, if any, have the Ghostbusters violated? What bases can Peck advance for the EPA's right to regulate the Ghostbusters' activities? Although he doesn't know about the unlicensed nuclear accelerators, Peck believes that some type of harmful waste is being generated and/or stored on the premises.[\[82\]](#) Further, he suspects the Ghostbusters are creating the waste themselves, rather than collecting it from the environment. If pressed for legal justification to intervene he would be likely to point, for example, to the Low Level Radioactive Waste Act (LLRWA),[\[83\]](#) as well as statutes regulating the disposal of high level radioactive waste.[\[84\]](#)

The LLRWA sets forth extremely specific terms under which sites must be proposed, evaluated, and chosen. It also mandates environmental impact statements,[\[85\]](#) which the Ghostbusters could not have prepared since they did not notify any agency of their activities. Additionally, the LLRWA guidelines require that the waste being stored, and the disposal site, be structurally stable.[\[86\]](#) Apparently the psychic waste being stored does not meet Class B or C waste guidelines,[\[87\]](#) nor does it seem to have the minimum stability required by any other class. As we see on Peck's second visit to the facility, it is neither liquid nor solid, and if released will likely ignite or emit toxic vapors.[\[88\]](#) Furthermore, storage is likely to be advisable not for 100 years, as with Class A and B wastes,[\[89\]](#) but forever. However, under RCRA, the government need only show that the waste is hazardous within the statutory definition. The EPA might prefer to exercise this option for this particular case.[\[90\]](#)

While the LLRWA does not address the particular nature of psychic waste directly, such waste clearly seems dangerous to human health and safety. As a practical matter, therefore, those believing in this waste may demand some governmental agency to regulate their disposal. Taking the position that the LLRWA does not apply may be intellectually justifiable; but such a stand will only delay regulation.

Inarguably the use of radioactive emissions to capture ghosts brings the operation under the aegis of some government

agency, but which agency is an open question. The Nuclear Regulatory Commission,[\[91\]](#) rather than the EPA, regulates the disposal of nuclear waste. However, states also have some jurisdiction in this area.[\[92\]](#) Peck may not have any authority to demand access to inspect the facility, yet someone may have authorized him to investigate. In addition, New York is not a compact state,[\[93\]](#) so that whatever disposal mechanisms are decided upon are likely to bind the inhabitants and the governments for many years. Yet, conspicuously absent from the Ghostbusters' confrontations with governmental authorities are the State of New York representatives; although individual states have the authority to set up hazardous waste programs according to guidelines set out by the federal EPA guidelines.[\[94\]](#)

Further, as Egon tells his colleagues, the disposal unit that the Ghostbusters are using is filling up quickly due to ever-increasing levels of psychic activity.[\[95\]](#) Although they discuss opening another storage facility, they probably should act quickly to obtain additional disposal units or franchise the operation somehow.[\[96\]](#) Thus, time is of the essence, both in dealing with the environmental problem and in getting whatever licenses and permissions that are required to comply with the federal regulations.[\[97\]](#) Yet we know that environmental siting decisions take years to complete[\[98\]](#) and we also know that the Ghostbusters have a matter of days or weeks, not years, to deal with the pollution problems created by psychic waste.

D. Other Possibly Applicable Statutes and Standards

Peck's first visit identifies several specific concerns in which one can discern the basis for a *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[\[99\]](#) showing. "I'm curious about what you do here," he tells Venkman, implying that the activities carried out on-site are of concern not only as a general matter but also to the neighborhood. The activities are also somewhat mysterious because they are based on an unknown technology and are intricately involved with an unknown and unrecognized hazard. One can deduce the existence of other possible hazards through an examination of the Ghostbusters' regular procedures for capturing, transporting, and disposing of psychic waste. By examining the number of agencies potentially involved in regulating such transport, we can appreciate the concerns of all parties in balancing public health concerns, private property rights, and the rights of businesses engaged in lawful commerce.

E. The Chevron Standard

While the Ghostbusters never articulate their assumptions about the nature of the psychic waste they entrap, they clearly believe it is both physically and psychologically dangerous. Walter Peck never articulates his assumptions either. However, he clearly believes that the psychic waste, if it exists, is environmental waste, and subject to the existing federal environmental regulatory scheme. The *Chevron* case provides his justification for interpreting various statutes to cover the psychic waste. In *Chevron*, the Supreme Court held that administrative agencies must be granted discretion in determining the scope of their jurisdiction when enabling legislation is unclear and the agency determination is not inconsistent with the statute.[\[100\]](#)

Peck is equally concerned about the disposal methods used to contain the waste. These disposal methods fall under the EPA's mandate to regulate the use of and access to radioactive materials. Therefore, crucial to successful EPA regulation of the Ghostbusters' activities, is an as yet uncompleted legal determination that the waste being stored is of the type envisioned by an applicable statute.

At no time does the overly smug Peck indicate that an appropriate investigation has determined that the psychic entities under consideration correspond to any environmental category over which the EPA has regulatory authority. Peck may be operating on the assumption that they do. For example, he tells Venkman that he has received reports about the nature of the Ghostbusters' business that have prompted him to investigate and intervene. Thus, Peck has two possible positions to assert to intervene on behalf of the EPA. First, he may claim the EPA has jurisdiction over the entities themselves as waste referred to in the statute. Second, he may assert control over the disposal methods. If he chooses the latter, then the Ghostbusters are in violation of RCRA[\[101\]](#) and the Hazardous and Solid Waste Amendments of 1984 which require that hazardous waste facility operators request permits.[\[102\]](#) Since the Ghostbusters have not done so, they are in violation of EPA regulations and liable for civil penalties.[\[103\]](#) RCRA may offer more justification for Peck's later action in shutting down the facility. If he can demonstrate that the Ghostbusters' practices present

imminent or substantial danger to human health or the environment, the EPA may either issue an administrative order or bring suit to shut down the operation.[\[104\]](#)

Once the EPA has issued a subsection (a) order, it can request "the production of relevant papers, books, and documents."[\[105\]](#) Furthermore, the EPA "may promulgate rules for discovery procedures."[\[106\]](#) Where Peck goes wrong in his handling of the Ghostbuster case is in turning off the grid before a hearing is held, rather than following proper procedure.[\[107\]](#) Ironically, his actions result in an immediate discharge of dangerous waste into the atmosphere; the precise result the Ghostbusters are trying to avoid.

Thus before we can subject ghostbusting activity to the strictures of EPA regulation, the EPA must be prepared to make a Chevron showing that the entities can be considered "waste" under the meaning of some relevant statute.[\[108\]](#)

While a Chevron showing is not necessarily difficult, justifying regulatory authority over ghostbusting storage and disposal is even easier. Peck's objections to the Ghostbusters' operation may be rooted in any number of other federal statutes, depending on how we interpret the composition of the psychic waste. Certainly, the Ghostbusters might be failing to comply with the solid and hazardous waste disposal provisions of 42 U.S.C. § 6901.[\[109\]](#) The radioactive "positron colliders" that the Ghostbusters use to capture their prey, and arguably some of the waste they store in their basement storage unit falls within the definition of solid waste in 42 U.S.C. § 6903:

(27) The term "solid waste" means any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations, and from community activities, but does not include . . . source, special nuclear, or byproduct material as defined by the Atomic Energy Act of 1954[\[110\]](#)

However, the radioactive materials used to capture ghosts, could make part, if not all, of the Ghostbusters' waste subject to provisions of the Atomic Energy Act.[\[111\]](#)

Are the Ghostbusters in violation of the solid waste disposal statutes? The EPA has the authority to issue regulations on radiation exposure only with regard to the use of radioactive materials in "construction or land reclamation."[\[112\]](#) If this statute applies, the Ghostbusters must also comply with 42 U.S.C. § 6922.[\[113\]](#) When Venkman tells Peck that he has "no idea" how many ghosts the team has captured, he is in violation of the record keeping requirements in RCRA because records must accurately identify "the quantities of such hazardous waste generated, the constituents thereof which are significant in quantity or in potential harm to human health or the environment."[\[114\]](#) Additionally, the Ghostbusters are required to submit reports to the administrator of the EPA or the relevant State agency.[\[115\]](#)

If the Solid Waste Disposal Act is applicable, Venkman's refusal to let Peck inspect the facility and look at the company's records is clearly in violation of the act. According to section

6927:

[A]ny person who generates, stores, treats, transports, disposes of, or otherwise handles or has handled hazardous wastes shall, upon request of any officer, employee or representative of the Environmental Protection Agency, duly designated by the Administrator, or upon request of any duly designated officer, employee or representative of a State having an authorized hazardous waste program, furnish information relating to such wastes and permit such person at all reasonable times to have access to, and to copy all records relating to such wastes.[\[116\]](#)

Whether Peck's request is reasonable, however, is a matter of interpretation. He arrives during the regular business day and seems content at first simply to inquire about activities on site. Peck arrives without warning,[\[117\]](#) and fails to show any identification. Venkman might be able to ask him to return at a later time for purposes of the inspection. However, this could cause Peck to suspect that the Ghostbusters want to conceal materials or evidence of illegality, and the statute does require compliance upon request. Peck, like many of us, suspects the worst of companies that seem to profit from societal misfortune.

F. Problems of Overreaching and Governmental Recklessness: The Second Peck Visit

Once Venkman refuses Peck's entry, [118] Peck's recourse is to request a compliance order after notifying the State of New York that he intends to inspect the premises. [119] Peck, as a representative of the EPA, also has the authority to order monitoring and testing of the facility. [120] Venkman's intransigence adds yet another violation to the list of infractions.

Peck returns to the Ghostbusters' facility with a Consolidated Edison (Con Ed) employee and a police officer. Peck presents a cease and desist all commerce order, a seizure of premises and chattels order, an order banning the use of utilities for unlicensed wastehandlers, and a federal entry and inspection order. Peck also accuses the Ghostbusters of "violation of half a dozen environmental regulations." [121] All present then rush to the basement where Peck waves at the impressive looking equipment and tells the Con Ed technician to shut them all down. When the Con Ed technician objects that he has never seen such a setup, Peck simply tells him to follow orders. The electrical shut-off causes an immediate explosion, releasing the psychic entities into the environment to terrorize Manhattan. Peck's second visit introduces the problem of officious and rigidly thoughtless government inference, compounded by a quasi-iatrogenic *catas trophe*; his cure for the environmental violations committed by the Ghostbusters is much worse than the disease.

IV. WHO YA GONNA SUE? CAUSATION, LIABILITY, AND REMEDY

Once Peck orders the grid turned off, the problem is exacerbated. Whose actions are most proximately related to the undesired result? Who is responsible for remediation? Where will the responsibility lie regardless of fault? Is the situation an act of (anyone's) god, and if so is the simple answer that no human being can be held legally accountable?

A. EPA Liability: Peck's Authority to Intervene and the Ghostbusters' Response

The escape of hazardous gaseous materials may be regulated under the Clean Air Act. [122] Peck's unilateral action may leave the EPA liable for suit by New York City residents under the Federal Tort Claims Act. [123] A successful suit would have to fall outside one of two exceptions to the federal government's waiver of immunity. The discretionary function exception, exempts the acts and omissions of a government employee "exercising due care in the execution of a statute or regulation," [124] or specific intentional torts, such as assault, battery and false imprisonment. [125] Peck's behavior in forcing the release of the psychic waste arguably falls within the battery exception, as would Venkman's claim of malicious prosecution. However, Peck's defense to a charge of battery would be his disbelief in the existence of the waste. Since he does not credit the existence of the waste and has no personal independent knowledge of them, he lacks the *mens rea* of recklessness or knowledge.

How much sovereign immunity shields the agency from accusations of recklessness in causing collateral damage is another question. [126] The escaping entities run rampant through Manhattan, crashing taxicabs, causing injury, and destroying other property. As a matter of policy, should the EPA be held responsible for such damage caused by Peck's miscalculation of the existence of the harm when he has made an absolute, yet erroneous, determination that no injury is possible? Given the results of his ill-advised action, the EPA is almost certain to take the position that Peck had exceeded his authority in demanding the shutdown prior to a complete investigation. If no psychic pollution problem exists, then he could not have had any legitimate justification for bypassing agency requirements for a hearing.

For their part, the Ghostbusters would certainly think about suing for what Venkman angrily calls "wrongful prosecution," perhaps on theories of tortious interference with business, trespassing, and perhaps even defamation or false light. [127] The latter might be a difficult win because one institution thinks so little of their methods that it revoked their grant and tossed them out into the real world. [128] They would also have to refute Peck's allegations that the ghosts they capture are really hallucinations they induce in their clients. If this is so, the EPA's authority to intervene is less obvious, although the Ghostbusters' use of radioactive materials still falls under the regulatory oversight of some governmental agency. However, New York City might be interested in allegations of fraud.

At the point of shutdown, Peck may claim to be operating under the provisions of 42 U.S.C. § 6973, which provides:

[U]pon receipt of evidence that the past or present handling, storage, treatment, transportation or disposal of any solid waste or hazardous waste may present an imminent and substantial endangerment to health or the environment, the Administrator may bring suit . . . in the appropriate district court against any person (including any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility) who has contributed . . . to such handling, storage, treatment, transportation or disposal to restrain such person from such handling, storage, treatment, transportation, or disposal, to order such person to take such other action as may be necessary, or both. [129]

However, Peck apparently has no hard evidence that the imminent and/or substantial endangerment condition exists, since he does not believe in the psychic plague. Thus, justification for his act would theoretically be based solely on the Ghostbusters' unauthorized use of radioactive materials.

One of the Ghostbusters' remedies might be to petition a federal court for review of Peck's actions. Certainly, both the Ghostbusters and their neighbors could argue that Peck was extremely reckless in shutting down the power grid without first understanding its proper operation and use. However, both federal statutes and the Administrative Procedure Act (APA)[130] strictly limit the types of agency action open to judicial review.[131] Further, the government's response is likely to be, as Peck snaps at Venkman, that "[y]ou had your chance. You chose to insult me. Now it's my turn." The EPA's discretion to issue administrative orders or decisions is broad, and invokes the protective tradition of judicial respect for agency discretion. Venkman's opportunity to demonstrate proper use of the radioactive equipment has already passed. While government representatives ought not to be vindictive, given Venkman's animosity toward him, Peck's resentment and subsequent vengefulness is understandable.

Again, assuming that the Solid Waste Disposal Act is applicable, members of the neighborhood, or any other individual, can attempt to file suit against the EPA for Peck's abrupt shutdown of the facility on the theory that Peck should have thoroughly inspected the facility and determined how best to cease its operations rather than by simply cutting off power to the storage grid.[132] Of course, either the person bringing suit, or the Ghostbusters, are likely to have to pursue such claims under the APA, rather than under the statute specifically authorizing agency action.[133] As noted above, there might also be an action under the Federal Tort Claims Act.[134] A private nuisance claim may also be pursued by arguing negligence on the Ghostbusters' part in siting the storage facility in a ramshackle building, increasing the amount of traffic in the neighborhood, and disturbing the peace at odd hours.

The Locally Undesirable Land Use (LULU) aspect of the Ghostbusters' facility is one of the most powerful arguments the neighborhood has against it sitting in their area. However, lawyers will have to carefully investigate the zoning requirements, the procedures the Ghostbusters followed, if any, to obtain any necessary business licenses, the regulatory status of the business, and other issues discussed in this Essay in order to prevail at a hearing. The social good the company performs may also weigh against any immediate citizen objections to the storage facility's location. If the Ghostbusters' activities violate a zoning ordinance, the local authority could enjoin their activities without further investigation. However, because a fire station already existed on the site, and because the area looks fairly commercial, a finding of a violation of the ordinance is not a foregone conclusion. If the local courts were to find a violation, however, federal law might not preempt the local authority.[135]

B. Ghostbuster Liability

Even if the EPA is found liable for failure to designate the waste as hazardous under the Clean Air Act, the Ghostbusters may not be absolved of liability if a court finds that they should have known of the hazardous nature of their waste and the likelihood of harm should it escape.[136] Under the Emergency Planning and Community Right-to-Know Act of 1986,[137] the community may also have a "right to know" of hazardous substances stored in the Ghostbusters' facility, if it can show that the substances appear on the EPA's list of regulated substances.[138]

Under a trespass theory, individuals or groups might also sue the Ghostbusters. While absolute liability is no longer the rule once trespass is established,[139] "conduct associated with an abnormally dangerous activity"[140] might be shown. Another difficulty for plaintiffs is the existence of physical trespass; psychic wastes may not equate with what human beings traditionally assume to be inherently capable of the trespass action. However, "[m]any courts now hold that an entry on property by fumes or gaseous material is a trespass and actionable as such." [141]

Several strict or absolute liability theories may also offer an approach for any of the parties interested in suing the Ghostbusters. This approach can be summarized as follows: (1) the Rylands v. Fletcher[142] line of cases, under which an activity's hazardous nature is evaluated according to the nature of the activity and the location of the activity; (2) the Restatement (Second) of Torts approach, which holds that anyone carrying on an abnormally dangerous activity is strictly liable to anyone harmed by that activity (factors include the extent of the risk, the location of the activity, and the value of the operation to the general public);[143] and (3) the "Magnitude of the Risk" doctrine, under which the conduct of any sufficiently hazardous activity imposes absolute liability on the operator.[144]

C. Other Parties' Liability

While a Con Ed employee disconnects the power to the system, neither the Ghostbusters, their neighbors, nor the city is likely to sue the employee or his company. Apart from the fact that the employee is probably judgment proof, the employee is acting according to company policy in cooperation with the EPA, and has no reason to question Peck's authority to order him to assist in the operation. Further, Peck has a court order. Only someone with much greater authority and responsibility at Con Ed, or someone with authority to represent New York City could challenge Peck's decision to seek the court order or the evidence he presents to obtain it, and as a practical matter they are unlikely to do so. While the Con Ed employee is resistant, he must ultimately comply with Peck's order. The employee's inability to refuse to comply is another example of the helplessness and frustration that many people, including some civil servants and public utility employees, feel in the face of ever-increasing and seemingly petty, arbitrary, or dangerous regulatory directives.[145]

D. Acts of Gods[146] Defense

One party who is unlikely to be brought into court is "Gozer the Destructor" in any of its manifestations. As in the case of Satan, service of process on Gozer is, as a practical matter, impossible without serious loss of life.[147] Whether Gozer is entitled to due process is questionable.

V. PREVENTING ENVIRONMENTAL ACCIDENTS: REGULATING TRANSPORTATION OF PSYCHIC WASTE AS AN ALTERNATIVE TO

LLRWA, RCRA, AND SIMILAR STATUTORY REGULATIONS

The process of regulating transport of psychic phenomena is another good example of the amount of law and the number of agencies involved in hazardous waste transport. That the Ghostbusters' psychic waste may fall within the definition of "hazardous substance," as set out in applicable hazardous waste transport legislation, seems clear from the following example:

The term "hazardous substance" means:

[a]ny substance or mixture of substances which (i) is toxic, (ii) is corrosive (iii) is an irritant, (iv) is a strong sensitizer, (v) is flammable or combustible, or (vi) generates pressure through decomposition, heat, or other means, if such substance or mixture of substances may cause substantial personal injury or substantial illness during or as a proximate result of any customary or reasonably foreseeable handling or use[\[148\]](#)

Further, the statutory definition of "toxic" seems to encompass the effects of exposure to psychic waste.[\[149\]](#) Section 1261(g) provides: "The term "toxic" shall apply to any substance (other than a radioactive substance) which has the capacity to produce personal injury or illness to man through ingestion, inhalation, or absorption through any body surface."[\[150\]](#) Such substances require special packaging and labeling.[\[151\]](#) Transportation of the ghosts from the capture site to the storage facility may also be regulated under the Hazardous Waste Management subchapter of the Solid Waste Disposal Act,[\[152\]](#) as well as under Interstate Commerce Commission regulations promulgated under the authority of the U.S. Department of Transportation (DOT).[\[153\]](#) Apparently, the Ghostbusters take no precautions when they transport captured psychic phenomena in their traps; federal regulations mandate certain standards in the packing, repacking, handling, labeling, marking, and placarding of hazardous materials.[\[154\]](#) Should they find themselves in an automobile accident, for example, the trap might easily be crushed, allowing the trapped ghosts to escape. The Ghostbusters may need to install some backup system to guard against accidental release of the ghosts during transport. The trap should also be labeled with appropriate caution signs to guard against a thief or passerby, unfamiliar with its contents, from mishandling the trap. Furthermore, under the New York State Environmental Conservation Law,[\[155\]](#) the state and city may regulate waste transport. Various state insurance agencies also regulate use of vehicles.[\[156\]](#)

Under the Occupational Safety and Health Act (OSHA),[\[157\]](#) Congress has empowered the United States Occupational Safety and Health Administration to promulgate regulations governing the clothing and equipment to be used when working with or transporting waste on public roads.[\[158\]](#) The Ghostbusters' responsibility for their two employees, Winston Zeddemore and Janine, falls within the "catch-all provision" of OSHA,[\[159\]](#) which states: "[e]ach employer shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees."[\[160\]](#) In a naturally hazardous but ill-understood activity like ghostbusting, the employer cannot be allowed to escape responsibility by pleading such hazards that occur do not fall within the statute because they are not commonly known and detectable, or are generally recognized as hazards in the industry that the employer should be aware of. Moreover, in a case in which specific statutes do not address the hazards, the general duty imposed must apply.[\[161\]](#) The Ghostbusters seem to fall within the general duty requirement by using their "unlicensed nuclear accelerators," but use of these accelerators almost certainly violates EPA regulations, as noted above. The combination of federal agencies (EPA, DOT, and OSHA), and state and local insurance and environmental agencies and bureaucracies can seem overwhelming and counterproductive to even the most willing companies.[\[162\]](#)

Other issues that may concern the local residents include the question of long-term liability for any damage due to leakage or improper storage should the Ghostbusters go out of business.[\[163\]](#)

VI. DEALING WITH THE ENVIRONMENTAL ACCIDENT: WHEN A PROBLEM BECOMES AN EMERGENCY

Once a problem becomes a crisis, compliance with any government regulation seems less important than dealing with the emergency presented. The necessity for avoiding panic and limiting the destruction impels the mayor to disregard Peck's objections and the court's orders. His decision may be legally justifiable since if the EPA has no authority in the matter, the court orders obtained are void.[\[164\]](#) Further, as part of his authority as chief officer of the city, the mayor has broad powers under the emergency powers acts of the New York City Charter.[\[165\]](#)

The last question one might pose is whether the amount of destruction the Ghostbusters carry out in the course of their activities and the noncompliance with public health and welfare regulations they exhibit is appropriate or justifiable, or whether they are somewhat reckless in their approach. Certainly they damaged the apartment building in which Dana Barrett lives. Further, Gozer the Destructor's appearance as the Sta-Puft Marshmallow Man is a direct result of Stantz's failure to follow Venkman's instructions "not to think of anything." The amount of goo produced through the torching of the Marshmallow Man adds to the cleanup costs.[\[166\]](#) However, given the physical and mental strain they are under during the attack on Gozer, the necessity of their actions, the reluctance or inability of anyone else to tackle the problem, and the near-impossibility of "not thinking about anything,"[\[167\]](#) one should acquit them of any charges of negligence or recklessness in the handling of their equipment as well as this particular situation.

VII. GHOSTBUSTERS ON REMAND: GHOSTBUSTERS II AND SYMBOLIC POLLUTION

Like the original film, Ghostbusters II takes pollution as its subject: pollution of the soul that occurs when evil takes control of human beings and encourages them to exploit the other and other living things. Such self-indulgence is a much darker concept than that in the original Ghostbusters. In order to make its discussion more palatable, Ghostbusters II is a wilder, more farcical ride through the Murray/Ramis/Moranis view of law and

society. The psychic plague in *Ghostbusters* represents the accumulated generalized evil and desire for power in the world, left to pollute the commons until it overwhelms the ability of the earth to absorb and neutralize it. *Ghostbusters II* considers the existence and nature of Evil. The film postulates that it lies hidden beneath human consciousness, and personifies evil as a polluting river of slime that runs underneath New York city. When this accumulated ugliness finds an entrance into the physical world, ironically represented by the imaginary Manhattan Museum of Art, it bursts through and infects the city. Like Gozer the Destructor in *Ghostbusters*, the personification of evil in *Ghostbusters II*, a seventeenth century "genocidal maniac" named Vlad, needs both a door through which to enter and a physical body through which to appear to the human race. For its incarnation it chooses Dana Barrett's eight-month-old son Oscar.

As in *Ghostbusters*, the legal system represented in *Ghostbusters II* is concerned with process and procedure, and not with the substantive issues of life and death and good and evil that occupy the *Ghostbusters'* time. When discussing how to help Dana and her son, the reunited *Ghostbusters* consider drilling under the street to locate the river of slime. Winston reminds them that their last attempt to save the city was not an unqualified success. "Apart from destroying a whole apartment building, and covering the city with marshmallow gunk, we got sued by every city, state, and federal agency and paid \$25,000 in damages. We were wiped out." Clearly, the *Ghostbusters* did not have a good lawyer.

Nor does the mayor acknowledge their contribution. When Venkman accidentally runs into him and points out that the city never paid for disposing of Gozer and Zul, a mayoral aide pushes the discredited entrepreneur away.

Completely bankrupt, the *Ghostbusters* have each gone their own ways: Venkman is the host of a local television show, "World of the Psychic," which seems only slightly more respectable than pro wrestling.^[168] Stantz runs a bookstore, "Ray's Occult Books," specializing in New Age materials. His store serves as the meeting place for the *Ghostbusters* and their few remaining friends. In his spare time, he and Winston entertain at children's parties singing and dancing to the original *Ghostbusters* theme. Spengler has what passes for an academic position; he carries out bizarre testing designed to measure the effect of temperature on human psychology. When Dana approaches him for assistance he assures her of his willingness to help. His warm reaction to this friend from the past contrasts markedly with his approach to a young and obviously lonely test subject who is cradling a puppy: "Let's see what happens when we take away the puppy." This scene recalls and contrasts with the opening scene in *Ghostbusters* in which we see Venkman carrying out his parapsychological research, oblivious to any result except the one that benefits him personally.

At first, since Dana objects to involving her former lover Venkman in her problems, Spengler and Stantz decide to help Dana on their own. Eventually, Venkman worms the truth out of them. Dana, like the rest of New York, is in danger once again from malevolent psychic forces which appeal to the worst side of human nature.^[169] They quickly identify the entry point as a painting at the Manhattan Museum of Art and locate the river of slime that runs beneath the city and carries with it the accumulated Evil of centuries. This Evil is not just malevolence or criminality. It also encompasses the self-indulgence and selfishness that lead to the casual commission of heinous crimes.

Ignoring Winston's warnings, the trio don bright orange safety gear and masquerade first as telephone repairmen, then as utility workers, and excavate part of a Manhattan street in the middle of the night. They initially elude capture by feigning ignorance of any contrary regulations and asserting that they are just "doing their jobs," in a buried reference to the traditional excuse ordinary citizens give to explain their acceptance of the rise of the kind of tyranny that Vlad and other evildoers represent. The police finally apprehend the *Ghostbusters*, and the district attorney disposes of them in a very quick trial, remarkable for its lack of procedural safeguards. The lapse of time is only a few days (the film opens just before Christmas and they are tried and sentenced before New Year's Eve, presumably the same year). Their lawyer is the hapless Lewis Tully, who practices only tax law and "went to night school." Venkman approves stating, "it (the excavation) happened at night." The prosecuting attorney is an unpleasant young woman, unattractively attired, who hammers home her legal points to Tully's dismay.^[170] "You could give me a break," he mutters to her at one point. "We're both lawyers."

The judge sentences the trio to long prison terms and fines, but before the bailiff leads them away, out pop two executed criminals (representing recidivism^[171] and the failure of the legal system) whom the judge has sentenced. Other psychic entities seize the prosecutor and carry her off upside down, symbolizing the reversal of the traditional operation of the legal system as well as the eventual reversal of the *Ghostbusters'* sentences. The judge takes refuge underneath the defense table. Amid courtroom chaos the *Ghostbusters* seize their equipment off the evidence table and capture the apparitions. Relieved, the judge screams, "Case dismissed!" and the vindicated trio marches off to save the city.

Salvation ultimately comes in a reaffirmation of the essential and basic desire of human beings for individual liberty, a theme already developed in *Ghostbusters*. The Statue of Liberty takes the Sta-Puff Marshmallow Man's role, though not its meaning, and marches through the city to destroy the evil forces at work.

VIII. CONCLUSION: DISTRUST OF THE GOVERNMENT AND VIGILANTE GHOSTBUSTING

One of the clearest messages of *Ghostbusters*, its sequel *Ghostbusters II*, and darker films like *Falling Down*, *The Star Chamber*, the "Dirty Harry" movies and film characters like those portrayed by Charles Bronson is that government cannot be trusted to protect the people. Whether through incompetence or conspiracy, government officials carry out an agenda designed to disenfranchise the very people they represent. According to these films, the transfer of power from the individual to the government has gone so far that neither the individual nor the group can reclaim it. Therefore, vigilante justice or outright rebellion is justified.

Further, such conspiracy extends from corruption in the legal system, a pervasive theme of many films and television shows as well as popular

fiction,[\[172\]](#) to an active conspiracy to "cover up" the existence of extra-terrestrials and their visits to Earth. A plethora of films and TV shows has offered variations on this theme since cinema was invented.[\[173\]](#) Extra-terrestrials and the threat they may pose to human existence are a short step from dangerous psychic phenomena like ghosts and perverted life forms like vampires and werewolves. The popularity of such cult shows as *The Night Stalker*,[\[174\]](#) in which every week a newspaper reporter braves the ridicule of his editor and the hostility of the local police force, combines the conspiracy theory with the dangers of psychic phenomena; its formula for scarifying the masses has returned in *The X-Files*.[\[175\]](#) Shows like *Millennium*,[\[176\]](#) in which the psychic investigator assists a supportive police force, are fewer. More often, the psychic investigator finds himself alone, as in the sixties and seven ties series *The Invader*,[\[177\]](#) *The Night Stalker*, and the current crop of television series featuring paranormal phenomena.[\[178\]](#)

Combining the stupidity theory (Peck), the conspiracy theory (the city government which doesn't want the public to become aware of the problem once it becomes convinced of the danger), and the element of overwhelming danger posed by the psychic apocalypse creates a climate for increasing public distrust of government officials. The very institutions that have encouraged the public to turn over control of many human activities to elected and non-elected representatives over the past five decades now seem unworthy of that control.

Ghostbusters, like many other films, appeals to a public whose frustration with what it perceives to be government bureaucracy inaction or overaction, an overly litigious[\[179\]](#) and corrupt legal system, corporate greed, and the individual's inability to control his or her own decisions has reached epic proportions.[\[180\]](#) Through its obvious satire of many sources of authority, *Ghostbusters* telegraphs the desire of many people to act affirmatively to combat what they consider to be dangerous situations. At the same time, it glorifies the ability of the individual to create opportunities, to become important, and therefore become authoritative and powerful. When Roger Delacorte, the library administrator, objects to Venkman's questioning of the librarian-witness to the New York Public Library psychic occurrence, Venkman snaps, "Back off, man. I'm a scientist."[\[181\]](#) While we may question how scientific his methods are (the University administration certainly does), we nevertheless applaud his defense of his behavior. His response to the Dean's charge that he is a "poor scientist" is to start his own business and make more money in a few weeks than the Dean will likely make in a lifetime.[\[182\]](#) We recognize his self-promotion and the carnival atmosphere that surrounds his activities, yet he gets results when the various governments, to which we pay what we consider to be exorbitant taxes, cannot.[\[183\]](#) *Ghostbuster's* farcical elements entertain us, but they also comment on the lack of control many of us feel in regard to our personal and professional environments.[\[184\]](#) The impossibility of dealing with many of the Earth's environmental problems overwhelms us at times.

The appeal of *Ghostbusters* is in its presentation of the individual who fights back, who retakes control, who demands and receives respect from those in power, who are after all public servants, and who is vindicated by events and the evidence of his own abilities. Walter Peck wants to cite Peter Venkman and the *Ghostbusters* for environmental violations, and in a rational world he may be right. The *Ghostbusters'* world is a world of crisis, however, and in such a world we should cite Venkman, Stantz, and Spengler for "spirited" ingenuity, and site them in our law schools for a "friendly"[\[185\]](#) introduction to environmental law.

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[1] (Columbia Pictures Corp. 1985). Refer to this note for all future references to GHOSTBUSTERS. A film taking an even more lighthearted view of environmentalism is NAKED GUN 2 1/2: THE SMELL OF FEAR (Paramount Home Video 1991). [Return to text.](#)

[2] By September of 1984, the year Columbia Pictures released the film, GHOSTBUSTERS had earned a gross of \$200.9 million, making it the most successful movie for Columbia Pictures at that time. See Columbia's Ghost Is a Smash, Too, N.Y. TIMES, Sept. 29, 1984, § 1, at 31. The movie spawned many products, including a Saturday morning cartoon series and a sequel, GHOSTBUSTERS II (Columbia Pictures Corp. 1989), as well as a training manual for would-be paranormal investigators. See CHRISTOPHER BROWN, THE OFFICIAL GHOSTBUSTERS TRAINING MANUAL: A GUIDE TO CATCHING GHOSTS (1984); see also Karen Cherry, Busting Loose/Ghostbuster Role is Just One of Many for Ernie Hudson, ST. PETE. TIMES, June 24, 1989, at D1. [Return to text.](#)

[3] See Richard Schickel, *Exercise For Exorcists*, *TIME*, June 11, 1984, at 83. Rick Moranis plays the tax professional, Lewis Tully, a successful but nerdy certified public accountant, who is taken over by one of the psychic entities loose in the city, thereby immeasurably improving his personality quotient. He actually gets the girl, albeit temporarily. Tully subsequently goes to law school and returns in *GHOSTBUSTERS II* as a tax lawyer; a subspecies of the *Avocatus Americanus* generally considered to be even less personable than CPAs. See Paul L. Caron, *Tax Myopia, Or Mamas Don't Let Your Babies Grow Up To Be Tax Lawyers*, 13 VA. TAX REV. 517, 530 n.50 (1994) (discussing the image of tax professionals in *GHOSTBUSTERS* and *GHOSTBUSTERS II*); see also Erik M. Jensen, *The Heroic Nature of Tax Lawyers*, 140 U. PA. L. REV. 367, 369 n.13 (1991). On the application of film and television to other law school subjects, see Christine Alice Corcos, *Columbo Goes To Law School*, 13 LOY. L.A. ENT. L.J. 499 (1993). [Return to text.](#)

[4] However, the topic has been discussed in passing in various law review articles. See Robert A. Prentice & John H. Langmore, *Hostile Tender Offers and the "Nancy Reagan Defense": May Target Boards "Just Say No?" Should They Be Allowed To?*, 15 DEL. J. CORP. L. 377, 436 (1990) (citing the depiction in *GHOSTBUSTERS II* of incidents of tortured logic and bad faith); Leonard R. Jaffee, *The Troubles With Law and Economics*, 20 HOFSTRA L. REV. 777, 871 (1992) (citing the existence of Slimer and the Ghostbusters breakfast cereal as an example of a product designed to appeal to infant consumerism). Since *GHOSTBUSTERS*, other entertainment vehicles have carried an environmental message, including the cartoon television series *The Simpsons* (Fox Television Network, 1989-1997) (depicting the father, Homer Simpson, as an intellectually challenged nuclear power plant worker); see also Tony Perry, *San Diego at Large: "Simpsons" Enlightened, But Don't Expect Glowing Praise for Nukes*, L.A. TIMES, Dec. 28, 1990, at B1. [Return to text.](#)

[5] Of course, the Ghostbusters themselves do not manage the ghosts for very long. After their first attempt, which Walter Peck torpedoes, they keep "Zul," the dangerous interloper from the Ancient Near East, incarcerated for only as long as it takes Hollywood to develop *GHOSTBUSTERS II* (Columbia Pictures Corporation 1989). See Jay Boyer, *Bill Murray Is "Ghost busters II" Hero*, ORLANDO SENT., Aug. 28, 1994, at 48. In environmental terms, that's very temporary storage. [Return to text.](#)

[6] Another theme portrayed in movies is that of hauntings substantially reducing the value of suburban neighborhood property constructed over former burial grounds. This is the theme of *POLTERGEIST* (MGM 1982) and *Grave Secrets: The Legacy of Hilltop Drive* (Hearst Entertainment Productions, Inc. 1992), both of which postulate venal land developers as a subgroup of avaricious business people. In *Grave Secrets: The Legacy of Hilltop Drive*, the unwary property owners are unable to recover from the title company, which takes the position that they knew or should have known of the prior existence of the burial ground. A sympathetic real estate attorney points out that even though the homeowners have a good case, they are unlikely to prevail at trial, and appeals will be costly. Eventually, the owners abandon the property after unsuccessfully suing their real estate agents for "abuse of corpse." See BEN WILLIAMS ET AL., *THE BLACK HOPE HORROR: THE TRUE STORY OF A HAUNTING* (Morrow 1991); see also Michele Meyer, *Houston's Haunted Houses: Spirits Leave Calling Cards All Over Town*, HOUSTON CHRON., Oct. 31, 1991, at 1 (discussing the events at the Galveston Wal-Mart, said to be built over a cemetery). [Return to text.](#)

[7] See Scott Allen, *US Accepts \$129M for Cleanup of Love Canal: Some Say Case Set a Wrong Course*, BOSTON GLOBE, Dec. 22, 1995, at 1 (discussing the history and cleanup of the Love Canal). Similarly, many citizens are concerned that electric power lines put them at risk for developing cancer. Mainstream science currently dismisses the possibility. See PAUL BRODEUR, *THE GREAT POWER LINE COVER UP* (1993); Terry C. Cavanaugh, *Fear & Loathing*, 13 CELLULAR BUS. 56 (Nov. 1996); see also Panel Sees No Clear Evidence That Power Lines Cause Cancer; But a UCR Scientist Calls For More Research Into an Unexplained Link to Childhood Leukemia, PRESS- ENTERPRISE, Nov. 1, 1996, at A5. [Return to text.](#)

[8] The failure of critics to recognize *GHOSTBUSTERS* as a social and political satire is surprising given the preference that Bill Murray, Harold Ramis, and Dan Ackroyd have always shown for social and political satires in their early *Saturday Night Live* (Broadway Video/ NBC Productions) work and in other films. See, e.g., Jay Carr, *Bill Murray's Somber Side*, BOSTON GLOBE, Nov. 20, 1988, at 93 (discussing the actor's views on filmmaking); see also Lois Romano, *Busting 'Em Up: Harold Ramis, On the Million-Dollar Laugh Trace*, WASH. POST, Sept. 5, 1984, at B1 ("Our characters are rebels, but not losers. Other characters may accuse them of being neurotic, but our characters are radical heroes. And the audience thrives on heroism."). Students of the work of both Ramis and Ackroyd immediately spot the social critique rampant in *GHOSTBUSTERS*. See Interview with Rita Knight-Gray, *Independent Film Maker*, in Cleveland, Ohio (Sept. 14, 1994). [Return to text.](#)

[9] (Made for TV movie 1989). [Return to text.](#)

[10] (New World Pictures 1984). *C.H.U.D. (Cannibalistic Humanoid Underground Dwellers)*, is a cinematic portrayal of toxic waste and its impact on living or formerly living beings. This film depicts entities living under New York City that feed on unwary inhabitants; a variant on the "alligators in the sewers" urban myth. See Richard Harrington, *"C.H.U.D.": Subterranean Sludge Movies by Richard Harrinton*, WASH. POST, Sept. 26, 1984, at D6. Accidental exposure to toxic waste produces the *Toxic Avenger*, the *Teenage Mutant Ninja Turtles*, the *Penguin* (in the film version of *Batman*), *The Incredible Hulk*, *Swamp Thing*, *Spiderman*, and various teenage characters in the series of *NUKE 'EM HIGH* films. Recent "environmentally conscious" films and television shows include *FREE WILLY* (Warner Bros. 1993), *Star Trek: The Next Generation:: Force of Nature* (Paramount, Nov. 13, 1993), and the *X-Files: Darkness Falls* (Fox television broadcast, Apr. 15, 1994) episodes. Children's cartoon shows also seem more inclined to feature environmental issues. See Donna Parker, *EMA Noms to "Willy," "X-Files," THE HOLLYWOOD REP.*, Aug. 17, 1994. Amphibia are a particular theme. Note the environmental message directed at the youngsters by the *Muppets*, in *Kermit the Frog's* theme song, *IT'S NOT EASY BEING GREEN*. Turtles and tortoises seem to be a popular subject in environmental law and popular culture. For example some individuals make films about them, see *TURTLE DIARY* (Vestron 1985) (Two British environmentalist try to free sea turtles kept

at the London Zoo), where others slash sea turtles' throats, see Maura Dolan, *Nature at Risk in a Quiet War*, L.A. TIMES, Dec. 20, 1992, at A1 (Angry fishermen kill endangered sea turtles that become entangled in their nets while some property owners dispose secretly of endangered desert tortoises.). Turtles can also be expensive to maintain. See Linda Matchan, *One Family's Turtle Diary: Shelling Out to Pamper a Pet*, BOSTON GLOBE, Nov. 19, 1992, at A1 (detailing expenses in three figures incurred in a treating bored, lonely, sickly \$12 turtle). [Return to text.](#)

[11] (20th Century Fox 1983). *Female environmental heroes are less common than male ones, and usually less forceful.* See Roberta Green, *Diana to Dian Fossey: Hollywood's Women as Protectors of the Environment*, 37 W. VA. U. BULL. PHILOLOGICAL PAPERS 9 (1991) (discussing women as traditional advocates for flora and fauna). [Return to text.](#)

[12] (BBC 1992). *This film is also known under the title Disaster at Valdez.* See LEONARD MALTIN, *LEONARD MALTIN'S MOVIE AND VIDEO GUIDE* 1994 292-93 (1993). [Return to text.](#)

[13] (1991). *When released on video, the title was changed to The Final Warning.* See MALTIN, *supra* note 12, at 461. [Return to text.](#)

[14] (Columbia Pictures Corp. 1979). [Return to text.](#)

[15] *Environmental disaster made the mainstream as a bankable theme with THE CHINA SYNDROME, which debuted shortly before the Three Mile Island nuclear power plant accident.* See Rich Kirkpatrick, *Three Mile Island: America's Age of Nuclear Innocence Ended 10 Years Ago*, L.A. TIMES, March 26, 1989, at 2. Later, in *STAR TREK IV: THE VOYAGE HOME* (Paramount Pictures 1986), an interstellar probe visits Earth to communicate with whales. This film reemphasized environmental science fiction which had first surfaced in films such as *THEM!* (Warner Brothers 1954) (featuring radioactive ants invading the L.A. sewer system) and *THE TIME MACHINE* (MGM 1960). Other nuclear disaster films include *THE DAY AFTER* (ABC Motion Pictures 1983), *TESTAMENT* (Paramount Pictures 1983), and numerous science fiction films including *LOGAN'S RUN* (MGM 1976). For other ecological films, see Terry George, *Hollywood Goes Green*, 94 AUDUBON 86 (March 1992); see also Tom Gliatto, *Have a Blast With These Films*, USA TODAY, Oct. 19, 1989, at 6D (listing movies that focus on nuclear disaster). Only a few movies that examine the attempt to control natural resources have been made. However, *CHINATOWN* (Paramount Pictures 1974) is one of the few movies that examine the attempt to control natural resources. *CHINATOWN* details the attempt by a Los Angeles-based syndicate to preempt use of the Colorado River. The hero, Jake Gittes (Jack Nicholson), is ultimately unable to undo the damage. Television shows that have emphasized environmental messages include *Star Trek: The Next Generation: The Force of Nature*, *supra* note 10, *The X-Files: Darkness Falls*, *supra* note 10, and the short lived *Quark* (NBC television broadcast, May 7, 1977-Apr. 7, 1978) (about an interstellar garbage scow). See *From Space Junk to Stellar Missions; The Worst to the Best*, SACRAMENTO BEE, Jan. 3, 1993, at EN 15. [Return to text.](#)

[16] *Ecologist Garret Hardin originated this term in The Tragedy of the Commons*, 162 SCI 142 (1968). [Return to text.](#)

[17] *Though, as we see demonstrated through GHOSTBUSTER'S characters Lewis Tully and Dana Barrett, the ghosts are not out of body.* [Return to text.](#)

[18] *One of the underlying problems in environmental regulation is the lack of consensus on what constitutes reliable science on which to base policy decisions.* See Wendy E. Wagner, *The Science Charade in Toxic Risk Regulation*, 95 COLUM. L. REV. 1613, 1614 (1995). Venkman is accused of being a poor and unethical scientist by the University administration, the EPA, and his client (Dana Barrett); both because his critics do not like his manner, and because his grasp of the scientific method seems shaky at best. Yet, his seat-of-the-pants approach is reminiscent of the stereotypical American desire to get the job done without worrying about seemingly pointless bureaucratic demands. [Return to text.](#)

[19] *The extent to which business must anticipate potential dangers to the public is generally a thorny problem. For example, the elaborate precautions taken by the developers in JURASSIC PARK (MCA/Universal Pictures 1993) was not enough to protect the public from rampaging dinosaurs. Thus, society should consider what risks it is willing to take in order to carry on a moderately rational existence. For the developers in JURASSIC PARK, the question is not so much whether a dinosaur will escape, but rather the risks it poses to public health and welfare, and the amount of money available to minimize those risks. "Is it a big dinosaur or a little dinosaur? Is it a people-eating dinosaur?" Comments of Robert Avant, Jr., Deputy Director, Texas Low-Level Radioactive Waste Disposal Authority, Cleveland, Ohio (Oct. 4, 1994).* [Return to text.](#)

[20] *Such a lack of preparedness marks several ecological disasters over the past few years, including the Exxon-Valdez oil spill in Prince William Sound, the massive radiation poisoning of sheep and nuclear test site employees on Nevada ranges, and the Chernobyl disaster.* See Casey Bukro, *Alaska Team Aims to Prevent Oil Spills*, CHICAGO TRIB., July 19, 1991, at C6 (reporting on the Exxon-Valdez spill); see also Maria L. LaGanga, *Legal Fallout; Judge Rejects Claim That Nevada Test Site Radiation Caused Worker Illnesses*, L.A. TIMES, Aug. 1, 1994, at A3; STEWART UDALL, *THE MYTHS OF AUGUST* (1994); Stuart Diamond, *Chernobyl Causing Big Revisions in Global Nuclear Power Policies*, N.Y. TIMES, Oct. 27, 1986, at A1; Aleksei Mikhailov, *Sore Spot: Victimization Being Reversed: More Than Half a Million Children Live in Areas Contaminated by the Chernobyl Disaster*, CURRENT DIG. SOVIET PRESS, April 13, 1994, at 21 (examining the effects of Chernobyl). [Return to text.](#)

[21] *On the clash between federal and state jurisdictions in the environmental protection area, see David R. Hodas, Enforcement of Environmental Law in a Triangular Federal System: Can Three Not Be a Crowd When Enforcement Authority Is Shared in the United States, the States, and Their Citizens*, 54 MD. L. REV. 1552 (1995); see also Kenneth M. Murchison, *Enforcing Environmental Standards Under State Law: The Louisiana Environmental Quality Act*, 57 LA. L. REV. 497 (1997). [Return to text.](#)

[22] *If the answers are not clear by the end of this Essay, well, that is my point.* [Return to text.](#)

[23] *Business people in general are subject to widespread criticism in the movies. See generally Stuart Feldman, At the Movies: Business Gets a Bad Rap; Hollywood's Portrayal of Business and Executives*, 81 *MGMT. REV.* 49 (1992). [Return to text.](#)

[24] *Some companies are beginning to object to the media's portrayal of them as cloddish, money-hungry robber barons, primarily responsible for our present ecological disasters. See Laurie Lande, Marathon Oil Quits Parade to Protest Seagal Portrayal*, *DALLAS MORNING NEWS*, July 4, 1994, at D1 (discussing Marathon Oil's pullout from the Cody, Wyoming Independence Day celebration in protest over the image of an oil executive in the Steven Seagal film *ON DEADLY GROUND* (Warner Brothers 1994)). Some commentators have expressed concern over the oil and gas industry's failure to promote a more attractive image as well as the movie's inaccuracy: "I don't think the future of the industry will rise or fall based on one movie," said Robert Stewart, president of the National Ocean Industries Association, a group that represents the offshore oil and gas industry, "but if that movie is all the public is seeing, then we have no one to blame but ourselves." *Id.*; see generally Greg Hassell, *Hollywood Casts Big Oil the Villain; In Movies, the Energy Industry Can Do No Right—and That Bad Image Reflects on Houston*, *HOUSTON CHRON.*, May 29, 1994, *Business Sec.* at 1 (discussing the negative image of the oil industry in movies). Television reinforces this image in series like *Dallas* (Columbia Broadcasting System, 1978-1991), in which J. R. Ewing cheerfully personifies both corporate greed and environmental insensitivity. [Return to text.](#)

[25] Dana Barrett (Sigourney Weaver) tells him bemusedly, "You don't seem like a scientist. More like a game-show host," a putdown that leaves Venkman undaunted. [Return to text.](#)

[26] *When the three decide to go into business, Venkman is enthusiastic, even though seeking out venture capital for this unknown technology puts them at the mercy of the overly greedy financial world. "Will you guys relax? We are on the threshold of establishing the indispensable defense science of the next decade—Professional Paranormal Investigations and Eliminations. The franchise rights alone will make us rich beyond our wildest dreams." Stantz is dismayed at the exorbitant rate of interest he'll have to pay on his mortgaged home. "Nineteen and a half percent? You didn't even bargain with the guy!" The lugubrious Spengler contributes the sobering thought that the payments on the interest alone over the next few years will amount to ninety-five thousand dollars.* [Return to text.](#)

[27] Oswald Spengler, *THE DECLINE OF THE WEST* (Charles Francis Atkinson trans., Oxford University Press 1991). [Return to text.](#)

[28] *The proper word is "fungi," but, after all, Spengler is a hard sciences man. See RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 776 (2d ed. 1987).* [Return to text.](#)

[29] *But the dead are coming back, and significantly make their first appearance in a building, the public library, devoted to print.* [Return to text.](#)

[30] *Venkman, for example, uses his position as a researcher to skew results in an ESP experiment in order to seduce one of the female participants. Whether it is politically wise for the Dean to toss all three of them out based on Venkman's performance is another question. Scientists with funded projects are not normally treated this way, although perhaps some of them should be. For a recent example of questionable scientific methods, see JUDY SARASOHN, SCIENCE ON TRIAL (1992) (discussing accusations of faulty or falsified research results in the lab of David Baltimore, the Nobel Prize winner of 1975, and former Rockefeller University president). Theresa Imanishi-Kari, the scientist who was the primary target of Congressman John Dingell's investigation, was eventually cleared by a National Institutes of Health (NIH) panel in 1996. See Gina Kolata, *Inquiry Lacking Due Process*, *N.Y. TIMES*, June 25, 1996, at C3. The end of the NIH probe has simply triggered further discussion of scientific misconduct. See Joseph Palca, *Scientific Misconduct: Ill-Defined, Redefined*, 26 *HASTINGS CNTR. REP.* 4 (1996). [Return to text.](#)*

[31] *For a ten minute sweep of a hotel, during which they destroy property with great abandon, they charge the establishment \$5000.* [Return to text.](#)

[32] *Stantz tells Venkman, "I found the car. Needs some suspension work, and shocks, and brakes, brake pads, lining, steering box, transmission, rear end . . . only \$4800 . . . maybe new rings, also mufflers, a little wiring." The car is a former ambulance, emphasizing the similarities between the Ghostbusters' venture and responses to other tragedies.* [Return to text.](#)

[33] *Harvey Famous Cartoons sued Columbia Pictures over the use of the emblem, which bears some physical, though not psychic, resemblance to one of the characters in Casper's ghostly trio. See Stuart M. Wise, "Ghostbusters" Buster*, *NAT'L L.J.*, Dec. 3, 1984, at 43; *Harvey Cartoons v. Columbia Pictures Indus., Inc.*, 645 F. Supp. 1564 (S.D.N.Y. 1986) (holding similarities between cartoon and GHOSTBUSTERS emblem not copyrightable, or had entered public domain). Another suit, by Filmation, over the title of the film was settled out of court. See *Dispute Over "Ghostbusters" Title Is Vaporized By Settlement*, 6 *ENT. L. REP.* 20 (August 1984). Still more litigation surrounded the use of the theme song for the film. See David May, "So Long As Time Is Music": *When Musical Compositions Are Substantially Similar*, 60 *S. CAL. L. REV.* 785, 791-94 (1987) (discussing composer Huey Lewis' suit against Ray Parker, Jr. for copyright infringement). [Return to text.](#)

[34] *Such use would seem to fall within the ambit of prohibited transactions involving nuclear materials. See 18 U.S.C. § 831(a)(1) (1994) (prohibiting receipt, possession, use, transfer, alteration, disposition of, or dispersion of any nuclear material). Naturally, any misuse may also suggest liability on the part of the Ghostbusters should harm come to any bystander (e.g., the hotel maid). See infra, note 52.* [Return to text.](#)

[35] *Their use of the facility as a residence may or may not also violate city zoning ordinances. Like firefighters and staff physicians, the Ghostbusters may have good reason to be on the premises in case of emergency.* [Return to text.](#)

[36] Spengler asserts that the neighborhood is like a demilitarized zone, but we have no independent evidence that it is particularly dangerous or in more need of urban renewal than the average downtown area. [Return to text.](#)

[37] On nuisance, see generally J. D. LEE & BARRY A. LINDAHL, 3 MODERN TORT LAW: LIABILITY & LITIGATION 191, 194 (rev. ed. 1996).

"A public nuisance affects the community as a whole. It is an invasion of a right common to members of the public generally; or to an indefinite number of persons. A private nuisance is an individual wrong caused by unreasonable or unlawful use of one's property. An individual so affected may maintain an action to enjoin or abate the nuisance, or to recover damages."

Id. [Return to text.](#)

[38] Do the Ghostbusters have a right to install a siren on their vehicle? A siren implies a demand for a right-of-way on city streets, to which the company is not yet entitled, as far as we know. Yet in their work, time may be of the essence, and the Ghostbusters may be able to make an argument that they are entitled to negotiate municipal thoroughfares as rapidly as possible in order to deal with rapidly developing ecological problems. On the other hand, noisy devices, whose signal requests for immediate passage installed willy-nilly on motor vehicles, may violate city ordinances in a way that the mounting of loudspeakers on sound trucks designed for the broadcast of political rhetoric may not. See generally Kovacs v. Cooper, 336 U.S. 77 (1949) (affirming the lower courts decision that Kovacs did violate a city ordinance which prohibited the use on the city streets of sound amplifying devices making loud and raucous noises). Further, owners and drivers of emergency vehicles bear a responsibility for the safe operation of those vehicles, as complaints about the increasing number of accidents due to high speed driving attest. See, e.g., Deb Kollars, 4 Crashes Mar City-Run Ambulance Service, SACRAMENTO BEE, May 8, 1995, at B1 (reporting on lawsuits faced by the city based on death and injuries caused by ambulances driven over the speed limit). [Return to text.](#)

[39] A policeman delivers Lewis Tully to the facility, telling Egon that although the man should get medical treatment, "Bellevue doesn't want him and I'm afraid to put him in the lockup." Does this statement constitute some kind of recognition on the part of the city that the Ghostbusters' business is a legitimate public service and the premises meet (unnamed) requirements? [Return to text.](#)

[40] See generally 40 C.F.R. for EPA regulations. [Return to text.](#)

[41] President Clinton made the possibility of environmental racism a consideration in siting decisions. "[E]ach Federal agency shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations . . ." Executive Order 12898: Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, 30 WKLY. COMP. PRES. DOC. 276 (Feb. 11, 1994). [Return to text.](#)

[42] See American Mining Congress v. EPA, 824 F.2d 1177 (D.C. Cir. 1987). In American Mining, the court held that "in light of the language and structure of the RCRA, . . . Congress clearly and unambiguously expressed its intent that 'solid waste' . . . be limited to materials that are 'discarded' by virtue of being disposed of, abandoned, or thrown away." Id. at 1193. [Return to text.](#)

[43] See, e.g., LA. CIV. CODE ANN. art. 667 (West 1996) ("Although a proprietor may do with his estate whatever he pleases, still he cannot make any work on it, which may deprive his neighbor of the liberty of enjoying his own, or which may be the cause of any damage to him."). [Return to text.](#)

[44] See *infra* Part II.B.3.b. [Return to text.](#)

[45] See Murchison, *supra* note 21, at 508-09. [Return to text.](#)

[46] See *infra* note 103 and accompanying text. [Return to text.](#)

[47] Note that Spengler already realizes that the building may not withstand the use to which they hope to put it, which may expose them to additional liability. [Return to text.](#)

[48] The question of built-in redundancies is another topic that a complete siting and licensing procedure would have explored. Compare Venkman's response to Peck with Jack Lemmon's explanation to Jane Fonda of the "backup systems to backup systems" that protects the core of the nuclear power plant in THE CHINA SYNDROME (Columbia Pictures Corporation 1979). Ironically, the plant's structural shortcomings in THE CHINA SYNDROME already threaten the integrity of those systems, as Lemmon discovers when he examines the X-rays of the plant's underground supports. The X-rays reveal that the builders provided the same X-ray for each support. The builder's justification is the high cost of providing independent verification of compliance for each support when the building has already been deemed structurally sound. See *id.* [Return to text.](#)

[49] See *infra* Part IV.A. (discussing Peck's second visit). [Return to text.](#)

[50] On liability for abnormally dangerous activities, see, e.g., Shockley v. Hoechst Celanese Corp., 793 F. Supp. 670, 647-57 (D.S.C. 1992) (holding operator of chemical reclamation facility liable for improperly storing waste when operator knew or had reason to know of improper

storage), *aff'd in part and rev'd in part*, 996 F.2d 1212 (4th Cir. 1993). [Return to text.](#)

[51] Interestingly, they are chasing a thirsty ghost who's busily polluting himself with conveniently provided wedding reception liquor. [Return to text.](#)

[52] After they nearly vaporize a hotel maid, they decide that this encounter qualifies as a "completely successful test." [Return to text.](#)

[53] Are the Ghostbusters' services likely to be covered under a conventional business premises policy? Is the psychic plague an act of God? Is any specific god implied in traditional insurance policy language? [Return to text.](#)

[54] Are the Ghostbusters required to explain their rates before accepting the job? Because they did not explain their rates, they are the only company available to provide the service, and since the ghostly apparitions are apparently developing into a plague, should the government act to regulate the Ghostbusters under the Sherman Antitrust Act? See, e.g., 15 U.S.C. §§ 1-7 (1994). Does the manager have an argument that such a charge is exorbitant, given the emergency situation? Are the Ghostbusters in the nature of a public utility, like policemen or physicians (or Consolidated Edison)? Or, are they providing an optional service, like elective surgery, whose necessity is in the eye of the beholder? EPA representative, Walter Peck, certainly believes that they are fraudulently creating the need for their services. On price-gouging by suppliers after natural disasters, see Shannon King, *5 Gulf Coast States Unite to Combat Disaster Rip-Offs*, BATON ROUGE ADVOCATE, July 9, 1996, at A6 ("People lost thousands of dollars to fly-by-night contractors who failed to deliver on promises to restore homes; with goods scarce, people paid triple the usual prices for generators and emergency supplies."). Of course, since the Ghostbusters have no competition, it's difficult to know what the usual price is for a service like psychic waste capture. [Return to text.](#)

[55] However, Zeddemore is a character people believe in. He seems so real in fact that Hudson said he often is called upon to do real-life ghostbusting. He once was asked to go to Arizona to investigate a ghost named Jake who had been sighted for more than a hundred years in a hotel. He traveled to Arizona but was not able to find Jake. See Cherry, *supra* note 2, at D3. Egon and Ray, however, firmly believe in the evidence produced by their equipment. Unlike Venkman, they are archetypal mad scientists transformed into reluctant saviors of the world, a perfect, if unlikely, combination. Ever since Dr. Frankenstein's appearance in Mary Shelley's *FRANKENSTEIN* (1818), mad scientists and their impact on the environment have also been a favorite topic for novelists and filmmakers. See Bob Thomas, *Old Mad Scientist Is New Again*, CLEVE. PLAIN DEALER, July 22, 1994, at 6E. [Return to text.](#)

[56] (Made for TV Movie 1989). [Return to text.](#)

[57] (20th Century Fox 1983). [Return to text.](#)

[58] (Columbia Pictures Corp. 1979). [Return to text.](#)

[59] The outline of tort theories and possible remedies is taken from MICHAEL J. LAST, *TORT AND INSURANCE ISSUES, IN SITING OF HAZARDOUS WASTE FACILITIES & TRANSPORT OF HAZARDOUS SUBSTANCES* 20, 23 (Washington DC: American Bar Association Public Services Division, 1984). [Return to text.](#)

[60] "[O]perating a hazardous waste disposal site in downtown Boston might be deemed inherently dangerous, whereas in a more remote location like Last Chance, Colorado, it might not." *Id.* at 20. [Return to text.](#)

[61] *Id.* [Return to text.](#)

[62] See Kenneth M. Murchison, *Interstate Pollution: The Need for Federal Common Law*, 6 VA. J. NAT. RESOURCES L. 1, 3-6 (1986). Murchison points out substantial problems with the use of either private or public nuisance theory to support environmental claims. Private nuisance theory requires a demonstration of substantial interference with private enjoyment of one's property, and traditionally, public nuisance theory required a demonstration of criminal wrongdoing. See *id.* [Return to text.](#)

[63] See discussion *infra* Part IV. [Return to text.](#)

[64] Last, *supra* note 59, at 20. [Return to text.](#)

[65] *Id.* at 21. [Return to text.](#)

[66] If the citizens could establish that RCRA applies, they could of course bring suit to compel the Ghostbusters to obtain a permit or correct other statutory violations, or otherwise compel the EPA to enforce various provisions of RCRA. See 42 U.S.C. § 6972(a)(1) (1994). [Return to text.](#)

[67] This is evidenced by a scene in which Janine gives the Ghostbusters a list of the day's clients including several free repeaters. [Return to text.](#)

[68] The New York City municipal government's attitude is represented by the mayor's reaction to the psychic plague unleashed by Peck in the second half of the film. The EPA's willingness to pursue suspected polluters adversarially seems to fluctuate with the Administration in power, as demonstrated by the agency's changing attitude toward Superfund. For contrasting approaches see H. C. Barnett, *Crimes Against the Environment: Superfund Enforcement at Last*, 525 ANNALS AM. ACAD. POL. SOC. SCI. 119 (1993). [Return to text.](#)

[69] See Thomas J. DiLorenzo, *Federal Regulations: Environmentalism's Achilles Heel*, 123 U.S.A. TODAY, Sept. 4 1994, at 48 (noting the EPA's failure to consider cost-benefit ratios when enacting new regulations). [Return to text.](#)

[70] Egon explains the dimensions of the problem to Winston by analogy to a Twinkie, an interesting choice since Twinkies are generally acknowledged to be nearly indestructible (as well as possibly inedible). The use of the Twinkie as a symbol naturally leads one to consider other associations. Although the Twinkie defense implies that continuous, unsupervised Twinkie consumption may be harmful to humans, the animal population may actually benefit from the concoction. "In Sarasota, Florida, when an elephant refused his normal diet following surgery, the attending veterinarian prescribed Twinkies. The elephant recovered and grew strong. In 1976 in Kings Mill, Ohio, runaway baboons were captured with bait of Twinkies and bananas." Jane and Michael Stern, *Twinkie, Twinkie, Little Suet-Filled Sponge-Cake Cisco Log, Now I Know What You Are*, SPY MAG., July 1989, at 96, 98. While this story may be farcical, the Japanese Environment Assessment Center in Okayama announced the successful creation of a new delicacy called "environmental sausage," made from "recycled Toyko 'sewage solids' by adding soybean protein and steak flavoring. Officials concede 'a slight image problem' probably will keep the sausage from ever being sold commercially." See Brian E. Albrecht, *Journalassic Park!*, CLEVE. PLAIN DEALER, Dec. 26, 1993, at 1H. [Return to text.](#)

[71] See generally ADELIN LEVINE, *LOVE CANAL: SCIENCE, POLITICS, AND PEOPLE* (1982). [Return to text.](#)

[72] John Ritter, *In Mining Town, Years of Bad Blood With EPA // Bitter Colo. Cleanup Fight Could Take a Turn Today*, USA TODAY, August 26, 1994, at A10 (discussing differences of opinion concerning extent of damage and responsibility for cleanup in a small Colorado town). The television movie *INCIDENT AT DARK RIVER*, *supra* note 9, deals with a similar, Love Canal-like problem and documents the frustration of a homeowner unable to obtain redress through the courts for the death of his daughter, caused by her exposure to point-source pollution illegally discharged by a local chemical plant. [Return to text.](#)

[73] See generally Vincent D'Elia & Catherine M. Ward, *The Valuation of Contaminated Property*, 111 BANKING L.J. 350 (1994). [Return to text.](#)

[74] See Margaret Murphy, *Viewpoints; Warning: Disclose Environmental Cost*, N.Y. TIMES, Sept. 4, 1994, § 3, at 9. [Return to text.](#)

[75] DiLorenzo, *supra* note 69, at 48. [Return to text.](#)

[76] The name is suggestive of Peck's penchant for nipping at the Ghostbusters and their activities, constantly battering away at the same point (the lack of proper procedures) rather than stopping to examine their purpose and effectiveness. Peck never seriously believes in the existence of the ghost entities, although he uses it as a justification for investigating and attempting to regulate their business. [Return to text.](#)

[77] See, e.g., Sandra L. Goodman, *Why Does EPA Issue Exaggerated Warnings?* SACRAMENTO BEE, July 31, 1994, at FO3.

Few people would dispute that exposure to high levels of toxic chemicals is dangerous; the health effects of low-level exposure, however, are not so clear. Low levels of exposure are what you find at most Superfund sites. But rather than providing an accurate assessment of the most probable dangers . . . EPA prefers to whip up public hysteria.

Id. Note, however, that Peck's objection to the Ghostbusters' operation is that it is unsafe, not because they are mishandling the environmental hazard they are hired to eradicate, but because he believes they are creating an environmental hazard through fraud and reckless use of dangerous equipment. [Return to text.](#)

[78] See Murchison, *supra* note 21, at 508-09; see also *supra* notes 20-21 and accompanying text. However, nothing requires that the EPA continue to take this position, since the statutes are silent on the issue. [Return to text.](#)

[79] 476 U.S. 227 (1986). [Return to text.](#)

[80] See *id.* at 239. [Return to text.](#)

[81] See generally *United States v. State of New Mexico*, Civ. No. 90-276 SC, 1992 WL 437983, at *1 (D.N.M. Oct. 14, 1992) (discussing extent of EPA's power to regulate activity based on failure to specify exact nature of waste at issue as falling within statutory definition), *aff'd*, 32 F.3d 494 (10th Cir. 1994). [Return to text.](#)

[82] Although Peck may not believe that ghosts exist, a New York Court of Appeals allowed rescission of a real estate contract on the basis that the seller had failed to disclose the reputation of the property as "haunted," therefore breaching the agreement to deliver a "vacant" house to the buyer. See *Stamovsky v. Ackley*, 169 A.D.2d 254, 259-60 (N.Y. App. Div. 1991). On haunted real estate, see generally Daniel M. Warner, *Caveat Spiritus: A Jurisprudential Reflection Upon the Law of Haunted Houses and Ghosts*, 28 VAL. U. L. REV. 207 (1993) (discussing, among other cases, *Stamovsky*). [Return to text.](#)

[83] 42 U.S.C. § 10171 (1994). [Return to text.](#)

[84] The term "civilian nuclear activity" is defined by statute as "any atomic energy activity other than an atomic energy defense activity." 42 U.S.C. § 10101(5) (1994). The term "disposal" is defined as "the emplacement in a repository of high-level radioactive waste, spent nuclear fuel, or

other highly radioactive material with no foreseeable intent of recovery, whether or not such emplacement permits the recovery of such waste." Id. § 10101(9). The Ghostbusters' use of the unlicensed nuclear accelerators may bring their activity within the ambit of these sections. According to 42 U.S.C. § 10132, proposed nuclear waste disposal sites must be thoroughly investigated by the EPA and approved by the President. [Return to text.](#)

[85] See 42 U.S.C. § 10134(f) (1994). [Return to text.](#)

[86] See 10 C.F.R. § 61.7(b)(2) (1997). For a general discussion of C.F.R. guidelines, see Michael A. Petrella, *Wasting Away Again: Facing the Low-Level Radioactive Waste Debacle in the United States*, 5 *FORDHAM ENTVL. L.J.* 103 (1993). [Return to text.](#)

[87] See 10 C.F.R. § 61.7(b)(2) (1997). The waste could only retain a stable physical character if mixed with some stabilizing agent; the radioactive gases that the Ghostbusters use to capture it seem very unstable. [Return to text.](#)

[88] See generally 10 C.F.R. § 61.7 (1997). [Return to text.](#)

[89] See 10 C.F.R. § 61.55(2) (1997) (detailing Class A, B, and C distinctions). [Return to text.](#)

[90] See 42 U.S.C. § 6903(5) (1994) (defining hazardous waste). [Return to text.](#)

[91] See 42 U.S.C. § 5841(a) (1994) (establishing the Nuclear Regulatory Commission). [Return to text.](#)

[92] See 42 U.S.C. § 5842 (1994). [Return to text.](#)

[93] See *Congress Must Help States Settle Low-Level Waste Issue New York Isn't Alone in Having No Solution*, *BUFFALO NEWS*, June 26, 1994, at F10. [Return to text.](#)

[94] See 42 U.S.C. § 6926(b) (1994). [Return to text.](#)

[95] See *supra* note 70. Based on the Ghostbusters' specialized knowledge, they may also have a duty to inform various governmental bodies that an environmental hazard exists. For example, the EPA requires a good faith effort on the part of past and present owners of hazardous waste disposal facilities to file reports. See 46 *Fed. Reg.* § 22,144 (1981). The Ghostbusters know that they are using unlicensed nuclear accelerators, therefore, they know that their equipment is emitting radioactivity. [Return to text.](#)

[96] Franchising might be difficult since (at least in Spenglerian terms) ghostbusting is such a precise and dangerous activity, and would seem to require a certain amount of practice and expertise. Such a franchise operation may eventually implicate licensing concerns in the environmental area: how does one obtain the education and/or training necessary to become a Ghostbuster? See, e.g., 10 U.S.C. § 2701 (1994) (mandating educational programs and standards for environmental restoration by armed forces). Unhappy clients of ghostbusting franchises might quickly line up at the courthouse door to petition for redress against incompetent operators who do an inadequate job of eradicating psychic wastes, just as unhappy homeowners file complaints about incompetent termite control companies. See *Teresa Burney, Lennar Buyers Sue Over Termites*, *ST. PETE. TIMES*, July 16, 1996, at E1 (citing lawsuit against Lennar Homes Inc. and Ace Professional Pest Control Inc. for improper treatment of newly built dwellings against pest infestations). [Return to text.](#)

[97] Once the balance shifts so that the psychic disturbances become an invasion, a city-wide emergency exists. At that point, the city is unlikely to quietly allow the federal government to take over the counterattack and cleanup operations completely. The mayor obviously wants the glory of saving the city from disaster, although he would probably like the federal government to pick up the tab. On local preparedness to deal with environmental emergencies, see *Bill Dietrich, Near-Disaster Shows Alaska's Spill Savvy*, *SEATTLE TIMES*, Jan. 11, 1993, at A1. [Return to text.](#)

[98] See U.S. GEN. ACCT. OFF., PUB. NO. GAO/RCED-94-172, *NUCLEAR WASTE: FOREIGN COUNTRIES' APPROACHES TO HIGH-LEVEL WASTE STORAGE AND DISPOSAL* (1994) (identifying siting procedures as main obstacles to successful disposal programs). [Return to text.](#)

[99] 467 U.S. 837 (1984). [Return to text.](#)

[100] *Chevron*, 467 U.S. at 843 ("[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."). [Return to text.](#)

[101] See generally 42 U.S.C. §§ 6921-39 (1994). [Return to text.](#)

[102] See 42 U.S.C. § 6925 (c) (3) (1994) (requiring "[a]ny permit under this section shall be for a fixed term, not to exceed 10 years in the case of any land disposal facility, storage facility, or incinerator or other treatment facility"). [Return to text.](#)

[103] See 42 U.S.C. § 6928(a)(3) (1994) ("Any order issued pursuant to this subsection may include a suspension or revocation of any permit issued by the Administrator or a State under this subchapter and shall state with reasonable specificity the nature of the violation."). [Return to text.](#)

[104] See 42 U.S.C. § 6973(a) (1994). [Return to text.](#)

[105] 42 U.S.C. § 6928(b) (1994). [Return to text.](#)

[106] See *id.*; see also *Chemical Waste Management, Inc. v. EPA*, 873 F. 2d 1477, 1482 (D.C. Cir. 1989) (finding the EPA practice of holding informal hearing to investigate violations of orders brought under RCRA and Hazardous and Solid Waste Amendments permissible under the statute). [Return to text.](#)

[107] See generally 40 C.F.R. §§ 24.10(b), 24.14(a)(1) (1997) (detailing record submissions for responding parties). The Ghostbusters never have a chance to submit information for the record, but given Venkman's attitude, they are very likely not to have done so even if a hearing were held. [Return to text.](#)

[108] It should be clear, however, that even if the Ghostbusters do not violate any storage and disposal regulations with their psychic waste, their use of radioactive equipment certainly violates other environmental laws and regulations. [Return to text.](#)

[109] See 42 U.S.C. § 6901 (1994). [Return to text.](#)

[110] 42 U.S.C. § 6903(27) (1994). In regard to the renovation of the fire station,

(2) The term "construction," with respect to any project of construction under this Chapter, means (A) the erection or building of new structures and acquisition of lands or interests therein, or the acquisition, replacement, expansion, remodeling, alteration, modernization, or extension of existing structures, and (B) the acquisition and installation of initial equipment of, or required in connection with, new or newly acquired structures or the expanded, remodeled, altered, modernized or extended part of existing structures (including trucks and other more vehicles, and tractors, cranes, and other machinery) necessary for the proper utilization and operation of the facility after completion of the project . . .

42 U.S.C. § 6903. The fire station requires extensive renovation. See *supra* note 47 and accompanying text. The technology needed to build and operate the actual storage unit is completely new. [Return to text.](#)

[111] See 42 U.S.C. §§ 2071-2114 (1994). [Return to text.](#)

[112] 42 U.S.C. § 6921(b)(3)(B)(iii) (1994). [Return to text.](#)

[113] See 42 U.S.C. § 6922 (1994) (proscribing standards applicable to generators of hazardous waste). [Return to text.](#)

[114] 42 U.S.C. § 6922(a)(1) (1994). [Return to text.](#)

[115] See 42 U.S.C. § 6922(a)(6) (1994). The Ghostbusters may also have violated 42 U.S.C. § 6923 (1994) (regulating the transportation of hazardous wastes); 42 U.S.C. § 6924 (1994) (regulating the standards applicable to owners and operators of hazardous waste treatment, storage, and disposal facilities); and 42 U.S.C. § 6925 (1994) (requiring permits for treatment, storage and disposal of hazardous waste). [Return to text.](#)

[116] 42 U.S.C. § 6927(a) (1994). [Return to text.](#)

[117] Although, the EPA position is to obtain a warrant. See *Murchison*, *supra* note 21, at 508-09 and accompanying text. [Return to text.](#)

[118] Note that Venkman is apparently in charge of the operation. [Return to text.](#)

[119] See 42 U.S.C. § 6928(a)(2) (1994). We have no indication in the film that Peck notifies the State of New York. Therefore, this failure may invalidate the court order he obtains should the Ghostbusters choose to challenge the order. This section also provides for criminal penalties for knowing violations of the chapter. See 42 U.S.C. § 6928(d) (1994). Presumably this justifies the arrest of the Ghostbusters after Venkman attempts to prevent Peck from shutting down the operation. [Return to text.](#)

[120] See 42 U.S.C. § 6934(a) (1994). [Return to text.](#)

[121] Law school instructors could amuse themselves and bedevil their students by asking what are the "half dozen" violations. As this Article demonstrates, there are more than half a dozen to choose from. [Return to text.](#)

[122] 42 U.S.C. §§ 7401-7671q (1994). [Return to text.](#)

[123] See 28 U.S.C. §§ 1346(b), 2671-80 (1994). However, holding the federal government or its employees liable is difficult. See *Wells v. United States*, 655 F. Supp. 715 (D.D.C. 1987) (allowing liability to be assessed against the United States government only if the private party would be liable in similar circumstances, and government liability would not otherwise be prohibited by statute). [Return to text.](#)

[124] 28 U.S.C. § 2680(a) (1994). [Return to text.](#)

[125] See *id.* § 2680(h). On sovereign immunity and the Federal Tort Claims Act, see generally FRANK L. MARAIST & THOMAS C. GALLIGAN

JR., LOUISIANA TORT LAW 258-59 (1996). [Return to text.](#)

[126] While this question has not been litigated, the Office of the General Counsel of the EPA suggests that the government would not be liable for damage caused by pesticides duly registered under FIFRA. Coupled with the Wells decision, *supra* note 123, we might analogize, therefore, that the EPA may not be held liable for damage caused by hazardous but properly registered materials even when an employee negligently causes such damage. On the FIFRA question, see Environmental Protection Agency, 74 Op. Gen. Counsel 6 (1974). [Return to text.](#)

[127] See generally Goodman, *supra* note 77. See also Mary Judice, Taylor Questions Oil Bond, *TIMES-PICAYUNE*, Apr. 26, 1994, at C1 (considering financial surety requirements of the Oil Pollution Act of 1990 overkill). [Return to text.](#)

[128] The institution in question seems to be Columbia University, although it is not named in the film. In an appeal of this action, the burden would be on the Ghostbusters to demonstrate that the Dean exceeded his authority, or failed to comply with any necessary due process requirements before evicting them. Since Columbia University is private, due process requirements are almost nonexistent. Due process in institutions of higher education generally is a complex area. The nature of the institution is crucial in determining the amount of process due. See Donna P. Grill, *Due Process Protection For Nontenured Faculty in Public Institutions of Higher Education: Long Overdue*, 83 W. VA. L. REV. 99 (1980); see also Michael J. Phillips, *The Substantive Due Process Rights of College and University Faculty*, 28 AM. BUS. L.J. 567 (1991). The law dealing with student due process in public institutions is only marginally clearer. See *Dixon v. Alabama State Bd. of Educ.*, 294 F.2d 150, 151 (5th Cir. 1960) (holding that due process clause of the Constitution applies only to expulsion). [Return to text.](#)

[129] 42 U.S.C. § 6973(a) (1994). [Return to text.](#)

[130] 5 U.S.C. §§ 551-59, 701-06 (1994). [Return to text.](#)

[131] See *id.* §§ 701-06. [Return to text.](#)

[132] See 42 U.S.C. § 6972 (1994). [Return to text.](#)

[133] Compare 42 U.S.C. § 9659 (1994) (authorizing citizen suits under CERCLA) with 5 U.S.C. § 704 (1996).

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

Id. [Return to text.](#)

[134] See *supra*, note 123. [Return to text.](#)

[135] See *Izzo v. Borough of River Edge*, 843 F.2d. 765, 767 (3d Cir. 1988) (holding that federal interest may require district courts to balance federal and state land use concerns). [Return to text.](#)

[136] See *United States v. Goldsmith*, 978 F.2d 643, 645 (11th Cir. 1992) (holding that government need only show defendant's knowledge of general hazardous nature of chemical in use, not EPA's pre-existing classification of chemical as hazardous to be liable). The problem is of course that the Ghostbusters' case involves radioactivity and phantasms, not chemicals. [Return to text.](#)

[137] 42 U.S.C. §§ 11001-50 (1994). [Return to text.](#)

[138] See 42 U.S.C. § 11046 (1994) (authorizing citizen suits). [Return to text.](#)

[139] See Last, *supra* note 59, at 21. [Return to text.](#)

[140] *Id.* [Return to text.](#)

[141] *Id.*

142> LR 3 HL 330 (1868). [Return to text.](#)

[143] See *RESTATEMENT (SECOND) OF TORTS* §§ 519-20 (1964). [Return to text.](#)

[144] See Last, *supra* note 59, at 21. [Return to text.](#)

[145] A more likely candidate for suit, based on the "deep pocket theory," is the Ghostbuster business. Ghostbusters gives no information on its form of incorporation, if any, but the movie shows that the boys were extremely busy. If they charge all their clients according to the scale they describe to the hotel manager, they were certainly taking in a great deal of money in a short time. Of course, how much of it is profit is a question

for discovery. [Return to text.](#)

[147] See *United States ex rel. Mayo v. Satan and his Staff*, 54 F.R.D. 282 (W.D. Pa. 1971) (holding that plaintiff attempting to sue Satan for constitutional violations failed to allege residence of defendant within the district, thus making personal jurisdiction over the Dark Angel unlikely). The Satan Court found that:

Even if plaintiff's complaint reveals a prima facie recital of the infringement of the civil rights of a citizen of the United States, the Court has serious doubts that the complaint reveals a cause of action upon which relief can be granted by the court. We question whether plaintiff may obtain personal jurisdiction over the defendant in this judicial district. The complaint contains no allegation of residence in this district. While the official reports disclose no case where this defendant has appeared as defendant there is an unofficial account of a trial in New Hampshire where this defendant filed an action of mortgage foreclosure as plaintiff. The defendant in that action was represented by the preeminent advocate of that day, and raised the defense that the plaintiff was a foreign prince with no standing to sue in an American Court. This defense was overcome by overwhelming evidence to the contrary. Whether or not this would raise an estoppel in the present case we are unable to determine at this time.

Id. at 283; see also STEPHEN VINCENT BENET, *THE DEVIL AND DANIEL WEBSTER* (1937) (discussing the cited unofficial New Hampshire trial). [Return to text.](#)

[148] 15 U.S.C. § 1261(f)(1)(A) (1994). [Return to text.](#)

[149] See *id.* § 1261(g). [Return to text.](#)

[150] *Id.* § 1261(g). [Return to text.](#)

[151] See *id.* §§ 1261, 1263. [Return to text.](#)

[152] See 42 U.S.C. § 6923 (1994) (articulating standards for transporters of hazardous waste). [Return to text.](#)

[153] See 49 U.S.C. § 5103(b)(1) (1994) (authorizing the Secretary of Transportation to "prescribe regulations for the safe transportation of hazardous material in intrastate, interstate, and foreign commerce"). A case such as *New York v. Mattiace*, 568 N.E.2d 1189 (1990), illustrates the number of state, local and federal violations with which someone accused of "commercial hazardous waste disposal crimes" could be charged. However, the federal government has jurisdiction to regulate the transportation of hazardous materials. See § 5103. [Return to text.](#)

[154] See 49 U.S.C. § 5103 (1994) (authorizing the Secretary of Transportation to promulgate rules for the safe transportation of hazardous materials). [Return to text.](#)

[155] N.Y. ENVTL. CONSERV. LAW § 27-0305 (Consol. 1997) (regulating permits for waste transporters). [Return to text.](#)

[156] See, e.g., *Fireman's Fund Ins. Co. v. Corcoran*, 548 N.Y.S.2d 211 (N.Y. App. Div. 1989) (discussing the difficulties encountered when an insurance company not licensed in New York forces policy holders to obtain additional insurance to operate in New York to comply with federal regulations governing interstate transportation of hazardous waste). [Return to text.](#)

[157] See 29 U.S.C. §§ 651-78 (1994). [Return to text.](#)

[158] See *id.* § 655. [Return to text.](#)

[159] See generally JOHN HARTNETT, *OSHA IN THE REAL WORLD; HOW TO MAINTAIN WORKPLACE SAFETY WHILE KEEPING YOUR COMPETITIVE EDGE* (Merritt Publishing 1996) (explaining in layperson's terms the workings of OSHA). "When enforcing compliance, OSHA inspectors often cite employers under the General Duty Clause because the agency does not have a specific regulation that addresses a particular hazard in the workplace. Employers should note that any recognized hazard in the workplace, whether specifically addressed by OSHA or not, can be cited under the General Duty Clause. It is up to you, not OSHA, to identify and eliminate all existing and potential hazards." *Id.* at 51. For a discussion of the legislative history of the general duty clause, see BENJAMIN W. MINTZ, *OSHA: HISTORY, LAW, AND POLICY* 436 (Bureau of National Affairs, Inc., 1984). [Return to text.](#)

[160] 29 U.S.C. § 654(a)(1). (1994). [Return to text.](#)

[161] See generally JOSEPH M. ROBERTS, SR., *OSHA COMPLIANCE MANUAL* 27-28 (1976); 29 C.F.R. pt. 1910 (1997) (detailing Occupational Safety and Health Standards for General Industry). Ghostbusting may be a naturally hazardous activity, but no government agency has yet made a determination that this is so. [Return to text.](#)

[162] For a good general overview of the tensions created by overlapping jurisdictional regulations and public frustration, see William L. Rosbe, *Transport of Hazardous Substances*, in *SITING OF HAZARDOUS WASTE FACILITIES & TRANSPORT OF HAZARDOUS SUBSTANCES* 23-25 (Washington DC: American Bar Association Public Services Division, 1984). [Return to text.](#)

[163] As *GHOSTBUSTERS II* shows us, they do go out of business shortly after the end of *GHOSTBUSTERS*. [Return to text.](#)

[164] See *supra* note 93. [Return to text.](#)

[165] See New York, N.Y., City Charter § 1403(h) (1997) (granting power to the local executive to intervene when natural or man-made disasters have or are about to occur). [Return to text.](#)

[166] Consider the controversy over the enormous sums and unforeseen costs involved in Superfund and CERCLA site cleanup. On dissatisfaction with cleanup costs, see generally John Nielsen, *The Failure of the Superfund Law—Part 5*, MORNING EDITION, Sept. 16, 1994 (Transcript #1435-9) (NEWS Library, CURNWS File); see also BENJAMIN H. SHIAO & PHILIP J. HOLTHOUSE, *Deductibility of Environmental Cleanup Costs: The Debate Continues*, 21 J. REAL ESTATE TAX. 3 (1993). [Return to text.](#)

[167] Although one could argue that, given the nutritional value of marshmallows, Stantz actually did not think of anything. [Return to text.](#)

[168] Venkman's guests include a man whose hardcover book predicts the end of the world occurring on New Year's Eve, and a woman whose prediction of the end of civilization was revealed to her by an alien she met at a Holiday Inn in Paramus, New Jersey. When Venkman questions why he can't get more credible guests, his assistant points out that reputable psychics think he is a fraud. "I am a fraud!" he responds matter-of-factly. [Return to text.](#)

[169] Unlike the original *GHOSTBUSTERS*, *GHOSTBUSTERS II* tells us, rather than shows us, the effect that the psychic phenomena have on the city's inhabitants. This flaw in the script makes the film's argument that Evil is eternal and cumulative, and pollutes the human soul less persuasive than the similar theme in *GHOSTBUSTERS*. [Return to text.](#)

[170] This portrait of a woman attorney is an archetype, meant to appeal to the public's dislike and distrust of lawyers in general and women lawyers in particular. On the female attorney in film, see CHRISTINE A. CORCOS, *CIVIL WARS, IN LAW AND THE SMALL SCREEN* (Bob Jarvis & Paul Joseph ed., forthcoming 1998); Diane M. Glass, *Portia in Primetime: Women Lawyers, Television and L. A. Law*, 2 YALE J. L. & FEMINISM 371 (1990); Louise Everett Graham & Geraldine Maschio, *A False Public Sentiment: Narrative and Visual Images of Women Lawyers in Film*, 84 KY. L.J. 1027 (1996); Judith Mayne, *L. A. Law and Prime-Time Feminism*, 10 DISCOURSE 30 (Spring/Summer 1988); Carolyn Lisa Miller, Note: "What a Waste. Beautiful, Sexy Gal. Hell of a Lawyer.": Film and the Female Attorney, 4 COLUM. J. GENDER & L. 203 (1994); Carole Shapiro, *Women Lawyers in Celluloid: Why Hollywood Skirts the Issue*, 25 U. TOL. L. REV. 955 (1994); Ric S. Sheffield, *On Film: A Social History of Women Lawyers in Popular Culture 1930 to 1990*, 14 LOY. L.A. ENT. L.J. 73 (1993); Elaine Weiss, *Who's Missing in This Picture?* BARRISTER, Winter 1989, at 5. [Return to text.](#)

[171] I am indebted to Jill Kuswa for this observation. [Return to text.](#)

[172] On conspiracy theories in films see Christopher Sharrett, *Hollywood Fuels the Panic Years*, USA TODAY, July 1, 1995, at 67. Sharrett describes conspiracy films as follows:

The genre [crime films] has been very prescient in this regard, touching on the topic by the early 1960s, with its most incisive contemporary examples being Sidney Lumet's 'Prince of the City' and 'Q & A.' The crime movie is the natural territory for an exploration of corruption, having gone from individuals being born evil to the notion 'we have met the enemy and he is us between the Great Depression and the Greed Decade.'

Id. [Return to text.](#)

[173] On this theme see MARK JANCOVICH, *RATIONAL FEARS: AMERICAN HORROR IN THE 1950S* (Manchester University Press 1996); see also PATRICK LUCANIO, *THEM OR US: ARCHETYPAL INTERPRETATIONS OF FIFTIES ALIEN INVASION FILMS* (Indiana University Press 1987); BILL WARREN, *KEEP WATCHING THE SKIES!: AMERICAN SCIENCE FICTION MOVIES OF THE FIFTIES* (MacFarland Press 1982). [Return to text.](#)

[174] (ABC 1974-1975). Two movies of the week, *The Night Stalker* and *The Night Strangler*, preceded the series. A big-screen version was due in the spring of 1997. See Marilyn Beck and Stacey Jenel Smith, "Stalker" Gets Big-Time Walking Papers, PORTLAND OREGONIAN, December 20, 1996, at 29. [Return to text.](#)

[175] (Fox 1992-Present). [Return to text.](#)

[176] (Fox 1996-Present). See Larry Bonko, "Millenium" Makes Scary Debut Tonight, VA.- PILOT & LEDGER STAR, Oct. 25, 1996, at E2. [Return to text.](#)

[177] (ABC 1967-1968). See Frank Lovece, *Hide Under Your Couches! Unfriendly Visitors from Outer Space Will Soon be Invading Your Living Room*, NEWSDAY, July 28, 1996, at C16. For a comparison of *The Invaders* with newer but like-minded series, see Noel Holston, *Fumes and Flies Foul TV's New "Invaders"*, MINNEAPOLIS STAR-TRIB., Nov. 11, 1995, at O9E. [Return to text.](#)

[178] See Charles S. Clark, *Popularity of the Paranormal is no Fiction to Television*, Film Industries, ROCKY MOUNTAIN NEWS, June 2, 1996,

at 9D. [Return to text.](#)

[179] Witness the recent flap over a six-year-old boy's "sexual harassment" of a classmate (he kissed her after she asked him to) and his subsequent suspension. See *Another School Boy Suspended For Kissing Girl*, AGENCE FRANCE- PRESSE, Oct. 2, 1996. On the suspension of the teenager who gave her friend a Midol tablet, see Rene Sanchez and Victoria Benning, *Fearing Abuse and Lawsuits, Schools Just Say No to Legal Drugs*, WASH. POST, Oct. 12, 1996, at A01. While the sentiments behind prosecution of such acts are intended to promote child safety, their result is to encourage the general public to belittle the very real problems that gender discrimination, harassment, and child abuse litigation are intended to eradicate. [Return to text.](#)

[180] Other recent examples are films such as *Falling Down* (1993), the Michael Douglas vehicle showing a frustrated executive "taking the law into his own hands" by taking revenge on everyone who annoys him. One commentator suggests that the character is based in part on Bernard Goetz. See Al Martinez, *Let the Games Begin*, L. A. TIMES, Sept. 6, 1994, at B3 (discussing local residents that stand up to gang violence). Charles Bronson, Steven Seagal, and Chuck Norris have made their careers depicting individuals who take independent revenge on wrongdoers in society to the delight of much of the movie-going public. See "'Death Wish' Sequel No. 1 at Box Office," SAN DIEGO UNION-TRIB., Nov. 13, 1985, at C7 (reporting that *DEATH WISH 3* grossed \$3.1 million during one weekend in 1985).

The individual who rights society's wrongs is not a new phenomenon. Maverick characters such as the Scarlet Pimpernel, Batman, the Lone Ranger, and Zorro are so common that they have become archetypal heroes, in some cases with supernatural powers (Superman). In some cases they are part of "the system," but in many cases not (Sherlock Holmes, Simon Templar ("the Saint"), Mike Hammer, Sam Spade, *The Equalizer*). Their primary interest is in justice, not in the letter of the law. However, in one way these characters are fundamentally different from characters like Venkman. They operate within and are faithful to a moral code. On the vigilante tradition and public frustration see *Justified Bloodshed: Robert Montgomery Bird's Nick of the Woods and the Origins of the Vigilante Hero in American Literature and Culture*, 15 J. AMERICAN CULTURE 51 (Summer 1992). Venkman and other picaresque characters are interested in their own well-being. Although at the end of the movie, Venkman and his colleagues face a terrifying ordeal in order to destroy Gozer, one can argue that they really have no choice if they hope to survive, and also want to rescue Lewis Tully and Venkman's "would-be girlfriend" Dana Barrett. [Return to text.](#)

[181] Admittedly, when Dana Barrett asks him if he is using the equipment correctly to test for psychic phenomena, he replies, "Well, I think so." But he is more interested in scoring points with her than in looking for her ghostly roommates, in whom he does not at that time believe. [Return to text.](#)

[182] On academic salaries, see Philip Walzer, *Highest-Paid Academics Break Six Figures; Salaries Often Reflect Prestige of Schools*, VA.-PILOT, July 31, 1994, at A1. [Return to text.](#)

[183] "[T]he average American thinks 37 percent of the \$1.5 trillion federal budget could realistically be cut as wasteful." See 95% in Survey Think Government Wastes Lots of Tax Dollars, ARIZ. REPUBLIC, Sept. 6, 1993, at A2. [Return to text.](#)

[184] See generally *Is Your Building Sick?* ARIZ. REPUBLIC/PHOENIX GAZETTE, Aug. 27, 1994, at 2. [Return to text.](#)

[185] See *supra* note 33 (discussing likeness of GHOSTBUSTERS emblem to Casper, the Friendly Ghost). [Return to text.](#)

GLOBAL CLIMATE CHANGE: THREATS AND SOLUTIONS

CAROL M. BROWNER[*]

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Four-and-a-half years ago, when President Clinton and I went to Washington, we called on businesses, communities, and all levels of government to build a new generation of environmental and public health protection—one that builds on the successes of the past and meet the challenges of the next century.

Today, we can look back on four-and-a-half years of progress in protecting public health and the environment. Real people in real communities are reaping real, everyday benefits.

We're clearing up more of the nation's hazardous waste dumps—in fact, more in the last four years than in the previous twelve years combined. And we're planning to clean up 500 more over the next four years.

Across this country, we are helping cities begin the process of cleaning up and redeveloping their abandoned industrial properties—the brownfields—which at the same time helps to save the pristine, open spaces *outside* our cities.

Under the leadership of President Clinton and Vice President Gore, we have taken measures to improve our air quality—the strongest measures in two decades—that will prevent thousands of premature deaths each year, and improve health protections for people of all ages.

We have enacted new laws to protect our drinking water and our food from dangerous contaminants.

We have expanded the public's "right-to-know" about toxic pollutants in their own neighborhoods—so they can take steps to protect themselves and their families, and so they can take action to work with industries and reduce pollution in their communities. Indeed, this has been one of our most effective tools in fighting pollution.

But, of course, the job is not done. We cannot rest. We still face tremendous environmental and public health challenges.

This administration is determined to continue to meet these challenges head-on—with standards that are second to none, vigorous enforcement of those standards, by giving the American people the tools to reduce pollution in their own communities.

But the new generation of environmental protection means something else, too.

It means what the President has said, on many occasions, and what has proven to be true: that environmental protection and economic progress *do* go hand-in-hand. Over the past four and-a-half years, we have proved that you *can* have strong environmental protection and still have strong economic growth and prosperity. We do *not* have to choose between our health and our jobs. In fact, the two are inextricably linked.

We believe in building upon this progress. We must bring to this challenge that which has long made this country great—our creativity, innovation, ingenuity. We must reward those willing to do more than just an adequate job—to go further, to push the envelope, and to create new technologies and new ways to prevent pollution. We must seek to build the kinds of partnerships—between industries, governments and communities—partnerships that get the job done.

The challenge of global warming will test this philosophy as never before.

The science on this phenomenon is compelling.

More than two thousand of the world's foremost experts on the global environment have come together to conduct a

joint assessment on global warming. They are now telling us there is ample evidence that, for the first time in history, pollution from human activities is changing the earth's climate.

Modern industrial activity—particularly the burning of fossil fuels—namely coal and petroleum products—is filling the atmosphere with carbon dioxide and other "greenhouse gases," which trap the Sun's heat in the atmosphere and cause the steady, gradual warming of the Earth's surface temperatures.

The average surface temperature is now a full degree Fahrenheit *higher* than it was at the beginning of this century—and it may rise another two to six degrees over the next century.

That may not sound like much to many people. But here's what the scientific community says it will mean over the course of the next century:

More frequent and more intense heat waves, causing thousands more heat-related deaths. Severe droughts and floods will become more common. Tropical diseases like malaria will expand their range. Agriculture will suffer. The oceans will rise, perhaps by several feet over the next century—swamping many coastal areas.

This will be our legacy to our children, if we do not look for some way to begin reducing our emissions of greenhouse gases.

As the President has said, this is a great challenge for our democracy. We have the evidence, we see the train coming, but most ordinary Americans, in their day-to-day lives, cannot yet hear the whistle blowing. Unless they live in a place where they have experienced a couple of hundred-year floods in the past decade, the consequences of global warming are not yet readily apparent to them.

But, again, the scientific evidence shows that these consequences are on the way.

Do we know everything there is to know about global climate change? No.

Do we know *exactly* what will happen in the decades ahead? Of course not.

But we have enough to go on—based on years of rigorous scientific analysis—to know that we must begin dealing with this problem. And we should act sooner, rather than later, because—scientists say—of the substantial "lag time" involved. Global warming will continue for many years after we begin reducing the emissions that are causing it. Even if we begin today, you probably won't see the results of any progress we make today until your own kids are in college.

In December, the nations of the world will meet in Japan to seek a global agreement on reducing the emissions of greenhouse gases that cause climate change.

President Clinton is committed to securing realistic and binding agreements that ensure that all countries—both industrial and developing—participate in this process and do their part to address the challenge of global warming.

Although the U. S now produces more than 20 percent of the world's greenhouse gases, our share is expected to decline over the next couple of decades as nations like China and India increase their level of industrialization—and with it their emissions of climate-changing pollutants.

So we cannot go this alone. Pollution does not know political boundaries. And the challenge of global warming brings a whole new perspective to the notion that the nations of the world "are all in this together."

But those who oppose action are on the march. Some industries are funding a massive advertising campaign attempting to portray the fight against global warming as a loser for America. They warn of dire consequences—drastically higher fuel prices, economic catastrophe. In the words of one campaign sponsor: "All pain and no gain."

They are wrong.

Addressing the challenge of global warming is *not* about ratcheting down our economy. It *is* about investing in new technologies and using America's technological leadership to develop new ways to make things, new ways to get where we want to go, to work and to play.

It's about economic *growth*. Those who are first in bringing pollution-reducing technologies to market are going to be very well-positioned in the global economy of the 21st Century. And American industries are leaders in developing these technologies.

Much of it has to do with getting *more* out of the energy we are currently using.

According to the National Academy of Sciences, we can cut global warming pollution by one-fifth—right now, at no cost—simply by using technologies that are already on the market. In fact, many of our industries can actually *save* money in the process.

For example, using available technologies, the typical manufacturing plant can cut its pollution and energy use by 10 to 20 percent—and recoup its investment in two years. After that, the yearly cost savings are pure profit. That's an attractive deal, and many companies are already taking advantage of it. We need to encourage more to do so.

When you reduce energy use—when you use more efficient equipment and make better use of electricity—you reduce the need to burn fossil fuels—the coal and petroleum—that contribute to global climate change. Every little bit helps, but we are finding opportunities for huge improvements.

Office buildings can cut their global warming pollution and their utility bills by 30 percent or more—and they can do it by investing in efficient lighting, office equipment, heating and cooling systems, and building materials. These investments pay for themselves over two to four years.

Sometimes the energy savings come from obvious sources—more efficient motor systems in factory equipment, advanced turbine systems, computer workstations that use less electricity—or capturing the enormous amounts of heat that is wasted during electricity generation and, rather than throwing it away, using it to meet our heating and cooling needs. We can save billions of gallons of oil.

Sometimes you can find a huge potential for energy savings—and for pollution reduction—where you least expect them.

Exit signs, for example—like the ones you see over the doors in the buildings right here on campus. Did you know that, in this country, a billion dollars is spent each year on electricity to operate exit signs?

Now they make LED signs that are every bit as effective, but use 75 percent less energy. Think about it. Simply by focusing on one item—exit signs—you can save more than a thousand dollars a year for a 100,000-square-foot building. And, by using less energy, you're helping reduce the creation of the greenhouse gases that cause global warming.

So this is *not* a question of who is going to sacrifice and how much. Rather, it is about investing in new technologies—available technologies—that make our industries more efficient, more profit able—and cleaner in the process.

And we need to provide incentives for industries to develop even better pollution-reducing technologies. We've found that the best way to do this is through market-based strategies like "emissions trading"—where overall emissions are "capped" and pollution reductions are traded on the open market. These market-based strategies allow industries to find the most flexible, cost-effective ways to reduce their pollution. And they get government out of the business of mandating particular technologies.

We are also looking to make great strides in efficiency and energy savings of the products that many of us use every day in—in our homes and on the road.

After you are graduated from this university—and have a few years to earn enough money to purchase a new car—

you'll likely be able to choose one that gets as much as three times the gas mileage of today's vehicles—without sacrificing safety, performance, size or affordability. That's because government and the auto industry are working in partnership to develop a new generation of automobiles.

Considering that today's typical car emits more than 10,000 pounds of carbon dioxide each year, tripling the gas mileage is going to go a long way toward reducing greenhouse gases.

A new generation of consumer products is enabling homeowners to cut this pollution—and their energy bills—by 30 percent or more. I'm talking about energy-efficient lighting, refrigerators, heating and cooling equipment, washing machines, and other appliances—as well as energy-efficient insulation, windows, and other building materials.

Now, how are you supposed to know which consumer products are making use of these new technologies? How can businesses and public institutions make the most 'of their energy efficiency programs?

EPA and other federal agencies are working with thousands of private sector partners to bring these technologies into more widespread use.

You can look for our "Energy Star" label to find energy-efficient computers, copiers, and other office equipment—as household appliances. We believe that, over the next fifteen years, these more energy-efficient products have the potential to cut the nation's utility bills by \$100 billion - and, most importantly, to reduce global warming pollution by an amount equal to taking seventeen million cars off the roads.

Right here in Tallahassee, the city government is doing something to prevent emissions of nearly fifteen million pounds of carbon dioxide into the atmosphere each year. How? By upgrading the light bulbs on city property. And the taxpayers here will save some \$325,000 in electricity costs—each year.

That's just one city. The state of Florida will be reducing carbon dioxide emissions by 800 million pounds a year—and its annual utility costs by \$17 million—when it finishes its upgrading the fighting at state facilities. Right here on this campus, Florida State University will be reducing carbon emissions by twenty-seven million pounds—the equivalent of taking 2,700 cars off the road.

You get the picture. But this is just the tip of the iceberg. Over time, as we increase the use of available technologies—and as new technologies come on line—this nation can make tremendous strides toward a future where prosperity and economic growth can co-exist with a cleaner, healthier environment.

As the great science writer, Arthur C. Clarke, once said: "Any sufficiently advanced technology is indistinguishable from magic."

Well, now is the time to believe in magic—and to believe in our own ingenuity.

But we're going to need more than magic to see us through.

Global warming is for real. We must squarely face its potential consequences.

I believe we can build a shared commitment and a consensus—among the American people, among industries, among the nations of the world—to develop the kinds of strategies and market-based approaches that will enable us to solve this enormous problem while enabling the economy to grow.

We owe it to our children—to all the children of the world—and all of the generations to come—to give it our best effort.

One hundred years from now, let the people of the world look back and say: "They saw the challenge. They answered the call. And they did not flinch the face of their responsibility to build a better world for us."

Thank you.

[*] Administrator, United States Environmental Protection Agency. This is an excerpt from the remarks prepared for delivery at Florida State University Tallahassee, Florida, September 18, 1997. For the complete speech, see Administrator's Speeches (visited November 24, 1997) . [Return to text.](#)