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MORE UNFINISHED STORIES: *LUCAS, ATLANTA COALITION,* AND *PALILA/SWEET HOME*

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INTRODUCTION

> *In no other political or social movement has litigation played such an important and dominant role. Not even close.*
>
> —David Sive[1]

Environmental protection is a hard road. Lawsuits placed the issue on the national agenda half a century ago, and lawsuits since have prodded it forward over stiff resistance. We have yet to know whether this approach will succeed. Environmental protection is in few places achieved, many places threatened, and nowhere guaranteed. Those who pronounce victory have a credibility problem.[2] Those who pronounce de-

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1. Tom Turner, *The Legal Eagles*, THE AMICUS J., Winter 1988, at 25, 27 (quoting David Sive). In the late 1960s, Mr. Sive represented plaintiffs in the seminal administrative standing and environmental cases surrounding Storm King Mountain. *See* Oliver A. Houck, *Unfinished Stories*, 73 U. COLO. L. REV. 867 (2002). Mr. Sive went on to become a leader of the environmental law movement, annual Chair of the annual ALI/ABA Conference on Environmental Law in Washington, D.C., and a perceptive analyst and scholar. Retired from practice, he currently teaches at Pace Law School. *See Biography*, Pace Law School, *at* http://csmail.law.pace.edu/lawlib/Archives/Biography.html (last visited Feb. 3, 2004).

2. *See* BJØRN LOMBORG, THE SKEPTICAL ENVIRONMENTALIST: MEASURING THE REAL STATE OF THE WORLD (Hugh Matthews trans., Cambridge Press 2001)

feat have also spoken too soon.[3] We are in the midst of an experiment in achieving massive social change through the use of law.

Within this experiment lie a series of ordinary lawsuits that had an extraordinary impact on environmental policy. An earlier article described three cases that transformed the way we manage water quality, national forests, and public lands.[4] A subsequent article treated five cases that established bedrock principles for environmental law.[5] The current article continues these histories, and presents cases with both dimensions: *Lucas v. South Carolina Coastal Council*,[6] *Atlanta Coalition on the Transportation Crisis, Inc. v. Atlanta Regional Commission*,[7] *Palila v. Hawaii Department of Land and Natural Resources*,[8] and *Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon*.[9]

(1998) (stating that the environment is improving, and those who hold otherwise act out of ignorance, self-interest, or misplaced zeal). For a criticism of this view, *see* Robert V. Percival, *Skeptical Environmentalist or Statistical Spin-Doctor?*, 53 CASE W. RES. L. REV. 263, 265 (2002) (stating that manipulated data yields manipulated conclusions). A Danish scientific committee subsequently accused Lomborg of "scientific dishonesty," and in August 2003 a panel of independent Scandinavian academics found that "none of [his] reports represent scientific work or methods." *Danish Environmentalist Work 'Unscientific'-Panel*, PLANET ARK (August 27, 2003), *at* www.planetark.org/dailynewsstory.cfm?newsid=22004&newsdate=27-Aug-2003.

3. *See* Jared Diamond, *The Last Americans: Environmental Collapse and the End of Civilization*, HARPERS MAG., June 2003, at 43 (comparing environmental crisis today to that of the Mayan civilizations before the fall).

4. Oliver A. Houck, *The Water, the Trees, and the Land: Three Nearly Forgotten Cases that Changed the American Landscape*, 70 TUL. L. REV. 2279 (1996) (discussing United States v. Republic Steel, 362 U.S. 482 (1960); United States v. Standard Oil, 384 U.S. 224 (1966); W. Va. Div. of the Izaak Walton League of Am. v. Butz, 367 F. Supp. 422 (N.D. W. Va., 1973), *aff'd*, 522 F.2d 945 (4th Cir. 1975); Natural Res. Def. Council v. Morton, 388 F. Supp. 829 (D.D.C. 1974), *aff'd*, 527 F.2d 1386 (D.C. Cir. 1976)).

5. Houck, *supra* note 1 (discussing Scenic Hudson Pres. Conf. v. Fed. Power Comm'n, 354 F.2d 608 (2d Cir. 1965); Calvert Cliffs' Coordinating Comm., Inc. v. United States Atomic Energy Comm'n, 449 F.2d 1109 (D.C. Cir. 1971); Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971); Sierra Club v. Morton, 405 U.S. 727 (1972); Tenn. Valley Auth. v. Hill, 437 U.S. 153 (1978)).

6. 505 U.S. 1003 (1992).

7. 599 F.2d 1333 (5th Cir. 1979). Also treated are several cases attacking Atlanta's transportation planning under the Clean Air Act, 42 U.S.C. § 7401 (2000).

8. 471 F. Supp. 985 (D. Haw. 1979) (subsequent *Palila* cases are cited and treated below).

9. 515 U.S. 687 (1995).

In a narrow sense, these lawsuits were cases about the clash of public and private property rights in South Carolina, transportation planning in Atlanta, and endangered species protection in Hawaii and the Pacific Northwest. They were also surrogates for issues that environmental law has not yet wrestled to conclusion: the courts remain divided on property rights, are willing to hold the line on protecting endangered species, and are no more capable of dealing with the automobile than anyone else is. The cases further reveal that, no matter what environmental laws say, they are often eclipsed by subsidies that make the attainment of legislated goals all but impossible.[10]

At bottom, these cases are also about people with very different visions about American life. They barely understand each other, at times hate each other, and have little common ground. As a result, the cases did not decide their issues, except in an immediate sense. Unlike other forms of litigation, these stories do not end with the reported judgments but, by their very nature, go on and on. As the years go by, the enduring question in environmental law is not simply what the courts decided but, rather, where the cases came from and where they went. To that end, these stories may be useful.

LUCAS

> *I thought about all of those who had sacrificed so much for this country. I could do no less. . . . The ancient struggle to secure property rights for all men, not just a privileged few, was about to have a new dedicated warrior.*
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> —David Lucas, former owner, Wild Dunes, Isle of Palms, South Carolina[11]

10. See the development subsidies in *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992), and the highway funding in *Atlanta Coalition on the Transp. Crisis, Inc. v. Atlanta Reg'l Comm'n*, 599 F.2d 1333 (5th Cir. 1979). One is tempted to propose a bargain under which all environmental laws would be repealed in exchange for the repeal of the subsidies that drive environmental degradation, a fanciful conjecture, but not necessarily a bad deal.

11. DAVID LUCAS, LUCAS VS. THE GREEN MACHINE 160 (1st ed. 1995) [hereinafter GREEN MACHINE].

> *20 Beachwood East, Oceanfront Home Four Bedroom . . . four and a half bath . . . . Spacious, contemporary, artist decorated interior. All rooms, including bedrooms have ocean views and access to an oceanfront balcony. Second floor balcony includes large screened porch. . . . Corner lot on cul-de-sac for ultimate privacy.*
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> —Advertisement, Wild Dunes, Isle of Palms[12]

> *And every one that heareth these sayings of mine, and doeth them not, shall be likened unto a foolish man, which built his house upon the sand: And the rain descended, and the floods came and the wind blew . . . upon that house, and it fell: and great was the fall of it.*
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> —Matthew 7:26–27[13]

In a country of wild and beautiful places, the coastal sea islands off South Carolina and Georgia are high on the list. Isolated, difficult to access, and subject to the front-end forces of the Atlantic Ocean, these islands were first occupied by people who retained their own language well into the twentieth century.[14] Around the time of the Civil War, however, they became peopled as well by city dwellers fleeing the heat and the yellow fever of summers in Charleston and Savannah.[15] The newcomers found sea breezes, unspoiled beaches and the shade of Spanish moss drifting from centuries-old live oak trees. In the American South, it didn't get any better than this. The stage was set for an invasion with but one objective: to get as close to the waves as possible and build there.

David Lucas did not set out to be a hero. But as he would later describe, when the circumstances called for it he was up to the job. What David Lucas set out to do in life was build houses. When he ran into bankruptcy he also ran into Raymon Finch, a part owner of the Isle of Palms Beach and Racquet Club with ambitions to become the Republican Governor of

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12. Wild Dunes, *Oceanfront Home Advertisement*, *at* http://www.wilddunes.com/20_beachwood_east.htm (last visited Feb. 3, 2004).

13. 7 *Matthew* 26:27.

14. *Gullah History and Language*, Gullah Gourmet, Inc., *at* http://www.gullahgourmet.com/history.htm (last visited Feb. 3, 2004).

15. Jane O'Boyle, *Destination: Charleston's Islands*, U.S. AIRLINES ATTACHE MAGAZINE, http://www.attachemag.com/archives/01-03/features/story1.htm (Jan. 2003).

South Carolina.[16] They were a good fit. As a young man Lucas had campaigned door to door for presidential candidate Barry Goldwater, selling cans of ginger ale for the cause, and went on, with Finch, who was at that point finance director for the Reagan campaign, "selling Doctor Ronald Reagan's True Government Limiting Elixor [sic]," which was going to "cure bloated government-caused ills."[17] Finch took Lucas into a heady world of conservative politics. He also took him into a heady world of leveraged financing on the Isle of Palms.[18] For Lucas, it seemed he had died and gone to heaven; he moved into a house that was not only "beautiful, it was right on the beach. This was too much to ask."[19]

The Isle of Palms had been a low-key vacation spot since the early 1900s, with a small hotel, an amusement park and six miles of white sand beaches.[20] Immediately following World War II, a bridge was built from the mainland and the island began to develop.[21] In the 1970s, the Sea Pines Company bought 900 acres at the tip of the island, which quickly turned into a 1,600 acre, oceanfront, gated community named, without apparent irony, Wild Dunes.[22] Lucas started out "heading up a custom home building company," became part owner, and by 1984 had secured the financing to buy the entire resort for $50 million.[23] Two years later, with Lucas as managing partner, Wild Dunes sales went over the $100 million mark, by sales volume, the fourteenth largest private company in the state.[24] In 1986, as he stepped down, he was offered the best investment on the island, two oceanfront lots that had shot up in value from $96,000 to nearly half a million dollars each.[25] Over

16. GREEN MACHINE, *supra* note 11, at 21–29.

17. *Id.* at 38.

18. *Id.* at 29–30, 36, 45–64.

19. *Id.* at 31.

20. For a history of the Isle of Palms, which includes its early occupation by the Seewee Native Americans, its legendary pirate treasure, and its role in the Civil War as home to the doomed confederate submarine CSS Hunley, see *Island History: Hunting Island*, A World of Difference, Inc., *at* http://www.awod.com/gallery/iop/history.html (last visited Feb. 3, 2004).

21. *Id.*

22. *See Wild Dunes Resort*, http://www.wilddunes.com/ (last visited Apr. 2, 2004). For a history of the Wild Dunes Development see *Isle of Palms: A Brief History*, http://www.wilddunes.com/isle_of_palms_history.htm (last visited Apr. 2, 2004).

23. GREEN MACHINE, *supra* note 11, at 30–31, 53–59.

24. *Id.* at 64.

25. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1039 n.3 (1992).

the past decade, the value of oceanfront property prices had increased by 20 percent a year.[26] "It was possible," explains Lucas, "that within four to seven years you could double your money."[27] That same year the community added its second eighteen-hole golf course.[28] Lucas and Wild Dunes were on a roll. At which point he ran into a monster, in his own words: "the Green Machine."[29]

The Isle of Palms, and the Wild Dunes resort in particular, had a problem with Mother Nature. Many of the properties were within inches of sea level, exposed to the Atlantic Ocean, and for every day of roughly half of the previous forty years they had been flooded by the tides.[30] Between 1957 and 1963 Lucas's lots had been completely under water. Between 1963 and 1973 the shoreline had retreated over them by 100 to 150 feet. Most of Wild Dunes faced the same problem, and between 1981 and 1983 alone, the community resorted to twelve emergency orders to sandbag the perimeter and hold back the sea. South Carolina, responding to the pleas that Isle of Palms residences were in "imminent danger of collapse," issued emergency permits for two rock levees to protect a condominium so near to Lucas that one levee extended halfway onto his property. Whatever impact these problems might have had in other quarters, however, they did not dampen the enthusiasm of David Lucas nor the market for real estate on Isle of Palms.

Land-based notions of property have a hard time catching up with the dynamics of the coast, to say nothing of those of barrier islands. These are properties in motion and often in full retreat. They can move hundreds of yards after a large storm and, over time, buffeted constantly by the sea, they subside, recreate themselves on the leeward side, and migrate towards land.[31] They can even disappear. Before a hurricane in 1856,

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26. GREEN MACHINE, *supra* note 11, at 64.

27. *Id.*

28. *Isle of Palms: A Brief History, supra* note 22.

29. GREEN MACHINE, *supra* note 11, at 75, 261.

30. *Lucas*, 505 U.S. at 1038–39. The flood history of the Isle of Palms that follows is taken from this source.

31. Susan Bloch Wenzel, *Trying to Turn the Tide,* DUKE: A MAGAZINE FOR ALUMNI AND FRIENDS, Sept.–Oct. 1984, at 12, 14. *See also* David M. Halbfinger, *Oh Man, It Sounded Like Dynamite Going Off,* THE TIMES PICAYUNE, Sept. 20, 2003, at A-6:

> Hatteras Island is no more. It is several islands now, separated by newly cut inlets, a testament to Hurricane Isabel's deadly force.
>
> . . . .

Louisiana's Isle Derniere boasted a thriving hotel and weekend trade, "no ordinary island, but the proudest summering place of the Old South—a private little world dedicated to fine living."[32] One needs a global positioning device to find Isle Derniere today, and a vivid imagination to relate its former habitation with the scraps of sand that remain.[33] The land, too, is a moving target, inland: nearly all of California's 1,100 mile coastline is retreating at an average rate of six inches to two feet per year, and up to 15 feet around Monterey Bay.[34] Cape Shoalwater, Washington, eroded more than two miles in the twentieth century, and between 1970 and 1987 land loss in coastal Louisiana averaged more than thirty square miles.[35] You can own ten acres of beachfront today, and zero acres within the blink of an eye. One storm on Cape Cod in the late 1980s ripped the beach in half and removed fifty feet of dunes; a landowner reports that he now directly faces the brunt of the sea, which he likened to "looking down the barrel of a gun."[36]

The primary response is denial. The history of coastal America is littered with shipwrecks and house wrecks from the fury of ocean storms, some like the Galveston flood of 1909 the stuff of legend; all fueled by a stubborn, systemic belief that it can't happen here.[37] One below-sea-level development in South

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Tim Midgett, a Hatteras Village resident who is chairman of the Dare County Tourism Board, watched the storm from a three-story observation tower at his house. At about 1 p.m., he said, he could not believe his eyes. "I said, 'What's going on here? It's like a wall of water coming.'"

When he finally got out and about his hometown, he said, it was pancaked. "The Seagull Motel is smithereens," he said. "It was washed from the oceanfront across Highway 12, a few hundred feet. Three motels have done that. They're all totaled."

32. Keith O'Brien, *At Home in Harm's Way*, THE TIMES PICAYUNE, July 13, 2003, at E-3.

33. *Coastal Conflicts*, U.S. Geological Survey, *at* http://pubs.usgs.gov/circ/c1075/conflicts.html (last modified Sept. 15, 1997).

34. Michael D. Lemonick, *Shrinking Shores*, TIME, Aug. 10, 1987, at 38, 40.

35. *Id.*

36. *Id.* at 43.

37. ERIK LARSON, ISAAC'S STORM: A MAN, A TIME, AND THE DEADLIEST HURRICANE IN HISTORY 15–16 (Crown Publishers 1999). For the Galveston waterfront, today, 1909 never happened. *See* Jeremy Cox, *Deep Trouble: Liquid Gold*, NAPLES NEWS, Sept. 29, 2003, *available at* http://web.naplesnews.com/03/10/naples/e1688a.htm:

Roke and Cristeria Martinez of Houston took their children Christian, 2, and Erick, 5, to cool off this summer in the Gulf of Mexico at Galveston Beach each at 61st street and Seawall Boulevard. With more than 4,000

Louisiana, so submerged by Hurricane Juan that the tombs were uprooted from the cemetery and went floating down the streets, features the highly-imaginative Highland Avenue and Mount Rushmore Drive.[38] Ocean City, New Jersey, was hit by a northeaster in 1962 that, for two days, over five tide cycles, inundated all of Fenwick Island; development on the island has since boomed to the point that the government predicts losses to a future, similar storm in the "hundreds of millions of dollars."[39] The owners of the aptly-named Sea Vista Motel on Topsail Island, North Carolina, devastated by Hurricane Gloria in 1985, were paid more than $200,000 in federal flood insurance to repair their building, only to have all fifteen of their first-floor units torn out again two years later. Says its manager, "There's a feeling we can't win."[40]

Not for want of trying. The amount of government monies supporting coastal development is heroic. Without major subsidies for highway and bridge access, vacation home financing, potable water, sewage treatment, flood levees, groins, beach nourishment, flood insurance and disaster relief,[41] few people would put big bucks on any island. A new $38.3 million highway and a 2.2 mile bridge, the Isle of Palms Connector, serve the Lucas properties and Wild Dunes.[42] A sand restoration project in Florida is estimated to cost upwards of $100 million,[43]

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hotel rooms and condominiums, Galveston has a hospitality industry that is valued at more than $350 million annually.

38. Oliver A. Houck, *Rising Water: The National Flood Insurance Program and Louisiana*, 60 TUL. L. REV. 61, 62 (1985).

39. Lemonick, *supra* note 34, at 44. *See also* Roger DiSilvestro, *Only Fools Build on Shifting Sands*, AUDUBON MAGAZINE (describing development of Ocean City and Fenwick Island). (undated photocopy on file with author).

40. Lemonick, *supra* note 34, at 40.

41. For a survey of federal programs promoting barrier and coastal development, see *infra* notes 188–201 and accompanying text.

42. Vartan Kupelian, *Hurricane Hugo Claims Share of Design Honors at Wild Dunes, at* http://detnews.com/egolfguide/golf595/resorts/palms.html (last visited Oct. 14, 1999).

43. The H. John Heinz III Center for Science, Economics and the Environment, *The Hidden Costs of Coastal Hazards: Implications for Risk Assessment and Mitigation*, 21 (April 1999) (on file with author); *see also* Heritage Conservation and Recreation Service, Department of the Interior, *Alternative Policies for Protecting Barrier Islands Along the Atlantic and Gulf Coasts of the United States and Draft Environmental Statement* 118 (1979), *reprinted in Hearings on S. 2686 Before the Subcomm. on Parks, Recreation, and Renewable Resources of the Senate Comm. on Energy and Natural Resources*, 96th Cong. 35 (1980); *see also infra* note 200 (detailing U.S. Army Corps of Engineers investments in Grand Isle, Louisiana).

and the Isle of Palms may soon have its own as well.[44] They last an average of five years.[45] Then we do it again.[46] And when the storms come ashore, every year, private property losses are reimbursed as if they were unforeseeable disasters from a whimsical and malicious God. In the wake of Hurricane Hugo in 1989, the National Flood Insurance Program paid out $300 million in claims[47] and another $3 billion in disaster relief.[48] The lion's share went to barrier island properties, starting with the Isle of Palms.[49] In a practical sense, more than anywhere else in America, barrier island development is real estate on welfare.

Then there are the human costs. People lose their homes:

> Jan and Bill Alford's troubles began during the devastating winter storms of 1982. That January a 15 ft chunk of earth slid away from in front of their bluff-top home . . . and crashed to the beach below. A year later another 15 ft vanished, leaving the house just a few feet from the edge of a 160 ft cliff. . . . [They moved the house back.] Then came Valentine's Day 1985. Following unusually high tides, 30 ft of land dropped into the sea. The foundation of the house remained just a foot from the precipice, with nothing but air between the guest-room deck and the surf below.[50]

People also lose their lives. No reader can emerge from the history of the Galveston disaster with anything but pity and dread. Eight thousand people died, and many more were scarred for life.[51] A survivor of Isle Dernier who had taken refuge in the hotel later wrote:

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44. E-mail from Dr. Michael P. Katuna, to Julie Rosenzweig, Student, Tulane Law School (June 4, 2003) (on file with author).

45. *See* Christina Headrick, *Sand Dollars*, ST. PETERSBURG TIMES. Dec. 8, 1999, at 1D; *see also Coastal Barrier Resources Act: Hearings on S. 1018 Before the Subcomm. on Environmental Pollution of the Comm. on Environmental and Public Works*, 97th Cong. 200–201 (1981–1982) (statement of Jay D. Hair, Executive Vice-President, National Wildlife Federation).

46. *See* Cornelia Dean, *Nature Tries to Shift Outer Banks, But Man Keeps Shoveling It Back*, N.Y. TIMES, Sept. 22, 2003, at A1.

47. Mary T. Schmich, *After Hugo, Residents Rebuild in Spite of Law*, CHICAGO TRIBUNE, Apr. 15, 1990, at 12.

48. Kathy Kadane, States News Service, Sept. 21, 1990, LexisNexis States News Service archive.

49. Rutherford H. Platt, *An Eroding Base*, THE ENVIRONMENTAL FORUM, Sept.–Oct., 1992, at 10, 11.

50. Lemonick, *supra* note 34, at 40.

51. Larson, *supra* note 37, at 16.

> Suddenly I heard a crash and found myself in midair. A piece of timber fell on my head. Blood gushed from my wound. I was completely conscious, though . . . Before I knew it I was on a piece of timber. My sister-in-law holding her sick baby was swept by me. She was grasping for a log. "Don't crush my baby!" she shouted as she and her child were washed under by a wave.[52]

These are not run-of-the-mill stories of yet another environment in danger, although coastal development threatens the survival of many species and the abundance of many others. These are stories of investment losses and drowned bodies. In the first half of the twentieth century, reports one commentator, more than 50,000 Americans met their death "as the ocean has licked over the land."[53] A private foundation study concludes that, nationally, "roughly 1,500 homes and the land on which they are built will be lost to erosion each year," with more than a half billion dollars in damages.[54] It was these stories and consequences that impelled the South Carolina legislature to move to cut its losses. It passed a beach management act whose essential message was: rather than fight the sea, retreat.

South Carolina was acting under the impetus of a federal program that encouraged the states to do what South Carolina ultimately did. The Coastal Zone Management Act offered incentives for states to develop programs to control coastal development. The federal mandates were weak, but the monies were there and a few states such as California took the bait and imposed serious coastal protections.[55] In the mid-1980s it

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52. JAMES M. SOTHERN, LAST ISLAND 52 (1980).

53. Natasha Zalkin, *Shifting Sands and Shifting Doctrines: The Supreme Court's Changing Takings Doctrine and South Carolina's Coastal Zone Statute,* 79 CAL. L. REV. 205, 212 (1991) (quoting ARTHUR BEISER, THE EARTH 78 (Time, Inc. 1962)).

54. The H. John Heinz III Center for Science, Economics and the Environment, *Evaluation of Erosion Hazards* (2000) (on file with author). The estimate may be conservative. North Carolina alone estimates the loss of 5,000 homes to coastal erosion over the next sixty years. Dennis J. Hwang, *Shoreline Setback Regulations and the Takings Analysis*, 13 U. HAW. L. REV. 1, 3 (1991); David W. Owens, *Where Erosion and Development Meet*, EPA JOURNAL, Sept.–Oct. 1989, at 45.

55. *See* Jill D. Wright, *Protecting California's Coast*, 34 MCGEORGE L. REV. 476 (2003); *see also* California Coastal Commission, *at* http://www.coastal.ca.gov/web/ (last visited Feb. 3, 2004). The aggressiveness of the California Coastal Commission has provoked significant litigation. *See* Cal. Coastal Comm'n v. Granite Rock Co., 480 U.S. 572 (1987) (discussing control of

was South Carolina's turn. Spurred forward by mounting coastal erosion and property losses, it appointed a commission to address the problem.[56] The report was grim: fifty-seven miles of beaches were critically threatened, and the entire coast was "in a state of crisis."[57] Within a year the legislature acted. It found that the state's beach and dune system protected "life and property," that both "public and private interests" depended on giving the system room to expand and contract "in its natural cycles," and that this could only be accomplished "by discouraging new construction in close proximity to the system, and encouraging those who have erected structures too close to the system to retreat from it."[58] The law established two baselines, measured by erosion rates and vulnerability to coastal storms; development seaward of the nearest line was prohibited, development seaward of the second was limited to small structures.[59]

As an ecological statement, and response, the law was unimpeachable. The problem was that David Lucas's properties on the Isle of Palms lay seaward of the baselines.

As Lucas would be the first to tell you, he is an environmentalist.[60] He was at one point a game warden, and claims to have arrested an Italian prince for shooting brown bears out of season.[61] But game laws are a world away from development restrictions, and Lucas had already experienced problems with a no-growth "little ole lady in tennis shoes," who had become mayor of the Isle of Palms and took a restrictive view of new construction.[62] Now he faced the state—his own state—and saw red: he saw the ugly hand of big government, if not socialism, if not communism, and felt the call.[63] For Lucas, it was as

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mining); Sec'y of the Interior v. California, 464 U.S. 312 (1984) (control of offshore oil development); Nollan v. Cal. Coastal Comm'n, 438 U.S. 825 (1987) (control of beachfront properties).

56. Platt, *supra* note 49, at 11.

57. *Id.* (quoting from the 1987 committee report).

58. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1021 n.10 (1992).

59. The Beachfront Management Act, S.C. CODE ANN. §§ 48-39-250–48-39-360, § 48-39-290(A)(1) and (2) (Law Co-op. 2003).

60. David H. Lucas, *Private Property Owner's Perspective, at* http://bigfoot.wes.army.mil/6120.html (last visited Feb. 3, 2004).

61. *Id.*

62. GREEN MACHINE, *supra* note 11, at 75.

63. *Id.* at 258–259.

if the "government had fallen into the hands of radicals while we were all asleep."[64]

Lucas knew who the enemy was. It was the "environmental-government-complex or 'the Green Machine,'" a "manevolent [sic] axis between government and environmental groups [which had] become very wealthy and powerful" with the worst of motives (e.g., "lawyers looking for fees; professors looking for grants; consultants looking for contracts; specialists looking for new ecological problems that they can then be paid to solve . . .") and with toxic effects on private enterprise.[65] He "thought about all of those who had sacrificed so much for this country," and he "could do no less."[66] Besides, he would state in the next breath, he had real estate loans to pay, and if he failed, "I was no longer going to be issued a preferred [V]isa gold card. I would no longer get calls from their investment counselors and would be taken off of their promotional mailing lists."[67] For these reasons, then, wrapped in liberty and the American flag, Lucas would soldier his case through the courts. He would not, however, be alone. He would be supported by a counter-revolution that saw the same green enemy and that looked at stopping it through a new interpretation of the Fifth Amendment to the United States Constitution: the Takings Clause.

The takings doctrine is one of the messiest in all of law.[68] The Fifth Amendment states that private property will not be "taken for public use, without just compensation."[69] There is little argument, even today, that in so saying the framers of the Constitution had in mind the physical invasion of property, as in harboring troops or building a road.[70] State and Supreme

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64. *Id.* at 279.

65. *Id.* at 261–262.

66. *Id.* at 160.

67. *Id.* at 161. Lucas' sudden moments of candor in GREEN MACHINE are refreshing. At one similar point he describes a conversation with Reagan strategist Lee Atwood over the need to hold onto the second home mortgage interest deduction. *Id.* at 61. Both men were well aware of the tax subsidy fueling vacation real estate on Isle of Palms. *Id. See also* discussion *infra* note 195.

68. Penn. Cent. Transp. Co. v. New York City, 438 U.S. 104, 123 (1978) (Brennan, J.) ("The question of what constitutes a 'taking' for purposes of the Fifth Amendment has proved to be a problem of considerable difficulty."); *see also* Carol M. Rose, Mahon *Reconstructed: Why the Takings Issue Is Still a Muddle*, 57 S. CAL. L. REV. 561, 566–569 (1984).

69. U.S. CONST. amend. V.

70. The Legal Tender Cases, 79 U.S. (12 Wall.) 457, 551–552 (1870).

Court decisions for more than a century maintained this line, and refused to go beyond.[71] Even outright takings were further subject to a nuisance exception, as all property carried the "implied obligation" of not harming the community at large.[72] In 1922, the Supreme Court shifted the line to include regulations that went "too far" and destroyed the underlying estate;[73] regulations less restrictive, however, were permissible, as without them the life of government "hardly could go on."[74] For the next sixty years, as late as the 1980s, the Court was applying the takings doctrine in a conservative fashion that balanced economic impacts against public purposes; in one case saving the historic Penn Central Railroad Station in New York City[75] and, in another, remarkably similar in facts to its decision in 1922, seeming to put regulatory takings back in the box.[76] A new agenda with new players, however, was in the works.

The new agenda was fueled by many sources, but they had one thing in common: they feared environmental law. In 1971 the United States Chamber of Commerce, reeling from the first waves of environmental litigation, commissioned a study from Lewis Powell, Jr., then in private practice.[77] Powell's conclusions were that American free enterprise was under "frontal assault"[78] from those (naming consumer activist Ralph Nader and Yale historian Charles Reich) "who propagandize against the system, seeking insidiously and constantly to sabotage it."[79] The time had come for business to marshal its forces against

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71. *See* Douglas T. Kendall & Charles P. Lord, *The Takings Project: A Critical Analysis and Assessment of the Progress So Far*, 25 B.C. ENVTL. AFF. L. J. 509, 515–516 (1998); *see also* Fred Bosselman et al., *The Taking Issue: A Study of the Constitutional Limits of Governmental Authority to Regulate the Use of Privately-Owned Land Without Paying Compensation to the Owners*, Council on Environmental Quality 105–123 (1973).

72. *See* Mugler v. Kansas, 123 U.S. 623, 665 (1887).

73. Penn. Coal Co. v. Mahon, 260 U.S. 393 (1992).

74. *Id.* at 413.

75. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124–25 (1978).

76. Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 484–85 (1987) (denying a taking even though an owner of a coal deposit, as in the earlier *Penn. Coal*, might be deprived of a portion of its value, and distinguishing the earlier *Penn. Coal* on the basis that the legislative action in question responded to a significant threat to the public welfare and did not unduly interfere with the mine owner's investment-backed expectations).

77. *See The Powell Memorandum*, Washington Report Supp., Code No. 2900, U.S. Chamber of Commerce (1971) (on file with author).

78. *Id.* at 2.

79. *Id.*

those who would destroy it,[80] and Powell followed with recommendations for Chamber-sponsored scholars, speakers, think-tanks, textbook evaluation, media surveillance, and political action and litigation.[81] Within months Lewis Powell would go onto the Supreme Court, and within a year the Chamber of Commerce would be founding the first business-sponsored public interest law firm, the Pacific Legal Foundation,[82] with the mission to "promote the general interest of business in the nation's courts."[83] Backed by the construction and homebuilding industry, and in turn backing the industry's own lawsuits, Pacific Legal made land use and property rights its stock in trade, and the California Coastal Commission, striving to implement the federal and state coastal zone programs, its favorite defendant.[84] By 1996 Pacific Legal was proclaiming "a quarter of a century devoted to defending property rights."[85] Pacific Legal's goal, however, was not compensation. The goal was, in its own words, to "get rid of the regulatory state;"[86] and it had lots of company.

The intellectual push for the property rights movement came from Richard Epstein, a University of Chicago professor who, sponsored by a grant from the Olin Chemical Company's private foundation,[87] published a book recommending that the takings clause be used as a tool to defeat government regulation.[88] If the life of government could not go on in the face of an amplified takings requirement, then that was the ticket to ride. A reconstruction of takings could undermine "many of the heralded reforms and institutions of the twentieth century: zoning, rent control, workers' compensation laws, transfer payments, [and] progressive taxation."[89] At first blush, it was the sort of

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80. *Id.* at 4.

81. *Id.* at 3–4.

82. *See* Oliver A. Houck, *With Charity for All*, 93 YALE L.J. 1415, 1457–60 (1984) [hereinafter Houck, *With Charity for All*].

83. ALLIANCE FOR JUSTICE, JUSTICE FOR SALE: SHORTCHANGING THE PUBLIC INTEREST FOR PRIVATE GAIN (1993).

84. Houck, *With Charity for All*, *supra* note 82, at 1470–71.

85. Kendall & Lord, *supra* note 71, at 541 (quoting PACIFIC LEGAL FOUNDATION, 1996 ANNUAL REPORT (1997)).

86. David Helvarg, *'Property Rights' Movement: Legal Assault on the Environment*, THE NATION, Jan. 30, 1995, at 126 (quoting Jim Burling, Attorney, Pacific Legal Foundation).

87. Kendall & Lord, *supra* note 71, at 552.

88. ALLIANCE FOR JUSTICE, *supra* note 83, at 32–33.

89. RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN x (1985).

thing you might have heard from a soapbox in Central Park or the "Taxes Are Unconstitutional" fringe. Epstein's new reading of takings was absolute: if any part of a property interest were diminished, if you lost an inch of space or a dollar in value, you had a takings claim.[90] His corollary, in order to defeat the nuisance exception, was to restate the exception in the narrowest terms, actions that physically invaded neighboring property.[91] To implement the agenda, Epstein called for "a level of judicial intervention far greater than we now have, and indeed far greater than we ever have had."[92] All three of his recommendations would find their way to the Supreme Court, and into the majority decision on David Lucas and the South Carolina Beachfront Management Act.

An intellectual theory in their back pocket and early success in California already on the board, the backers of the property rights movement—primarily land developers, contractors and a wide range of industries with no particular properties at risk but high levels of antipathy to environmental constraints—took their offense nationwide. The Olin Foundation and others formed the Federalist Society ("the cornerstone of our success on the law school campuses"), annually supported by Olin lectures, featuring conservative members of the federal judiciary and, in turn, the basic recruiting device for the conservative and property rights movements.[93] Out of the Society would come, inter alia, Justice Antonin Scalia, author of the majority opinion in *Lucas*.[94] Out of the Society and its business funders would also come a range of other initiatives originally suggested by Lewis Powell, including media monitoring,[95] judicial education projects,[96] cadres of sponsored speakers,[97] think tanks,[98] and university institutes,[99] all with the same message:

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90. RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985).

91. *Id.* at 107–25.

92. *Id.* at 30–31.

93. ALLIANCE FOR JUSTICE , *supra* note 83, at 88.

94. *Id.* at 83; *see also* Kendall & Lord, *supra* note 71, at 539.

95. THOMAS FERGUSON & JOEL ROGERS, RIGHT TURN: THE DECLINE OF THE DEMOCRATS AND THE FUTURE OF AMERICAN POLITICS 86–88 (1986).

96. *See* Kendall & Lord, *supra* note 71, at 549 n.181 (citing JOHN M. OLIN FOUNDATION, INC., 1995 ANNUAL REPORT (1995)) ("In 1995, the Olin Foundation gave $25,000 to FREE (Foundation for Research on Economics and the Environment) to support its judicial seminars.").

97. ALLIANCE FOR JUSTICE, *supra* note 83, at 88.

98. *Id.* at 3, 23.

up with private property rights and down with regulations. It would establish a separate federal court of claims for property takings cases[100] (while "liberals . . . [were] somewhat asleep at the switch"),[101] and staff it with the most intransigent true believers it could find. It would enter the Administration through the Office of the Attorney General, whose Solicitor General, also a loyal soldier in the Reagan revolution, later wrote:

> Attorney General Meese and his young advisers—many drawn from the ranks of the then fledgling Federalist Societies and often devotees of the extreme libertarian views of University of Chicago law professor Richard Epstein—had a specific, aggressive, and, it seemed to me, quite radical project in mind: to use the Takings Clause of the Fifth Amendment as a severe brake upon federal and state regulation of business and property. The grand plan was to make government pay compensation as for a taking of property every time its regulations impinged too severely on a property right—limiting the possible uses for a parcel of land or restricting or tying up a business in regulatory red tape. If the government labored under so sever an obligation, there would be, to say the least, much less regulation.[102]

In short, by the time Mr. Lucas was taking his case through the courts, the legal landscape was undergoing a seismic shift, funded by business and industry, and seeking not the compensation of individual landowners but rather, and quite overtly, the frustration of all government social and environmental programs through the threat of compensation. Better yet, it was using a vehicle, the re-interpretation of the Constitution through its allies in the judiciary, which would be immune from democratic response. As one proponent of the movement wrote: "[i]f lasting change is to come in property rights protection, it will come from court actions . . .

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99. *Id.* at 4, 29–38 (Corporate-sponsored think tanks have been established at, inter alia, Yale, Stanford, University of Chicago, Harvard, Columbia, University of Virginia, George Mason, University of Pennsylvania, Duke, and Georgetown.).

100. Kendall & Lord, *supra* note 71, at 536.

101. W. John Moore, *Just Compensation*, 1992 NAT'L J. 1404, 1406 (1992). ("That is the result of liberals being somewhat asleep at the switch and the [Reagan and Bush] Administrations' being extremely sophisticated in their selection and placement of judges.").

102. CHARLES FRIED, ORDER AND LAW: ARGUING THE REAGAN REVOLUTION: A FIRSTHAND ACCOUNT 183 (1991) (citations omitted).

[l]egislation is too open to change whereas judicial rulings of constitutional dimension cannot be changed by the legislature."[103] Last and better still, courts were responding favorably. The Federal Circuit interpreted the doctrine to include partial takings,[104] and a newly-configured Supreme Court, Chief Justice Rehnquist writing, was extending it to include temporary takings[105] and nullifying California Coastal Commission decisions altogether.[106] All the pieces were in place then, as Lucas reached the Supreme Court, for a major doctrinal kill.

Meanwhile, back on the Isle of Palms, Mother Nature was not cooperating. In September 1989, with Lucas still in state court, Hurricane Hugo struck Puerto Rico packing wind speeds of more than 150 m.p.h. and wave heights of eighteen feet and more.[107] Dune lines were destroyed and ninety million cubic meters of near-shore sand barrier simply disappeared. Total monetary damages were put at $2.5 billion. Then Hugo turned northwest. It hit the mainland just north of Charleston, South Carolina, with maximum winds of 120 m.p.h. and twenty foot waves. The barrier islands, no more than a few feet above sea level, were washed over, washed away, cut through and moved dozens of yards landward. Twenty nine South Carolinians died. Property damages approached $6 billion.

Damages to the Isle of Palms and its neighbors were particularly severe. Houses along Folly Beach, just south of Charleston, were swept away, as was a popular seafood restaurant.[108] A protective revetment of boulders and rubble went the way of a child's toys.[109] To the north, the Isle of Palms was also inundated. South Carolina called out the National Guard and closed down the island.[110] David Lucas's properties were buried under four feet of water.[111] To some observers, Hurricane Hugo made the South Carolina Beachfront Management Act look both prescient and wise. To others, however, the state legisla-

103. Kendall & Lord, *supra* note 71, at n.76 (quoting MARK POLLOT, GRAND THEFT AND PETIT LARCENY: PROPERTY RIGHTS IN AMERICA 161 (1993)).

104. Loveladies Harbor, Inc. v. U.S., 28 F.3d 1171, 1181–82 (Fed. Cir. 1994).

105. First English Evangelical Lutheran Church of Glendale v. Los Angeles, 482 U.S. 304, 322 (1987).

106. Nollan v. California Coastal Comm'n, 483 U.S. 825, 841–42 (1987).

107. *Coastal Conflicts, supra* note 33.

108. *Id.*

109. *Id.*

110. Kupelian, *supra* note 42.

111. Platt, *supra* note 49, at 11.

ture's motives were irrelevant, and a smokescreen for the dreaded enemy: environmental regulation.

David Lucas first won, and then lost, in the South Carolina courts. He and his counsel made two tactical decisions. The first was not to apply for an exception under the South Carolina law, which Lucas viewed as a waste of time.[112] The second was not to challenge the law itself, but simply insist on compensation. It was a tactic that ostensibly mooted all the state's reasons for passing the law.[113] It did not moot the trial court's obvious suspicion of the legislature's motives, however, nor its acceptance of testimony that the Isle of Palms, far from eroding, was actually accreting instead.[114] On appeal, the South Carolina Supreme Court pinned Lucas to his admissions: "By failing to contest these legislative findings, Lucas concedes that the beach/dune area of South Carolina's shores is an extremely valuable public resource," that "new construction" contributes to the destruction of this resource, and that discouraging this construction is "necessary to prevent a great public harm."[115] On this basis, under existing United States Supreme Court precedent, there was no taking. For Lucas, it was time to change the precedent. A writ to the Supreme Court was granted and everyone piled on.[116]

Supporting Lucas in his claim were nearly a dozen amicus briefs, ranging from that of the United States to every moneyed interest, financial backer, and prime mover in the property rights movement, including the United States Chamber of Commerce, the National Association of Home Builders, the National Association of Realtors, the American Mining Congress, the Defenders of Property Rights, the Pacific Legal Foundation, the Mountain States Legal Foundation, the Washington Legal Foundation, a beachfront property association, a business mall developers' association, and last but not least, Richard Epstein.[117] This was Resurrection Day and they were not going to miss it. Their briefs, typified by that of the Pacific Legal Foundation, argued the absolutist view.[118] The government was out

112. GREEN MACHINE, *supra* note 11, at 163.
113. *Id.* at 163–64.
114. *Id.* at 105.
115. Lucas v. S.C. Coastal Council, 404 S.E.2d 895, 898 (S.C. 1991).
116. *Id.* at 176.
117. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1005 (1992).
118. *See* Brief of Amicus Curiae Pacific Legal Foundation at 4–15, Lucas v. S.C. Coastal Comm'n, 505 U.S. 1003 (1992) (No. 91-453).

there trampling on property rights to protect no end of things, from wetlands to endangered species. The reasons for the laws were irrelevant. There was no nuisance exception. Whatever the reason, the government paid.

Of all the briefs, however, that of the United States would be the plum, and Lucas and the property rights advocates had high hopes that the U.S. Department of Justice would side with them.[119] The Solicitor General in charge of the brief was Kenneth Starr, no enemy of the conservatives, and the Justice Department had been salted with true believers from the Federalist Society.[120] Lucas himself, accustomed to wheeling and dealing on a personal level, called his "political friends" in Washington, who "gave [him] a name," which Lucas quickly called.[121] His contact, apparently within the Department itself, was "very interested and assured me that they were looking into the matter and he felt certain they would be filing an amicus brief in the case."[122] Lucas took this as a positive sign.[123] On the other hand, the federal government also held a reservoir of attorneys from other eras, and from agencies such as the United States Army Corps of Engineers that could be badly stung by a sweeping ruling on takings. The result was a hidden war within the federal establishment over the soul of the takings doctrine.

The first shot was fired by the Department of Justice, which, as is its custom, asked federal agencies with regulatory responsibilities their opinion on whether the government should file an amicus brief in the case, followed by a memorandum attaching the Department's proposed arguments.[124] The memo recognized an "institutional desire" on the part of these agencies "to minimize the scope of private property protections" in order defend the federal fisc.[125] These "desires," however, did not trump the Department's need to defend the Constitu-

119. GREEN MACHINE, *supra* note 11, at 184–85.

120. *Id.* at 184.

121. *Id.*

122. *Id.*

123. *Id.*

124. Memorandum from Peter Steenland, Jr., Chief, Appellate Section, Envtl. & Natural Resources Div., U.S. Dept. of Justice to Thomas L. Sansonetti, Solicitor, Dept. of Interior, Raymond B. Ludwiszewski, Acting General Counsel, EPA, Lester Edelman, Chief Counsel, Corps of the Army, Department of the Army, George W. Watson, General Counsel, FEMA, & Thomas A. Campbell, General Counsel, NOAA (Dec. 12, 1991) (on file with author).

125. *Id.* at 6.

tion.[126] "We do not subscribe," the memo warned, "to the popular fiction that requiring payment for regulatory takings will automatically undermine or render the regulatory programs less effective."[127] Turning to the law, the Department saw *Lucas* as the opportunity to establish a "bright line" takings test, by adopting the position of the property rights movement.[128] Takings would be determined by economic value alone.[129] There was no nuisance exception. With luck, the memo explained, the Court might "eschew analysis of the public purpose, and hold that the total extirpation of private property values amounts to a taking, per se."[130] The considerable and unanimous body of precedent to the contrary notwithstanding,[131] the Fifth Amendment required no less. It was a radical and doctrinaire position, and it was quick to draw return fire.

The first agency to respond was, logically, the National Oceanic and Atmoshperic Administration (NOAA) within the Department of Commerce. After all, NOAA had partnered with South Carolina in developing its coastal program, and devoted major energy to protecting the American coast.[132] It was NOAA's position that South Carolina "acted within the bounds of the public safety/nuisance exception" of the takings clause, and indeed that its public safety argument had not been sufficiently developed. Government's "most important function," the agency continued, "is the protection of the health and safety of its citizens."[133] Beachfront development threatens

126. *Id.*

127. *Id.* The memo went on to explain: "It will, however, disclose the true cost of such programs to policy makers. It is they who will decide if such programs are worth the cost." *Id.* Exactly how increased costs would *not* weaken regulatory programs is left unstated.

128. *Id.* at 11. The memo references the brief of the Pacific Legal Foundation, a business-sponsored law firm with which it was apparently coordinating its position. *Id.* The memo began by treating, and dismissing, the ripeness argument in a fashion that would be followed by Justice Scalia. *Id.* at 8–9. Additionally, the memo ended with a fallback argument that, even were a "nuisance-like exception" required by law, in this case Lucas' development was not a nuisance. *Id.* at 14–15. The primary thesis of the memo, however, was the "bright line" test eliminating the nuisance exception, and it was this argument that would incite the federal agency response. *Id.* at 11, 17.

129. *Id.* at 12.

130. *Id.* at 13.

131. *Id.* at 10 n.7.

132. Letter from Thomas A. Campell, General Counsel, NOAA to Peter Steenland, Jr., Chief, Appellate Section, Envtl. & Natural Resources Div., U.S. Dept. of Justice (Dec. 5, 1991) (on file with author).

133. *Id.*

both, and if the "proper parameters of the public safety/nuisance exception are not made clear to the Court, government may lose its ability to perform that function."[134] The Federal Emergency Management Agency (FEMA), whose flood insurance program at least tried to encourage development away from storm-prone areas, opined that an "overly broad" reversal of the *Lucas* decision below could "severely limit, if not eliminate FEMA's ability and authority to administer the Congressionally mandated scheme of the [National Flood Insurance Program]."[135]

These were the more mild reactions. The Department of the Army, within which the Corps of Engineers administered the always-contentious Section 404 wetland permit program also objected to the "'bright line' takings test because it would unnecessarily restrict the nuisance exception."[136] The Army minced no words. The Department of Justice made two arguments: that its rule would give "greater predictability" to the government and private parties, and that it "inheres in the Fifth Amendment."[137] "The first argument [was] illusory", and the second "conclusory."[138] The Army then went on to challenge Justice's hubris in presenting itself as a "defender of the Constitution," as if other federal agencies were not.[139] "Equally compelling from a constitutional perspective," it noted, "is the notion of Federalism and whether the Executive Branch of the Federal Government should interfere in what may well be a legitimate exercise of statu[tory] authority to protect individuals from the dangers of certain shoreline construction."[140] As for Justice "not subscribing" to what it called the "popular fiction" that takings claims would undermine regulatory programs, in-

134. *Id.*

135. Letter from Patricia R. Gormley, General Counsel, FEMA, to Peter Steenland, Jr., Chief, Appellate Section, Envtl. & Natural Resources Div., U.S. Dept. of Justice (Dec. 23, 1991) (on file with author). The NFIP faced constant criticism from landowners and their congressmen for its elevation and location requirements, and had faced down several serious takings challenges of its own. *Id.*; *see, e.g.*, Texas Landowners Rights Ass'n v. Harris, 453 F. Supp. 1025 (D.C. 1978), *aff'd*, 598 F.2d 311 (D.C. Cir. 1979), *cert. denied*, 444 U.S. 927 (1979).

136. Letter from William J. Haynes II, General Counsel of the Dep't of the Army to Peter R. Steenland, Jr., Chief, Appellate Section, Envtl. & Natural Resources Div., U.S. Dep't. of Justice (Dec. 20, 1991) (on file with author).

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

deed they would: indeed, the impact on Army programs would be "dramatic."[141] Federal agencies to the Justice property rights advocates: back off.

Remarkably, the Department of Justice backed off. Whatever inside strings that David Lucas and his allies were able to pull, the established agencies had more pull and, to the consternation of the Wall Street Journal which complained that the Department had "muddied up the case,"[142] Justice would end up filing a federal brief on the narrow grounds of ripeness.[143] The Beachfront Management Act allowed Lucas to apply for a variance, which he had refused to do. On a normal day, no federal court decides a constitutional issue it doesn't have to, and such an argument wins. This was, of course, no normal day.

The South Carolina Coastal Commission was represented before the Supreme Court, as was David Lucas, by a local lawyer. Cotton C. Harness III was grounded in environmental litigation, but the Court in Washington was a new world.[144] He drafted a brief in support of the state supreme court's opinion, and sent it to friends in the public interest community. The brief challenged the concept of regulatory takings head-on; and it landed on the desk of Richard Lazarus, who was teaching at Northwestern at the time. Lazarus had served in the U.S. Solicitor General's office where he had handled several takings cases. He was afraid of what the Court might do with *Lucas*, and he was afraid of the sweep of Harness's claims. Justice Thomas had just joined the Court, his views favoring takings were plain, and ominously the Court had granted no fewer than three writs of certiorari on takings for that term. Clearly

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141. *Id.*

142. Platt, *supra* note 49, at 13; *see also* Brief of the United States as Amicus Curiae at 9, Lucas v. S.C. Coastal Comm'n, 505 U.S. 1003 (1992) (No. 91-453). In an opinion article in the *Wall Street Journal*, L. Gordon Crovitz grumbled that "[t]he U.S. government filed a surprisingly incoherent brief in *Lucas*, reflecting what happened when Solicitor General Kenneth Starr felt obliged to let pro-regulation environmental lawyers in the Justice Department muddy up the constitutional argument in favor of Mr. Lucas." L. Gordon Crovitz, *Rule of Judging Whose Beach Fronts, Wetlands and Junk Bonds*, WALL ST. J., Mar. 4, 1992, at A13.

143. *Id.*

144. Telephone Interview with Richard Lazarus, Professor of Law, Georgetown Law Center (June 23, 2003 and Jan. 9, 2004); Interview with Cotton C. Harness III, Attorney at Law, Mt. Pleasant, South Carolina (Jan. 7, 2004). The material contained in the following two paragraphs is taken from these interviews.

they were in a mood to make new law, and it would not be favorable to government regulators or the environment. Lazarus called Harness, who declared himself open to input, and hopped the next plane to Charleston. He and an attorney from California—the wires were buzzing over *Lucas* by this time—met with Harness on a Saturday morning in January. The brief was due the following week. They made their recommendations: Accept the law of regulatory takings, hit on ripeness, narrow the issue to nuisance, stress the harm.

To his credit, Harness listened. It is not easy to switch horses after one has written the brief. Apparently the swing factor was a call he placed to Alan Morrison, a respected veteran of public interest litigation with many Supreme Court arguments on his resume. Harness told Lazarus, "I just called Alan and he told me the same thing you did."[145] For the rest of the weekend they re-wrote the brief. It made the case on ripeness and nuisance, presented in the words of a lawyer from conservative South Carolina, upholding the action of its legislature. When the Justices bore in on the statute from the bench—wasn't it just a pretext for a public playground on the beach—Harness was the one to talk about the hurricanes, about lives and property lost. Lazarus would later recall, "It didn't bother me a bit to have an attorney from South Carolina by the name of Cotton Harness III saying in a southern accent that we were talking about storm damages and property which was flooded 40 percent of the time."[146] The argument would not win. But it would temper the verdict a great deal.

On South Carolina's side were briefs of twenty-six states, the United States Conference of Mayors and a few non-profit planning and environmental organizations.[147] David Lucas looked at them with dismay. They confirmed his every fear; the environmental world was out to get him.[148] He would write, of the time awaiting the appeal, "I realized that this Supreme Court case was no longer just a fight between David and Goliath, but possibly the last stand of private property in America."[149]

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145. Interviews with Richard Lazarus and Cotton C. Harness III, *supra* note 144.

146. *Id.*

147. *Lucas*, 505 U.S. at 1005.

148. GREEN MACHINE, *supra* note 11, at 184.

149. *Id.* at 182.

However, the smart money, and certainly the big money, was on David Lucas, the property rights movement and their patron saint on the bench, Justice Scalia. At oral argument, Scalia did not disappoint them. Lucas writes:

> When he started a line of questioning, we felt that the questions he posed were sympathetic to our cause. Conversely, when another Justice appeared to be weakening our position on some legal tangent, Justice Scalia would answer with either another question or a comment that would refocus the court on the real issue .... I loved it every time that man opened his mouth during the arguments that morning. He was knowledgeable, skillful in his questioning, and somewhat passionate in the way he articulated his understanding of the case. He was our champion of that day and the champion for property rights for all Americans.[150]

What Scalia delivered, in the end, is less clear. The *Lucas* opinion is now history and, both for its holding and its confusion, one of the most analyzed and cited opinions in recent Supreme Court history.[151] We may leave that analysis to others. Suffice it to say here that, writing for the majority, Scalia went out like a lion and came back more lamb-like and ambiguous than anyone could have expected. His eagerness to take the case was apparent, finding the claim ripe for decision despite

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150. *Id.* at 209–10.

151. According to a Westlaw search, *Lucas* has been cited in fifty-nine subsequent cases to date (as of June 25, 2003). *See also* Stephen E. Abraham, *Windfalls or Windmills: The Right of a Property Owner to Challenge Land Use Regulations (A Call to Critically Reexamine the Meaning of* Lucas*)*, 13 J. LAND USE & ENVTL. L. 161 (1997); Brittany Adams, *From* Lucas *to* Palazzolo*: A Case Study of Title Limitations*, 16 J. LAND USE & ENVTL. L. 225 (2001); Pat A. Cerundolo, *The Limited Impact of* Lucas v. South Carolina Coastal Council *on Massachusetts Regulatory Takings Jurisprudence*, 25 B.C. ENVTL. AFF. L. REV. 431 (1998); Calvert G. Chipchase, Lucas *Takings: Why Investment-Backed Expectations Area Irrelevant When Applying the Categorical Rule*, 24 U. HAW. L. REV. 147 (2001); F. Patrick Hubbard, Palazzolo, Lucas, *and* Penn Central: *The Need for Pragmatism, Symbolism, and Ad Hoc Balancing*, 80 NEB. L. REV. 465 (2001); Glenn P. Sugameli, Lucas v. South Carolina Coastal Council*: The Categorical and Other "Exceptions" to Liability for Fifth Amendment Takings of Private Property Far Outweigh the "Rule,"* 29 ENVTL. L. 939 (1999); Victoria Sutton, *Constitutional Taking Doctrine—Did* Lucas *Really Make a Difference?*, 18 PACE ENVTL. L. REV. 505 (2001). For a thoughtful analysis of the environmental-health argument which did not prevail but remains vibrant in the literature, see Joseph L. Sax, *Property Rights and the Economy of Nature: Understanding* Lucas v. South Carolina Coastal Council, 45 STANFORD L. REV. 1433 (1993).

Lucas's failure to exhaust his remedies.[152] Scalia's hostility to the South Carolina legislation was also apparent, describing the state's "expressed interest" (as opposed, apparently, to its unrevealed and nefarious interest) in managing the "so-called 'coastal zone'" (quotation marks in the original, as in the "so-called King of Timbuktoo" or any other false and vainglorious claim) that led to the need for this lawsuit.[153] He went on to dismiss the "public value" and balancing tests of recent Court decisions, and to find a per se taking wherever property had lost its economic value.[154] Turning to Epstein's second tenet, he limited the "nuisance exception" to cases of activity so noxious and threatening—a nuclear plant on a seismic fault was his rather extreme example[155]—that they would be enjoinable by the state outright, if not criminally punishable.[156] This said, and more, he wound his way finally to the opaque conclusion that the now-required "total taking" inquiry included analysis of "the degree of harm to public lands and resources, or adjacent private property posed by" the regulated activity, the "social value" of the activity, its "suitability" to the location, and "the relative ease with which the alleged harm can be avoided" by other measures;[157] in short, the old balancing test in nuisance dress.

Reflecting on the majority opinion, dissenting Justice Blackmun would write that the Court had "launch[ed] a missile to kill a mouse."[158] The missile, however, was part of the script. Justice Scalia had written his anticipated disquisition on takings.

Of course, the takings movement cheered. David Lucas had won, and the case was remanded to determine if, and by how much, his property had been condemned. Behind the scenes, however, there was less joy than expected. The majority opinion had been explicit, to the point of italicizing the world "all," that the holding applied only where "*all* economically beneficial uses" of property had been denied.[159] Left for future courts to determine, as before, then, were the questions

152. *Lucas*, 505 U.S. at 1010–13.
153. *Id.* at 1007.
154. *Id.* at 1015–1019.
155. *Id.* at 1029.
156. *Id.* at 1030.
157. *Id.* at 1030–31.
158. *Id.* at 1036.
159. *Id.* at 1019.

"how all is all?" and "how nuisance is nuisance?"; questions that remain at the heart of the debate.

The litigation rages on, bitterly divided between competing interests and competing justices, each battle leaving the front-line, the outcomes, and even the issues addressed less clear than the one before. Two years after *Lucas* the Supreme Court decided *Dolan v. City of Tigard*,[160] which, depending on your point of view—and one's starting point is very much one's ending point in this field—involved either "an elderly widow, who wishe[d] to expand the family hardware store"[161] and was blackmailed by her town into giving land for a local park, or "the owner of one of the largest chains of hardware stores in the state,"[162] proposing a mammoth paving job that would increase storm water run-off and traffic congestion in an already over-loaded environment, resisting reasonable conditions to mitigate the impacts of its project. In a five-to-four decision that bought parts of both stories, the majority required the town to show more than a nexus between harm created and the town's requirements, something of a super-nexus, cause-and-effect test.[163] A clean hit for the takings movement, but no home run. Then came *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*,[164] dealing with a California oceanfront development hassled by local authorities into minimizing its impact on its surroundings, and leading to a $1.45 million jury award for a temporary taking. Expressing impatience with the continuing lack of clarity in the area, the majority both approved the award and limited *Dolan*'s super-nexus test, leading one commentator to observe that it had succeeded "in the seemingly impossible: making the muddled law of takings even more muddled than it already was."[165]

The new century brought yet more confusion, but, within it, a glimmer that the two-decade long assault on local land use management under the takings clause may have reached its apex. The movement had high hopes for *Palazzolo v. Rhode Is-*

160. 512 U.S. 374 (1994).

161. William Funk, *Reading* Dolan v. City of Tigard, 25 ENVTL. L. 127 (1995).

162. *Id.* at 127.

163. *Dolan*, 512 U.S. at 391.

164. 526 U.S. 687 (1999).

165. John D. Echeverria, *Revving the Engines in Neutral*: City of Monterey v. Del Monte Dunes at Monterey, Ltd., 29 ENVTL. L. REP. 10682, 10690 (1999).

land,[166] where a badly-divided court stretched doctrine to hold that even land acquired *subsequent* to a land restriction could give rise to a takings claim.[167] At the same time, it upheld a lower court finding of no taking, "for it is undisputed that the parcel retains significant worth" for construction of a house on the unregulated portion of land.[168] Translation: no partial takings claim.[169] Another hit for the movement, but also a strike-out. A year later, a majority went the other way in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*,[170] rejecting a lower court decision for having "disaggregated" the property in question rather than treating the remaining value of the property as a whole,[171] and returning, after long absence, to the *Penn Central* balancing test to determine whether or not a taking had occurred.[172] It was the first big loss for the takings movement in twenty years.

Tahoe-Sierra may have brought the takings issue full circle to the status-quo-ante of circa 1985.[173] Or it may simply have brought time for the next assault. None of the passions, money, and political views that fuel this debate have abated. As the smoke clears, however temporarily, neither *Lucas* nor its progeny present insurmountable problems for environmental fellow travelers supporting regulation across the board. Nor will they so long as the Court adheres to requiring the loss of "all" economic use for a taking, the requirement of the Court in 1922 when it first opened this can of worms. As even Justice

166. 533 U.S. 606 (2001). *See* Michael C. Blumm, Palazzolo *and the Decline of Justice Scalia's Categorized Takings Doctrine*, 30 B.C. ENVTL. AFF. L. REV. 137 (2002); Michael Allan Wolf, *Pondering* Palazzolo: *Why Do We Continue to Ask the Wrong Questions?*, 32 ENVTL. L. REP. 10367 (2002).

167. *Palazzolo*, 533 U.S. at 630.

168. *Id.* at 632.

169. *Id.*

170. 535 U.S. 302 (2002). *See* Richard J. Lazarus, *Celebrating* Tahoe-Sierra, 33 ENVTL. L. 1 (2003); Danaya C. Wright & Nissa Laughner, *Shaken But Not Stirred: Has* Tahoe-Sierra *Settled or Muddied the Regulatory Takings Waters?*, 32 ENVTL. L. REP. 11177 (2002).

171. *Tahoe-Sierra*, 535 U.S. at 331.

172. *Id.* at 321.

173. The Court has not yet accepted further writs since *Tahoe-Sierra*, and in November 2003 it declined another opportunity in *McQueen v. S.C. Coastal Council*, 580 S.E.2d 116 (2003), *cert. denied*, 124 S.Ct. 466 (2003). *See Supreme Court Declines to Review Owner's Coastal Wetlands Taking Case*, 34 BNA ENVTL. REP. 2446 (2003).

Scalia noted in *Lucas*, perhaps as a way of selling his opinion, few regulatory measures go this far.[174]

The exception, however, is in the battle zone of David Lucas and the South Carolina Coastal Commission on the Isle of Palms; high-priced properties highly vulnerable to coastal erosion and whose perpetuation threatens not only their own security, but the security of those up and down shore, including the coastal ecosystem itself. In this zone, with the takings doctrine hanging over the heads of coastal planners, but at the same time providing insufficient relief to an aggrieved and threatened community of coastal land developers, each has developed a new offense of its own.

For their part, coastal states have gone looking for strategies to step development back from the beach without having to pay for it. The fact is, they could not pay for it in the wildest stretch of one's imagination: as of 2003, forty-eight states were in deficit spending;[175] that of California alone rivaling the recent debt crises of Mexico, Argentina, and Brazil.[176] More than sixty million people live within fifty miles of the Atlantic Ocean and the Gulf of Mexico, and nearly two-thirds of the coastlines of New York and New Jersey are privately owned.[177] Oceanfront property, raw land, and sand, sells for up to half a million dollars an acre,[178] and highly desirable property even more.[179] If the states have to pay bills of this size in order to control coastal construction they are at stalemate, exactly the one that Epstein and the property rights movement have worked to achieve.

The resulting strategies try to take the sting out of *Lucas* by finessing the takings question. One is simply to build into coastal setback requirements provisions for variances on the

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174. 505 U.S. at 1018.

175. Mike Thompson, *'Debt Tax' Throttles Babies, Boomers*, THE PRESS DEMOCRAT (Santa Rosa, Cal.), Feb. 17, 2003, at B13.

176. Sebastian Mallaby *Bush Taking a New Look at Bailouts*, CONTRA COSTA TIMES (Walnut Creek, Cal.), Aug. 7, 2002, at 10.

177. Iver Peterson, *The Public-Private Clash Over Beaches*, N.Y. TIMES, Oct. 15, 1989, § 10 (Real Estate), at 1. *See also* Bradford W. Wyche, *The South Carolina Coastal Zone Management Act of 1977*, 29 S.C. L. REV. 666, 666 (1978) (stating that 50 percent of all persons in the United States live within fifty miles of the coast).

178. *See supra* text accompanying notes 20–29.

179. *See* Coronado Shores Co., http://www.coronado-shores.com (last visited Jan. 21, 2004) (listing California beachfront homes from $450,000 to over $4 million).

basis of hardship or unusual circumstances.[180] Another is to prohibit groins, revetments, and seawalls, no matter how much their absence exposes beachfront property to erosion, and leave property owners to their fate.[181] Another has been to concede development on already developed areas, but prohibit it on undeveloped land.[182] Yet another grandfathers existing structures but prohibits their reconstruction if and when they are damaged by coastal storms.[183] Florida has come up with a rolling baseline that factors in projected rates of erosion and sea level rise;[184] Maryland advances a similar program with enhanced development rights inland.[185] The community of Fire Island, a coastal barrier off of Long Island, New York, has mitigated the impact of its no-build beach zone by allowing landowners a fifty-year amortization period for existing structures, and the ability to build smaller, conforming structures if they are storm-damaged in the meantime.[186] Beyond these regulatory approaches, many states have imposed impact fees on development to fund the acquisition of at least small parcels of coastal property.[187] On a level playing field, these measures, should they survive *Lucas* scrutiny, would provide some measure of hope.

The playing field of coastal development, however, is by no means level. America's rush to the sea is fueled by a range of federal subsidies that put the lie to anything the Coastal Zone Management Act might say, or the states might do, to stem the tide. The United States Army Corps of Engineers has spent billions on hard protections for coastal properties,[188] and now

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180. JOSEPH J. KALO ET AL., COASTAL AND OCEAN LAW: CASES AND MATERIALS 285 (2d ed. 2002).

181. *Id.* at 277.

182. *Id.* at 285–86.

183. Esposito v. S.C. Coastal Council, 939 F.2d 165, 167–68 (4th Cir. 1991).

184. JOSEPH J. KALO ET AL., COASTAL AND OCEAN LAW 286 (2d ed. 2002).

185. *See* Christopher M. Corchiarino, *Educating Smart Growth: One Size Fits All Growth Initiatives are Lacking Sound Environmental Guidance*, 9 U. BALT. J. ENVTL. L. 1 (2001).

186. Jessica VanTine & Tiffany B. Zezula, *The Beach Zone: Using Local Land Use Authority to Preserve Barrier Islands*, 20 PACE ENVTL. L. REV. 299, 301 (2002).

187. Tiffany Eisberg & Jessica VanTine, *The Beach Zone: Using Local Land Use Authority to Preserve Barrier Islands Part I* (Environmental Law in N.Y.), Nov. 2002, Vol. 13, No. 10, at 181–182.

188. Robert R. Kuehn, *The Coastal Barrier Resources Act and the Expenditure Limitation Approach to Natural Resources Conservation*, 11 ECOLOGY L.Q. 583, 591 n.34 (1984) (citing Saving the American Beach: A Position Paper by Con-

that these have proven ineffective, is running up an even larger tab rebuilding beaches that have washed away once, twice, and will wash away again.[189] The State of Florida has its own multi-hundred-million dollar beach nourishment program, a loss leader among the states.[190] The Federal Highway Administration spends major sums providing fast access to the coasts and bridges to the barrier islands, up to $10 million per mile,[191] projects that are often justified as "hurricane evacuation corridors" without a nod to their obvious effect of moving people directly into the hurricane zone.[192] The Environmental Protection Agency spends hundreds of millions more on fresh water and sewage treatment plants, without which island development could not survive.[193] The acquisition of coastal properties is boosted by federal mortgage guarantees,[194] the second home

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cerned American Geologists, reprinted in Hearings on S.2686 Before the Subcomm. on Parks, Recreation, and Renewable Resources of the Senate Comm. on Energy and Natural Resources, 96 Cong. 2d Sess. 35 (1980)) ("It is estimated that beach renourishment costs in excess of $1 million per mile of shoreline, and seawalls cost upwards of $100 to $600 dollars per linear foot of shoreline.").

189. Friends of the Earth, *Green Scissors 2003: Cutting Wasteful and Environmentally Harmful Spending* 26 (2003), http://www.greenscissors.org/publications/gs2003.pdf.

190. Through 1997, Florida had appropriated over $190 million to local communities for beach renourishment. These funds are, in turn, matched by local cost sharing. The Florida Beach Control Erosion Program, *at* http://www.dep.state.fl.us/beaches/programs/bcherosn.htm (last visited Apr. 6, 2004).

191. Doug Simpson, *Energy One Road From Crunch*, SOUTH BEND TRIB., Sept. 13, 2001, at B8.

192. Such was the justification for the proposed Lafitte-Larose highway in southern Louisiana in the late 1970s providing access to the coast for New Orleans. Telephone Interview with Barry Kohl, Adjunct Professor of Geology, Tulane University (August 15, 2003) (Mr. Kohl was conservation chair of the New Orleans Audubon Society at the time, and an opponent of the highway). The environmental costs of these access roads are, likewise, ignored: "When a causeway was built between the mainland and Sanibel Island on the Florida Gulf Coast, it wiped out a $1.5 million-a-year scallop industry, which has not recovered after seventeen years." William J. Siffin, *Bureaucracy, Entrepreneurship, and Natural Resources: Witless Policy and the Barrier Islands*, 1 CATO J. 292 (Spring 1981).

193. From 1972 to 1994, the EPA has awarded $44.6 billion from the Sewage-Treatment Construction-Grants program under the State Revolving Funds for Sewage Treatment program. U.S. Environmental Protection Agency, *EPA Announces Guidance on State Revolving Funds for Sewage Treatment*, *at* http://www.epa.gov/history/topics/cwa/02.htm (last visited Aug. 8, 2003).

194. For information on federal Housing and Urban Development and related mortgage assistance programs, see HUD, *Buying a Home*, *at* http://www.hud.gov/buying/index.cfm (last visited Apr. 6, 2004).

mortgage deduction,[195] and bargain-rate federal flood insurance.[196] Policies that would cost close to $7,500 on the private market are available for about $950 a year.[197] Meanwhile, following every major hurricane, insured property losses run to half a billion dollars and more.[198] Lastly, when all else fails, there is federal disaster relief. Twenty years ago, a United States House of Representatives report placed total federal expenditures on coastal barrier development at averages in excess of $25,000 an acre for initial infrastructure, and $53,000 when post disaster assistance is thrown in.[199] That is for each acre, and that was two decades ago. In short, coastal policies may be trying to sound the retreat, but federal monies are sounding the y'all-come-we'll pay-for-it,[200] and the result is no contest.[201]

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195. The deduction provides an estimated $16 billion for second home mortgages over a ten-year period. TAX NOTES TODAY, 2003TNT236-4, Dec. 9, 2003. For David Lucas' reliance on the second-home mortgage deduction to fuel development on the Isle of Palms see GREEN MACHINE, *supra* note 11.

196. Rick Raber, *Flood Insurance Plan Would Raise Rates in Louisiana.*, THE TIMES-PICAYUNE, Sept. 20, 1989, at A3.

197. Monica Yant, *Bill to Cut Flood Insurance Draws Tide of Resentment*, THE TIMES-PICAYUNE, June 28, 1992, at A10. A recent report published by the free-market oriented Cato Institute calls the federal flood insurance program "crop insurance for real estate brokers and mortgage lenders." *See* Suffin, *supra* note 192, at 296. Also described are yet other federal programs of the Small Business Administration, Economic Development Administration, and Farm Home Mortgage Administration that provide additional hundreds of millions of dollars for coastal and barrier island investments. *Id.*

198. The following illustrates storms and their damage: Gloria (1960) $900 million, Hugo (1989) $7 billion, Bob (1991) $1.5 billion, Andrew (1992) $26.5 billion, Opal (1995) $3 billion, Frances (1998) $500 million, Georges (1998) $2.31 billion, Floyd (1999) $4.5 billion, Claudette (2003) $400 million. Jerry D. Jarrel et al., *The Deadliest, Costliest, and Most Intense Hurricanes From 1900 to 2000 (and Other Frequently Asked Hurricane Facts)*, National Weather Service, *at* http://www.nhc.noaa.gov/pastcost.shtml (last visited Jan. 21, 2004).

199. Coastal Barrier Resources Act, H.R. REP. NO. 63-28, at 10 (1982).

200. Consider the following profile of Grand Isle, Louisiana:

Location: Gulf of Mexico
Population: approximately 1,500 full-time residents
Permanent residences: 622, with an average value of $75,000
Second homes and vacation residences: 1,200, average value $250,000
New condominium prices: $500,000 per unit
Average erosion rate: sixteen feet per year
Hurricane vulnerability: fifty major storms in the past 130 years
Hurricane impacts (selected):

> 1893—Hurricane with sixteen foot storm surge killed 2,000 in Louisiana
> 1909—Hurricane with sixteen foot storm surge killed 351 in Louisiana

1915—Tropical Storm with twelve foot storm surge killed 275 and destroyed 90 percent of existing buildings
1926—Hurricane with fifteen foot storm surge
1947—Hurricane with eleven foot storm surge killed twelve
1956—Hurricane Flossy with thirteen foot storm surge
1965—Hurricane Betsy with fifteen foot storm surge killed eighty-one
1969—Hurricane Camille with seventeen foot storm surge
1995—Hurricane Opal with three to five foot storm surge
1997—Tropical Storm Danny with 5.4 foot storm surge
1998—Hurricane Georges with four to eight foot storm surge
1998—Tropical Storm Frances with two to four foot storm surge
1998—Tropical Storm Hermione with one to three foot storm surge
2002—Tropical Storm Isadore with four to six foot storm surge killed one
2002—Hurricane Lili, ten to twelve foot storm surge and 120 mile per hour winds, caused $105 million in insured losses and 48,000 claims with FEMA
2003—Tropical Storm Bill with 5.8 foot storm surge caused $44 million in damage

Subsidies and investments (selected):

U.S. Army Corps of Engineers, Beach Nourishment, 1954–1996: $72.6 million
Federal Highway Administration, federal aid-highway and access bridge: $350 million
U.S. Department of Agriculture, fresh water system: $17.5 million
Home mortgage deductions: $33 million (estimated twenty-year total)
Second home mortgage deductions: $295 million (estimated twenty-year total)
Flood Insurance: 1,609 claims paid since 1978, totaling $11.8 million
Disaster Relief: $781,347 from 2001–2004, estimated $19.5 million since 1978
Total investment: approximately $800 million
Total investment per permanent residence: $1.28 million
Total investment per permanent and seasonal residence: $439,000
Caveat: Not all figures are over compatible periods of time, and some (e.g., the highway and bridge) support more users than just residents of Grand Isle. This said, the total subsidies for those living on Louisiana's version of the Isle of Palms are impressive.

Joshua Hansen, *Government Subsidies and Infrastructure Improvements Spur Growth and Development on Grand Isle, Louisiana* (Fall, 2002) (unpublished transcript on file with author). For hurricane data, see National Climatic Data Center, http://www.ncdc.noaa.gov/cgi-bin/wwegi.dll?wwevent-storms (last visited Mar. 9, 2004). For information pertaining to residences and home values, see United States Census Bureau, *Census 2000 Results*, http://makeashorterlink.com/?G32652BE7 (last visited Apr. 2, 2004). Water system costs are taken from a telephone interview with Aubrey Chaisson, Superintendent, Grand Isle Water System (March 10, 2004) (on file with author). Flood insurance payout information is taken from a telephone interview with David Hiegel, National Hazard Programs Specialist, FEMA (March 4, 2002) (on file with

To the property rights movement, however, these subsidies are not enough. They do not compensate landowners for partial restrictions on their properties, nor do they arrest the evils of big government, regulatory excess and the Green Machine. Riding on the momentum of the Supreme Court's highly-visible opinion in *Lucas*, the movement ratcheted up the campaign with its new-found champion at the front. David Lucas was an ideal candidate, widely-known, battle-hardened and good with a phrase. Further, he absolutely loathed environmentalists at this point, whose "Mafia-like tactics" of "fear, publicity [and] political action" had been a "surefire money and power getter for a long time."[202] Lucas turned to the lecture circuit.[203] One of his favorite speeches begins with a parable about God, who is a real estate developer pressed by loans and attempting to deal with an irrational mob of environmentalists through the use of sweet reason, for example, "some erosion at the edge of any water body is inevitable."[204] In the end, God gives up and calls in a holocaust.[205]

In 1993 Lucas helped found the Council on Property Rights to help landowners advance takings claims. The Council refers cases to property rights law firms such as the Pacific Legal Foundation, Mountain States Legal Foundation, and Defenders of Property Rights that are largely underwritten by the real estate, homebuilder, and related industries,[206] in Lucas's words, a "gallant groups of legal Lancelots" coming to the rescue.[207] The main thrust of these groups and their supporters, however, has

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author). Disaster relief information is taken from a telephone interview with William Boar, National Hazard Program Specialist, FEMA (March 8, 2004) (on file with author).

201. The weight of federal subsidies has prompted several commentators to call for a "givings" analysis in takings cases, in which federal benefits that appreciate primitive property values are subtracted from market price in order to determine fair compensation. Edward Thompson Jr., *The Government Giveth*, ENVTL. F., Mar.–Apr. 1994, at 22, 26; Daniel D. Barnhizer, *Givings Recapture: Funding Public Acquisition of Private Property Interests on the Coasts*, 27 HARV. ENVTL. L. REV. 294, 294 (2003). Another commentator points out that it would be cheaper for the federal government to buy the barrier islands outright, even at today's inflated prices, than to continue to subsidize their development and indemnify their losses. *See* Suffin, *supra* note 192.

202. GREEN MACHINE, *supra* note 11, at 263.

203. *See Id.* at 219–28.

204. *Id.* at 253–56.

205. *Id.*

206. *Id.*

207. *Id.* at 279–80.

been to draft and lobby takings legislation at both the federal and state levels.[208] The federal assault has yet to succeed, although takings bills have been introduced in every congressional session for the past decade.[209] The lead vehicle, S. 605, drew opposition even from conservative quarters; Louisiana's Senator Johnston called it a "radical departure from the original intent of the framers" and "over 200 years of constitutional jurisprudence . . . ."[210] The movement has met more success in state capitols, where a majority have since enacted some form of property rights legislation.[211] Many of these statutes are restricted to particular, favored industries, i.e. agriculture, real estate; or to particular kinds of laws, i.e. wetlands and wildlife.[212] Seventeen states require an economic impact assessment, the same "look-before-you-leap" thesis as the—to this community—much-hated National Environmental Policy Act.[213] Some states go further, towards the nirvana of the property advocates, to require compensation for partial takings, defined either by percentage of property value—a reduction of 25 percent or more in Texas[214]—or in terms that seem deliberately vague, such as the "inordinate burden" standard of Florida's new law.[215] While the impact of these statutes has yet to be quantitatively measured, they all send the intended message to regulators: retreat.

States have in fact retreated, most notably South Carolina which, during the session following the Lucas decision, passed takings legislation of the "assessment" variety in record time.[216]

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208. *Id.*

209. Lynda J. Oswald, *Property Rights Legislation and the Police Power*, 37 AM. BUS. L.J. 527, 527 (2000).

210. Letter from Senator J. Bennett Johnston, Republican from Louisiana, to Senator Bob Dole, Senate Majority Leader (May 6, 1996) (on file with author).

211. Oswald, *supra* note 209, at 527.

212. *Id.* at 537.

213. *Id.* at 541–43. States which have passed property rights protection statutes in one form or another include: Arizona, Delaware, Idaho, Indiana, Kansas, Louisiana, Michigan, Missouri, Montana, Nebraska, North Dakota, Tennessee, Texas, Utah, Washington, West Virginia, and Wyoming. *Id.* at 538 n.51.

214. *Id.* at 545.

215. *Id.*

216. *See "Wise Use" Activity: South Carolina*, THE WISE USE MOVEMENT: STRATEGIC ANALYSIS AND FIFTY STATE REVIEW, *at* http://www.ewg.org/pub/home/clear/by_clear/Fifty_States/South_Carolina.html (March 1993). In 1993, the law was reported out of committee in seven days, without hearing, and accepted by the Senate without even the standard roll-call vote. *Id.*

That same year the independent Coastal Council was renamed, adorned with a council of its own appointed by the coastal counties and the legislature, and placed under the supervision of the Department of Health and Environmental Control.[217] In August of that year, the Department announced that the coastal director would no longer have deputy status within the agency, but would report to another deputy instead.[218] The downgrades were explained as necessary "to make the regulatory process more efficient."[219] The effect of these changes was highlighted by a controversy on, of all places, the Isle of Palms. Property owners wanted to build seawalls using 600-gallon, 2.5 ton sand bags.[220] The coastal office denied permission, finding that the bags were "new hard erosion control devices" of exactly the sort the Beachfront Management Act sought to prohibit.[221] The Department of Health and Environmental Control overruled, and allowed the sandbagging.[222] A former Coastal Council member called it a "mockery . . . bad for our state, our environment and those concerned about our coast."[223] Very good, however, for the owners of high-end properties at Wild Dunes.

As of summer 2003, Destination Wild Dunes was approaching full build-out.[224] There were only a dozen lots for sale on the island itself, which already had four hotel/resorts, fourteen real estate companies, two golf courses, two yacht harbors and nineteen restaurants.[225] Eleven lots remain at Wild Dunes.[226] One of the newest residents is Cotton Harness, the attorney for the South Carolina Coastal Council in *Lucas*.[227]

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217. Brett Bursey, *The Incredible Shrinking Coastal Agency*, POINT: SOUTH CAROLINA'S INDEPENDENT NEWSMONTHLY (Sept. 1996), *at* http://www.scvotersforcleanelections.com/point/9609/p07.html.

218. *Id.*

219. *Id.*

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.*

224. *Construction News*, WILD DUNES CMTY. ASS'N, INC. NEWSLETTER 5 (July–Sept. 2003), *at* http://www.pressomatic.com/wdunesca/upload/3%202003%20Jul%20Aug%20Sept.pdf.

225. *Id.*; *see also* IOP Island Business, *at* http://www.awod.com/gallery/iop/business.html (last visited Feb. 7, 2004) (listing businesses on the island).

226. Telephone Interview with Joan Wagner, Island Realty, Isle of Palms, South Carolina (May 28, 2003).

227. GREEN MACHINE, *supra* note 11, at 286.

Cotton's house, says Lucas, is now closer to the beach than that of Lucas himself.[228]

Lucas may have won in the United States Supreme Court, but he is still angry. On remand, the South Carolina Supreme Court ruled that Lucas had suffered a temporary taking for the period of the lawsuit, and possibly a permanent taking depending upon the Council's subsequent permit decision.[229] The Coastal Council then denied his permit, setting up the permanent claim.[230] Lucas retaliated by suing the members of the Council individually, for having granted other permits, and denying his application.[231] With the pressure of two lawsuits now pending, one for the takings claim and another for damages, the Council looked for a way out, and settled.[232] Lucas received a little over $1.5 million, and the state took title to the lots.[233] After paying his litigation expenses and the bank, he was left with less than $10,000.[234] The state coastal program at this point was under new management, and decided to sell.[235] In November 1993, Lucas's oceanfront lots went at auction for $730,000.[236] To Lucas, it was proof that the state did not care about the environment and never had; it was only about "power, money, and prestige."[237] To others, it was proof that, as Justice Holmes had predicted, a government that had to pay for the impacts of its controls would have a hard time getting the job done.[238]

The advertisements for Wild Dunes residences feature splendid, three and four story homes on the edge of the sand.[239] One of the Lucas lots sports a huge, new, salmon-pink structure built to the maximum size possible in order to get the highest price for the property when it sold, at the insistence of

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228. *Id.*
229. *Id.* at 242–43.
230. *Id.* at 247.
231. *Id.* at 248.
232. *Id.* at 248–49.
233. *Id.* at 250.
234. *Id.*
235. *See* Bursey, *supra* note 217.
236. GREEN MACHINE, *supra* note 11, at 252.
237. *Id.*
238. Penn. Coal Co. v. Mahon, 260 U.S. 393, 413 (1922) ("Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.").
239. *See, e.g.*, Wild Dunes Real Estate, Inc., *at* http://www.wilddunes.com/oceanfront.htm (last visited Feb. 5, 2004) (showing rental information for lavish "oceanfront" homes located right on the beach).

the state.[240] Next to it is a large cube structure three stories in the air.[241] The homes do not merely overlook the beach, they are built smack on it.[242] The fact that fourteen years ago Hurricane Hugo roared over the island, buried it in water, destroyed dozens of homes, and tore out two holes of the golf course does not, apparently, register. In the words of a state official, the effect of the "immense destruction" was "higher value homes at larger risk today than before."[243] From 1978 through 2002, the National Flood Insurance Program paid out over $61 million in claims for flood damage on the Isle of Palms.[244] It paid out more than $400 million to the state of South Carolina, and over $11.6 billion to the nation as a whole.[245] More than 70 percent of the program's coverage is on the coast and the barrier islands.[246] Not to be outdone, the Corps of Engineers is prepared to spend an estimated $10 billion pumping sand on the nation's beaches in the years to come,[247] $1 billion alone on a twelve-mile stretch of the New Jersey shore.[248]

The Bible says that only a foolish man builds his house on sand. It shows you how out of date a metaphor can become.

240. William Fischel, *A Photographic Update on* Lucas v. South Carolina Coastal Council*: A Photographic Essay*, *at* http://www.dartmouth.edu/~wfischel/lucasupdate.html (last modified March 30, 2000).

241. *Id.*

242. *Id.*

243. Stephen E. Moore, What This Place Needs is a Good Hurricane, Remarks at Roundtable Discussions (July 24, 1997) (transcript on file with author).

244. The National Flood Insurance Program, *Loss Statistics From 1/1/1978 Through 12/31/2002*, *at* http://www.fema.gov/nfip/10400212.shtm#45 (last modified May 13, 2003).

245. *Id.*

246. Platt, *supra* note 49, at 12.

247. Friends of the Earth, *supra* note 189, at 26 (citing an estimate by Taxpayers for Common Sense).

248. *See* Heinz Report, *supra* note 43, at 21.

ATLANTA COALITION

> *Downtown, a few blocks from where the golden dome of the State Capitol forges spears of fire from the glare of the sun, six legs of the Interstate Highway System converge in a great sheepshank knot of ramps. And around the city, construction of a circumferential highway nears completion.*
>
> —Atlanta, Pacesetter City of the South (1969)[249]

> *We cannot accommodate any more traffic on our existing street patterns. And there's not enough money on God's green earth to change the street patterns in Atlanta. The only solution is a mass-transit system or additional expressways.*
>
> —Ivan Allen, Mayor, Atlanta (1969)[250]

> *The world as we knew it just ended in the business of transportation.*
>
> —Sam Williams, President, Metro Atlanta Chamber of Commerce (1999)[251]

Atlanta lives by the automobile, grows by the automobile, and spends a great deal of time in traffic. Described with pride as "the fastest growing human settlement in history,"[252] yet by others as the poster child of suburban sprawl,[253] from 1990 to 1997 the city nearly doubled in size, consuming 500 acres of open space a week.[254] There is little resistance to the trend; as a former Executive Director of Georgia's Association of County Commissioners commented, "zoning in a lot of [Georgia] coun-

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249. William S. Ellis & James L. Amos, *Atlanta, Pacesetter City of the South*, NAT'L GEOGRAPHIC at 247, 276 (Feb. 1969).

250. *Id.*

251. Michael R. Yarne, *Conformity as Catalyst: Environmental Defense Fund v. Environmental Protection Agency*, 27 ECOLOGY L.Q. 841, 842 (2000) (quoting David Goldberg, *Ruling May Halt Metro Roads; Judges Reject Clean Air Exception*, ATLANTA J. & CONST., Mar. 4, 1999, at A1).

252. Christopher B. Leinberger, *The Metropolis Observed*, URB. LAND, Oct. 1998, at 30.

253. Robert D. Bullard, Glenn S. Johnson, & Angel O. Torres, *The Costs and Consequences of Suburban Sprawl: The Case of Metro Atlanta*, 17 GA. ST. U. L. REV. 935, 942 (2001).

254. Jay Bookman, Editorial, *End Pollution Subsidy*, ATLANTA J. & CONST., June 10, 1997, at A26.

ties is right up there with communism."[255] In consequence, more and more commuters hit the road. All together, Atlanta commuters log in over 100 million miles a day, the equivalent of a space voyage to the sun and part of the way home again.[256] The next day they get up and do it again. Individually, they spend more than double the amount of time in traffic they spent only seven years earlier.[257] In 1999, they lost a total of 152 million hours to traffic delays, at a cost of $2.6 billion to the local economy.[258] This congestion has come about despite one of the most aggressive highway construction programs in the world. By the late 1990s, Atlanta had more highway lane miles per person than any other city in America except Dallas.[259] Atlanta's answer has been to build more highways.

Atlanta has always been about transportation. A few years after General Andrew Jackson drove the Creek Indians out of Georgia, plans were drawn to connect commerce on the Tennessee River to the nearby Chattahoochee.[260] The vehicle was a railroad spur. In 1836, "an Army engineer from New Hampshire stuck a stake in the ground to mark the southern terminus of the line," and that stake became Atlanta.[261] In fact, at first it became a little place called "Terminus,"[262] then "Marthaville,"[263] after the Governor's daughter, and then, in an attempt to elevate the tone a little more (or perhaps, simply, a change of family in the governor's mansion), the feminine of At-

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255. Yarne, *supra* note 251, at 871 (quoting Alan Ehrenhalt, *The Czar of Gridlock*, GOVERNING, May 1999, at 20).

256. Oliver A. Pollard, III, *Smart Growth and Sustainable Transportation: Can We Get There From Here?* 29 FORDHAM URB. L.J. 1529, 1555 (2002) [hereinafter Pollard, *Can We Get There From Here?*].

257. *Id.*

258. *Id.* at 1555, 1556 (quoting DAVID SCHRANK & TIM LOMAX, THE 2001 URBAN MOBILITY REPORT). Some Atlantans see a silver lining in their traffic congestion; Sam Massell, Mayor of Atlanta from 1970–1974, recently observed:

> Visitors and residents alike bemoan Buckhead traffic, but the alternative can be devastating for positive growth and the support of lifestyle amenities. In a way[,] Buckhead can even take pride in the fact that it's one of the very few metropolitan areas that can admit to having traffic issues seven days a week.

Sam Massell, *Buckhead Bound: Atlanta is a City of Neighborhoods, and Buckhead is One of the Most Vibrant*, AIRTRAN ARRIVALS, (Oct.–Nov. 2003), *at* http://www.at-arrivals.com/Content/ContentCT.asp?P=97.

259. Pollard, *Can We Get There From Here?*, *supra* note 256, at 1555.

260. Ellis & Amos, *supra* note 249, at 252.

261. *Id.*

262. *Id.* at 255.

263. *Id.*

lantic, "Atlanta."[264] Because of its strategic location and railroads, the Union Army went after Atlanta in the Civil War with a tenacity rivaled only by the siege of Vicksburg and the many campaigns on Richmond.[265] When the city fell, General Sherman burned it to the ground. Visiting the city some years later, Sherman commented: "the same reason which caused me to destroy Atlanta will make it a great city in the future."[266]

Atlanta rebuilt slowly, and by 1950 was a small, southern metropolis of 500,000 people, about the size of Birmingham.[267] Then, in the 1950s, it broke with the Old South and took off. Its new philosophy was hustle and profit. The city's mayor of that era, William B. Hartsfield, declared that, "the secret of our success [is that] we roll a red carpet out for every damn Yankee who comes in here with two strong hands and some money."[268] Atlanta did not have a lot of natural resources. Its red carpet was to be airports and highways, and the model was what the progressive, northern cities were doing, particularly New York City under Robert Moses: massive urban expressways.[269] The vision, as expressed in the publication Automotive Industries, was for nothing less than a new urban Eden:

> The downtown commercial and industrial sites will become things of the past . . . in their place neighborhood units will spring up—pleasant residential areas, made up mostly of medium-sized apartment buildings located close to modern factories and office buildings, thus eliminating the need for a great deal of commuting. . . . Transportation no longer will be a problem. Most people will be able to walk to work. . . . The city would become a pleasant place to work in and live

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264. *Id.*

265. *See* ULYSSES S. GRANT, 2 PERSONAL MEMOIRS OF U.S. GRANT 146 (1885) ("[General] Lee, with the capital of the Confederacy, was the main end to which all were working. [General] Johnston, with Atlanta, was an important obstacle in the way of our accomplishing the result aimed at, and was therefore almost an independent objective.").

266. Ellis & Amos, *supra* note 249, at 248.

267. *Moving Beyond Sprawl: The Challenge for Metropolitan Atlanta*, 2000 BROOKINGS INST. CTR. ON URB. AND METRO. POLICY 30.

268. *Id.* at 32 (citing William Emerson, *Where the Paper Clips Jump and M Stands for Men, Money, and Millions*, NEWSWEEK, October 19, 1959).

269. *See generally* ROBERT A. CARO, THE POWER BROKER: ROBERT MOSES AND THE FALL OF NEW YORK (1975) and HELEN LEAVITT, SUPERHIGHWAY—SUPERHOAX 30, 56–61 (1970) (for Moses' role in lobbying for more federal-aid highway funding; Moses had, apparently, won a $25,000 award from General Motors for an essay declaring that highways and expressways should be routed directly *through* cities, not around them, as a means of urban modernization).

> in; instead of asphalt jungles, the verdant city without suburbs, instead of obsolete street patterns, an efficient, well integrated network of expressways and arterials. In such an environment, the automobile would vastly increase its mobility and therefore become a more valuable part of urban living.[270]

In 1946, ten years before the federal interstate system was launched, Atlanta read the handwriting on the wall and began building urban freeways.[271] When the federal money came, the city was ready.

Today, no fewer than three interstates (I-75, I-85, and I-20) feed through Atlanta, part of a network of federal-aid highways that also includes I-285, I-575, I-675, I-985, and Georgia 400.[272] Major suburban "downtowns" have sprung up along every freeway, centered on shopping malls.[273] Over these same arteries, white middle class Atlanta fled to the suburbs, followed by black middle class Atlanta, leaving a city of hard-core poor behind.[274] A journalist for the Atlanta Constitution wrote: "after two decades of incredible job creation and income growth in the Atlanta region, the city had a poverty rate approaching 30 percent," putting it fifth highest among major metropolitan areas in the country.[275]

By the late 1990s, metropolitan Atlanta had nearly four million people,[276] a record number of highways, record white flight, record suburban growth, record traffic jams, chronically unhealthy air and, like virtually every other similarly-situated city in the country, was looking to build more highways. It would be foolish not to. The federal government was paying for them.

The federal role in highways, like the rebuilding of Atlanta, began modestly and then boomed. For the first half of the twentieth century, ground transportation was looked on as

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270. LEAVITT, *supra* note 269, at 3 (quoting from an unnamed article in AUTOMOTIVE INDUSTRIES, Dec. 1956).

271. *Moving Beyond Sprawl*, *supra* note 267, at 32.

272. David Goldberg, *Briefing Paper: Atlanta Metropolitan Regional Forum* (July 28, 1997), *at* http://info.cnt.org/mi//at_f_brf.htm.

273. *Id.*

274. *Id.*

275. *Id.*

276. U.S. Census Bureau, *Metropolitan Areas Ranked by Population*, *at* http://www.census.gov/population/cen2000/phc-t3/tab03.pdf (last visited Feb. 5, 2004).

something for local governments and the transportation industry to solve.[277] Automobile manufacturers and their allies faced problems in making their market: widespread and convenient public rail and trolley systems in the cities, and rural areas with poor roads or no roads at all. They met the first problem by buying up and decommissioning the city trolley systems, beginning with Manhattan.[278] Starting in 1927 General Motors acquired interests in the New York rails and by 1936 it had destroyed them.[279] Then, in combination with Standard Oil, Phillips Petroleum, Greyhound Bus, Mack Truck and Firestone, it took over virtually every major urban transit system in the United States, bankrupting them and replacing the lines with buses.[280] Convicted of conspiracy to violate antitrust laws, General Motors and its co-defendants were fined $5,000.[281] In the meantime, they had converted urban transportation to their products and changed the landscape forever. This accomplished, there remained the problem of constructing new roads. They wanted the government to do it instead. This would take longer to accomplish; indeed it would take a world war.

At the end of World War II and the subsequent Korean conflict, America found itself with money in its pockets and General Dwight Eisenhower in the White House. The German system of high-speed autobahns had impressed Eisenhower strongly during the war.[282] In a speech in the early 1950s Eisenhower mused on the need for a $50 billion national highway program.[283] Overnight, Washington was "flooded" by highway lobbyists; road contractors were "performing cartwheels."[284] Eisenhower appointed a retired Army colleague to head a

277. *See* LEAVITT, *supra* note 269, at 20–25 (describing the gradual rise of federal funding and federal involvement).

278. Bradford Snell, *How General Motors (GM) Destroyed the U.S. Rail System: Excerpts from the Movie "Taken for a Ride", at* http://www.culturechange.org/issue10/taken-for-a-ride.htm (last visited Feb. 5, 2004).

279. *Id.*

280. United States v. Nat'l City Lines, 186 F.2d 562 (7th Cir. 1951).

281. *The Industrial Reorganization Act: Hearings before the Senate Subcommittee on Antitrust and Monopoly of the Committee on the Judiciary on S. 1167,* 93d Cong. at 1839 (statement of Bradford C. Snell, Assistant Counsel, Senate Antitrust and Monopoly Subcommittee). In what only can be considered a stamp of approval, the Treasurer of General Motors was also fined one dollar. *Id.*

282. *See* LEAVITT, *supra* note 269, at 24 (stating that accelerated federal involvement in highway construction began during the second World War on the rationale of national defense).

283. *Id.* at 26.

284. *Id.* at 27–28.

committee of industry to study the possibilities.[285] The committee's witnesses read like a list of every national entity with Builder, Automobile or Road in its name.[286]

The Congress however, like the President, was fiscally conservative and not in a spending mood. Enter Charles Wilson, the former Chief Executive Officer of the largest auto maker in the world, General Motors: his stated maxim, "What's good for General Motors is good for the nation."[287] Wilson had also been Secretary of Defense during the big war, and knew Eisenhower personally. Wilson and the Clay Committee proposed to fund the construction of a federal interstate highway system through taxes on gasoline, exclusively dedicated to the highway program, The Highway Trust.[288] Envisioned as a 37,500-mile network of freeways built largely on existing rights of way, it was sold to the President, the Congress and the public on grounds of national defense[289] and was initially called the National System of Interstate and Defense Highways.[290] The federal government would pay 90 percent of the costs; states and local governments would pay only 10 percent, largely in contributions of land and other services.[291] Congress had taken itself

285. BEN KELLEY, THE PAVERS AND THE PAVED: THE REAL COST OF AMERICA'S HIGHWAY PROGRAM 22 (1971) (stating that the Committee was chaired by Eisenhower's former colleague, General Lucius Clay).

286. LEAVITT, *supra* note 269, at 29 (stating that the Clay Committee took appearances from the Automobile Manufacturers Association, the United States Chamber of Commerce, the American Trucking Association, the American Road Builders Association, the National Parking Association, the Automotive Safety Foundation, the National Association of Motor Bus Operators, Sinclair Oil, the American Petroleum Institute, the American Association of State Highway Officials, the Truck-Trailer Manufacturers Association, the Associated General Contractors of America, the National Association of County Officials, the American Automobile Association, the Private Truck Council of America, and the American Municipal Association, represented by Detroit's Mayor Albert Cobo, as well as Robert Moses, then the City Construction Coordinator of New York City).

287. TOM LEWIS, DIVIDED HIGHWAYS: BUILDING THE INTERSTATE HIGHWAYS, TRANSFORMING AMERICAN LIFE, 106–07 (1999).

288. *See* KELLEY, *supra* note 285, at 23–29.

289. *See generally* LEWIS, *supra* note 287.

290. Federal-Aid Highway Act of 1956, Pub. L. No. 84-627, 70 Stat. 374 . Section 108 of the bill provided for the "National System of Interstate and Defense Highways," and stated in its introductory section that the interstate system was given this name "[b]ecause of its primary importance to the national defense . . . ." *Id.* at 378.

291. Roger Nober, *Federal Highways and Environmental Litigation: Toward a Theory of Public Choice and Administrative Reaction*, 27 HARV. J. ON LEGIS. 229, 243 (1990).

and the Administration largely out of the picture,[292] the Trust would provide the money; and the only role for the Federal Highway Administration would be to shovel out the funds. General Motors got its roads, and the stage was set for the largest and most popular construction program in history.

The Federal Aid Highway program roared into the 1960s fueled by the post-war boom, America's dream of mobility, and massive federal funding. Between 1956 and 1991 it would funnel $242.9 billion to state and local governments for highway construction.[293] New car sales measured the nation's economic health. They also measured personal status on neighborhood driveways and the high school parking lot. Sleek fins, chrome portholes, and fighter-model nose cones assured new car buyers the latest in space-age aerodynamics and the "planned obsolescence" of last year's models. As General Motors went, so went the nation.

Highway construction, for its part, measured the political clout of members of Congress, a reward for good connections and for votes properly cast,[294] and funded primary industries in cement, limestone, gasoline, steel, heavy equipment, and more.[295] It also funded local gas stations, repair shops, insur-

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292. *See* KELLEY, *supra* note 285, at 21, 30–32 (citing REPORT OF THE SUB COMM. ON ECON. IN GOV'T, JOINT ECON. COMM. OF CONGRESS (Feb. 9, 1970), stating that, "[t]he trust fund formula allocation instrument . . . generates budget uncontrollability, disguises program costs and benefits, eliminates the possibility of applying public expenditure criteria, and effectively removes the program from regular congressional scrutiny.").

293. Memorandum from Scott Walters to Professor Oliver Houck, *Federal Aid Payments to State/Local Governments for Highway Construction* (Aug. 18, 1995) (on file with author) (analyzing annual data for federal highway payments, as reported by U.S. Census Bureau in the yearly *Statistical Abstract of the United States*, 1957–1992 eds.).

294. The power of House Transportation and Infrastructure Committee Chairmen Bud Shuster has been described as follows:

> Shuster is no slouch when it comes to legislating on highway funding. A recent issue of the NATIONAL JOURNAL says that 'if you're a legislator who wants to bring home federal cash for a road or a bridge in your district, Shuster is still the man to see.' His committee, which has jurisdiction over ISTEA, has grown from 64 members in 1995–96 to 73, making it 'the largest congressional committee ever . . . with a record number of House colleagues standing in line asking for a slice of the pie for pet local projects,' NATIONAL JOURNAL reports.

Bud Ward, *Tea Anyone? Iced or Hot? Lemon?* ENVTL. FORUM, July/Aug. 1997, at 4.

295. According to A.Q. Mowbray:

ance policies, trade unions, contractors, suppliers, architects, and law firms. Fortunes in real estate were made at interstate exits. The upgrade of the Tchoupitoulas Corridor in New Orleans, in what could be a record for local patronage, offered contracts to five separate architecture firms, better than one per mile.[296] Everyone was on the take, and there was literally nothing that stood in the way. Not even a war hero turned President of the United States:

> In July 1959, on the way from the White House to Camp David, President Eisenhower was shocked to see a deep freeway construction gash leading into Washington from the outskirts of the city. Furious, he called the Bureau of the Budget, then ordered a formal study of urban interstates. To his chagrin, he discovered that his lobbyists had sold the interstate program to Congress in part by promising roads and construction dollars to big-city mayors. Even though he . . . thought it extraordinarily wasteful to run interstates through cities, there was no way he could stop it now.[297]

What happened next was unexpected; a grass roots rebellion in cities led by middle class, white residents who had been leading tranquil and Republican lives until they were faced

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The National High Users Conference has estimated that, for every million dollars spent in the 41,000-mile interstate system now being built, materials are consumed at the rate of:

16,800 barrels of cement
694 tons of bituminous materials
485 tons of concrete and clay pipe
76,000 tons of sand, gravel, crushed stone, slag
24,000 pounds of explosives
121,000 gallons of petroleum products
99,000 board feet of lumber
600 tons of steel
57 new bulldozers and other construction machinery.

A.Q. MOWBRAY, ROAD TO RUIN 14 (1st ed. 1969). The author continues: "Money [available] for the automotive and petroleum industries—more roads, more cars and trucks, more gasoline pumped. The statistics are astronomical: One of every four retail dollars spent in this country is spent for the automobile; 75 billion gallons of fuel are consumed each year on our highways." *Id.*

296. Telephone Interview with Bruce Eggers, City Desk Correspondent, THE NEW ORLEANS TIMES-PICAYUNE (Feb. 26, 2004). Mr. Eggers reported on the expansion of the Tchopitoulas corridor in the early 1990s, and recalls that the official explanation for the numerous contractors was that they would expedite the project. One is of course free to believe this explanation.

297. Harold Henderson, *Up Against the Sprawl*, THE CHICAGO READER, Sept. 6, 1996, at 25.

with the possibility of losing their parks and neighborhoods to an on-coming federal-aid highway. The first environmental movement in America arose not in response to Silent Spring or oil on the beaches of Santa Barbara, but rather, ten years earlier, to the urban interstate program. They fought back with little more than their wits. They succeeded in amending the Highway Act to include protections for parks,[298] but the demolition of homes and corridors of pavement and cars reached well beyond recreation areas. They also succeeded in amendments requiring public participation in the highway program,[299] but the process was so dense and so dominated by construction and real estate interests that few could in fact participate, and those who tried came away with the feeling that the deck was stacked, and the outcome foreordained.[300] They had little more hope in the courts, which were still a few years away from a liberalized view of standing under the Administrative Procedure Act.[301] Even with direct and demonstrable injuries, highway plaintiffs in Atlanta, as in other cities, foundered on the lack of law to apply.[302] A sense of their frustration can be taken from the literature of the time: *The End of the Road*,[303] *The Pavers and the Paved*,[304] *Superhighway, Super-Hoax*,[305] *Road to Ruin*.[306] Books full of facts and outrage.[307]

On its own, this resistance would probably have passed from the scene—another set of losers in a land where money

298. 49 U.S.C. § 303 (2000) (formerly at 49 U.S.C. § 1653(f) (1968)). This section forbids routing highways through public parks and recreation areas unless there is no feasible and prudent alternative. *Id.*; *see also* Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971).

299. *See* 23 U.S.C. § 134(a) (2000) and 23 C.F.R. §§ 450.100–450.336 (2003); *see also* DAVID G. BURWELL & MARY ANN WILNER, THE END OF THE ROAD: A CITIZEN'S GUIDE TO TRANSPORTATION PROBLEMSOLVING 60–61 (Robert J. Golten et al. eds. 1977).

300. Ronald C. Peterson & Robert M. Kennan, Jr., *The Federal-Aid Highway Program: Administrative Procedures and Judicial Interpretation*, 2 ENVTL. L. REP. 501 (1972).

301. *See* Sierra Club v. Morton, 405 U.S. 727 (1972) (adopting a liberalized view of standing).

302. *See* Morningside-Lenox Park Ass'n v. State Highway Dep't, 161 S.E.2d 859 (Ga. 1968) (unsuccessful challenge to federal aid for highway I-485).

303. BURWELL & WILNER, *supra* note 299.

304. *See* KELLEY, *supra* note 285.

305. *See* LEAVITT, *supra* note 269.

306. *See* MOWBRAY, *supra* note 295.

307. *See* JANE HOLTZ KEY, ASPHALT NATION: HOW THE AUTOMOBILE TOOK OVER AMERICA, AND HOW WE CAN TAKE IT BACK (1997) for a more recent version of the outrage.

ruled. They were not alone, however, and their protests, combined with those of others facing very different threats, produced the most remarkable piece of environmental legislation in the world: the National Environmental Policy Act of 1969 (NEPA).[308]

Congress had big things in mind for NEPA. It was reacting to a litany of environmental disasters and rising public pressure to do something, anything.[309] The massive demonstrations on Earth Day that surprised even its organizers, to say nothing of the FBI, were a few short months away.[310] Congress went looking for a magic bullet—a prescription so strong and broad that it would fix this great range of infirmities that beset the nation.[311] Chief among these problems, listed in several ways and at the top of this agenda, were urban life and transportation: "haphazard and suburban growth," "conditions in our central cities which result in civil unrest," closely followed by "inconsistent and often, incoherent, rural and urban land use policies," and "faltering and poorly designed transportation systems."[312] These problems had to be "faced while they [were] still of manageable proportions," and "while alternative solutions [were] still available."[313]

Three conclusions emerge from this history. The first is that, in enacting NEPA, Congress had highways at the top of its mind. The word "transportation" meant highways and little else by 1969, and their impacts led the list of problems NEPA was to solve. The second is that Congress intended these problems to be addressed early on, while they were "manageable"

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308. 42 USC §§ 4321–4375 (2000).

309. According to the Senate Report:

> It is the unanimous view of the members of the Interior and Insular Affairs Committee that our Nation's present state of knowledge, our established public policies, and our existing governmental institutions are not adequate to deal with the growing environmental problems and crises the Nation faces. The inadequacy of present knowledge, policies, and institutions is reflected in our Nation's history, in our national attitudes, and in our contemporary life.

S. REP. NO. 91-296, at 4 (1969).

310. *See* BARRY COMMONER, THE CLOSING CIRCLE: NATURE, MAN, AND TECHNOLOGY 2 (2d ed. 1972) (quoting FBI report on Earth Day 1970).

311. *See supra* notes 308, 309; *see also* LYNTON KEITH CALDWELL, THE NATIONAL ENVIRONMENTAL POLICY ACT: AN AGENDA FOR THE FUTURE, 29–47 (1998). Mr. Caldwell was an important legislative witness to the birth of NEPA. *See id.* at 1–5.

312. S. REP. NO. 91-296.

313. *Id.*

and still had "alternative solutions." The third is that they could not have described Atlanta's own problem better had they named the city outright.

The prescription Congress came up with was a new review process, culminating in the preparation of an environmental impact statement (EIS) for "major Federal actions."[314] Congress saw the review process as "action forcing,"[315] and leading to substantive environmental protections that, while stated in generalities,[316] were the point of the exercise.[317] It placed its faith in the power of information and the apparent belief that, once fully informed, agencies would make better decisions. In the heady rush of its environmental moment, it did not fully appreciate the entrenched, gut-level resistance of agencies and their client constituencies that, in their own minds, had been doing just fine before this new statute came along. They saw their jobs, training, products, financing, and political clout—everything about their professional lives—threatened by the EIS process. The first federal agency to feel the heat would be the Federal Highway Administration.

Highway opponents turned to NEPA like a canteen in the desert. They began filing lawsuits. In 1966, there had been but one federal lawsuit filed opposing highway location.[318] In the next three years there were a total of thirteen more.[319] In 1970, after the enactment of NEPA, the total jumped to seventeen highway cases, to twenty-seven in the following year, and then to forty-eight in the next.[320] NEPA was off to the races, and it was dragging highway planning out of its sinecure and into the courtroom.

The difficulty with the early litigation was not winning the lawsuits. The FHWA was preparing very few environmental statements and those produced were not of sterling quality. The difficulty, instead, was having a meaningful impact on transportation decisions. Most of the early cases noted above

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314. 42 U.S.C. § 4332(2)(c) (2000).

315. *See National Environmental Policy: Hearings on S. 1075, S. 237 and S. 1752: Before the Senate Committee on Interior and Insular Affairs*, 91st Cong. 116 (1969) (colloquy between Senator Henry Jackson and Dr. Lynton Caldwell).

316. 42 U.S.C. §§ 4331(b)(1)–(6) (2000).

317. *See* 42 U.S.C. § 4332(1) (2000).

318. RICHARD A. LIROFF, THE NATIONAL ENVIRONMENTAL POLICY ACT 33–34 (1976).

319. *Id.* at 34.

320. *Id.*

challenged the decision to locate a highway, here or there, down Maple Street or Vine. So it was in Atlanta, the government would have to prepare an impact statement on the remaining section of Interstate 485.[321] However important this decision to local residents, it did not include the more basic questions: the need for a new highway in the first place, the land use patterns it would stimulate and in fact determine, and alternative modes of transportation. These were the questions on the minds of a group of Atlanta residents in 1974, triggered by a proposal to widen Interstate 85 through the city from four to as many as sixteen lanes.[322] The Atlanta Coalition on the Transportation Crisis brought suit against the Atlanta transportation planning agencies; not for environmental review of I-85, although it was clearly in their sights, but rather, on the city's long-range transportation plan. They were entering a thicket rarely penetrated by any litigant before, and never under the auspices of NEPA.

Highway litigation is not easy, in large part due to the confounding complexity of the highway planning process.[323] In the end, the federal-aid highway program is a federal program and it is the federal government that will pay the (very large) bill. The primary planning responsibilities, however, are those of the states, under a loose set of criteria calling for a "continuing comprehensive transportation planning process."[324] The very words induce sleep. State planning and federal approvals follow three stages, from big to small: "systems planning," the overall picture, resulting in a 'regional development plan" (RDP); "transportation improvements" (TIPs), a priority list of projects from the RDP to be undertaken over the next three to five years; and the last step, "project planning," i.e. Interstate 310 from Hollywood to Sunset, which includes final decisions on location and design.[325] The legal question in the Atlanta Coalition case was: when does NEPA come in?

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321. *See* Morningside-Lenox Park Ass'n v. Volpe, 334 F. Supp. 132 (N.D. Ga. 1971).

322. Atlanta Coalition on the Transp. Crisis, Inc. v. Atlanta Reg'l Comm'n, 599 F.2d 1333, 1336 (5th Cir. 1979).

323. *See* Peterson & Kennan, *supra* note 300; *see also* BURWELL, *supra* note 299, at 60–61.

324. 23 U.S.C. § 134(a) (2000).

325. *See Atlanta Coalition on the Transp. Crisis, Inc.*, 599 F.2d at 1337–39; *see also* BURWELL, *supra* note 299, at 63–66.

The question is large, and its proper answer depends very much on one's position in the equation. For developers and federal agencies—threatened by the prospect that an impact statement could reveal serious impacts and worse, alternatives that, while vastly superior, are not at all what they do for a living—the later the environmental review the better. Getting the decision locked in and the project committed are the key to getting it done, without unnecessary intrusion or changes. NEPA can come later. As the country's most famous highway planner, Robert Moses, responsible for an orgy of freeway construction in New York City observed: "Once you drive in that first stake, they'll never make you pull it out!"[326] And so the development agencies and their constituencies advocate a technical reading of the statute: NEPA only applies to "federal actions," and a transportation agency's plans aren't actions, they are only plans.

Environmentalists, of course, see the same question and arrive at the opposite answer. Precisely because the planning both considers and decides the controlling issues of impacts and alternatives, NEPA review has to take place at this stage of the process. After all, they argue, Congress specifically called for NEPA to change federal plans, transportation chief among them, while the decisions were still malleable and admitted of alternative solutions. Otherwise, the statute is just wasting everyone's time.

The Atlanta Coalition plaintiffs raised the issue head-on. The Atlanta Regional Commission had prepared a transportation plan for the Atlanta area. The plan projected needs through the year 2030, and "identifie[d] the general location and the mode (i.e., highway or mass transit) of recommended transportation corridors to meet those needs."[327] These corridor decisions were not speculative, nor were they imprecise. One transit line identified not only the corridors by street names but also the location of particular stops.[328] As the Fifth Circuit would acknowledge on appeal, the Atlanta plan reflected "important and, to some extent, irrevocable decisions."[329] The question—does it fit the RDP—would be the standard of refer-

326. BURWELL, *supra* note 299, at 79 (quoting New York highway-builder Robert Moses).

327. *Atlanta Coalition on the Transp. Crisis, Inc.*, 599 F.2d at 1341.

328. *Id.*

329. *Id.*

ence for all future reviews and approvals. The court also acknowledged the logic of the plaintiff's argument that, due to the amount of federal funding, the "federal presence" in this planning had become "so pervasive that what might ordinarily be viewed as state or local action is in fact federal action."[330] But, held the court, the RDP was merely a plan, and the federal participation in it, at this early stage, was only minimal.[331] Put one way, there was no "action" required to trigger NEPA; put another way, there was no "federal" action. Put either way, the highway planning process sidestepped the new law and the intent of Congress, clean.

Four consequences of the Fifth Circuit's opinion were quick to appear:

First, the federal-aid highway program was cut loose from early stage environmental review. Ironically, at the time of the decision the Federal Highway Administration had formally proposed an order requiring the application of NEPA to Regional Development Plans, an initiative killed outright by the case.[332]

Second, the decision deferred the preparation of impact statements to the later time of location approval, for example, Interstate 310 from Hollywood to Sunset. There was a need now for hundreds of smaller statements in lieu of fewer, comprehensive ones, and the FHWA did not have the manpower for the job. Congress obligingly amended the statute, the one and only time it has done so, to provide that state highway agencies themselves could write the statements, so long as they had subsequent federal approval.[333] With the project proponents writing their own statements, objectivity went down the drain.

Third, with the courts micro-focused on the word "actions," the statements could treat separately parts of projects, highway segments that were being brought forward this or next year for construction "action," so long as the segments had

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330. *Id.* at 1345.

331. *Id.* at 1346–47.

332. *See* Comments of David G. Burwell, Counsel, National Wildlife Federation, Nov. 14, 1979, Re: FHWA/UMTA NEPA Implementing Regulations, 44 Fed. Reg. 59,437–59,454 (October 15, 1979) (codified at 23 C.F.R. pt. 771, 49 C.F.R. pt. 622); *see also* Nat'l Wildlife Fed'n v. Appalachian Reg'l Comm'n, 677 F.2d 883 (D.C. Cir. 1980) (holding out the possibility that transportation planning receive "programmatic" consideration under NEPA, but refusing to require it in this case).

333. 42 U.S.C. § 4332(d) (2000).

"logical termini," a concept that has proven to be so opaque and permissive that virtually any segment with an off-ramp passes muster.[334] The reviews, therefore, became yet smaller in scope and the process a mishmash of hundreds of projects in various stages of completion.[335]

And lastly, since the courts separated the state and federal roles in the program, despite the fact that the states and the federal government were joined at the hip and driven equally by the federal highway trust, states were free to cherry-pick their projects, conducting NEPA reviews for the non-controversial pieces and avoiding review for the difficult ones (e.g., routes through historic districts and parks) by choosing to fund these segments themselves.[336]

In the wake of *Atlanta Coalition*, then, the federal aid highway program hinged on a planning process that did not have to include environmental reviews, the later reviews were conducted by the very people who were going to receive the money, the reviews were reduced to insignificant issues, and the reviews were avoided altogether for elements with the worst environmental impacts, by passing them off as state projects. NEPA came in late, biased, small, and fraudulent; the worst of all possible worlds. It should surprise no one then that, thirty years later, NEPA litigation continues to bog down on highway issues, and the United States Department of Transportation and its state counterparts remain among the agencies most sued and least changed by this environmental law.[337]

It should also be no surprise that, lifted from any meaningful review of their environmental impacts, American cities continued to embrace highway construction as their primary

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334. *See* Nat'l Wildlife Fed'n v. Goldschmidt, 677 F.2d 259 (2d Cir. 1981); *see also* Environmental Assessment Route I-10: Loyola Drive Interchange to Tulane Avenue Interchange (U.S. Dep't of Transp. July 1992) (on file with author).

335. *See* Morningside-Lenox Park Ass'n v. Volpe, 334 F. Supp. 132, 138–40 (N.D. Ga. 1971) (describing mishmash complexity of project approvals and implementation).

336. *See* Save Barton Creek Ass'n. v. FHA, 950 F.2d 1129 (5th Cir. 1992) (describing by no means a typical example of this maneuver); *see also* Southwest Williamson County Cmty. Ass'n v. Slater, 67 F. Supp. 2d 875 (M.D. Tenn. 1999); *but see* Ross v. FHA, 162 F.3d 1046 (10th Cir. 1998).

337. *See* COUNCIL ON ENVIRONMENTAL QUALITY, ENVIRONMENTAL QUALITY: THE TWENTY FOURTH ANNUAL REPORT OF THE COUNCIL ON ENVIRONMENTAL QUALITY 368–370 (1992) (identifying the Department of Transportation as the most frequently sued agency under NEPA).

source of lucre from the federal government, free money which in turn determined their land use and environmental quality. Sprawl outpaced population growth by factors ranging from three to one to fifteen to one.[338] The surface area of Los Angeles shot up 300 percent between 1970 and 1990, with less than a 50 percent increase in population.[339] Cleveland grew 31 percent despite an actual decrease in population.[340] Vehicle miles traveled boomed as well, in California by more than 200 percent.[341] In 1960 Americans drove 600,000 miles a year; by 1992 they were up to 1,600,000 miles a year, and climbing at a forty-five degree angle.[342] Despite the Herculean amounts of funding and construction, they were also spending more than 1.6 million hours stuck in traffic every day,[343] at considerable loss to the economy, to say nothing of their sanity, and a new phenomenon of violence called road rage. Despite the increased congestion, air pollution, and the destruction of open space and viable neighborhoods, there was no environmental limiting factor. Like a costly and losing war, the only remedy was more of the same. Until 1990, when Congress revisited the question. Congress attempted to re-balance the federal aid highway program by funding alternative modes of transportation, and it amended the Clean Air Act.

The Intermodal Surface Transportation Efficiency Act (ISTEA) was, even in its title, an act of faith. Its impulses were the issue that the courts had ducked in *Atlanta Coalition*: the environmental impacts of highways, considered early and writ large. Starting in the 1960s, New York's visionary Senator Daniel Patrick Moynihan was writing, "It is becoming increasingly apparent that American government, both national and local, can no longer ignore what is happening as the suburbs eat endlessly into the countryside."[344] Since the "spreading pollution of land follows the roads," he argued, "those who build

338. *The Greening of Transportation: Environmental Provisions at Issue in ISTEA Reauthorization*, LAND LETTER (The Conservation Fund, Arlington, Va.), July 1, 1997, at 1, 3 [hereinafter *The Greening of Transportation*].

339. *Id.*

340. *Id.* at 4.

341. *Id.* at 2–3.

342. *Id.* at 2.

343. *Id.*

344. Oliver A. Pollard, III, *Smart Growth: The Promise, Politics, and Potential Pitfalls of Emerging Growth Management Strategies*, 19 VA. ENVTL. L.J. 247, 250 (2000) (citing Daniel Patrick Moynihan, *New Roads and Urban Chaos*, THE REPORTER, Apr. 14, 1960, at 20) [hereinafter Pollard, *Smart Growth*].

the roads must also recognize the responsibility of the consequences."[345] It would take more than two decades before those who built the roads, beginning with Congress, would come to acknowledge these consequences and their responsibility, kicking and screaming all the way.

ISTEA was to develop a system that was both "economically efficient and environmentally sound."[346] Its sponsors sought to change the highway program to a transportation program by, among other things, allowing more funds for mass transit, providing new funding for "environmental enhancements," establishing another account called "Congestion Mitigation and Air Quality Improvement" (CMAQ) to fund carpools and similar measures in cities contaminated by air pollution, and, the old stand-by, greater public participation.[347] Senate Environment and Public Works Committee Chair John Chafee declared that the new law "radically altered the focus of transportation policy," making "[f]or the first time" transportation decisions "part of a larger planning process that considers how transportation touches every corner of our lives."[348] One would have thought that this consideration was what NEPA had intended, more than two decades earlier. However, it all came down to money; and when the dust had cleared there was a new $155 billion available for highways and bridge construction, $1.2 billion for sidewalks and bikeways, and a case-by-case dogfight over the diversion of some of these monies to mass transit.[349] To the states and the construction community, these measures were ominous threats to their sovereignty and ways of life. To environmentalists they were a pittance, but a pittance in the right direction. Progress is in the eye of the beholder.

The more substantive check on the highway program would come not through ISTEA, but rather through an overhaul of the nation's clean air laws. Sprawl was a serious

345. *The Greening of Transportation: Environmental Provisions at Issue in ISTEA Reauthorization*, 16 THE LAND LETTER: THE NEWSLETTER FOR NATURAL RESOURCE PROFESSIONALS, July 1, 1997, at 1 (on file with author).

346. *See* F. Kaid Benfield & Michael Replogle, *The Roads More Traveled: Sustainable Transportation in America—Or Not?*, 32 ENVTL. L. REP. 10633, 10638 (2002) (citing Intermodal Surface Transportation Efficiency Act of 1991, § 2, 105 Stat. 1914 (1991) (codified as amended at 49 U.S.C. § 101)).

347. *See The Greening of Transportation*, *supra* note 338, at 4–5.

348. Margaret Kriz, *Road Warriors*, NAT'L J., June 28, 1997, at 1327.

349. *See The Greening of Transportation*, *supra* note 338, at 5.

enough environmental problem; but bad air, mostly in urban areas, was killing more than 60,000 people a year.[350]

If NEPA is America's most ambitious environmental law, the CAA makes a fair claim to be its most complex. The Environmental Protection Agency's first Administrator, William Ruckleshaus, quipped at the time that he had only two employees who understood the Air Act and they were not allowed to take the elevator at the same time.[351] Originally enacted in 1970,[352] the CAA has evolved into a maze of approaches ranging from fuels to emissions to technology to ambient standards, to plans, permits and pollutant trading, and from programs covering all attainment areas to others addressing specific industries, states, and even specific sites.[353] Few measures are deleted and many are added as the country tries the impossible trick of achieving clean air without upsetting its major industries, first and foremost among them, the automobile. However, the basic approach to mobile sources of pollution, e.g. cars and trucks, was relatively simple. Auto manufacturers were to reduce the principal contaminants in their emissions by fixed percentages on an ambitious timetable.[354] States, meanwhile, were to include in state implementation plans (SIPs) whatever vehicle controls were necessary to meet national ambient air quality goals.[355]

Transportation pollution was a primary driver of the CAA. In 1969, motor vehicles contributed three-quarters of the carbon monoxide and about half of the hydrocarbons and nitrogen oxides in the nation's air.[356] These pollutants were not only killing people,[357] they were reducing the amount of sunlight en-

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350. *Particles in Air Help Kill 60,000 a Year, Study Says*, WASH. POST, May 13, 1991, at A13.

351. William Ruckleshaus, Remarks to the Environmental Law Conference, American Bar Association/Environmental Law Institute (Feb. 11, 1972) (on file with author).

352. 42 U.S.C. §§ 7401–7671 (2000).

353. *See* WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW, §§ 3.1–3.8 (2d ed. 1994).

354. 42 U.S.C. § 7521 (2000). *See also* ROBERT PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE AND POLICY 554–556 (4th ed. 2003).

355. 42 U.S.C. § 7410 (2000); *see also* RODGERS, *supra* note 353, at §3.6.

356. COUNCIL ON ENVIRONMENTAL QUALITY, ENVIRONMENTAL QUALITY: THE SECOND ANNUAL REPORT OF THE COUNCIL ON ENVIRONMENTAL QUALITY 212 (1971).

357. *See supra* note 350 and accompanying text. Air pollution was also implicated in a sharp rise in death rates from heart disease, up from 137 per 100,000 to

tering cites by up to 16 percent and causing an estimated $10.1 billion in property losses.[358] Nevertheless, the ink was no sooner dry on the new act than the automobile and oil industries were lobbying Congress for extensions of their deadlines and relaxation of the standards.[359] Congress does not hold up very well under these circumstances, and in 1977 it relented, extending the deadlines for years and devolving the tar baby of dealing with auto pollution to the state ambient programs.[360]

The state programs turned out to be too slender a reed. Loosely supervised, based on uncertain scientific measurements and predictions, and reeking with discretion, they provided little incentive for states to deal with their air problems and little cover for those employees that wanted to actually do something. States prepared "cheater SIPS"[361] that downplayed pollution data and postponed remedies. EPA approved them and worse, the courts went along with the game.[362] Plans for polluted areas based on little more than hope, or falsehood, were approved in rubber-stamp fashion.[363] Plans based on bogus pollution offsets were approved as well.[364] Avoiding the automobile—whatever its contribution to the problems they faced—the plans instead predicted giant reductions from point source industries and, when these ran out, from hypothetical

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362 in 1970, and cancer, up from 64 per 100,000 to 163.8. COUNCIL ON ENVIRONMENTAL QUALITY, ENVIRONMENTAL QUALITY: FIFTH ANNUAL REPORT OF THE COUNCIL ON ENVIRONMENTAL QUALITY 12–14 (1974).

358. BURWELL, *supra* note 299, at 25 (citing COUNCIL ON ENVIRONMENTAL QUALITY, THE COSTS OF SPRAWL (1974)).

359. *See* PERCIVAL ET AL., *supra* note 354, at 555. The auto and gasoline industries were also going to court to defeat the statutory guidelines; *see* Int'l Harvester Co. v. Ruckleshaus, 478 F.2d 615 (D.C. Cir. 1973).

360. PERCIVAL ET AL., *supra* note 354, at 556–57.

361. Howard Latin, *Regulatory Failure, Administrative Incentives, and the New Clean Air Act*, 21 ENVTL. L. 1647, 1689 (1991) (citing J. QUARLES & W. LEWIS, THE NEW CLEAN AIR ACT 21 (1990)).

362. *See generally* Atlanta Coalition on the Transp. Crisis, Inc. v. Atlanta Reg'l Comm'n, 599 F.2d 1331 (5th Cir. 1979); Sierra Club v. EPA, 315 F.3d 1295 (11th Cir. 2002).

363. *See* City of Seabrook v. EPA, 659 F.2d 1349 (5th Cir. 1981); *see also* RODGERS, *supra* note 353, at § 3.6 and cases cited therein (citations omitted):

> For the most part, courts extended a soft glance to EPA judgments on the SIPs, not only on the basic predictions of whether the plan would assure attainment of the standards but also on lesser policy choices, as in the decision to overlook certain trends or effects, to tolerate some ambiguity about who is to clean up, or to forgive procedural chicanery in notices of SIP changes.

364. *See* Citizens Against the Refinery's Effects, Inc. v. EPA, 643 F.2d 183 (4th Cir. 1981).

automobile strategies that had no chance of success.[365] When the day of reckoning finally came, Congress and EPA simply extended the deadlines.[366] What emerged was a sort of legitimized Liar's Poker in which everyone looked the other way, and kept the money flowing. In 1991, a commentator wrote: "I believe there is a consensus among environmental analysts that the SIP process failed when the 1970 CAA was enacted, failed after the 1977 CAA Amendments, and was still failing to achieve attainment when the 1990 Amendments were enacted."[367]

It was not a question of legal authority. The CAA empowered, indeed required, EPA to approve each state SIP,[368] with increasing scrutiny for areas that failed to attain national standards,[369] and to reject and promulgate federal implementation plans where state plans failed to measure up.[370] EPA was even authorized to cut off new highway funding in non-attainment areas with inadequate air quality plans,[371] an authority that, like the atom bomb, scared everyone but could be seldom, if ever, used for the fallout it would create. At bottom, the problem in the cities was the automobile, and nobody was going to touch it. The City of Atlanta was in non-attainment for ozone continuously from the 1970s when the pollutant was first measured.[372] The relevant SIPs were prepared, amended, and extended. The highways kept on coming. More automobiles kept on coming. The SIP was a necessary piece of paper (or, in real life, a file cabinet of papers). The highways, however, were real federal money. The air quality gains from im-

365. *See* RODGERS, *supra* note 353, at § 5.5 (citing numerous cases); *see also* RODGERS, *supra* note 353, at § 4.2 ("EPA has gone further than necessary to demean the process by approving SIPs that scarcely resemble what the statute is driving at."); *see also* Brief for Petitioner at 10–14, So. Org. Comm. for Economic and Soc. Justice v. EPA, 333 F.3d 1288 (11th Cir. 2003) (No. 02-13705-A) (describing the City of Atlanta's early SIPs) [hereinafter Sierra Club Brief].

366. *See* RODGERS, *supra* note 353, at § 3.7.

367. Latin, *supra* note 361, at 1689.

368. 42 U.S.C. § 7410 (2000).

369. 42 U.S.C. § 7502 (2000).

370. 42 U.S.C. § 7410(c) (2000).

371. 42 U.S.C. § 7509(b)(1) (2000).

372. Marie Hardin, *Air Quality War Expanding to Other Fronts*, GA. TREND, May, 2001, at 29. *See* Sierra Club Brief, *infra* note 365.

proved tailpipe controls were swallowed up by the sheer increase in roads and cars.[373]

By the late 1980s the elephant in the room was no longer capable of being ignored. Congress would act again, and a primary impulse would be, as with NEPA, motor vehicle transportation. That cars and trucks were the reason for bad air in America—unhealthy, and even killer air—was undeniable. They had risen to become the principle cause of ozone pollution, the nation's most widespread form of air contamination.[374] Vehicle tailpipes produced half of the volatile organic compounds and nearly half of the nitrogen oxides that put American city dwellers at risk.[375] The same nitrogen oxides caused about a third of the nation's acid rain, and more than 90 percent of carbon monoxide pollution in urban areas.[376] Among other unpleasant effects, carbon monoxide robs the heart and the brain of oxygen.[377] Mobile sources were also the largest single source of toxic emissions nationwide, including diesel particulates, butadiene, benzene, and formaldehyde.[378] In total, they caused well more than half the cancer produced by air pollution.[379] And this was before considering their primary role in ozone depletion and global warming.

The congressional debates and their underlying analyses revealed another fact: for the previous twenty years, both the EPA and the states in their SIPs had been relying on reductions from the smokestack industries, with marked success,[380] but the easy fruit had long been picked. It was time, once again, to look at the car.

The CAA amendments of 1990 went in many directions. They began, however, in Title 1, with improving the failed state

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373. *See The Greening of Transportation, supra* note 338, at 2–3; Pollard, *supra* note 344, at 1537 n.46 (citing Reid Ewing, *Measuring Transportation Performance*, 49 TRANS. Q., 91, 94 (Winter 1995)).

374. Hon. Henry A. Waxman et al., *Cars, Fuels, and Clean Air: A Review of Title II of the Clean Air Act Amendments of 1990*, 21 ENVTL. L. 1947, 1950–51 (2001).

375. *Id.*

376. *Id.*

377. *Id.*

378. *Id.* (citing COMMITTEE ON ENERGY AND COMMERCE, REPORT OF THE CLEAN AIR ACT AMENDMENTS OF 1990, H.R. REP. NO. 490, pt. 1, at 195–98 (1990)).

379. Waxman et al., *supra* note 374, at 1951 (citing COMMITTEE ON ENERGY AND COMMERCE, REPORT OF THE CLEAN AIR ACT AMENDMENTS OF 1990, H.R. REP. NO. 490, pt. 1, at 277–79 (1990)).

380. *See* PERCIVAL ET AL., *supra* note 354, at 522, 541.

implementation programs in non-attainment areas.[381] You could almost hear Congress saying "this time we really mean it," as if they had not said it before. Compliance with the primary contaminants—volatile organic compounds and nitrogen oxides—was placed on five separate schedules, depending on their severity, ranging from "marginal" to "extreme."[382] Each more severe category imposed tighter transportation controls and increasingly stringent emission requirements.[383] EPA was afforded as little discretion as possible in its review of state compliance; areas that failed to meet numerical standards were to be "reclassified by operation of law" to at least the "next higher classification,"[384] and plans that failed to assure compliance were to lead, automatically, to the loss of highway construction funds.[385] The amendments also increased review of state transportation planning and its compliance with air quality goals. No transportation improvement plan (TIP) could be approved without a finding that it conformed to the vehicle emissions budget of an approved SIP ("the TIP must fit the SIP"),[386] and, additionally, that it would not delay the achievement of clean air. All approved plans had to include whatever measures the SIP dictated for transportation controls. All of these requirements, according to a primary sponsor of the amendments, were to assure the evaluation and accommodation of air quality impacts in advance. Most notably at the transportation planning stage.

The Clean Air Act, then, after twenty years of groping with the question, came up with the answer that the Fifth Circuit had booted under NEPA in *Atlanta Coalition*.[387] The impacts of transportation plans would be reviewed, in advance and in detail, before construction commitments were made. The CAA added its own bite, however, for if the plans did not conform to SIP requirements they were to be rejected, jeopardizing the all-important highway funding. Some involved in the 1990 Amendments predicted a bright new day for urban transporta-

381. Clean Air Act Amendments of 1990, Pub. L. No. 101-549, 104 Stat. 2399 (codified as amended in scattered sections of 42 U.S.C.).

382. 42 U.S.C. §§ 7511(a)–(e) (2000).

383. 42 U.S.C. §§ 7511(a)–(e) (2000).

384. 42 U.S.C. § 7511(b)(2)(A) (2000).

385. 42 U.S.C. § 7509(b)(1) (2000).

386. Gus Bauman, *Nationwide Overview of Transportation Conformity Lawsuits*, A.L.I.-A.B.A. CONTINUING LEGAL EDUC., WL SH018 ALI-ABA 397 (2002).

387. 599 F.2d 1333 (5th Cir. 1979).

tion and clean air.[388] It remained to be seen, however, how this process would be received on the ground, and by the courts. Given the size of the monies and the dependencies at stake, a warm welcome was not in the offing.

In the recitation that follows, it should be borne in mind that Atlanta is not unique in its resistance to the ISTEA and CAA requirements. The same evasions, dissembling and imaginative-to-strained interpretations of these requirements are found in the SIPs of Houston, New York, and other major, auto-contaminated urban areas; often with the connivance of the EPA.[389] When the CAA in particular raised the stakes and made the triggers more objective, it raised the level of the gamesmanship as well.

As mentioned above, Atlanta had been in non-attainment for ozone since the pollutant was first monitored in the 1970s.[390] By 1996, Atlanta's air quality was so poor that its metropolitan planning agency, the Atlanta Regional Commission, could not craft a three-year TIP without exceeding the motor vehicle budget it had agreed to in the SIP. Nor could it revise the SIP.[391] EPA was, accordingly, forced to cut off new highway funding. To local politicians and developers, "the sky [was] falling."[392]

Instead of revising its plans, Atlanta decided to play hardball, accelerating its road construction. The state approved sixty-one new projects, each of which would have added to the already over-extended motor vehicle pollution budget.[393] The ARC argued in its defense that EPA regulations allowed the state to "grandfather" projects approved in an earlier SIP.[394] EPA, green in outlook at the time, objected to this interpretation, writing that these regulations "were not intended to allow areas to avoid the need to develop conforming plans and

388. *See* Waxman et al., *supra* note 374. For a more pessimistic view that more-of-the-same was unlikely to solve the problem, see Arnold W. Reitze, Jr., *A Century of Air Pollution Control Law*, 21 ENVTL. L. 1549, 1553–54 (1991).

389. *See* BCCA Appeal Group v. EPA, 348 F.3d 93 (5th Cir. 2003) (upholding EPA approval of Houston SIP); *see also* WILLIAM H. ROGERS, JR., ENVIRONMENTAL LAW 104–05 (2d ed. 1994).

390. *See* Hardin, *supra* note 372, at 29.

391. S. Wesley Woolf, *Mitigating the Air Quality Impacts of Sprawl in Atlanta*, 15 NAT. RESOURCES & ENV'T 232, 234 (2001).

392. Maria Saporta, *Lopsided 'Transportation Plan' Ignores Rail, Favors Buses*, ATLANTA J. & CONST., May 19, 2003, at E3.

393. Woolf, *supra* note 391, at 234.

394. *Id.*

TIPs."[395] The dispute bred two lawsuits. The Environmental Defense Fund challenged "grandfathering."[396] The Sierra Club challenged the sixty-one projects head-on.[397]

The Environmental Defense Fund won first, invalidating the rule.[398] Hardball to the end, the U.S. and Georgia departments of transportation sought to interpret even this ruling in a way that allowed their highway projects to go forward.[399] As a court date neared on the second suit, however, the parties reached a settlement canceling all but seventeen of the sixty-one projects.[400] The settlement also diverted over $300 million from highway construction to alternative transportation strategies,[401] created an independent panel to oversee the ARC's air quality models, launched a comprehensive study of transportation, air quality, and land use, and built momentum for the creation of the Georgia Regional Transportation Authority, a super-agency with both planning responsibilities and the veto over RDPs, TIPS and specific projects of Georgia DOT.[402] To the Atlanta roadbuilders, of course, "the world [had] just ended."[403] Environmentalists, for their part, hailed a new day. It would last about that long.

Job one for the ARC and new Authority was to get the highway money moving again, and to this end they prepared a new SIP and TIP. Adopted in 1999, the plans included more money for mass transit, but relied as well on increasing the budget for automobile pollution and postponing the compliance

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395. Pollard, *Can We Get There From Here?*, *supra* note 256, at 1559 n.179 (quoting EPA comments in attachment to letter from John H. Hankinson, Jr., Regional Administrator, EPA Region 4, to Larry R. Dreihaup, Administrator, Georgia Division, FHWA (Jan. 16, 1998)).

396. Envtl. Def. Fund v. EPA, 167 F.3d 641 (D.C. Cir. 1999).

397. *See* Bauman, *supra* note 386, at 399–400.

398. *Envtl. Def. Fund*, 167 F.3d at 650–51.

399. Pollard, *Can We Get There From Here?*, *supra* note 256, at 1559–60.

400. Pollard, *Can We Get There From Here?*, *supra* note 256, at 1560 (citing David Goldberg, *Deal Kills Money for 44 Roads, But 17 Others Get Go Ahead as Environmentalists Drop Suit*, ATLANTA J. & CONST., June 21, 1999, at A1 (allowing these 17 projects to go forward due to the advanced state of state contracting and commitments)). This is living proof of the Robert Moses maxim: "Once you drive in that first stake, they'll never make you pull it out." BURWELL, *supra* note 299, at 79 (quoting New York highway-builder Robert Moses).

401. Pollard, *Can We Get There From Here?*, *supra* note 256, at 1560.

402. David Goldberg, *Road Case Settled with 17 Projects Approved*, ATLANTA J. & CONST., June 22, 1999, at C1.

403. *See supra* text accompanying note 251.

deadline for four more years.[404] Environmentalists took an emergency appeal to the Eleventh Circuit, arguing that until the validity of the extension could be determined, cutting loose $400 million worth of highway projects would only worsen the ozone problem.[405] The court agreed, and eventually EPA agreed to withdraw its approvals.[406] Like one of those Civil War battles around Atlanta, another end run had been blunted by an alert defense.

For about a week. Within days of the Eleventh Circuit stay, Georgia juggled its motor vehicle emissions budget and re-approved its SIP. EPA went along with it,[407] environmentalists sued and the litigation that followed revealed the same pattern of catch-me-if-you-can that marked Atlanta's performance for the previous thirty years.[408] At stake was a region that had exceeded national ozone standards by up to 50 percent every year since their enactment. The health effects were not inconsequential. On high-ozone-pollution days, over one half a million children, 350,000 asthmatics, and another half million elderly residents of Atlanta were forced to stay indoors, take medications, or receive medical assistance.[409] The one moment of relief was the 1996 Olympic Games, during which mandated traffic reductions brought down the number of children requiring emergency care for asthma by 40 percent.[410] Also at stake, however, were $36 billion in transportation funds, nearly half

404. Woolf, *supra* note 391, at 235. The state relied on another, ambiguous EPA memorandum that purported to grant extensions to areas "significantly affected" by pollution traveling downwind from other states. The memorandum was of doubtful legality, and the state's reliance on it more doubtful given that only 9 percent of Atlanta's ozone problem was caused by upwind sources. *Id.*

405. *Id.* at 272.

406. *Id.*

407. Recognizing that the plans presented a "significant litigation risk," the agencies entered into settlement negotiations that, for a while, looked promising, only to founder on the issue of enforceability. *Id.* at 272–73. The state would not agree to conditions reviewable in federal court, which might have said something about its intent to abide by them. *Id.*

408. *Id.*

409. Sierra Club Brief, *supra* note 365, at 6.

410. Brief of Plaintiff-Appellants, at 8, Sierra Club v. Atlanta Reg'l Comm'n, 54 Fed. Appx. 491 (11th Cir. 2002) (No. 02-11652 CC) ("[A] recent study found that when motor vehicle travel was reduced during the morning rush by 22% during the 1996 Olympic Games, the number of children requiring emergency or urgent care for asthma decreased by over 40%.").

of which was contemplated for the expansion of highways to and from the suburbs.[411]

By the close of 2002, two lawsuits were on the table. The first challenged the motor vehicle emissions budget that exceeded the SIP and would not attain compliance, even granting the effectiveness of the measures proposed, for several years.[412] To the Eleventh Circuit, the argument had "intuitive appeal"; it "seemed strange" that a budget could be "found to be 'conforming' to a SIP when that emissions level is not achieved until 2005."[413] EPA regulations had left a loophole, however, which sufficed.[414] Whatever the intent of the statute, compliance with the auto emissions budget, like compliance with NEPA in *Atlanta Coalition*, could come at some later and less effective time. The Eleventh Circuit's opinion was unpublished.[415] No one seemed accountable for Atlanta's performance under the Clean Air Act.

The second case challenged EPA's refusal to "bump up" Atlanta's rating to "severe," and the range of maneuvers that Georgia relied on to predict future compliance.[416] The maneuvers merit mention because they tend to show the ingenuity of the human mind where highway money is involved, and because they will in all likelihood be seen again. Georgia began by using a model to predict future air quality required by the Act itself, but when the model showed significant violations the state threw out the results in favor of a more subjective "weight of the evidence" test.[417] It also relied on emission reductions from the use of cleaner cars without accounting for the impact of *more* cars,[418] on emissions reductions from new public transit for which no funding was provided,[419] on travel speeds lower

411. Memorandum from Robert E. Yuhnke, Attorney, to Fred Krupp, Executive Director and James T.B. Tripp, General Counsel Litigation Review Committee 5 (Jan. 6, 2001) (on file with author) [hereinafter Memorandum from Yuhnke to Krupp].

412. Sierra Club v. Atlanta Reg'l Comm'n, No. 01-00428-CV-VBM-1, slip op. at 16–17 (11th Cir. Oct. 30, 2002) (on file with author).

413. *Id.* at 16.

414. *Id.* at 16, 17. The court relied on an EPA interpretation of its regulations requiring compliance only in targeted, future years. *Id.*

415. The slip opinion cover sheets reads, "DO NOT PUBLISH." *Id.* at 1.

416. *See* Sierra Club Opening Brief, *supra* note 409, at 7–34.

417. *Id.* at 21.

418. Memorandum from Yuhnke to Krupp, *supra* note 411, at 8.

419. *Id.*

than those averaged on the region's highways,[420] and on voluntary reductions in driving.[421] It further allowed emissions to increase in the core non-attainment area by projecting reductions from rural sources more than sixty miles away.[422] Nothing to surprise here. It could have been a United States Army Corps of Engineers cost-benefit ratio, or the ledgers of the Enron Corporation. As of 2002, Georgia was still cooking the books.

Obviously uncomfortable with the prospect of having to call the state's hand, the Eleventh Circuit took the procedural way out. It invalidated the extension and the approval of the SIP.[423] In so doing, it avoided ruling on the substantive challenges to the SIP itself. The case went back on remand.

By late 2003, EPA could stall no longer. In September it downgraded Atlanta's air quality to "severe," triggering by law the use of low-sulfur gasoline and a 15 percent reduction in nitrogen oxides from 1999 levels by 2005.[424] The new gasoline would add up to one dollar a gallon at the pump, costs somewhat offset by the fact that Georgia's gas taxes were the second lowest in the country; no small measure of the problem.[425] The real question was what measures would be proposed to achieve the necessary 15 percent reductions in the new SIP, to say nothing of the elusive motor vehicles budget.[426] It was always possible, however improbable, that the city would seize the opportunity, indeed the political advantage, of *having* to solve its problem, and move towards full-service public transit. But probably not. If history and the previous SIPs were any guide, the games would continue with unrealistic projections, bent data, the assignment of new reductions to point sources, and whatever else would necessarily be said to turn the highway faucet back on.

As the dust of the CAA transportation litigation tries to settle, it is clear that it cannot and will not settle in the life-

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420. *Id.*

421. *Id.* at 5.

422. Sierra Club Opening Brief, *supra* note 412, at 29.

423. S. Org. Comm. for Econ. & Soc. Justice v. EPA, 333 F.3d 1288 (11th Cir. 2003).

424. *See* Stacy Shelton, *EPA Lowers Rating for Air*, ATLANTA J. & CONST., Sept. 15, 2003, at D1; Stacy Shelton, *Cleaner Gas Goes on Sale in Metro Atlanta*, ATLANTA J. & CONST., Sept. 16, 2003, at B1.

425. *See* Shelton, *Cleaner Gas Goes on Sale in Metro Atlanta, supra* note 424.

426. 42 U.S.C. § 7511a (b)(1)(A) (2000) (requiring 15 percent reduction).

times of anyone now living. Transportation programs, by any other name and under whatever laws implemented by whatever agencies, remain highway programs at the root, trunk and branch. ISTEA, intended to reform the federal aid highway program, enabled cities to make wiser choices but continued to fund poor ones and the choices remain overwhelmingly the same.[427] In 1998, Congress amended ISTEA with TEA-21,[428] a new formula for spending that purported to increase support for mass transit. The ratio of highway dollars to alternate systems, however, remains at nearly five to one;[429] those kinds of odds win at Las Vegas every night. The City of Houston is looking to build its fourth circumferential freeway.[430] Northern Virginia, spreading west from Washington, is eyeing the expansion of two interstates and two new by-passes.[431] The City of Tucson, sprawling in all directions, upped its vehicle miles traveled from two million in 1970 to sixteen million in 1997, and is looking to reach twenty-eight million by 2020.[432] Despite its modest population, Georgia has received the fourth-highest amount of highway funds in the nation, nearly half a billion dollars a year.[433] Of those funds, the Atlanta region receives more than 80 percent.[434] Atlanta has proposed an outer circumferential, 235 miles long, at an original cost of $1 billion, which then escalated to $5 billion and has gone into remission, pending a lawful SIP.[435]

Atlanta's fixation with highways is not unique. By American standards, it is not even extreme. Many years ago, the automobile industry captured the transportation programs of the country, by hook and by crook.[436] With the assistance of real estate, construction, cement, oil and gas, mining, rubber,

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427. *See* Liam A. McCann, *TEA-21: Paving Over Efforts to Stem Urban Sprawl and Reduce America's Dependence on the Automobile*, 23 WM. & MARY ENVTL. & POL'Y REV. 857 (1999).

428. Transportation Equity Act for the 21st Century, Pub. L. No. 105-178, 112 Stat. 107 (1998) (as codified in scattered sections of 23 U.S.C. and 49 U.S.C.).

429. McCann, *supra* note 427, at 881–82.

430. TAXPAYERS FOR COMMON SENSE, ROAD TO RUIN 2 (1996).

431. *See* Press Release, Audubon Nationalist Society et al., Smart Growth Conservation & Bike Advocates Launch NoSprawlTax.org Campaign Against the Sales Tax Referendum (Sept. 23, 2002) (on file with author).

432. Tony Davis, *The Roll Call of Sprawl*, HIGH COUNTRY NEWS, Jan. 18, 1999, at 10.

433. McCann, *supra* note 427, at 870.

434. *Id.*

435. TAXPAYERS FOR COMMON SENSE, *supra* note 430, at 2.

436. *See supra* notes 278–293 and text accompanying.

steel, glass, and other industries it has all but shut down alternatives.[437] AMTRAK runs on a shoestring. Unless they have long memories, most cities have no experience with commuter rail. The costs of the resulting automobile-highway dependency are enormous, and rarely aggregated. More than 40,000 Americans die on the roads each year and have for decades.[438] Even more die from air pollution, largely from automobile tailpipes.[439] Over 70 percent of urban freeways are now classified as "congested," costing businesses $40 billion a year and $168 billion to the economy as a whole.[440] Auto-related subsidies—including road construction, tax deductions, and employee parking—total $300 billion a year.[441] The additional costs of maintaining access to oil supplies, up to and including war, dwarf these sums.[442] Indeed, they have broken the national budget.[443]

Meanwhile, back home, urban America goes down under ever more commuter lanes of traffic, 50 percent of its real estate paved over for roads and parking,[444] its shopping lost to the malls, its air contaminated, its temperatures raised by five

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437. *Id.* *See* Odil Tunali, *A Billion Cars: The Road Ahead*, WORLD WATCH, Jan.–Feb. 1996, at 24 (arguing that the same is occurring worldwide).

438. *See* TAXPAYERS FOR COMMON SENSE, *supra* note 430, at 3 (citing *U.S. Transportation Deaths Rise*, N.Y. TIMES, July 6, 1995, at B9, which reported that there were 43,134 highway deaths in 1994).

439. *See supra* note 350; BURWELL, *supra* note 299, at 27.

440. F. Kaid Benfield & Michael Replogle, *The Roads More Traveled: Sustainable Transportation in America—Or Not?* 32 ENVTL. L. REP. 9 (June, 2002).

441. JAMES J. MACKENZIE ET AL., WORLD RESOURCES INSTITUTE, THE GOING RATE: WHAT IT REALLY COSTS TO DRIVE 23 (1992).

442. The estimated cost of the Persian Gulf War was $79.9 billion in 2002 dollars. Assessing the Cost of Military Action Against Iraq, House Budget Committee Democratic Caucus (Sept. 23, 2002), at 7, *available at* http://www.house.gov/budget_democrats. The estimated cost of the Iraq war were projected to exceed $110 billion in 2003, and could exceed $550 billion over the next ten years. Taxpayers for Common Sense, *New Study Finds Cost of War and Post-Saddam Iraq Likely to Exceed $110B This Year; Could Exceed $550B Over Next Decade*, Mar. 24, 2003, http://www.taxpayer.net/TCS/PressReleases/2003/03-24IraqReportrelease.htm.

443. "The recent shift from a federal budget surplus to a budget deficit—the $159 billion deficit for fiscal year 2002 represents a $286 billion swing from the $127 billion surplus in fiscal year 2001." LaBrenda Garrett-Nelson, *A Framework for Evaluating the Legislative Viability of Proposals to Provide Foreign Direct Investment Incentives Through the Internal Revenue Code*, 35 GEO. WASH. INT'L L. REV. 315, 322 (2003); *see also* John McQuaid, *White House Now Awash in Red Ink*, THE TIMES-PICAYUNE, Feb. 3, 2004, at A1.

444. *See* Ralph Slovenko, *Mobilopathy*, 12 J. PSYCHIATRY & L. 293, 295 (1984).

degrees or more, its populations segregated, and its taxpayers fleeing to the suburbs.[445] Sprawl and SUVs have increased pollution faster than technology can fix it,[446] and the hotspots of non-attainment widen.[447] Little of this is news. The great dream of Automobile Industry for the Urban Eden[448] has turned into one of the largest economic and social nightmares in the United States. For the cities, highways don't work.

Nor has Congress worked in response. It first enacted NEPA, then the CAA, then ISTEA, and then the CAA Amendments of 1990, all in the vain hope that better planning would solve the problem. *Atlanta Coalition* and its many sequels now in progress make plain that these programs, which depend on highly accurate data, good faith by local agencies, and strong public participation, no matter what the statutes say, are simply too indirect to succeed. No program that asks local planners to step out into the way of high-octane highway funding has a chance. The one thing that will change the scene is to change the money. So long as the lion's share is available for

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445. *See* Goldberg, *supra* note 272; *Moving Beyond Sprawl, supra* note 267. For increases in heat, see Brookings Inst. Ctr. on Urb. and Metro. Pol'y *supra* note 267, at 26–27.

446. *See* PERCIVAL, *supra* note 354, at 553 (Fig. 5.11, Ozone Emission Reductions Offset by Increased Vehicle Use). *See also*, Transportation and Air Quality: CMAQ and Conformity Programs, *Hearing before the Subcommittee on Clean Air, Climate Change and Nuclear Safety and the Committee on Environment and Public Works*, 108th Cong. 7 (Mar. 13, 2003) (statement of James M. Jeffords, U.S. Senator from Vermont):

> Even tomorrow's cleaner vehicles could swamp our efforts to achieve cleaner air as their numbers grow and they travel ever farther. The total vehicle miles traveled (VMT) has grown [four] times faster than the rate of population growth in the last [thirty] years. And, at least one study in Tennessee indicates that the VMT increases there will overwhelm the reductions from the cleaner Tier 2 vehicles and heavy duty vehicles.

447. *See* David Goldberg, Editorial, *The Smog is Back in Los Angeles, and That's Bad News for Atlanta*, ATLANTA J. & CONST., Sept. 1, 2003, at A13. The American waistline also widens, and recent medical studies link America's sudden epidemic with sprawl. *See The Sprawl/Obesity Link*, 14 COMMON CAUSE 5 (Oct.–Dec. 2003) (citing studies published in the American Journal of Public Health and the American Journal of Health Promotion).

448. *See* LEAVITT, *supra* note 269, at 3.

highway construction, we will build it, they will come,[449] and no amount of environmental law is going to stand in the way.[450]

Back in 1955 when the federal-aid highway program was first debated in Congress, Francis Dupont, a dominant shareholder and materials supplier to General Motors and soon to become Administrator of the Federal Highway Administration, appeared as a witness before the House Public Works Committee. A skeptical congressman from Texas asked him:

> "But is it not true that the highway system needs of the United States of America are almost without limit, and will they not be almost without limit on and on?"
>
> Dupont replied, ingenuously, "I hope so."[451]

He got his wish.

PALILA/SWEET HOME

> *Nothing, nothing that ever existed on this island reached it easily. The rocks themselves were forced up fiery chimneys through miles of ocean. They burst in horrible agony onto the surface of the earth. The lichens that arrived came borne by storms. The birds limped in on deadened wings. Insects came only when accompanied by hurricanes, and even trees arrived in the dark belly of some wandering bird, or precariously perched upon the feathers of a thigh.*
>
> *Timelessly, relentlessly, in storm and hunger and hurricane the island was given life, and this life was sustained only by constant new volcanic eruptions that spewed forth new lava that could be broken down into*

449. *See* Pollard, *Can We Get There From Here?*, *supra* note 256, at 1536 (citing Richard Perez-Pena, *I-287: Extend It and They Will Drive on It*, N.Y. TIMES, June 2, 1996, at 35) ("The rule is this: If you build it, they will come. It's called induced demand. Every mile of road that you build induces people to drive.").

450. Indeed, at last look, Congress was considering amendments to weaken NEPA, the CAA, and ISTEA. They were getting in the way of new highways. *Transportation Reauthorization Bills Would Undermine NEPA, Air Act, Environmental Coalition Says*, DAILY ENVIRONMENT REPORT at A-10 (Jan. 10, 2004) *available at* http://pubs.bna.com/ip/BNA/den.nsf/is/a0a8a0f7r1.

451. LEAVITT, *supra* note 269, at 43.

> *life-sustaining soil. In violence the island lived, and in violence a great beauty was born.*
>
> —James Michener, HAWAII[452]

> *Native Hawaiians . . . recognized and practiced respect for a hierarchy of life based on regeneration and protection of food sources. They prioritized the nondisturbance of seed producing forest areas to promote new growth. To the Native Hawaiians the older trees are primary; those who use these trees as residence or food source are secondary. For this reason, mamane forest and kipuka are regarded as having special value to native Hawaiians. The mountains or land, water, and sky were a necessary part of the life cycle. The most prominent, celebrated place of religious importance within the project corridor is Mauna Kea.*[453]

The tallest mountain in the world does not rise in the Himalayas but from the floor of the Pacific Ocean to form a towering volcano on the island of Hawaii: Mauna Kea.[454] Its upper reaches are rock and ice, but below 11,000 feet the grasses appear and increasingly thick stands of mamane trees, unique to Hawaii, that condense moisture from the rising mists and create their own micro-world.[455] Deep in these woods lives a small, gray, yellow-headed bird, the Palila. It is an otherwise unremarkable bird except that it is completely dependent on the mamane trees for its survival, it is in danger of extinction, and it became lead plaintiff in a lawsuit so large that its implications even now, after several trips to the Ninth Circuit and one to the Supreme Court, are not fully known.

The Palila did not come to Hawaii, but some predecessor did, on the same winds that populated the islands and produced a dazzling variety of life forms that we are still discovering, some in a great hurry, before they disappear. The common ancestor of the Palila, like that of the birds Charles Darwin found on the Galapagos, was a finch blown by storms out of

452. JAMES MICHENER, HAWAII 8 (1959).

453. Federal Highway Administration, *Environmental Impact Statement Executive Summary, Saddle Road*, § S.5.1, http://www.saddleroad.com/execsum.html (last visited Mar. 17, 2004).

454. Richard E. Warner, *A Forest Dies on Mauna Kea*, PAC. DISCOVERY, Mar.–Apr. 1960, at 1 (on file with author).

455. *Id.*

Asia, thousands of miles over the Pacific and onto, by chance, a lush island with no predators, ample food and every incentive to develop new ways to catch and eat it.[456] Evolving in isolation, the Hawaiian islands generated an explosion of plants, insects, snails, bats, and marine mammals found nowhere else on earth.[457] More than nine out of ten things that grew here were new to the planet.[458] Of them, none were more spectacular, diverse, and beautiful than the birds.

It is said that if Darwin had not hit upon his theory of natural selection through the birds of the Galapagos, he would have on Hawaii.[459] The evidence was far more dramatic. As it was, he had to resort to subtle differences in the beaks and bills of his Galapagos finches to makes his point that, yes, life forms adapted to meet a need.[460] On Hawaii, however, the forests "swarmed with a riot" of finch offspring, one entire new family called honeycreepers "distinguished variously by red and yellow and olive green plumages, slashed with wing bands in black, gray, and varying nuances of white."[461] The riot continued in size, shapes, and survival strategies of the birds themselves. There were honeycreepers that looked and acted like fruit-eating parrots, others like insect-eating warblers, and still others like seed-eating finches and hammer-headed woodpeckers, all from the same common ancestor.[462] It was a textbook show of evolution, about to become a textbook show of extinction. Harvard's E.O. Wilson writes:

> Most of the honeycreepers are gone now. They retreated and vanished under pressure from overhunting, deforestation, rats, carnivorous ants, and malaria and dropsy carried in by exotic birds introduced to 'enrich' the Hawaiian landscape. They disappeared as vanished species usually do, not in a dramatic cataclysm but unnoticed, at the end of a decline when those who knew them could acknowledge that none had been seen around for a while, that perhaps there were still a few to be found in such-and-such a valley, where in fact a predator had already snatched the last living individual, a lonely male, let us suppose, from its nocturnal

456. EDWARD O. WILSON, THE DIVERSITY OF LIFE 96 (1992).
457. *Id.* at 95–96.
458. MICHENER, *supra* note 452, at 15.
459. Tom Turner, *Saving a Honeycreeper,* DEFENDERS, July–Aug. 1990, at 10.
460. CHARLES DARWIN, THE VOYAGE OF THE BEAGLE 401–02 (1909).
461. WILSON, *supra* note 456, at 97.
462. *Id.* at 98.

> perch. . . . [F]orgotten, in the words of the Catholic liturgy, as the unremembered dead."[463]

One of the survivors was a reclusive honeycreeper a little less then six inches from beak to tail. It was called the Palila.

The second great migration came millennia later, Polynesian sailors arriving on the same winds from the West.[464] They marveled at the birds and, much as the Mayan cultures of Central America, went on to invest them with religious and ceremonial significance.[465] The original Hawaiian leis were made of plumes, not flowers, and the robe of King Kamehameha I, first patriarch of the Hawaiian kingdom, is reported to have been made from the feathers of some 80,000 birds.[466] This significance was not lost on the next invaders. When Hernando Cortez was conquering Mexico and wanted to impress the people of Montezuma, he assembled them in the square and set fire to the public aviaries before their eyes, cages the size of temples, thousands of sacred quetzals, parrots, and exotic species, large birds in flames, the raucous sound of their terror and the smell of burning flesh.[467] What would happen on Hawaii was a little more subtle but, in the end, more devastating.

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463. *Id.* at 97.

464. *Hawaii*, *in* ENCYCLOPEDIA AMERICANA 866, 867 (Int'l ed. 2001).

465. Turner, *supra* note 459, at 10.

466. *Id.*

467. *See* BARRY LOPEZ, CROSSING OPEN GROUND 193–95 (1988) ("On June 16, in a move calculated to humiliate and frighten the Mexican people, Cortez set fire to the aviaries."); William Prescott described this scene:

> On the other side of the square, adjoining Montezuma's residence, were several buildings, as the reader is aware, appropriate to animals. One of these was now marked for destruction—the House of Birds, filled with specimens of all the painted varieties which swarmed over the wide forests of Mexico. It was an airy and elegant building, after the Indian fashion, and, viewed in connection with its object, was undoubtedly a remarkable proof of refinement and intellectual taste in a barbarous monarch. Its light, combustible materials of wood and bamboo formed a striking contrast to the heavy stone edifices around it, and made it obviously convenient for the present purpose of the invaders. The torches were applied, and the fanciful structure was soon wrapped in flames, that sent their baleful splendors, far and wide, over city and lake. Its feathered inhabitants either perished in the fire, or those of stronger wing, bursting the burning lattice-work of the aviary, soared high into the air, and, fluttering for a while over the devoted city, fled with loud screams to their native forests beyond the mountains.

3 WILLIAM H. PRESCOTT, HISTORY OF THE CONQUEST OF MEXICO 121–22 (1874).

The islands of Hawaii lacked land mammals, and what the Polynesians brought with them were pigs and rats which, finding no competitors and plenty to eat, went wild into their surroundings.[468] The Polynesians also brought fire, and proceeded to burn out the lowland forest and convert it to agriculture.[469] These intrusions made serious inroads on native species, many of which retreated to higher ground, but the ecosystem restabilized, battered but intact.[470] It would be up to Europeans to finish the job. In the late 1700s, Captain Cook "discovered" the islands and the missionaries and settlers who followed brought goats, sheep, and cattle which, turned loose to graze, mowed through the native plants like machines.[471] A second extinction cycle began. When the lowlands were eaten out, the livestock moved into the highlands, and then the mountains, taking out first the shrubs and grasses, then the trees, leaving behind a near desert that, in turn, began to erode back down into the valleys below.[472] It was the effects of this erosion, not concern for native species, that prompted the first conservation efforts on Hawaii.

By 1900, the sugar plantations which dominated the Hawaiian economic and political landscape saw erosion as a major threat to their irrigation systems and water supply and called on the legislature for action.[473] In 1903, the legislature established a system of forest reserves on the main islands and, with only 10 percent of the native forest remaining and the slopes largely denuded, the territorial foresters counter-attacked.[474] They tried planting new trees, with only modest success.[475] Their main mission, however, was to get rid of the feral livestock. There were more than 40,000 wild sheep on the reserve around the Mauna Kea, and thousands more goats and wild pigs.[476] In 1926 alone, the foresters killed more than 25,000 wild sheep, goats, and cattle; an effort that would continue at a

468. Turner, *supra* note 459, at 10.

469. J. Michael Scott et al., *Annual Variation in the Distribution, Abundance, and Habitat Response of the Palila (Loxiodes Bailleui)*, 101 THE AUK: A QUARTERLY JOURNAL OF ORNITHOLOGY 647, 661 (2001).

470. WILSON, *supra* note 456, at 245–46.

471. Turner, *supra* note 459, at 10.

472. Warner, *supra* note 454, at 3.

473. Steve Yates, *On the Cutting Edge of Extinction,* AUBUDON, July 1984, at 66.

474. *Id.*

475. *Id.*

476. Warner, *supra* note 454, at 4.

rate of 10,000 a year for the next twenty years.[477] It paid off. By 1946 the estimated population of non-native wild animals on Mauna Kea was down to 5,000, and by 1950 had dropped to 200.[478] At which point, with victory in its grasp and the forests and native wildlife rebounding, Hawaii experienced an "ironic reversal" of its extermination program, and everything went south.

The ironic reversal was political. With the decline of the sugar industry, the demand for conservation diminished, and with the boom in wealth and leisure time following World War II came a new demand: sport hunting.[479] Other states could expand their deer herds and ducks, but feral animals were the only huntable game in Hawaii. Acceding to the pressure, the forest reserve system was turned over to the Division of Fish and Game and Mauna Kea became a "Forest Reserve and Game Management Area."[480] Feral animals that were once considered "vermin" were now a "valuable recreational resource."[481] The Fish and Game Division closed the area to sport hunting to allow the herds to grow, and introduced the mouflon sheep from New Zealand to add yet another target species.[482] When hunting was reopened it took up to 2,000 animals a year without denting the population on Mauna Kea, which grew to 3,500 by 1959 and continued to expand.[483] Given the breeding rates of the animals and the remoteness of their habitats, sport hunting could limit the numbers at the top end, but would never threaten the stock. It was a perfect game management scenario.

It was a deadly scenario, however, for the mamane tree forests of Mauna Kea and the Palila. The relation between the two was closer than mother to child. The mamane trees were the Palila's entire world, their seeds, pods, and flowers its food, their screen of the mountain mists its water, their twigs and leaves its nests, their branches its roosts and nest sites.[484] Mamane trees grow slowly and might live up to 500 years; it takes twenty-five years for the seedlings to reach the age of re-

477. Yates, *supra* note 473, at 66.
478. Warner, *supra* note 454, at 6.
479. Yates, *supra* note 473, at 66.
480. Warner, *supra* note 454, at 6–7.
481. Yates, *supra* note 473, at 66.
482. *Id.* at 71.
483. Warner, *supra* note 454, at 8.
484. Turner, *supra* note 459, at 11.

production and to begin to supply the Palila with its needs.[485] Feral goats and sheep grazing on the mamane seedlings left behind, from the Palila's point of view, a wasteland that would last a quarter of a century. Neither the trees nor the bird had that kind of time. The trees were cropped out five feet in the air, new growth close to zero, and the ground turned hard and dry.[486] The Palila, long eliminated from the other islands, retreated to a patch of forest no more than three miles by four on the flank of Mauna Kea.[487] Under great stress, concentrated in one small area, it began to experience breeding failure, abandoned nests, few chicks and symptoms of genetic losses that are the beginning of the extinction vortex.[488] By the mid-1970s, hunting pressure had reduced the wild goats and sheep to about 1500, but the numbers were sufficient to maintain the status quo.[489] The Palila dropped to about 1,000 individuals as well, which, discounting the number of non-breeding juveniles and genetically-limited adults, put the breeding population in the low hundreds, perhaps less.[490] A species on its way out.

The plight of the mamane forest went largely unnoticed until the 1960s, when a state biologist published an article entitled "A Forest Dies on Mauna Kea," subtitle: "How Feral Sheep Are Destroying an Hawaiian Woodland."[491] In 1967, the article caught the attention of Dr. Alan Zeigler, then a vertebrate biologist with Hawaii's Bishop Museum.[492] Zeigler set out on the quixotic mission to save the forest. He had an important ally, the United States Fish and Wildlife Service entrusted with administering the new Endangered Species Act.[493] The Act might not protect forests but it did protect birds, and the major threat to American bird life was on Hawaii. More than half of all U.S. birds listed as endangered or threatened are Hawaiian.[494] Of seventy-one species and subspecies known to have existed there two centuries ago, twenty-three are now

485. *Id.*

486. Warner, *supra* note 454, at 5.

487. Sandra M. Pletschet & Jeffery F. Kelly, *Breeding Biology and Nesting Success of Palila*, 92 THE CONDOR 1012, 1018–20 (1990).

488. *Id.*

489. Turner, *supra* note 459, at 11.

490. 50 C.F.R. § 17.95 (1992).

491. Warner, *supra* note 454.

492. Yates, *supra* note 473, at 71.

493. Turner, *supra* note 459, at 11–13.

494. Harry Whitten, *Endangered Mauna Kea Bird*, HONOLULU STAR-BULLETIN, July 13, 1974, at A-11.

extinct, and thirty more are barely hanging on.[495] If protecting endangered species was what you were supposed to do, Hawaii was where you had to do it.

The Service listed the Palila as endangered right out of the box, went on to declare Mauna Kea its critical habitat, and began developing a recovery plan.[496] The plan called for the complete removal of feral sheep and goats and further study of the impacts of the mouflon sheep.[497] It argued that even limited numbers of feral animals put the Palila at risk, and certainly impeded its recovery.[498] The Service's plan met a mixed reception in Hawaii. The Board of Land and Natural Resources opposed total removal, arguing that since the reduction of feral livestock numbers, the habitat had stabilized, Palila numbers had also stabilized and even slightly increased, and that there was no reason that a limited population of sheep and goats could not sustain both recreational hunting and the Palila.[499] These same arguments would form the center of the debate for the next twenty years.

With Hawaii in opposition, the issue was at a stalemate until Zeigler approached an attorney for the Sierra Club Legal Defense Fund named Michael Sherwood and asked for a lawsuit.[500] The case that followed was quixotic in two respects. The first was that it was brought in the name of the Palila itself, a bird suing for its own survival. Sherwood brought a stuffed Palila to court every day from the first, and placed it prominently at the counsel table.[501] Its standing to bring the case was never challenged. The trial judge did not say a word.[502]

The second twist is that Sherwood and the Palila were basing their lawsuit on a regulation that the Service had promulgated several years before, which had received almost no sub-

495. Reed R. Noss & Robert L. Peters, *Endangered Ecosystems: A Status Report on America's Vanishing Habitat and Wildlife*, 31 DEFENDERS OF WILDLIFE 1 (Dec. 1995).

496. 50 C.F.R. § 17.95 (1992).

497. Turner, *supra* note 459, at 12.

498. *Id.* at 13.

499. *Id.* at 12.

500. *Id.* at 13.

501. *Id.*

502. *Id.*

sequent play.[503] The regulation seemed to say that no one, no individual, no state agency, anywhere in the country, could modify the habitat of an endangered species.[504] If the regulation meant what it said, this would be an enormous protection not only for the Palila but for the hundreds of other species listed and about to be listed under the Endangered Species Act. How such a regulation, in whatever political climate, was passed is something of a mystery.

It is a popular notion that when all has been said and done in Congress—the bills filed, the jockeying for jurisdiction, the lobbying, amendments and hearings, the mark-ups, committee reports and floor votes, the conference committee, final votes and the signing ceremony complete with pens, photos and everyone looking pleased in the background—the lawmaking is over.[505] Rather, it has only begun. All that has been passed is a statute with grand purposes and commands, conferred to an agency to flesh out and execute. The agency leeway is broad. Congress can't build the car or draw the blueprints. The most it can do is give the specs. A second battlefront opens over the blueprints, which will emerge as regulations, two, three, or more years hence.[506] These regulations are the rules of the game,[507] and making regulations is what pays the bills in Washington, D.C. Dozens of law firms and several hundred consulting firms and trade associations of every nature from the American Petroleum Institute to the National Pork Producers employ stables of lobbyists to make sure that the regulations come out their way.[508] They hire past agency heads and attorneys, former congressmen and their staffs, ad agencies, public relations firms, and every other influence they can.[509] This is where the money is. The Endangered Species Act

503. Endangered and Threatened Wildlife and Plants: Reclassification of American Alligator and Other Amendments, 40 Fed. Reg. 44412, 44416 (Sept. 26, 1975).

504. *Id.*

505. Al Kamen, *Despite Bill's Signing, Fight Has Just Begun*, THE WASH. POST, Nov. 22, 1991, at A-14.

506. *Id.*; Bill Walsh, *Report: Unelected Make the Laws*, THE TIMES-PICAYUNE, Aug. 7, 2003, at A-10.

507. KENNETH DAVIS, ADMINISTRATIVE LAW 126 (1951); *see also* Arizona Grocery v. Atcheson, Topeka and Santa Fe, R.R., 284 U.S. 370 (1932) (finding that legislative rules have force of law and bind administrative agencies).

508. *See generally* CINDY SKRYSKI, THE REGULATORS: ANONYMOUS POWER BROKERS IN AMERICAN POLITICS (2003).

509. *Id.*

would keep them busy for years. But on the issue the Palila made famous, they missed the ball.

Here is what we know. In 1973, Congress passed the Endangered Species Act with a breathtaking, banner command: Section 7 prohibited the federal government from jeopardizing the future of all threatened and endangered species.[510] The law would be administered in principal part by the U.S. Fish and Wildlife Service. It was up to the Service to take it from there and spell out the rules of the game.

We also know this. When it comes to clout in Washington, the Service is not a powerful agency. The ESA was about to confront every major development interest in the country from coal mining to highway projects to western timber and the U.S. Army Corps of Engineers. You couldn't pick a tougher bunch of enemies. Worse still, the first lawsuit picked under the Act pitted an ugly, three-inch, just-discovered endangered fish against a project of the mighty Tennessee Valley Authority, a dam that was backed by top congressional leaders and was nearing completion as it went to court.[511] In the words of the Director of the Fish and Wildlife Service at the time, "we all knew that the Act was fragile."[512] They were walking on eggs.

But we also know this. The Fish and Wildlife Service of that day was run by Republican appointees and, as anomalous as it might seem today, they cared about environmental protection. It was President Nixon who signed the National Environmental Policy Act,[513] the Clean Air and Water Acts,[514] and established the Environmental Protection Agency.[515] His Secretary of Interior, Wally Hickel, performed well under trying circumstances;[516] and it was Hickel's Assistant Secretary for

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510. 16 U.S.C. § 1536(a)(2) (1973).

511. *See* Tenn. Valley Auth. v. Hill, 437 U.S. 153 (1978). For a history of this case, see Houck, *supra* note 5.

512. Telephone Interview with Lynn Greenwalt, former Director of U.S. Fish and Wildlife Service (May 6, 2003).

513. 42 U.S.C. §§ 4321–4370d (1970).

514. 42 U.S.C. §§ 7401–7671q (1994); 33 U.S.C. §§ 1251–1387 (1994).

515. *See* Richard N.L. Andrews, *Long-Range Planning in Environmental and Health Regulatory Agencies*, 20 ECOLOGY L.Q. 515, 538 & n.11 (1993) ("The Environmental Protection Agency . . . was created in 1970, not by a statute, but by a Presidential Executive order that simply reorganized into one agency a number of existing units and their associated statutory authorities.").

516. Andrew Brodeck, *I Either Did It or I'm Against It: Wally Hickel's New Book Talks 'Crazy Big'*, ANCHORAGE PRESS, May 9, 2002, *available at* http://www.anchoragepress.com/archives/document0f97.html:

The hellhound on Hickel's trail has always been his environmental re-

Fish, Wildlife and Parks, Nathaniel Reed, whose testimony in favor of the ESA was so eloquent that it was quoted by the Supreme Court in its first major decision upholding the Act.[517] Lynn Greenwalt, the Director of the U.S. Fish and Wildlife Service, would go on to run the conservation programs of the largest environmental group in the country.[518] The culture was green all the way down, which could help explain what happened.

By 1975, the Endangered Species Act was still barely a year old, facing its first court tests, and already under siege. All of the Act's attention and that of its players was focused on federal agencies and Section 7's no-jeopardy command. There were mega-million dollar federal projects under way all over the country, with undeniable impacts on endangered species. Each one became a test of power, and of interpreting Section 7. No one in the environmental community, and no one in the development community, focused on the other prohibition in the Act, Section 9.[519] This section simply said that no person could "take" an endangered species.[520] Unlike Section 7, it applied to everybody, and unlike Section 7 it did not require "jeopardy" to the whole species: taking a single individual was prohibited. It

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cord. He takes pains in his book to establish that, in fact, he is Mother Nature's first born. As Nixon's Interior Secretary—Nixon fired him after two years for siding with Vietnam protesters—Hickel put eight species of great whales on the endangered species list. And he says he actually held up construction of the trans-Alaska oil pipeline because oil companies planned to do a half-ass job. Of course, Hickel was also the guy who authorized an "ice road" from Fairbanks to Prudhoe Bay, raking an ugly scar across both the tundra and his reputation.

517. Tenn. Valley Auth. v. Hill, 437 U.S. at 179 n.23 (quoting Assistant Secretary Reed):

> I have watched in my lifetime a vast array of mollusks in southern streams totally disappear as a result of damming, channelization and pollution. It is often asked of me, 'what is the importance of the mollusks for example in Alabama.' I do not know, and I do not know whether any of us will ever have the insight to know exactly why these mollusks evolved over millions of years or what their importance is in the total ecosystem. However, I have great trouble being party to their destruction without having obtained such knowledge.

518. Greenwalt directed the conservation programs of the National Wildlife Federation in Washington, D.C. between 1988 and 1996. As of 2004, the Federation claims over 4 million members and supporters worldwide. National Wildlife Federation, *About the National Wildlife Federation, available at* http://www.nwf.org/about/ (last visited Feb. 19, 2004).

519. 16 U.S.C. § 1538 (1988).

520. *Id.* at § 1538(a)(1)(B).

would be up to the Service, in its regulations, to determine just what "taking" a species meant.

The Congress did not give the Service carte blanche on the "take" clause. The Act said, in words that seem almost a parody of overlapping and duplicative legalese, that "take" meant to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect" a species.[521] Have we left out any verbs here? More relevantly, do they have a common denominator, a common thread of meaning? Many, even in the environmental community, assumed that they did, and that all of these types of "take" entailed some sort of deliberate harm: e.g., somebody shot an eagle. It didn't seem to have a whole lot to do with development projects and habitat modification. Perhaps for this reason, when the Fish and Wildlife Service proposed its regulations for Section 9 of the Act in July, 1975, they were not paid a great deal of attention.[522]

There was another reason as well. The Section 9 proposal was folded into regulations that boded considerably more heat, the reclassification of the American Alligator.[523] The proposal began with the alligator. Three pages later it made a brief allusion to the definitions of "take," which were said to "clarify" a previous proposal "virtually identical" in nature.[524] The great leap occurred in the definition of "harass" as an act which either "actually or potentially" harmed wildlife by "significant environmental modification" that affected its "essential behavior patterns, such as feeding, breeding or sheltering."[525] To a biologist, this was no leap at all. The proposition was obvious. As a drafter of the provision later recalled, "we sat around talking a lot about the meaning of "harass," and whether if a guy was taking photos of ducks in a blind and scared off the hen and the chicks were left to die this would be a taking. And we said, 'Hell yes!'"[526] If "take" was going to go this far, then actions that actually destroyed the nest were a no-brainer. As

521. 16 U.S.C. § 1532 (19) (1988).

522. Proposal to Reclassify the American Alligator, 40 Fed. Reg. 28712, 28714 (July 8, 1975).

523. *Id.* at 28712–14.

524. *Id.* at 28713; *See* Endangered and Threatened Wildlife: Proposed Amendments to Permit Revisions, 40 Fed. Reg. 21977, 21978 (May 20, 1975).

525. Proposal to Reclassify the American Alligator, 40 Fed. Reg. 28712, 28714 (July 8, 1975).

526. Telephone Interview with Rick Parsons, former USFWS enforcement agent (June 10, 2003).

the Service Director remembered the issue: "We were thinking, if you take the habitat away you might as well shoot it with a gun."[527] As the Assistant Secretary later commented, "It just made sense. But politically we had no idea what we were getting into."[528]

And so, when it came to the final regulation in September of that year—short work for any regulation and impossibly short for a regulation that raised significant controversy—the Service stayed with its position that "take" included habitat modification.[529] The majority of comments, and they were not numerous, supported the proposal and, as had been anticipated, most were focused on the downgrading of the alligator.[530] The Service did make two changes which would have decisive impact on the Supreme Court two decades later. One was to move habitat modification away from the definition of "harass," which implied intentional conduct, to "harm," which did not.[531] This change opened the box wider, although no one could know how wide. The second was to remove the word "potentially" and require "actual" harm, a change emphasized by explaining that "[t]he actual consequences of such an action upon a listed species is paramount."[532] This change purportedly narrowed the box, although no one could say how far. These changes were made, and the Service cut loose into the world a limitation on altering the landscape that expanded the habitat protections of the Endangered Species Act from federal actions to, potentially, every activity in the United States. Two-thirds of the United States is private land, and the ESA had just landed on its doorstep.

The biological consequences were large: fully 80 percent of listed species are found on non-federal lands, most of them *primarily* on non-federal lands.[533] The political consequences were large as well: suddenly the Act faced not only angry fed-

527. Interview with Lynn Greenwalt, *supra* note 512.

528. Telephone Interview with Nathaniel Reed, Assistant Secretary of Interior for Fish, Wildlife and Parks under Presidents Nixon and Ford (June 14, 2003).

529. Endangered and Threatened Wildlife and Plants: Reclassification of American Alligator and Other Amendments, 40 Fed. Reg. 44412, 44416 (Sept. 26, 1975).

530. *Id.* at 44412–44413.

531. *Id.* at 44, 413.

532. *Id.*

533. Peter Aengst et al., *Introduction to Habitat Conservation Planning*, 14 ENDANGERED SPECIES UPDATE Nos. 7–8, July–Aug 1997, at 5.

eral agencies but private shopping mall builders in New Jersey, gated community developers in Arizona, and marina operators in Florida. Everyone was in the mix. A few Christmases later, when the regulations and the *Palila* cases began to hit the fan, opponents of the ESA sent an endangered species Christmas card to all members of Congress.[534] It featured pop-up endangered animals of the less charismatic variety, for example, the Kangaroo Rat, which could suddenly shut down your constituent's dream house. At the time (1975) few people—including the Service—realized the implications of what had been done, and even those who did could not predict what the courts would do with it.

The *Palila* case came into court short on precedent. While the Service was conducting its Section 9 rulemaking in 1975, the Eighth Circuit was deciding that the construction of the Merremac Dam, although it would destroy the best remaining caves of the endangered Indiana bat, presented no "clear attempt to harass or harm" the species under Section 9.[535] In this court's view, to "take" required intent.[536] At the same time, a district court in Tennessee was deciding that, even if the Tellico Dam violated both Sections 7 and 9, equitable considerations outweighed the violations, including the fact that the dam was largely completed.[537] While the first *Palila* cases were winding to a close, two challenges to oil leasing[538] and one to a U.S. Navy training exercise failed under both Sections 7 and 9.[539] In sum, the *Palila* plaintiffs were not just short on positive interpretations of Section 9, they were naked. Which made the decision all the more dramatic.

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534. Interview with Michael Bean, Director, Wildlife Programs, Environmental Defense in Washington, D.C. (Fall 1998) (on file with author). Mr. Bean, principal author of THE EVOLUTION OF NATIONAL WILDLIFE LAW (3d ed. 1997), has been a leading player in ESA issues since 1973.

535. Sierra Club v. Froehlke, 534 F.2d 1289, 1304 (8th Cir. 1976).

536. *Id.*

537. Hill v. Tenn. Valley Auth., 419 F. Supp. 753, 758–59 (E.D. Tenn. 1976).

538. North Slope Borough v. Andrus, 486 F. Supp. 332 (D.C. Cir. 1980), *aff'd in part and rev'd in part*, 642 F.2d 589 (D.C. Cir. 1980); California v. Watt, 520 F. Supp. 1359 (C.D. Cal. 1981), *aff'd in part, rev'd in part, and vacated,* 683 F.2d 1253 (9th Cir. 1982), *rev'd in part sub nom.* Sec'y of Interior v. California, 464 U.S. 312 (1984).

539. Barcelo v. Brown, 478 F. Supp. 646 (D.P.R. 1979), *aff'd in part, vacated in part sub nom.*, Romero-Barcelo v. Brown, 643 F.2d 835 (1st Cir. 1981), *rev'd on other grounds.*

There were, in fact, six decisions. They all raised the same issue and, in the end, they resolved it in the same way. *Palila I* opened the play.[540] The plaintiff's story was relatively straightforward. Feral sheep and goats were eating out the mamane forest—seedlings, shoots, and all—the forest was essential to the Palila for feeding and breeding, and without it the bird would soon be gone.[541] The defendants maintained that their program was already cutting down the depredation, and that maintaining a small, huntable population was feasible, indeed a win-win for all sides.[542] Since the population of Palila was now actually increasing, there could be no violation of Section 9. The trial court held that, whatever the current situation, the remaining animals were still "taking" the Palila's habitat, in violation of the regulations.[543] In *Palila II*, the Ninth Circuit agreed.[544] The impacts fell smack within the regulatory definitions, and this kind of habitat modification was exactly what Congress had in mind when it enacted the ESA.[545] All of which would have been welcome news to the Fish and Wildlife Service, whose regulations had been vindicated and strictly applied. Only, by that time, the Fish and Wildlife Service and all of the Department of the Interior had radically changed.

The Presidential elections of 1979 had brought in an administration with an entirely new philosophy of conservation and the environment. Control of the agencies was vested in people who had demonstrated hostility and opposition to the very statutory mandates they were now supposed to execute.[546] Public lands management was given to a leader of the western Sagebrush Rebellion, which advocated the sale of public lands;[547] the Office of Surface Mining went to an Ohio con-

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540. Palila v. Haw. Dep't of Land & Natural Res., 471 F. Supp. 985 (D. Haw. 1979).

541. *Id.* at 989–90.

542. *Id.* at 990.

543. *Id.* at 995.

544. Palila v. Haw. Dep't of Land & Natural Res., 639 F.2d 495 (9th Cir. 1981).

545. *Id.* at 497.

546. *See* JONATHAN LASH ET AL., A SEASON OF SPOILS (Pantheon Books 1984) (describing hostile attitudes and actions of Reagan appointees to the Department of the Interior, EPA, and other environmental agencies).

547. *See* Neal Peirce, *Sagebrush Rebels Bound to Lose*, WASH. POST, Feb. 22, 1981, at C2 (describing BLM Director Robert Burford); *see also* National Wildlife Federation Staff, *Marching Backwards: The Department of Interior Under James Watt*, Apr. 29, 1982 (analyzing secretarial actions between Jan. 1981 and Apr. 1982) (on file with author).

gressman who had gone to court claiming the program was unconstitutional;[548] the Forest Service was placed under the supervision of the former counsel for Louisiana-Pacific, the nation's largest clear-cutter of federal timber;[549] the Environmental Protection Agency inherited a Colorado congresswoman who had litigated against EPA's Clean Air Act requirements for Denver.[550] Such a climate would not be seen again for twenty years.

The most notorious appointment of all, however, was that of James Watt as Secretary of Interior, a man whose dislike for the environmental movement was matched only by his flair for the dramatic.[551] Several years later, this flair would trigger his fall from office.[552] In the meantime, however, indeed from day one at Interior, he replaced a philosophy of protection with a philosophy of exploitation,[553] and had the grace to announce his replacement of all prior appointees, up to the heads of Interior agencies, in a general meeting of all agency personnel.[554] Watt's new Assistant Secretary for Fish and Wildlife, G. Ray Arnett, was a former publicity agent for the Atlantic Richfield Corporation who viewed environmentalists with equal para-

548. *See* Dale Rusakoff, *The Unenforcer: Strip Mining Agency Falls Victim to Reagan's Reforms*, WASH. POST, June 6, 1982, at A8 (describing OSM Director Richard Harris).

549. *See* Cass Peterson, *Possible USDA Forest Overseer Nominee Creates an Uproar*, WASH. POST, Feb. 11, 1981, at A3 (describing Department of Agriculture Assistant Secretary John Crowell).

550. *See* LASH, *supra* note 546, at 3–17; *see also* Malcolm Baldwin, *Playing Politics and Pollution*, COMMON CAUSE, May–June 1983, at 15 (describing failure of EPA under Administrator Ann Gorsuch).

551. *See* National Wildlife Federation Staff, *supra* note 547; *see also* Editorial, *Beware the New Park Ranger*, N.Y. TIMES, Apr. 5, 1981, at D20:

> Interior Secretary James Watt promises dramatic and disturbing changes in the way national parks are run. He recently told park concessionaries that he would change "fifty years of bad government" and had begun by firing other Presidents' appointees from Interior. "More heads will roll," he vowed. "I can be cold and calculating," he warned. And mindless, he implied: Decision will be made fast, without much study. "You folks will quickly understand why I bring so much controversy and flak. I don't like to paddle and I don't like to walk."

552. Cary Coglianese, *Social Movements, Law And Society: The Institutionalization Of The Environmental Movement*, 150 U. PA. L. REV. 85, 103 (2001).

553. *See supra* note 547.

554. Telephone Interview with Donald Brady, Wilderness Society, Aug. 14, 2003. Mr. Brady served in the Solicitor's Office of the Department at the time. *Id.*

noia.[555] A fierce proponent of lead shot in waterfowl hunting, despite evidence that it poisoned millions of birds each year, he proposed as one of his first initiatives at Interior to install duck-cleaning machines at federal refuges.[556] In short, the 1980s saw a very different culture at Interior, at least at the top. It remained to be seen what it would do with the Service's Section 9 regulations.

A counter-attack was inevitable. Indeed it had been planned in advance. Following the elections of 1980 the conservative and corporate-funded Heritage Foundation had prepared a blueprint targeting with specificity actions to be implemented by, among other agencies, the Department of the Interior.[557] Interpretations of the Endangered Species Act were high on its list.[558] So was the appointment of friendly faces. The new Associate Solicitor for Parks and Wildlife was J. Roy Spradley, formerly a lobbyist with the Edison Electric Institute. Spradley, an associate later recalled, was "a nice guy" but he "absolutely hated Parks and Wildlife."[559] In April 1981, with President Reagan barely in office, Spradley issued an opinion on the Section 9 "take" regulations.[560] The introduction came right to the point: "We conclude that the present definition exceeds the scope of authority conferred by Section 9."[561] As would soon appear, he was reacting to *Palila I* and *II*.

The Spradley memo set forth arguments against the habitat modification provisions of Section 9 that would not be finally resolved for another fifteen years. They went as follows.

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555. This author had personal contact with Mr. Arnett many times when the latter served on the Board of Directors of the National Wildlife Federation, and the author was its General Counsel. One of the Federation's initiatives was to petition the Department of the Interior to prohibit the use of lead shot in the hunting of migratory waterfowl, a proposal that made Mr. Arnett apoplectic. The saga finally ended, more than a decade later, with such a ban. *See* NRA v. Kleppe, 425 F. Supp. 1101 (D. D.C. 1976).

556. The author, whose organization closely followed the activities of the USFWS, see *supra* note 555, remembers seeing a United States Fish and Wildlife Service news release on the duck machine initiative in the spring of 1987. The release is no longer available.

557. LASH, *supra* note 546 at 37. The report was entitled, "Mandate for Leadership." *Id.*

558. Interview with Donald Brady, *supra* note 554.

559. *Id.*

560. Endangered and Threatened Wildlife and Plants; Proposed Redefinition of "Harm," 46 Fed. Reg. 29490 (June 2, 1981).

561. *Id.* at 29490.

Section 7, restricted to federal actions, dealt with habitat.[562] Section 9 dealt only with actions that were "directed against and likely to injure or kill individual wildlife."[563] An intent test, i.e. the eagle-shooter. While it might be "unfortunate" if a private party destroyed forests or poisoned fields where endangered species lived, the government could always protect these areas by buying them.[564] The *Palila* decisions demonstrated a "fundamental confusion" over the "distinction between habitat modifications and takings."[565] In *Palila*, even the broader standard was "misapplied to the facts of the case."[566] A new definition of harm was called for: "an act or omission which actually injures or kills wildlife."[567] No mention would be made of habitat modification. A month later, new regulations were proposed.[568]

At this point, another below-the-surface dynamic of life in Washington, D.C. came into play. Elections may change the leadership of federal agencies like the Fish and Wildlife Service, but it takes time to change the whole machine. Within the Solicitor's office, at the staff level, the culture remained green.[569] Meanwhile, on the outside, the proposal created a whirlwind of comment from environmental groups and industry. In the battle of paper, the environmentalists won, 262 comments to sixty-six, which might have meant little but it gave the insiders some backing.[570] Five months later the final regulations appeared.[571] In an almost Alice-in-Wonderland fashion, they began with a preamble that insisted on the need for clarifying changes and took a few direct swipes at the *Palila* decisions.[572] In the text, however, they reverted to the 1975 regulations, nearly verbatim.[573] A mountain of energy had pro-

562. *Id.* at 29491.
563. *Id.*
564. *Id.*
565. *Id.* at 29492.
566. *Id.* at 29492 n.4.
567. *Id.*
568. Endangered and Threatened Wildlife and Plants; Proposed Redefinition of "Harm," 46 Fed. Reg. 29490. (June 2, 1981)
569. Interview with Donald Brady, *supra* note 554.
570. Endangered and Threatened Wildlife and Plants; Final Redefinition of "Harm," 46 Fed. Reg. 54748, 54748 (Nov. 4, 1981).
571. *Id.*
572. *Id.* at 54748–50.
573. *Id.* at 54751. The 1981 amendment was not without impact, however. The preamble's insistence on "actual" harm, and the inclusion of "actual" a second time in the definition to reinforce it in a "this-time-we-really-mean-it" fashion,

duced a molehill. Somehow, the Solicitors' staff had sold the changes as more than they were.[574] As one staffer later observed: there is a rule in the appropriations committees on the Capitol Hill—if you want to fly things forward you "make big things seem small, and small things seem big."[575] The change in Section 9, in the end, was almost no change at all. It continued to beg the question that had been begged from the start, how "actual" would actual harm need to be for an action to violate the ESA? This question would go back to the courts. But not without a pit stop to refuel in Congress.

Congress was under an obligation to revisit the Endangered Species Act every five years.[576] In 1978 it had made significant amendments to Section 7, softening its blow, providing a process for consultation and, if necessary, exemption from its prohibition on jeopardy.[577] In 1982 it was Section 9's turn, but the Congress was still of a mind to protect endangered species and in no mood to overturn either the Service's regulation nor the *Palila* cases. Instead, Congress ratified them and added a provision allowing private developers the leeway of an "incidental taking," provided that they adopted a "habitat conservation plan" that would not "appreciably reduce the likelihood of the survival and recovery of the species in the wild."[578] When Congress had finished its review of the ESA, both of the Act's strong prohibitions, Sections 7 and 9, had been recast as a de facto permit system, but one in which the Fish and Wildlife Service held considerable leverage: it could always, in theory, blow the "endangerment" whistle and stop a proposal dead. In the real world, factoring in politics and the Service's relative weakness in the federal pecking order, this leverage would lead to few injunctions but, at times, to significant modifications that allowed a project to go forward and the species to live to fight another day.[579]

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would play an important role in the defense of the regulation before the Supreme Court. *See supra* note 434 and accompanying text. This reinforcement was certainly an unintended effect within the Watt Department.

574. Interview with Donald Brady, *supra* note 554

575. *Id.*

576. 16 U.S.C. §§ 1531–1544 (1988).

577. *See* MICHAEL J. BEAN & MELANIE J. ROWLAND, THE EVOLUTION OF NATIONAL WILDLIFE LAW 240 (3d ed. 1997).

578. 16 U.S.C. § 1539 (1973).

579. *See* Oliver A. Houck, *The Endangered Species Act and Its Implementation by the United States Departments of Interior and Commerce*, 64 U. COLO. L. REV. 277, 359–70 (1993) (hereinafter Houck, *The Endangered Species Act*) and

Section 9, emboldened by *Palila I* and *II* and by the Congress in 1982, then sallied forth to add its own bite to the ESA. It invalidated a timber clearcut in Texas, which took habitat of the endangered red-cockaded woodpecker.[580] It reached out and bit EPA for failing to control the use of strychnine in predator control programs, which in turn poisoned non-target species up to and including the American Bald Eagle.[581] At the same time, it failed to stop a Navy bombing exercise[582] and airboat use in the Everglades[583] for failure to prove the necessary harm. At which point, the Palila bird went back to court to give Section 9 a second ride.

Meanwhile, back in Hawaii, the removal of the remaining feral sheep and goats was going slowly, indeed backwards—their numbers actually increased[584]—and there was one remaining problem that had been deferred for further study: the mouflon sheep. In 1982, the Forest Service-funded mamane studies showed that the mouflon sheep were having the same impact as the others,[585] and were eating their way from the top of the mountain down, squeezing out the Palila and leaving Mauna Kea looking more and more bald from the top down, in the words of one observer "like Friar Tuck."[586] On the other hand, the mouflon sheep provided the best remaining big game hunting on the island. The Hawaii Department of Land and Natural Resources had its constituents to protect, and was not going to yield.

The consequent lawsuits read like déjà vu. It is hard to imagine what the Department was thinking, having lost twice before on virtually identical facts. Perhaps, pressured by its sportsmen, it simply preferred to let the courts make the call and take the heat. The question of law, however, was more tricky. Interior had amended the Section 9 regulations to em-

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sources cited therein (documenting the Service's compromises under the ESA, allowing development activity to go forward despite risk to listed species).

580. Sierra Club v. Yeutter, 926 F.2d 429 (5th Cir. 1991).

581. Defenders of Wildlife v. EPA, 882 F.2d 1294 (8th Cir. 1989).

582. Water Keeper Alliance v. U.S. Dep't of Defense, 271 F.3d 21 (1st Cir. 2001).

583. Federico Cheever, *An Introduction to the Prohibition Against Takings in Section 9 of the Endangered Species Act of 1973,* 62 U. COLO. L. REV. 109, 151 (1991).

584. Turner, *supra* note 459, at 15.

585. *Id.* at 1078–79.

586. *See* TOM TURNER, WILD BY LAW 88 (Sierra Club Legal Defense Fund 1990).

phasize the need for "actual" injury. The Palila populations were dangerously low, but stable. How imminent did the harm have to be? Need the plaintiffs produce a dead bird? Notwithstanding the Service's amendment, the district court in *Palila III* held no.[587] The fact that the sheep ate the mamane trees and therefore that the Palila would have less habitat in the future was sufficient. A finding of harm did not require "death to individual members of the species."[588] Nor did it even require a finding that the species was still declining. Actions that "prevent the recovery of the species" by taking its habitat were sufficient.[589] A wide door had just opened wider. In a brief opinion, the Ninth Circuit again affirmed, including the expansive interpretation below.[590] Hawaii, the court acknowledged, was arguing that "actual" harm meant the "immediate" destruction of Palila habitat.[591] Not so. Also prohibited was habitat destruction that prevents species recovery.[592] At which point the regulations were back to their original state in 1975, if not broader still. The Palila had done it again.

That would end the story, but for the fact that stories like these do not end. The Hawaii Department of Land and Natural Resources might learn to live with the *Palila* decisions, but major development industries on the mainland saw them as a continuing threat, primary among them the timber industry. The *Palila* cases interpreted the Fish and Wildlife Service's Section 9 regulations and applied them, but they did not deal with a facial challenge to their legitimacy. The best forum for industry to mount such a challenge would be the District of Columbia Circuit, which had jurisdiction to review the regulatory decisions of federal agencies headquartered there. If a split could be developed between the D.C. Circuit and the Ninth Circuit over Section 9, the path would be clear for a petition to the Supreme Court, increasingly hostile to environmental interests and favorable to industry appeals.[593] In the 1970s, the D.C. Circuit had developed a "hard look" doctrine to examine the de-

587. 649 F. Supp. at 1075.

588. *Id.*

589. *Id.* at 1077.

590. Palila v. Haw. Dep't of Land & Natural Res., 852 F.2d 1106 (9th Cir. 1988).

591. *Id.* at 1108.

592. *Id.*

593. Richard J. Lazarus, *Thirty Years Of Environmental Protection Law In The Supreme Court*, 19 PACE L. REV. 619, 631 (2002).

cisions of these agencies, and to ensure that they were based more on sound reasons than on political expediency.[594] In 1984, however, in *Chevron U.S.A., Inc. v. NRDC*, the Supreme Court announced a new doctrine of extreme deference, under which agency interpretations would be upheld if they reflected any "permissible construction" of their statutes.[595] In the short term, and in *Chevron* itself, the new deference would allow agencies to retreat from statutory goals, and even from long-held agency policies, under the Reagan Administration a clear victory for industry.[596] In the subsequent challenge to the Service's Section 9 regulations, however, the principle of deference would work in unwanted and unexpected ways. In the end, *Chevron* would cripple the attack.

By the late 1980s, the timber industry began to feel the pinch of Section 9, particularly in the Pacific Northwest, which housed the last large stands of old-growth timber, several old-growth dependant endangered birds like the Spotted Owl and the Marbled Murrelet; and a critical mass of scientists in academia, private consultancies and the federal agencies who were pushing the envelope on the concept of biological diversity and its protection through indicator and endangered species.[597] One such biologist, Jack Ward Thomas, rose to become Chief of the United States Forest Service itself, and imposed, for a brief moment, a discipline of integrity ("Tell the truth; obey the law") that is seldom seen in any institution.[598] Thomas's forest plan for the protection of the Spotted Owl was controversial both to industry and environmentalists,[599] but it demanded significant protections and reductions in the timber cut on National Forest lands.[600] What the *Palila* cases did was to move the action, and

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594. *See* Greater Boston Television Corp. v. FCC, 444 F.2d 841, 850–852 (D.C. Cir. 1970).

595. Chevron U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837, 843 (1984).

596. For example, the *Chevron* opinion itself allowed the Reagan Administration EPA to change agency policy and relax requirements for states and industry in non-attainment (i.e., polluted) areas under the Clean Air Act. *Id.* at 850–52.

597. *See* Oliver Houck, *On the Law of Biological Diversity and Ecosystem Management*, 81 MINN. L. REV. 869, 892–899 (1997) [hereinafter Houck, *On the Law of Biological Diversity*].

598. Paul Raeburn, *Can This Man Save Our Forests?*, POPULAR SCI., June 1, 1994 (Jack Ward Thomas of the Forest Service; includes related articles).

599. *See* Houck, *The Endangered Species Act, supra* note 579, at 335, and cases cited therein.

600. *See Spotted Owl Needs 8.4 Million Acres to Survive, Say Scientists*, Special Report, LAND LETTER, Apr. 20, 1990.

the friction, to private forest lands, also extensive; and the domain of Weyerhauser and Burlington Northern, some of the richest corporations of the West. Fish and Wildlife Service biologists began reviewing private timber harvests, finding "takes," and insisting on protections through habitat conservation plans.[601] To the industry, many of these calls were out of bounds. In some cases the species did not even live in the forests in question.[602] But they used to live there, and they would need to live there in order to recover their numbers, and that was enough for the Service.[603] The stage was set for a new round of timber wars.

In 1989, the Chief Executive Officers of the leading timber companies met in Williamsburg, Virginia to develop their strategy.[604] They formed a trade association called the American Forest Resource Alliance, and pulled an aggressive young staffer named Mark Rey from the industry's existing trade group, the National Forest Products Association, to lead it.[605] The Resource Alliance was located at the Products Association headquarters and funded by the same industries with a single mission: to secure government decisions to "protect fibre supply."[606] They needed a strategy and legal advice. Weyerhauser, a heavy hitter in the group, recommended a District of Columbia lawyer who had worked on the Spotted Owl issue in the Pacific Northwest, Steve Quarles. Quarles and his law firm got the job, and conducted a study of the ESA's potential effects on the timber industry that was as massive (it was nicknamed the "doorstop") as it was alarming: Section 9 was going to be a big problem, and in particular the *Palila* interpretation of "harm."[607] In their view, both the Service and reviewing courts

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601. Steven P. Quarles et al., *Sweet Home and the Narrowing of Wildlife: "Take" Under Section of the Endangered Species Act*, 26 ENVTL. L. REP. 10003 (1996).

602. *Id.*

603. Marbled Murrelet v. Pac. Lumber Co., 880 F. Supp. 1343, 1348 (N.D. Cal. 1995).

604. Telephone Interview and e-mail correspondence with Steven Quarles, Crowell & Moring, Washington, D.C. (June 10, 2003 and August 29, 2003) (on file with author). Mr. Quarles, as described below, helped quarterback the strategy and its implementation.

605. *Id.* Mr. Rey is presently the Bush Administration's Assistant Secretary of Agriculture with oversight responsibility for the U.S. Forest Service, which may help explain its current forest policies. The description of the meeting and strategy that follows is taken largely from the Quarles interview and correspondence.

606. *Id.*

607. *Id.* Quarles' firm was Crowell & Moring of Washington, D.C.

were collapsing the requirements of Section 9 into a single syllogism: any habitat modification alters behavioral patterns, which harms an endangered species, which constitutes a take.[608] At first, the Resource Alliance and its attorneys began to challenge these interpretations by intervening in lawsuits brought by environmental groups, case by case. It soon became clear, however, that in order to succeed they would have to challenge the Fish and Wildlife Services regulations head on. The timber industry would bankroll the suit.[609] What they needed were some "on the ground" plaintiffs. A new trade association called Forest Resources would not do the trick. As the lawsuit shows, they found several groups with appealingly local stories of grief with the Endangered Species Act,[610] but none with a more irresistible name than a group from a timber-dependent town in the Pacific Northwest, the Sweet Home Chapter of Communities for a Great Oregon.[611] They had their financial backing from the industry, a great-looking plaintiff, a decent cause of action and well-founded hopes of victory in Ronald Reagan's new D.C. Circuit.

The *Sweet Home* cases are a story all their own, a quartet of opinions that ended up in the Supreme Court where the *Palila* questions would be decided once and for all. The *Sweet Home* plaintiffs made the arguments first made by J. R. Spradley a decade before: that the Congress didn't intend Section 9 to protect habitat, that the Act had other habitat provisions instead, that all other verbs in the "take" definition implied intended or at least negligent harm to a species, and that, as written, the Service's definition was unconstitutionally

608. Steven G. Davidson, *Alteration of Wildlife Habitat as a Prohibited Taking Under the Endangered Species Act*, 10 J. LAND USE & ENVTL. L. 155, 185 (1995).

609. Telephone Interview with Steven Quarles, *supra* note 604; *see also High Court Ruling Affirms Reach of Species Act*, LAND LETTER, July 1, 1995 at 2 (lawsuit funded by timber industry).

610. Named plaintiffs in the lawsuit were, in order: Sweet Home Chapter of Communities For a Great Oregon, Mill City Chapter of Communities for a Great Oregon, Betty F. Orem, Erickson Busheling, Inc., Southeastern Lumber Manufacturers Assoc. Inc., Southern Timber Purchasers Council, Ridgetree Logging Co., Shotpouch Logging Co., Jean Reynolds, Emmy G. Birkenfeld, and Pat McCollum. Complaint for Declaratory and Injunctive Relief at 1–2, Sweet Home Chapter of Cmtys. for a Greater Or. v. Lujan, 806 F. Supp. 279 (D. D.C. 1992) (Civ. No. 91-1468).

611. Sweet Home Chapter of Cmtys. for a Greater Or. v. Lujan, 806 F. Supp. 279 (D. D.C. 1992).

vague.[612] The argument lost in the trial court, tripping over a predictable obstacle, *Chevron*: the court was to defer to Interior's interpretation of the statute.[613] It lost on appeal to the D.C. Circuit as well, two to one, on basically the same arguments[614] more elaborately made, and over a vigorous dissent by Judge Sentelle.[615] Then a very unusual thing happened. Judge Williams changed his mind.

Judge Williams was clearly the swing vote on the panel. Judge Mikva, author of the original majority opinion, was known for at least centrist if not liberal leanings,[616] while Judge Sentelle, known as a "hard-line conservative" and a Reagan delegate to the 1984 Republican convention,[617] was openly scornful of environmental law in general and of the ESA in particular.[618] Williams, then, was the key. He had concurred with Mikva, but only because the 1982 amendments seemed to ratify Interior's broad definition of harm.[619] The Sweet Home attorneys presented a motion for reconsideration, motions that are very rarely granted, arguing, as before, that all of the "take" verbs implied direct harm;[620] and more directly

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612. *Id.* at 283–284.

613. *Id.* at 285.

614. Sweet Home Chapter of Cmtys. for a Greater Or. v. Babbitt, 1 F.3d 1 (D.C. Cir. 1993).

615. *Id.* at 11.

616. Robert G. Vaughan, *A Comparative Analysis of the Influence of Legislative History on Judicial Decision-Making and Legislation*, 7 IND. INTL. & COMP. L. REV. 1, 61 (1996) (referring to "more liberal appellate judges such as Patricia Wald and Abner Mikva").

617. Robert Parry, *'Politicized' Prosecutors*, *at* http://www.consortiunnews.com/1990s/consor42.html (last visited Mar. 9 2004). In a 1991 article in the HARV. J.L. & PUB. POL'Y, Sentelle blamed "leftist heretics" for trying to turn the United States into a "collectivist, egalitarian, materialistic, race-conscious, hyper-secular, and socially permissive state." *Id.*

618. *See* Nat'l Ass'n of Home Builders v. Babbitt, 130 F.3d 1041, 1061 (D.C. Cir. 1997) (Sentelle, J., dissenting):

> Therefore, we may take it as a given that the statute forbidding the taking of endangered species can be used, provided it passes constitutional muster, to prevent counties and their citizens from building hospitals or from driving to those hospitals by routes in which the bugs smashed upon their windshields might turn out to include the Delhi Sands Flower-Loving Fly or some other species of rare insect. That leaves the question for today as: by what constitutional justification does the federal government purport to regulate local activities that might disturb a local fly?

619. *Babbitt*, 1 F.3d at 11.

620. *See* Appellant's Petition for Rehearing and Suggestion for Rehearing *En Banc* at 4–6, Sweet Home Chapter of Cmtys. for a Greater Or. v. Babbit, 1 F.3d 1

to Williams, that the 1982 amendments did not in fact ratify the Interior definition, indeed they did not even allude to them.[621]

The argument was problematic. In fact, Congress expressly modeled its incidental take and habitat conservation planning requirements after a plan to mitigate the effects of golf course development on two butterfly species in California, classic habitat-modifying harm.[622] It was sufficient to persuade Williams, however, who was obviously happier on Sentelle's side of the fence. Both Williams and Sentelle had been frequent participants at industry-sponsored judicial education seminars on the inefficiencies of government environmental programs.[623] Together they would further this agenda in other D.C. Circuit opinions that pushed traditional constitutional and administrative law theories to the limit.[624] Armed with this new teaching, Williams had authored an article on free-market environmentalism[625] that read like a lesson from the "desk reference" for judges provided at the most sophisticated of these seminars,[626] an all expense paid educational vacation

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(D.C. Cir. 1993) (No. 92-5255) The argument is certainly tenable, although it is usually rebutted by the presumption that the words of statutes, while seemingly redundant, convey different meanings or the legislature would not have bothered with them in the first place. Thus, it was logical that "harm" meant something different from "hunt" or "capture."

621. *Id.* at 13–15.

622. *See* H.R. REP. NO. 97-835, at 30–31 (1982) ("[T]his provision is modeled after a habitat conservation plan that has been developed by three Northern California cities, the County of San Mateo, and private landowners and developers to provide for the conservation of the habitat of three endangered species. . . ."). Needless to say, if Section 9 did not include habitat modification, none of these plans would have been necessary, nor would they have been made.

623. *See* Douglas T. Kendall & Eric Sorkin, *Nothing for Free: How Private Judicial Seminars are Undermining Environmental Protections and Breaking the Public's Trust*, 25 HARV. ENVTL. L. REV. 405 (2001). Judge Williams had attended no fewer than three seminars with the FREE judicial training program in Idaho. *Id.* at 452–53.

624. *See* Am. Trucking Ass'n, Inc. v. EPA, 175 F.3d 1027 (D.C. Cir. 1999) *aff'd in part, rev'd in part*, 531 U.S. 457 (2001).

625. The Honorable Stephen F. Williams, *Ecology and Economy: The Keynote Address Given at the Twenty-Eighth Annual American Law Institute-American Bar Association Environmental Law Course of Study*, 28 ELR NEWS & ANALYSIS 10251 (1998).

626. FEDERAL JUDGE'S DESK REFERENCE TO ENVIRONMENTAL ECONOMICS (John A. Baden ed., 1998). The deskbook includes such titles as: *Free-Market Forces Favor Public Good, Not Privilege* (by the program's director), *Public Choice: Understanding Government and Government Failure, The Role of Government in a Free Society* (by the ultra-conservative economist Milton Friedman in, not surprisingly, a very small role), *Property Rights & Natural Resource Management*

at the Foundation for Research on Economics and the Environment ("FREE") ranch in Idaho.[627] Coincidental or no, Williams changed his vote in *Sweet Home* after attending another FREE seminar, a few weeks following the original opinion.[628] Whatever the strength of the argument that convinced Williams to switch, it found a judge most willing to do so.

Almost too willing for the *Sweet Home* plaintiffs. Williams's new majority opinion went uncomfortably far, interpreting Section 9 to require something close to intentional harm to a species.[629] Habitat modification was out, and the prohibition was reduced to something akin to poaching. The government was forced to appeal. The timber industry had succeeded in making its way to the Supreme Court, but with a D.C. Circuit reading so extreme that it would be difficult to maintain on certiorari.[630]

By the time the case arrived at the Supreme Court there were no new arguments to be made. Three rounds of opinions below with full dissents and concurrences had exhausted the possibilities. It only remained to count the votes, which would be close. The Court by this time was stacked with Republican appointees, no friends of environmental law.[631]

The final *Sweet Home* decision was handed down in June 1995, the last day of the Court's term.[632] It is the Court's custom to present its decisions orally, and all counsel attended the hearing. None were confident of winning, but if the Court's re-

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(private property rights protect national reserves, public management does not), *How to Think About Pollution or, Why Ronald Coase Deserved the Nobel Prize* (the market will secure environmental quality), *Phantom Risk: Scientific Interference and the Law* (environmental risks are exaggerated), *Beltway Greens Undercut Worthy Ecological Goals* ("For twenty-five years environmental control has been a growth industry led by crisis entrepreneurs" in Washington, D.C.), and *Notes on the Liberal Constitution* (the Constitution has been hijacked by socialist thought).

627. *See* Kendall & Sorkin, *supra* note 623, at 452.

628. *Id.*:

> The timing of this switch is remarkable. The initial panel opinion was released on July 23, 1993. Judge Williams reported being reimbursed for a trip to Island Park, Idaho, to attend a week-long FREE seminar that took place less than two weeks after the initial panel opinion was released. Upon returning, Judge Williams granted rehearing, switched his vote, and wrote an opinion striking down DOI's regulations.

629. Sweet Home Chapter of Cmtys. for a Great Or. v. Babbitt, 17 F.3d 1463 (D.C. Cir. 1994).

630. Telephone Interview with Steven Quarles, *supra* note 604.

631. *See* Lazarus, *supra* note 593, at 631.

632. Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687 (1995).

cent environmental decisions were any guide, the odds were against the Fish and Wildlife Service regulations. The majority opinions are read by the writing judge, in order of seniority. When it came to Justice Stevens, a moderate, to read *Sweet Home*, the petitioners knew they were in trouble.[633] A six-justice majority upheld the regulations, dismissing any requirement of direct injury or intent.[634] Habitat modification was back in. The requirement that the modification cause "actual" as opposed to hypothetical harm sufficiently defined, and limited, the prohibition. Justice O'Connor, concurring in these conclusions, however, went after the *Palila* cases with a vengeance: in her mind, that a state agency committed a "taking by permitting mouflon sheep to eat mamane-naio seedlings that, when full grown, might have fed and sheltered endangered palila" was "wrongly decided" under the regulations themselves.[635] Which raised all the old questions again. If eating the seedlings didn't count, what about eating the mature trees, or their leaves, or cutting them down with a chainsaw? How actual is actual? How imminent is actual? We still do not know.

The legal fallout of *Palila-Sweet Home* is somewhat in the eye of the beholder. The Fish and Wildlife Service succeeded in upholding its regulation, albeit one that the Service of the 1980s had tried to jettison and that the Service of the 2000s will certainly limit in practice, and perhaps try again to kill outright. The *Sweet Home* plaintiffs, the real industry plaintiffs in interest, succeeded in blunting the application of Section 9 in cases where tangible harm was hard to demonstrate. Steve Quarles and his co-counsel have authored an article to this effect claiming a de facto victory in *Sweet Home*; the regulations may stand but they are safely in check.[636] Certainly, for the life of the current Administration, such is the case. Then again, the execution of many environmental regulations is in check these days, if not in full remission.[637]

The post-*Sweet Home* case law is more mixed, however, and shows several approaches deciding whether a Section 9

633. Telephone Interview with Steven Quarles, *supra* note 604.

634. 515 U.S. at 707–708.

635. *Id.* at 714 (O'Connor, J., concurring).

636. *See* Quarles et al., *supra* note 601. Half of the article reads like why-we-should-have-won-the-war; the second half reads like why-we-really-did.

637. *See* Natural Resources Defense Council, *The Bush Record*, *at* http://www.nrdc.org/bushrecord/default.asp (last visited Jan. 21, 2004).

take has or has not occurred. At one extreme are cases following Justice O'Connor's dictum rejecting takes for anything that does not show a dead bird in hand,[638] and at the other extreme *Palila III* and *IV*-like findings that take includes the destruction even of habitat not currently occupied by a species but necessary for its recovery over the long haul.[639] In the middle are cases, an emerging majority, that admit of a take by modifications that will harm a species in the future; but require proof that such harm is, at the least, likely in fact and proximate in time.[640]

Over time, the outcome is one with which, given the chance, industry and environmentalists can live. The ESA is not a stopper, but it is an enormously valuable bargaining tool for endangered wildlife and their habitats.[641] The inclusion of habitat modification in Section 9 has brought this tool to bear on actions that would otherwise have left species with no chance on this earth, and has led after much resistance and pain, to workable solutions.[642] Think: the Palila and the feral sheep and goats in the last forests on Mauna Kea.

The hunting community of Hawaii, however, feeling perhaps like an endangered species itself on the shrinking habitat of Hawaii, would go down swinging. Pursuant to a subsequent settlement between the state and *Palila* plaintiffs, the Hawaii Department of Natural Resources launched a campaign to minimize, if not eradicate, the feral goats and mouflon sheep on Mauna Kea.[643] The chief instruments of the campaign were aerial surveys and professional and sport hunting.[644] By 1980, they had reduced the feral goat population to less than seventy

638. *See* United States v. Dion, 476 U.S. 734 (1986); U.S. v. Town of Plymouth, Mass., 6 F. Supp. 2d 81 (1998); Hawksbill Sea Turtle v. FEMA, 11 F. Supp. 2d, 529, 554 (D.C. V.I. 1998) ("plaintiffs have failed to provide evidence of one dead or injured sea turtle. . . .").

639. *See* Mausolf v. Babbitt, 125 F.3d 661 (1997).

640. *See* Rancho Viejo, LLC v. Norton, 323 F.3d 1062 (D.C. Cir. 2003); Strahan v. Coxe, 127 F.3d 155 (1st Cir. 1997); U.S. v. West Coast Forest Res. Ltd. P'ship, No. 96-1575, 2000 U.S. Dist. LEXIS 19099 (D. Or. Mar. 10, 2000); Coastside Habitat Coalition v. Prime Props., No. 97-4025, 1998 U.S. Dist. LEXIS 6367 (N.D. Cal. April 30, 1998).

641. *See* Houck, *The Endangered Species Act*, *supra* note 579 at 351-52.

642. *See* Houck, *On the Law of Biodiversity*, *supra* note 597, at 954–971 (citing instances of workable compromises and significant changes effectuated by Section 9 consultations).

643. *See* Palila v. Haw. Dep't of Land & Natural Res., 73 F. Supp. 2d 1181, 1183 (D. Haw. 1999) (*Palila VI*).

644. *Id.*

individuals.[645] By 1998, the wild and mouflon numbers were down to 180.[646] The problem was, with numbers this low, the hunters were not bringing home their trophies, and so they took their case to the political arena, separately approaching both the Governor and Representative Patsy Mink with the pitch that, at these low numbers of wild animals up in the mamane forests, no further state controls were needed.[647] Politicians tend to respond more to upset voters than they do to endangered birds, and within a short time Mink was writing that she saw "no harm in allowing this remnant of sheep to remain," and the Governor was issuing an order to the Department to stop its eradication program.[648] So far, so good for the hunters.

There was, however, that pesky court settlement to deal with, and so the Sportsmen of Hawaii, intervenors in the earlier cases, moved to reopen the deal and halt the state program, leading to *Palila V* and *VI*.[649] The district court would have none of it. There were no new facts that would support the petition: mouflon sheep still ate the mamane trees, and more sheep would eat more of them.[650] But, the Sportsmen argued, the *Sweet Home* case, and in particular the opinion of Justice O'Connor waxing against the earlier *Palila* opinions, had changed the law on Section 9.[651] The district court would have none of this either, pointing out that "dictum by a single justice who is in the minority on this issue . . . hardly qualifies as a change in the law."[652] The Hawaii Department of Land and Natural Resources weighed in as well, arguing that elimination of the feral animals was impractical, if not impossible.[653] To which the court replied, in effect: do the best you can.[654]

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645. *Id.*

646. *Id.*

647. *Id.* at 1184.

648. *Id.* at 1184–85.

649. *Id.* at 1186.

650. *Id.* at 1186–87. The court treated the Sportmen's argument that, as the animals were reduced, the threat to the Palila was reduced as well, reducing the need for the reduction, as an "amusing mathematical exercise" and no more. Clearly, the court was getting tired of hearing the old arguments in new clothes. *Id.*

651. *Id.* at 1186.

652. *Id.*

653. *Id.* at 1187.

654. *Id.* at 1189. The Sportsmen's appeal was treated in summary fashion. Because there was no evidence that the hunters would be injured if the Palila became extinct, they lacked standing under the ESA, and the court lacked jurisdic-

Six *Palila* cases, six judgments in its favor, and yet the story continued. As the hunting controversy over the Palila was winding down, another, more classic one was unfolding over the improvement of a highway across the big island of Hawaii, the Saddle Road. Originally built during World War II to provide access to a military base in the center of the island,[655] the road follows the cleavage between Mauna Kea and Mauna Loa and provides the main east-west passage across the island.[656] It is narrow, winding and treacherous to cars and humans alike.[657] It passes through a live-fire artillery range as well, one of few roads in America with signs cautioning drivers against falling projectiles.[658] The Department of Defense, the Federal Highway Administration, and the State of Hawaii all wanted to upgrade the road.[659] Opposing them came, of all things, Hawaii hunters led by, of all people, a former state representative and Republican candidate for the United States Senate and raising, of all issues, endangerment to the Palila.[660]

The concerns were not bogus, in fact or law. The federal and state governments routed one section of the road away from the military reservation and through a state hunting area and 102 acres of habitat critical to the survival of the Palila in its one remaining refuge, the southwest slope of Mauna Kea.[661] Section 7 of the ESA prohibits the adverse modification of critical habitat, and the choice of this route seemed to violate that prohibition on all fours.[662] The statute provides an escape

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tion to hear their complaint. Palila v. Haw. Dep't of Land & Natural Res., No. 99-17477, 246 F.3d 675 (9th Cir. Dec. 14, 2000).

655. Hawaii Island Economic Development Board, *History of the Cross-Island Link*, KANI KUA MAUNA SADDLE ROAD NEWSLETTER, Nov. 1996, *available at* http://www.saddleroad.com/nl1.html (last visited Jan. 21, 2004).

656. Hawaii Island Economic Development Board, Illustration 3, KANI KUA MAUNA SADDLE ROAD NEWSLETTER, *available at* http://www.saddleroad.com/ill3.htm (last visited Jan. 21, 2004).

657. Hawaii Island Economic Development Board, *supra* note 655.

658. William Allen, *Hunter's* [sic] *Block Saddle Road Work, Professing Concern for Rare Palila*, 11 ENV'T HAW. 4 (Oct. 2000), *available at* http://www.environment-hawaii.org/1000cov.htm.

659. Hawaii Island Economic Development Board, *supra* note 655.

660. Allen, *supra* note 658.

661. *See* Hawaii Island Economic Development Board, *Alternatives*, KANI KUA MAUNA SADDLE ROAD NEWSLETTER, Jan. 1997, *available at* http://www.saddleroad.com/nl2.html; Hawaii Island Economic Development Board, *Proposed Project*, KANI KUA MAUNA SADDLE ROAD NEWSLETTER, Aug. 1999, *available at* http://www.saddleroad.com/nl4.html (each discussing the proposals to improve the road).

662. 16 U.S.C. § 1536(a)(2) (2000).

valve, however, if the U.S. Fish and Wildlife Service identifies a "reasonable and prudent alternative" that would avoid jeopardy and allow the activity to go forward.[663] The Service, then, had the call and found itself once again on the hot seat, this time under the watchful eye of Hawaii's Senator Daniel Inouye who had been boosting the new Saddle Road for more than a decade.[664] To no one's surprise, the Service found an alternative, not by rerouting the road away from critical habitat but, rather, by the adoption of a mitigation plan.[665]

The hunters appealed a Hawaii Department of Land and Natural Resources permit for the road.[666] The hunting issues were weak, but the alleged failure to choose a critical habitat-avoiding route had merit. Insufficient merit for the administrative board, however, which in late 2001 rejected the appeal by approving, in effect, the proposed mitigation measures.[667]

Whether the deal was a good one for the Palila remains to be seen. In acreage, it most certainly is. For the 100-plus acres taken by the new Saddle Road, the government will buy conservation easements and terminate grazing on some 7,000 acres of habitat on the northern and western slopes of Mauna Kea and lease another 3,000 acres for Palila management on the military base.[668] Money is also provided for predator control and for the suppression of fire, which has emerged, with the demise of the sheep and goats, as the primary threat to the dry, isolated, remaining mamane forest.[669] On the other hand, the management funding runs out in 2010, long before any sig-

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663. 16 U.S.C. § 1536(b)(3)(A) (2000). For the Service's penchant to find such alternatives, even ones with considerable risk to endangered species, see Houck, *The Endangered Species Act*, *supra* note 579, at 359; *id.* at Appendix I (examining more than 100 RPAs).

664. *See* Hawaii Island Economic Development Board, *Project Update*, KANI KUA MAUNA SADDLE ROAD NEWSLETTER, Oct. 1998, *available at* http://www.saddleroad.com/nl1.html (Sen. Inouye formed the Saddle Road Community Task Force in 1993); Jennifer Hamilton, *Federal Package Includes $241M for Hawaii*, PAC. BUS. NEWS, Oct. 24, 2003, *at* http://pacific.bizjournals.com/pacific/stories/2003/10/20/daily48.html (Sen. Inouye announcing bill providing $4 million for improvements to Saddle Road).

665. *Id.*

666. *See* Allen, *supra* note 658.

667. Bobby Command, *Appeal Denied on Saddle Road Permit Ruling*, W. HAWAII TODAY (n.d.) (on file with author). Contributing, at least psychologically, to the failure of the hunters' ESA claim was their history of opposition to Palila protections. *See* Allen, *supra* note 658.

668. *See* Allen, *supra* note 658.

669. *Id.*

nificant recovery in Palila numbers could be expected.[670] Yet more troublesome, the Palila do not live on the other slopes and the plan is based largely on the hope that the bird can be successfully reintroduced to new areas as its existing habitat degrades.[671] It is more hope than fact so far. The Birds of North America life history of the Palila, updated in 2002, states that while captured Palila have been relocated to the eastern and northern slopes of Mauna Kea, and some have even nested successfully, eventually they all return to their small, beleaguered home turf.[672]

We close, then, with a bird and its tiny ecosystem on the southwestern slope of Mauna Kea, still on the brink. Without the *Palila* and *Sweet Home* cases, it would not be on the brink. It would in all probability be extinct. Mauna Kea is no wilderness reserve. On the peak is a new, world-class astronomy complex that resembles Central Command.[673] It is accessed by a thirty-four mile highway leading up from the Saddle Road that encourages visitors to come on up, buy souvenirs, and watch the stars.[674] Meanwhile, at the bottom of the mamane slope are the new east-west highway, cattle ranches, and artillery fire. A large experiment in human co-habitation of the earth with one of its most threatened species is under way, and no one is taking bets. On the other hand, at least in the year 2004, there is still a bet to be made.

Meanwhile, back in Sweet Home, Oregon, the world has not ended. The predictions had been otherwise. President George W. Bush, campaigning for reelection in Oregon asserted that under the requirements of the ESA, the community would be "up to [its] neck in owls, and every mill worker will be out of a job."[675] A headline in Business Week warned, "The Spotted

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670. P.C. Banko et al., *Palila: Loxiodes Bailleui*, *in* THE BIRDS OF NORTH AMERICA 16 (A. Poole & F. Gill eds. 2002).

671. *Id.* at 16, 17.

672. *Id.* at 17.

673. *See* University of Hawaii Institute for Astronomy, *Mauna Kea Observatories*, *available at* http://www.ifa.hawaii.edu/mko/maunakea.htm (last visited Apr. 6, 2004). Even the name is imposing: The Mauna Kea Science Reserve and International Astronomical Observatory Complex. *See* History, *supra* note 655.

674. University of Hawaii Institute for Astronomy, *Visiting Mauna Kea Observatories*, *at* http://www.ifa.hawaii.edu/mko/visiting.htm (last visited Apr. 6, 2004).

675. Timothy Egan, *Oregon, Foiling Forecasters, Thrives as It Protects Owls*, N.Y. TIMES, Oct. 11, 1994, at A1.

Owls Could Wipe Us Out."[676] Industry economists predicted a loss of 150,000 timber jobs, and one University of Washington sociologist feared the creation of "a permanent, rural underclass."[677] None of it happened. In fact, the opposite happened. To be sure, Willamette Industries closed several of its mills starting in the late 1980s;[678] they had largely cut themselves out of lumber.[679] Most of the big stands were gone. The Pacific Northwest lost between six and seven thousand timber jobs, total,[680] but the economy boomed. Employment rates in Oregon and Washington increased by one-third.[681] Per capita income shot up by 21 percent.[682] By 1993, the high tech industry had overtaken timber in payroll size, which, even five years earlier, represented only 3.6 percent of total employment in the region.[683] The mill closures around Sweet Home laid off approximately 410 workers.[684] They now commute to jobs in nearby Eugene and Albany,[685] many of them better paying.[686] "'So many people say this is the best thing to ever happen to them,' said a former mill hand, 'I was brain-dead at the mill, never thought I'd do anything else. Now it's like the world has opened up.'"[687] No one has yet written the headline, "Endangered Species Saved Region," but one could.

The Supreme Court of the United States has considered the Endangered Species Act twice, more than two decades apart in time. Neither Court was particularly sympathetic to environmental issues, and the latter bordered on hostile. Nonetheless, *TVA v. Hill*[688] affirmed the Act's protections against the federal government, and *Sweet Home* approved its

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676. Ernie Niemi et al., *Bird of Doom. . .or Was it?*, THE AMICUS J. (Fall, 2000), http://www.nrdc.org/amicus/19s1.htm (last visited Mar. 9, 2004).

677. *Id.*

678. Shirley A. Buttenhoff, *Willamette Industries, Inc., Mill Closure Project*, http://www.sweethome.or.us/forest/owl/ow_WillMills.html (last visited Mar. 9, 2004).

679. Niemi, *supra* note 676, at 4.

680. *Id.* at 7.

681. *Id.* at 4.

682. *Id.*

683. *Id.* at 9.

684. Butenhoff, *supra* note 678.

685. *Sweet Home*, NATIONAL GEOGRAPHIC, Mar. 1997, http://www.sweethome.or.us/forest/national_geographic/NatGeostory.html (last visited Mar. 9, 2004).

686. Egan, *supra* note 675, at 20.

687. *Id.*

688. Tenn. Valley Auth. v. Hill, 437 U.S. 153 (1978).

protections against everyone else. Taken together, the opinions contain their own logic. To an endangered species, it doesn't matter a whole lot who wipes it out. And the evidence is increasingly clear that there is no need to wipe them out, not in the Pacific old growth forests and not on Mauna Kea. There are many explanations for what the Court did, but one of them is the simple and compelling belief that no one, public or private, has the right to eliminate an entire form of life from the face of the earth. In the end, there is something correct about the fact that the species which brought these issues to court were not the charismatic Bald Eagle, Whooping Crane, or Northern Gray Wolf but, rather, a three inch fish nobody knew existed and a six inch bird almost no one ever saw.