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DANGEROUS CROSSING: STATE BROWNFIELDS RECYCLING AND FEDERAL ENTERPRISE ZONING

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INTRODUCTION

Urban policymakers over the past two decades have engineered a curious and potentially dangerous intersection of late 20th Century policies designed to foster the rebirth of America's distressed urban regions. First, we find widespread enthusiasm about the potential for reusing brownfields[1] (typically contaminated urban sites), which has stimulated an impressive range of initiatives at all levels of government.[2] Second, after more than a decade of sitting on the sidelines and watching the states battle over the ideal range of incentives that will most effectively drive inner-city redevelopment, the federal government finally entered the fray in the 1990s with the designation of (and not insubstantial funding for) Empowerment Zones (EZs) and Enterprise Communities (ECs).[3]

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* Professor of Law and History, Director, EZ Project, University of Richmond. The author thanks David Buckley for his proficient research assistance, the members of the *Fordham Environmental Law Journal* for the opportunity to voice my concerns about urban environmental harms and inequities, and Joel Eisen, who shares and informs these concerns.

1. *See, e.g.*, Michael B. Gerrard, Brownfields Law & Practice § 1.05 (1998) (summarizing recent brownfields initiatives at federal and state levels).

2. For an excellent overview of brownfields initiatives during the 1990's see Joel B. Eisen, *Brownfields of Dreams?: Challenges and Limits of Voluntary Cleanup Programs and Incentives*, 1996 U. ILL. L. REV. 883 (1996). Other comprehensive, though less critical, treatments of the topic include William W. Buzbee, *Remembering Repose: Voluntary Contamination Cleanup Approvals, Incentives, and the Costs of Interminable Liability*, 80 MINN. L. REV. 35 (1995); Douglas A. McWilliams, *Environmental Justice and Industrial Redevelopment: Economics and Equality in Urban Revitalization*, 21 ECOLOGY L. Q. 705 (1994).

3. In the late summer of 1993, Congress passed the Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, 107 Stat. 312,

The dangerous crossing suggested by the title to this essay is found chiefly in existing and proposed federal initiatives that tie together these two well-intentioned initiatives: tax incentives for brownfield cleanup expenditures,[4] agency-funded pilot programs for brownfield reuse,[5] and congressional efforts to reform the Superfund program[6] (including devolution provisions tied to existing state voluntary programs)[7]. This crossing is representative of the dilemma currently facing lawmakers and other environmental policymakers: on the one hand, in the nation's depressed city centers there are hundreds of thousands[8] of abandoned buildings — vestiges of America's industrial heyday — that can house the engines of the post-industrial economy of the new century (especially in the service and technology sectors) and in turn provide living-wage jobs for some of the nation's neediest residents. On the other hand, the redevelopment and reuse of many of these structures and the parcels upon which they sit pose a real health threat to some of our most vulnerable and politically powerless communities.

The pages that follow are designed to describe the origins and nature of the dangerous crossing, to proscribe both the quick and the unrealistically ambitious solutions to the dilemma, and to prescribe a direct and practicable strategy for neutralizing

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which included provisions for the creation of EZs and ECs. By 1994, President Clinton's plan for revitalizing America's cities was in full swing with the designation of nine EZs and 95 ECs. The EZ/EC program provides large block grants ($100 million for urban EZs, $40 million for rural EZs and $2.9 million for ECs), tax credits, and special consideration for federal programs to spur revitalization in these areas. *See* Michael Allan Wolf, *U.S. Urban Areas Seek New Paths to Prosperity*, F. FOR APPLIED RES. & PUB. POL'Y, Winter 1995, at 84, 86. *See also* Audrey G. McFarlane, *Empowerment Zones: Urban Revitalization Through Collaborative Enterprise*, 5 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 35 (1995).

4. *See infra* text accompanying notes 69-71.

5. *See infra* notes 61-66 and accompanying text.

6. It is commonplace to refer to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) § 101, 42 U.S.C. §§ 9601-75 (1994), as the Superfund Law. *See, e.g.*, WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW, § 8.1 (2nd ed. 1994).

7. *See infra* notes 79-84 and accompanying text.

8. While there is no exact count of existing brownfields, estimates range from 150,000 to 500,000. *See* Eisen, *supra* note 2, at 893 & n.29.

many of the potential problems posed by the crossing. I believe that the best approach lies not in an aggressive development campaign that eschews and even criticizes a very high level of care, nor in a new, expensive, more rigorous, federal cleanup regime that runs contrary to the political will, but in the retooling and creative application of existing property and land-use devices.

I. POST-INDUSTRIAL URBAN POLICIES

As the twentieth century draws to a close, two governmental programs for addressing the impact of deindustrialization[9] on the American urban landscape have captured lawmakers' and commentators' attention: enterprise zones — the use of tax, financing, and regulatory incentives to attract increased investment and employment to the nation's most distressed communities[10] — and the reuse of brownfields — "abandoned or underutilized urban land and/or infrastructure where expansion or redevelopment is complicated, in part, because of known or potential environmental contamination."[11]

These two initiatives have much in common. Both are designed to attract increased (re)investment and employment in the nation's most distressed inner-city neighborhoods. Both programs rely primarily on government incentives designed to foster the injection of significant private-sector funding and redevelop-

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9. Deindustrialization, as the term implies, is a shift from a manufacturing-driven economy to one that is primarily service-based. It is a "widespread, systematic disinvestment in the nation's basic industrial capacity." Georgette C. Poindexter, *Separate and Unequal: A Comment on the Urban Development Aspect of Brownfields Programs*, 24 FORDHAM URB. L.J. 1, 4 (1996) (quoting Barry Bluestone, *Is Deindustrialization a Myth? Capital Mobility Versus Absorptive Capacity in the U.S. Economy*, ANNALS AM. ACAD. POL. & SOC. SCI., Sept. 1984, at 40). *See also* BARRY BLUESTONE & BENNETT HARRISON, THE DEINDUSTRIALIZATION OF AMERICA: PLANT CLOSINGS, COMMUNITY ABANDONMENT, AND THE DISMANTLING OF BASIC INDUSTRY (1982).

10. *See* Michael Allan Wolf, *Enterprise Zones: A Decade of Diversity*, 4 ECON. DEV. Q., Feb. 1990, at 3.

11. OFFICE OF TECHNOLOGY ASSESSMENT, STATE OF THE STATES ON BROWNFIELDS: PROGRAMS FOR CLEANUP AND REUSE OF CONTAMINATED SITES 3 (1995). *See* Eisen, *supra* note 2, at 890 & n.20.

ment energy. Both strategies are offered in contrast to the kinds of command-and-control approaches that have dominated the nation's regulatory agenda for most of the late twentieth century. Finally, enterprise zones and brownfields reuse share as their ultimate goal a dramatic improvement in the social climate and financial status of central-city residents who, to this point, have had to suffer the inequities and dangers resulting from disinvestment in the urban industrial core. While a narrative history of the two programs is well beyond the scope of this essay, the reader will find some background information helpful.

A. *Two Decades of Enterprise Zones*

Enterprise zones have evolved in many significant ways since the idea of "freeports" was first suggested by Peter Hall in the late 1970s as a last-ditch approach to improve the lot of residents in impoverished inner-cities in the United Kingdom.[12] Impressed by a visit to Hong Kong and Singapore, two of the world's economic "hot spots" that featured hands-off government strategies, Hall proposed an "essay in non-plan" as a "final recipe" for addressing urban devastation.[13] Hall envisioned "[s]mall, selected areas of inner cities [that] would simply be thrown open to all kinds of initiative, with minimal control."[14] In 1980, the Thatcher government enacted a right-wing version of Hall's concept, dubbed "enterprise zones" by the Conservative leader Sir Geoffrey Howe. Placed in pockets of economic distress throughout the United Kingdom, enterprise zones collected tax incentives, deregulation, and government assistance into a package designed to generate economic redevelopment.[15]

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12. *See* STUART M. BUTLER, ENTERPRISE ZONES: GREENLINING THE INNER CITIES 96-97 (1981) (quoting Hall's speech to the Royal Town Planning Institute, June 15, 1977). *See also* Peter Hall, *The British Enterprise Zones, in* ENTERPRISE ZONES: NEW DIRECTIONS IN Economic Development 179 (Roy E. Green ed., 1991) (providing a fuller history of the concept's origins); Wolf, *supra* note 10, at 4.

13. *See* BUTLER, *supra* note 12, at 96-97. *See also* Wolf, *supra* note 10, at 4.

14. BUTLER, *supra* note 12, at 96-97.

15. *See* Wolf, *supra* note 10, at 5.

The next significant chapter of enterprise zone history was written by Stuart Butler, an economist with the Heritage Foundation.[16] Butler took the British concept and undergirded it with the findings of M.I.T. economist David Birch, who labeled new, small businesses as the chief engines of American job growth, and the urban theories of Jane Jacobs, who envisioned thriving neighborhoods that featured a mix of residential and commercial uses, unhindered by top-down, government planning.[17] To Butler, and to the American conservatives who championed his ideas, tax and financing incentives, coupled with deregulation, could lead not only to the economic redevelopment envisioned by Howe and his colleagues, but also to neighborhood revitalization in America's urban pockets of poverty.

The spring of 1980 brought the introduction of the first federal enterprise zone proposals, sponsored by Representatives Jack Kemp (a Republican from Buffalo, New York) and Robert Garcia (a Democrat from the South Bronx in New York City).[18] During the fall, Republican presidential nominee Ronald Reagan made enterprise zones the heart of his urban agenda.[19] Despite this bi-

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16. *See id.*

17. *See* BUTLER, *supra* note 12, at 77-85 (citing DAVID BIRCH, THE JOB GENERATION PROCESS (1979); DAVID BIRCH, JOB CREATION AND CITIES (1980); JANE JACOBS, THE DEATH AND LIFE OF GREAT AMERICAN CITIES (1961); and JANE JACOBS, THE ECONOMY OF CITIES (1969)).

18. In May of 1980, Kemp introduced the Urban Jobs and Enterprise Zone Act of 1980, H.R. 7240, 96th Cong. (1980). The following month, Garcia joined Kemp as co-sponsor of a new version, H.R. 7563, 96th Cong. (1980). *See* David Boeck, *The Enterprise Zone Debate*, 16 URB. LAW. 71, 73 n.1 (1984). Under the Kemp-Garcia bill, local governments would identify areas containing 4,000 people or greater where the poverty rate was substantially higher than the national average. In addition, the local government was required to reduce real property taxes in the area by at least twenty percent. If federal designation was granted to an area, several incentives would be used to attract investment. Among these incentives were an increased capital gains deduction on zone assets, reduced social security taxes, a fifteen percent reduction in corporate income taxes, and capital equipment investment write-offs up to $500,000. *See* BUTLER, *supra* note 12, at 129-32.

19. *See, e.g.*, David E. Rosenbaum, *Reagan Calls His Version "Urban Enterprise Zones,"* N.Y. TIMES, Nov. 23, 1980, § 4, at 2. "Those who view poverty and unemployment as permanent afflictions of our cities fail to

partisan coalition and the President's consistent pleas for congressional support, two Reagan terms passed without the enactment of a federal enterprise zone program featuring even minimal tax or financial incentives.[20]

It was a different story altogether on the state level, for, by late 1983, eighteen states had enacted enterprise zone legislation.[21] As the 1990s began, more than thirty states had zone programs in operation, most featuring real property, sales and use, investment, and employer income tax breaks in addition to bond financing support for businesses in the zones.[22] While it was not uncommon to find anti-regulation rhetoric by the more conservative zone advocates, the reality was that state programs were responsible more for the repackaging and efficient delivery of government programs than for their outright elimination.[23]

State enterprise zones — in rural and suburban as well as inner-city locations — were usually selected in a heated competition among communities that featured high unemployment and levels of poverty. State lawmakers typically made zone incentives to new businesses and even to existing concerns that made solid commitments to increase employment and capital investment.

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understand how rapidly the poor can move up the ladder of success in our economy. But to move up the ladder, they must first get on it. And this is the concept behind the *enterprise zones.*" *Id.* (emphasis added).

20. In 1988, Reagan signed the Housing and Community Development Act of 1987, Pub. L. No. 100-242, 101 Stat. 1957 (1988) (codified as amended in scattered sections of 42 U.S.C.), authorizing the creation of up to one hundred federal enterprise zones; however, the Act was devoid of any tax or financial incentives. *See* Michael Allan Wolf, *An "Essay in Re-Plan": American Enterprise Zones in Practice*, 21 URB. LAW. 29, 37-38 (1989).

21. These states included Arkansas, Connecticut, Florida, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, Minnesota, Mississippi, Missouri, Nevada, Ohio, Oklahoma, Rhode Island, Texas, and Virginia. One additional state, Pennsylvania, offered a package of funding and incentives through administrative agencies. *See* Wolf, *supra* note 10, at 5.

22. By 1989, in addition to the aforementioned states, active zone programs were found in Alabama, Arizona, California, Colorado, Delaware, the District of Columbia, Georgia, Hawaii, Maine, Michigan, New Jersey, New York, Oregon, Tennessee, Utah, Vermont, West Virginia, and Wisconsin, making a total of 37. *See* Wolf, *supra* note 10, at 7.

23. *See* Wolf, *supra* note 20, at 42-46.

Enterprise zone champions in Congress and in the Reagan Administration were put to shame by this impressive array of non-federal activity.[24]

During the 1992 presidential election, in the wake of the fierce violence that swept through Los Angeles, each of the three major candidates promised that he would ensure the enactment of a federal enterprise zone program.[25] The winner of that contest, Bill Clinton, delivered on that promise in the spring of 1993, when he unveiled his proposal for the designation and implementation of federal enterprise zones; in August of that year, Congress responded with provisions of the Omnibus Budget Reconciliation Act that created empowerment zones (six urban and three rural) and enterprise communities (sixty-five urban and thirty rural).[26]

Competitors for the limited number of slots included hundreds of communities from throughout the nation, and, not surprisingly, as the selection day approached, administration officials faced intense lobbying.[27] Each of the six urban EZs —in

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24. *See id.* at 33-37.

25. George Bush proposed a $2.5 billion plan to create fifty zones throughout the country. His proposal included the elimination of capital gains taxes on zone property held for at least two years, tax deferments and refunds for low-wage zone employees. Bill Clinton's plan called for more zone designations, increased spending for infrastructure, and financing for small businesses. *See* ATLANTA CONST., Oct. 25, 1992, at G7. Ross Perot also spoke in favor of moving ahead on enterprise zones during the October 15, 1992, presidential debate at the University of Richmond, in Richmond, Virginia. *See Campaign '92: Transcript of the Second Presidential Debate (Part I)*, WASH. POST, Oct. 16, 1992, at A34.

26. On May 4, 1993, Clinton unveiled his plan to help the nation's distressed urban and rural areas. Known as the Economic Empowerment Act, this plan called for the creation of ten Empowerment Zones and one hundred Enterprise Communities. For an early account of the President's announcement, *see* Paul Richter, *Clinton Unveils Aid Plan for Poor Areas; Inner-Cities*, L.A. TIMES, May 5, 1993, at 23. In addition to the nine EZs and 95 ECs, Cleveland and Los Angeles were awarded Supplemental EZ status and four cities—Boston, Houston, Kansas City and Oakland—were designated as Enhanced ECs. *See id.*

27. There were seventy-four applicants for urban EZs and 218 communities vying for urban ECs. *See* Remarks on Empowerment

Atlanta, Baltimore, Chicago, Detroit, New York, and Philadelphia/Camden — announced on December 21, 1994,[28] received an initial injection of one hundred million dollars, eligibility for enhanced bond financing, and the ability to offer zone employers credits for hiring neighborhood residents.[29] The federal moneys directed to each urban EC approached three million dollars; the employer tax credits were not available.[30] More significant than these government grants or modest incentives, however, is the fact that several federal agencies (not just HUD, which has primary oversight responsibility for the designated urban communities) have singled out empowerment zones and enterprise communities for special treatment. That special treatment has included the creation of programs for which only federal enterprise zones are eligible;[31] targeting funding and technical assistance to federal enterprise zones and similarly situated, distressed communities;[32] and allowing "bonus points" for enterprise zone

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Zones and Enterprise Communities, 30 WEEKLY COMP. PRES. Doc. 2520, 2520-22 (Dec. 21, 1994); *White House Briefing*, Fed. News Service, Dec. 21, 1994, *available in* LEXIS, Nexis Library, fednew file (briefing by Assistant Housing and Urban Development (HUD) Secretary Andrew Cuomo).

28. *See* Wilton Hyman, *Empowerment Zones, Enterprise Communities, Black Business, and Unemployment*, 53 WASH. U.J. URB. & CONTEMP. L. 143, 155-56 & n.98 (1998).

29. *See id.* at 157-58.

30. *See id.* at 159. All ECs can issue tax-exempt facilities bonds and use the proceeds to make capital improvements within the area. *See id.* The four enhanced ECs — in Boston, Houston, Oakland, California, and Kansas City, Kansas/Kansas City, Missouri — received twenty-five million dollars each. *See HUD's December Announcement on Urban Empowerment Zones*, Tax Notes Today, Feb. 23, 1995, *available in* LEXIS, FEDTAX Library, tnt file.

31. For example, the Department of Labor, through its Job Training Partnership Act, has made certain grant money available exclusively to job training programs located in EZ/ECs. Job Training Partnership Act, 62 Fed. Reg. 17,871 (1997).

32. For example, the Department of Health and Human services, through its Job-Opportunities for Low-Income Individuals Program (JOLI), has earmarked funds to provide technical and financial assistance to businesses located in, among other areas, EZs and ECs. Administration for Children and Families, 62 Fed. Reg. 24,934 (1997).

applicants competing for agency assistance.[33] These programs run the federal regulatory gamut, including education, energy, transportation, community development, housing, and (most significantly for the purposes of this article) environmental protection.[34] While it is much too early to label the federal enterprise zone program a success or failure, recently the President successfully worked with Congress to make possible a second set of empowerment zone designations.[35]

B. *The Brownfields Challenge*

The abandoned factory building or industrial complex that dominates the inner-city landscape is a familiar feature of state and federal enterprise zones, particularly those in Rust Belt cities

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33. *See* Notice Inviting Applications for New Awards for Fiscal Year 1998, 63 Fed. Reg. 29,064 (1998) (Department of Education, through Training and Information for Parents of Children with Disabilities Program, awards ten bonus points to EZ programs); Notice of Funding Availability for the HUD Colonias Initiative (HCI) Fiscal Year 1998; Amendments and Extension of Application Deadline, 63 Fed. Reg. 42,550 (1998) (granting bonus points to EZ programs competing for funding through Colonias Initiative, a grant program for areas located along the U.S.-Mexico border).

34. In addition to the brownfields programs discussed in this essay, see, for example, Sustainable Development Challenge Grant Program, 63 Fed. Reg. 45, 156 (1998) (encouraging EZ/EC participation in Environmental Protection Agency (EPA) Sustainable Development Challenge Grant Program).

35. The Taxpayer Relief Act of 1997, Pub. L. No. 105-34, 111 Stat. 788 (codified as amended in scattered sections of 26 U.S.C.), enhances the EZ/EC program in several ways. The major modifications include incentives for education zones, the establishment of the District of Columbia Enterprise Zone, the designation of two "additional" urban Empowerment Zones (Cleveland and Los Angeles, chosen in January 1998), provisions for adding up to twenty "new" EZs (up to fifteen urban and up to five rural) by 1999, and changes to the criteria regarding incentives available to existing EZs and ECs. *See EZ Changes in the Taxpayer Relief Act of 1997* (visited June 25, 1999) <http://www.richmond.edu/~ezproj/taxbill.htm>. On January 13, 1999, Vice President Gore announced the "new" EZs. *See Vice President Gore Announces 20 Empowerment Zones* (visited June 25, 1999) <http://www.hud.gov/pressrel/pr99-03.html>.

of the Northeast and Midwest. There are many reasons why tens, if not hundreds, of thousands of these sites remain out of commission, posing real or potential environmental hazards to local and nearby residents, lurking as attractive nuisances for neighborhood children, serving as illegal housing for the urban homeless, and preventing local governments from realizing their full revenue potential. The explanations include daunting crime and property insurance rates, inadequate municipal services and inferior educational systems (especially when compared with competing suburbs and exurbs in the metropolitan region), high real property tax rates, crumbling infrastructure, and technological obsolescence.[36] Over the past two decades, however, one significant hurdle above all others has been cited by owners and developers of abandoned, urban, industrial sites: a profound fear of liability under a comprehensive agglomeration of federal and state environmental statutes and regulations.[37]

The chief culprits are the federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)[38] and its numerous state counterparts,[39] laws that feature expansive liability provisions (including retroactive application, joint and several liability, and strict liability), broad definitions of hazardous substances and releases thereof, a wide range of potentially responsible parties ("PRP's"), extremely narrow defenses, and exorbitant cleanup requirements and costs.[40] The vast majority of brownfields that sit as unproductive hulks in the nation's impoverished neighborhoods cannot be found either on the National Priorities List (the compendium of sites targeted for extensive,

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36. *See* Eisen, *supra* note 2, at 895, 913-14. *See also* Paul Skanton Kibel, *The Urban Nexus: Open Space, Brownfields, and Justice*, 25 B.C. ENVTL. AFF. L. REV. 589, 598 (1998).

37. *See* Eisen, *supra* note 2, at 898; *see also* Patrick J. Skelley II, *Public Participation in Brownfield Remediation Systems: Putting the Community Back on the (Zoning) Map*, 8 FORDHAM ENVTL. L.J. 389, 389-90 (1997).

38. 42 U.S.C. §§ 9601-9675 (1994).

39. Almost every state has hazardous waste cleanup statutes with regulatory schemes resembling CERCLA. *See* Eisen, *supra* note 2, at 900 n.74.

40. For a comprehensive introduction to CERCLA's elements and nuances, see Rodgers, *supra* note 6, at §§ 8.1-8.8.

Superfund-financed remediation)[41] or on the CERCLIS list of sites under investigation by federal authorities for possible remediation.[42] However, two factors give pause to owners and developers of abandoned industrial parcels: the profound uncertainty regarding the extent of environmental contamination on and below the surface, and the immense potential risk to humans and the environment posed by industrial activities and waste disposal that continued unabated until the dawn of widespread public awareness and comprehensive federal regulation in the 1970s.

The early history of CERCLA was checkered, to say the least. In the 1980s, two criticisms dominated the Superfund story — first, that federal regulators were overly friendly to the regulated parties targeted by the Act;[43] second, that too high a percentage of Superfund monies was being spent on program administration and legal fees and too little on actual cleanup.[44] Meanwhile, judi-

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41. Sites listed on the NPL are given top priority in CERCLA cleanup efforts. Moreover, only sites listed on the NPL are eligible for remedial actions financed by the Superfund. *See* 40 C.F.R. § 300.425(b)(1) (1998).

42. *See* 40 C.F.R. § 300.5 (1998)(defining CERCLIS). "CERCLIS is the abbreviation of the CERCLA Information System, EPA's comprehensive data base and data management system that inventories and tracks releases addressed or needing to be addressed by the Superfund program. CERCLIS contains the official inventory of CERCLA sites and supports EPA's site planning and tracking functions." *Id. See also* Eisen, *supra* note 2, at 901.

43. In the early to mid-1980's, the EPA came under fire from all sides, including Congress, environmental groups, and the media. *See, e.g., Environmental Agency: Deep and Persisting Woes*, N.Y. TIMES, Mar. 6, 1983, at 1. Amid allegations of mismanagement and political favoritism with respect to Superfund and other environmental programs, EPA Administrator Anne Gorsuch Burford resigned on March 9, 1983. *See* Mary Thornton, *Burford Goes Proudly, and Seemingly, with Relief*, WASH. POST, Mar. 11, 1983, at A1. *See also* Ronald L. Claveloux, *The Conflict Between Executive Privilege and Congressional Oversight: The Gorsuch Controversy*, 1983 DUKE L.J. 1333 (1983).

44. One commentator notes that CERCLA is a "statute that undoubtedly has engendered as much criticism concerning government effectiveness and efficiency as any other environmental law passed in this country." David L. Markell, *Superfund Reauthorization: "Reinventing Government": A Conceptual Framework for Evaluating the Proposed Superfund*

cial interpretations of CERCLA, as amended and strengthened by the Superfund Amendments and Reauthorization Act of 1986 (SARA),[45] reiterated the expansiveness of the act's liability provisions.[46]

By the 1990s, the federal government was doing a better job of locating and remediating many of the nation's most notorious hazardous waste sites.[47] Even so, there was growing recognition that a widespread fear of CERCLA strictures (and those of corresponding state laws) was having a chilling effect on urban redevelopment[48] and that brownfields reuse would be fruitful territory for experimentation with the new, incentives-driven approach to environmental regulation championed by President Clinton, Vice President Al Gore, and EPA Director Carol Browner.[49] As in the area of enterprise zones, however, the bulk

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Reform Act of 1994's Approach to Intergovernmental Relations, 24 ENVTL. L. 1055, 1056 (1994).

45. 42 U.S.C. § 9607.

46. *See, e.g.*, Rodgers, *supra* note 6, at §§ 8.7-8.8.

47. *See id.* at § 8.4 (noting that by 1993, over 37,000 sites were listed on CERCLIS). Professor Eisen reports that, "[i]n February 1995, . . . the EPA deleted approximately 25,000 of these sites from the CERCLIS list; it announced its intent to delete another 3,300 sites in 1996 as part of a package of Superfund administrative reforms." *See* Eisen, *supra* note 2, at 980 (footnotes omitted). Another commentator notes: "Many critics of CERCLA are convinced that CERCLA has been an utter failure. Critics focus on the expense of the program and argue that, after more than twelve years and $12 billion, only 220 of the currently identified 1200 sites have been cleaned." Frona M. Powell, *Amending CERCLA to Encourage the Redevelopment of Brownfields: Issues, Concerns, and Recommendations*, 53 WASH. U. J. URB. & CONTEMP. L. 113, 121 (1998). CERCLA supporters, however, note that CERCLA has made considerable progress in cleaning up hazardous waste sites. . . . Despite the fact that such cleanup is a slow and difficult process, as of September 1996 groundwater remediation had been completed at 410 NPL sites. Moreover, through September 1996, the EPA had conducted 4,023 removal actions; 1,226 at NPL sites and 2,797 at non-NPL sites. *Id.* at 122 (footnotes omitted).

48. For anecdotal evidence of this effect see Julia A. Solo, Comment, *Urban Decay and the Role of Superfund: Legal Barriers to Redevelopment and Prospects for Change*, 43 BUFF. L. REV. 285, 296-99 (1995).

49. This incentives-driven approach is embodied in the Common Sense Initiative developed by the EPA. *See Common Sense Initiative* (vis-

of that experimentation to date has taken place on the state level.

Professor Joel Eisen, my colleague and one of the nation's leading brownfield "gurus," has done a masterful job of collating and analyzing the voluntary cleanup programs found in roughly forty states.[50] While, as with enterprise zones, there are some variations, these programs typically feature provisions that prescribe site investigation procedures, streamline cleanup procedures, provide assurances to lenders and developers that liability (at least under state laws) will be limited, describe the level of government oversight, and mandate public participation.[51] The crux of the program is the departure from the demanding cleanup standards applicable to Superfund remediations:[52]

> Brownfield redevelopment advocates . . . say Superfund's cleanup standards are too strict. They believe that cleanup standards are based on inaccurate and unrealistic assumptions about the risks posed by hazardous waste that overestimate the true risks posed by Superfund sites and produce overly stringent cleanups, particularly because cleanups are required to meet residential standards at all sites. If this view is correct, standards could be relaxed without increasing the actual threat to human health and the environment. This is particularly true in the brownfield context, many say, given the intended use of most property for industrial or commercial purposes.[53]

The relaxation of cleanup standards is the element that makes state brownfields programs most attractive to developers and their lenders and most distressing to a small, but vocal, group of critics who are not prepared to take the slight chance of increased exposure to harmful contaminants.[54]

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ited June 25, 1999) <http://www.epa.gov/csi>. *See* Michael C. Dorf and Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 385-87 (1998).

50. *See* Eisen, *supra* note 2.

51. *See generally* GERRARD, *supra* note 1.

52. *See* Comprehensive Environmental Response Compensation and Liability Act (CERCLA) § 121, 42 U.S.C. § 9621 (1994).

53. Eisen, *supra* note 2, at 909-10 (footnotes omitted).

54. *See, e.g.*, Terry J. Tondro, *Reclaiming Brownfields to Save Greenfields: Shifting the Environmental Risks of Acquiring and Reusing Contaminated Land*, 27 CONN. L. REV. 789, 801 (1995).

A primary claim of environmental equity advocates is that

Brownfield reformers offer three chief alternatives to the top-dollar, site-specific "Cadillac" cleanups[55] encountered in the federal Superfund arena: (1) allowing cleanups to meet "generic numerical statewide standards" that may include permitting higher levels of contamination to remain on the parcels designated for nonresidential uses;[56] (2) applying "site-specific standards" that may raise the allowable level of risk for carcinogens over that permitted in CERCLA cleanups and that often tie the degree of remediation to proposed or anticipated future uses of the brownfield property;[57]and (3) using "background standards," whereby the developer is required "to return the property to the condition it would have been in if the contamination associated with the previous use of the site had not occurred."[58] These departures from CERCLA remediation norms, along with more efficient program administration, financial incentives, and limitations of state liability, have provided the proper climate for a modicum of on-site brownfield reuse activity.[59]

To date, while there have been congressional proposals to

> contaminated Brownfield sites have been deliberately located in low income communities. Differential clean-up standards, if set at a level lower than some "ideal" standard, can readily be characterized as continuing this discrimination against poor and minority communities, shifting to them part of the costs of cleaning up Brownfields (in the sense that a Brownfield does not get completely cleaned-up).

Id. at 801.

55. *See* Zygmunt J.B. Plater, *Facing a Time of Counter-Revolution: The Kepone Incident and a Review of First Principles*, 29 U. RICH. L. REV. 657, 696 (1995). "Can we . . . afford the luxury of 'Cadillac cleanups' of CERCLA toxic contamination sites to the point that the soil can be eaten?" *Id.* at 696. Professor Plater notes that such cleanups "occur because, at least where toxic cleanups at someone else's expense are concerned, neighbors and government officials tend to opt for the most protective and hence most expensive cleanup standards." *Id.* at 696 n.96. For a case in which experts argued over the number of days children would eat soil on a remediated parcel, *see* United States v. Ottati & Goss, Inc., 900 F.2d 429, 441 (1st Cir. 1990).

56. Eisen, *supra* note 2, at 939-42.

57. *Id.* at 942-43.

58. *Id.* at 945.

59. *Id.* at 990 n.478 (discussing modest cleanup efforts in Pennsylvania and Minnesota).

complement and enhance state programs,[60] federal brownfields initiatives have been much more circumspect and limited than state legislative and regulatory activity. In early 1995, EPA Administrator Browner announced the agency's "Brownfields Action Agenda,"[61] highlighting four areas of extant and anticipated activity: "Brownfields Pilots" (states and localities targeted to receive up to $200,000 each to test safe and effective ways to redevelop abandoned, contaminated sites),[62] "Clarification of Liability and Cleanup Issues" (exploring ways to provide guidance and assurances to developers, lenders, and prospective purchasers), "Partnerships and Outreach" (emphasizing intergovernmental cooperation and involvement with community organizations), and "Job Training and Development" (educating and training local residents for employment opportunities made possible by brownfields remediation).[63]

In March of 1998, the EPA outlined its "Brownfields Economic Redevelopment Initiative,"[64] a multi-faceted strategy that (according to a description overly-indulgent in the patois of 1990s urban redevelopment) "is designed to empower States, cities, Tribes, communities, and other stakeholders in economic redevelopment to work together in a timely manner to prevent, assess, safely clean up, and sustainably reuse brownfields."[65] The agency updated its activities in the four areas featured in the Action Agenda (for example, funding for 121 pilot programs with plans for one hundred more in fiscal year 1998, and the "archiving" of about 30,000 sites from the CERCLIS inventory).[66] In addition,

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60. *See, e.g.*, Superfund Reform Act, H.R. 3000, 105th Cong. (1997); Superfund Cleanup Acceleration and Liability Equity Act, H.R. 2750, 105th Cong. (1997); Superfund Cleanup Acceleration Act of 1997, S. 8, 105th Cong. (1997).

61. U.S. ENVIRONMENTAL PROTECTION AGENCY, *The Brownfields Action Agenda* (visited June 25, 1999) <http://www.epa.gov/swerosps/bf/ascii/action.txt> [hereinafter *Brownfields Agenda*].

62. Since 1995, the EPA has funded 228 pilots with over forty-two million dollars. *See Showcase Communities Press Release* (visited June 25, 1999) <http://www.epa.gov/swerosps/bf/html-doc/pr071598.htm>.

63. *See Brownfields Agenda, supra* note 61.

64. U.S. ENVIRONMENTAL PROTECTION AGENCY, BROWNFIELDS ECONOMIC REDEVELOPMENT INITIATIVE: QUICK REFERENCE FACT SHEET 1 (1998) [hereinafter BROWNFIELDS FACT SHEET].

65. *Id.*

66. *Id.*

the report notes several "other milestones," two of which — the Brownfields Tax Incentive[67] and the Brownfields Showcase Communities[68] — have direct ties to federal enterprise zones.

The Taxpayer Relief Act,[69] signed by President Clinton on August 5, 1997, allows taxpayers in certain targeted areas the advantage of deducting environmental cleanup expenses in the year they are incurred (rather than capitalizing them over what could be an extended amount of time).[70] Those targeted areas are limited to four groups: federal empowerment zones and enterprise communities, along with census tracts with at least twenty percent of the residents at the poverty level, industrial and commercial areas adjacent to those high-poverty neighborhoods, and Brownfields Pilots selected before February, 1997.[71]

There is an even closer consanguinity between enterprise zones and Brownfields Showcase Communities, an ambitious interdepartmental effort designed to create "models demonstrating the benefits of collaborative activity on brownfields."[72] According to the press release describing Vice President Gore's announcement of the winners in a nationwide competition, "The 16 communities . . . will receive about $28 million in funding and coordinated technical assistance from 15 federal agencies for environmental cleanup and economic revitalization as part of the Administration's Brownfields National Partnership — the single, largest federal commitment to clean up and redevelop

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67. *See* Taxpayer Relief Act of 1997, 26 U.S.C. § 2503 (1981).

68. On March 17, 1998, Vice President Gore announced the selection of 16 Brownfields Showcase Communities. The winning cities, regions, and states were Baltimore; Chicago; Dallas; East Palo Alto, California; Glen Cove, New York; Kansas City, Kansas/Kansas City, Missouri; Los Angeles; Lowell, Massachusetts; Portland, Oregon; Rhode Island; St. Paul, Minnesota; Salt Lake City; Seattle; Stamford, Connecticut; Southeast Florida; and Trenton. A partnership of federal agencies will provide funding and technical assistance to help spur economic redevelopment of brownfields. *See Cuomo Applauds Gore's Plan to Showcase 16 Communities for Brownfields Assistance*, U.S. NEWSWIRE, Mar. 17, 1998, *available in* 1998 WL 5683883 [hereinafter *Cuomo Applauds*].

69. Taxpayer Relief Act of 1997, Pub. L. No. 105-34, 111 Stat. 788 (codified as amended in scattered sections of 26 U.S.C.).

70. *See id.*

71. *See id.*

72. BROWNFIELDS FACT SHEET, *supra* note 64, at 2.

brownfields."[73] The interagency brownfields partnership is an outgrowth of the Clinton Administration's Community Empowerment Agenda;[74] the inter-agency Community Empowerment Board, chaired by Gore, has committed significant resources to federal EZs and ECs.[75] Indeed, the process used to select, and the benefits provided to, Brownfields Showcase Communities have much in common with the federal enterprise zone program.

These two federal programs have even more in common. HUD Secretary Andrew Cuomo was pleased to report that eleven of the showcase competition winners were located in federal urban enterprise zones: three in EZs (Baltimore, Chicago, and Los Angeles), one in the Kansas City, Kansas/Kansas City, Missouri Enhanced EC, and seven in ECs (Dallas, Lowell, Massachusetts, Portland, Oregon, Providence, St. Paul, Seattle, and Miami/Dade County, Florida).[76] As envisioned by the creators of this new program, therefore, EZ and EC residents would be intimately involved with (and affected by) efforts to "[p]romote environmental protection and restoration, economic redevelopment, job creation, community revitalization, and public health protection, through the assessment, cleanup, and sustainable reuse of brownfields."[77] The federal government has not yet given its blanket approval to state voluntary cleanups at less-than-

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73. *Vice President Gore Names 16 "Showcase Communities" Under "Brownfields" Program* (visited June 25, 1999) <http://www.epa.gov/swerosps/bf/html-doc/pr_show.htm>.

74. *See Fact Sheet: Clinton Administration Expands Brownfields* (last modified May 15, 1997) <http://www.epa.gov/swerosps/bf/html-doc/wh0513_3.htm>.

75. *See The President's Community Empowerment Board* (visited June 25, 1999) <http://www.ezec.gov/About/ceb_des.html>.

76. *See Cuomo Applauds, supra* note 68. "Brownfields often sit as prime real estate in the heart of Empowerment Zones and Enterprise Communities. In their day, these brownfields were the engines of America's urban greatness. Today, they can be a vessel for America's urban renewal — if we work together." *Id.*

77. Brownfields Showcase Communities, 62 Fed. Reg. 44,274, 44,275 (1997).

Superfund levels,[78] so government-financed remediations may predominate in these target areas. Some members of Congress, however, have more ambitious plans for making compliance with state voluntary cleanup programs (and their less-demanding standards) a crucial part of CERCLA reform.

Consider, for example, the following selections from H.R. 3000, the "Superfund Reform Act,"[79] introduced by Representative Mike Oxley (Republican from Ohio) on November 9, 1997. Among the findings contained in Title III of the bill (the "Land Recycling Act of 1997") are two strong endorsements of state activities:

(6) Many States have enacted voluntary cleanup programs to address the brownfields problem by allowing for the consideration of future land use in deciding appropriate cleanup stan-

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78. The federal government, while stopping short of unqualified devolution, has sent some very positive signals regarding state voluntary cleanup programs. Professor Robert Abrams notes that there are

> at least six different programmatic efforts already well underway and in support for legislative modification of CERCLA to encourage Brownfields redevelopment. Three of the EPA initiatives speak directly to developers and lenders. These are the revised lender liability rule, prospective purchaser agreements ("PPAs"), and the issuance of "comfort letters." The fourth, speaks to the community generally, removing more than twenty thousand sites from the lower reaches of the Comprehensive Environmental Response, Compensation and Liability Information System ("CERCLIS") thereby disclaiming federal interest in them. The fifth speaks to the states through the Memorandum of Agreement ("MOA") program under which EPA turns over primary authority to the states whose agencies adopt voluntary cleanup programs that meet certain guidelines. Finally, the sixth is the funding of hundreds of small demonstration projects from which successful models for Brownfields redevelopment can be drawn.

Robert H. Abrams, *Superfund and the Evolution of Brownfields*, 21 WM. & MARY ENVTL. L. & POL'Y REV. 265, 275-76 (1997) (footnotes omitted). EPA's Office of Solid Waste and Emergency Response (OSWER) has collected several of the key government documents governing MOAs, PPAs, and comfort letters. *See Brownfields-Related Law and Regulations* (last modified Oct. 19, 1998) <http://www.epa.gov/swerosps/bf/gdc.htm>.

79. Superfund Reform Act, H.R. 3000, 105th Cong. (1997).

dards and providing clear releases of liability upon completion of cleanups.

(7) State voluntary response programs have been very effective in promoting the cleanup and redevelopment of brownfields while ensuring the adequate protection of human health and the environment.[80]

The heart of the matter, though, is the following language that would shield the owners of state-approved, remediated brownfields from significant federal liability:

> (a) PROHIBITION ON ENFORCEMENT — Except as otherwise provided in this section, neither the President nor any other person (other than a State) may use any authority of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9601 et seq.) or of the Solid Waste Disposal Act (42 U.S.C. 6901 et seq.) to commence an administrative or judicial action under either of those Acts with respect to any release or threatened release at a facility that is, or has been, the subject of a voluntary response plan in a State that meets the requirements of subsection (b).
>
> (b) STATE REQUIREMENTS — The prohibition in subsection (a) applies with respect to a facility in a State only if the State submits to the Administrator of the Environmental Protection Agency a certification that the State has enacted into law a voluntary response program, that the State has committed the financial and personnel resources necessary to carry out such program, and that such program will be implemented in a manner protective of human health and the environment.[81]

These provisions (and similar proposals in other CERCLA reform bills[82]) have their strong supporters, heartened by the prospect of renewal of long-neglected parcels.[83] There are also equally strong critics, who are concerned by the prospect that this example of deferral to the states will mean higher risks of significant harm for inner-city populations, and who fear that the devolution of brownfields cleanup to state voluntary programs is the first step toward watering down the overall effectiveness of CERCLA.[84]

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80. *Id.* at § 302(6), (7).

81. *Id.* at § 303.

82. *See, e.g.*, Superfund Cleanup Acceleration Act of 1997, S. 8, 105th Cong. 103 (1997).

83. *See, e.g.*, Powell, *supra* note 47, at 127-41.

84. Professor Eisen cautions that "[t]he transition away from the

If the movement to allow state voluntary cleanup programs to receive CERCLA "immunity" is successful, and if the federal government continues to target federal enterprise zones for cooperative, intergovernmental (that is, federal, state, and local) cleanup efforts, there is a great likelihood that EZ and EC residents will end up living near, and working on, brownfield sites that have been remediated in accordance with more "realistic," land-use-based standards than those employed in Superfund cleanups.

As the 1990s draw to a close, the federal government, while building on and complementing state experimentation with incentives designed to foster sustained economic growth, is taking a more active role in two key areas of urban redevelopment enterprise zoning and brownfields reuse. While this growing commitment has created some exciting prospects for residents of impoverished urban neighborhoods with high concentrations of minority residents, there are as well some serious questions regarding the exposure of that population to increased risk of serious environmental harm.

II. THE ENVIRONMENTAL JUSTICE DOUBLE BIND

It is undeniable that America's central cities house a very high concentration of minority residents, and that those residents live, work, recreate, and are schooled in or near neighborhoods marked by high levels of environmental contamination.[85] While pundits will most likely continue to argue over the genesis of this correlation (that is, to debate the existence and extent of environmental racism[86]), and while more and more empirical studies and counter-studies are published by and circulated among academics and political and community activists,[87] thousands of

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rigorous cleanup standards of the regulatory regime . . . is prompting the states to move too far to relax cleanup standards and requirements for contaminated sites, jeopardizing public health and safety." Eisen, *supra* note 2, at 1031.

85. *See, e.g.*, Kibel, *supra* note 36, at 589-90.

86. For a helpful introduction and analysis of the leading literature on environmental justice, see Lynn E. Blais, *Environmental Racism Reconsidered*, 75 N.C. L. REV. 75 (1996).

87. *See, e.g.*, Vicki Been & Francis Gupta, *Coming to The Nuisance or Going to the Barrios? A Longitudinal Analysis Of Environmental Justice*

American persons of color live in fear (or in blissful ignorance) of a contamination time-bomb that might explode today or in the distant, hereditary future.

Thanks to a growing body of literature by lawyers and social scientists, the future of brownfields reuse is now firmly entrenched in the debate over environmental justice.[88] Those concerned about the prospect of "churning contaminated soils" as part of an urban redevelopment strategy have cautioned public decisionmakers about the relaxed cleanup standards that make brownfields programs most attractive to the real estate development sector.[89] There has even been the suggestion that government should foot the (very steep) bill for converting brownfields into hospitals and parks.[90]

At the other end of the public policy spectrum, urban redevelopment advocates and owners and potential purchasers of abandoned urban industrial parcels emphasize that these properties are a far cry in terms of actual contamination and reasonably anticipated risk of harm from the toxic hot-spots targeted by federal and state regulators, particularly if their reuse is limited to industrial or commercial pursuits.[91] In between these two ex-

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Claims, 24 ECOLOGY L.Q. 1 (1997). For a discussion of the leading empirical studies on the topic, *see id.* at 5-9.

88. *See, e.g.*, Stephen M. Johnson, *The Brownfields Action Agenda: A Model for Future Federal/State Cooperation in the Quest for Environmental Justice*, 37 SANTA CLARA L. REV. 85 (1996); McWilliams, *supra* note 2; Samara F. Swanston, *An Environmental Justice Perspective on Superfund Reauthorization*, 9 ST. JOHN'S J. LEGAL COMMENT 565 (1994).

89. *See, e.g.*, Eisen, *supra* note 2, at 1031-32.

90. A National Wildlife Federation (NWF) representative "stated that many affected communities did not want 'repollution,' but instead want 'parks and hospitals on those sites.'" Eisen, *supra* note 2, at 1004 n.552 (quoting Patricia Williams, legislative representative of the NWF).

91. *See, e.g.*, McWilliams, *supra* note 2, at 706 n.1.

> Urban redevelopment advocates include local and state officials, such as mayors and governors, city planners, and local economic development officials, who are charged professionally or politically with the economic revitalization of urban areas. As these public servants expressed their frustration with the pace and expense of environmental cleanup at old industrial sites, they undoubtedly found business leaders, developers, and their lawyers and bankers will-

tremes are the true believers in sustainable urban development — a growing body of observers who embrace the notion that there are ways to please both sides, that is, to accommodate the deep desire for economic growth in the inner-city and the need to protect human health and assure a cleaner urban environment for current and future generations.[92]

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ing to commiserate about environmental impediments to urban redevelopment.

Id.

92. *See, e.g.*, Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) or Superfund, § 101, 42 U.S.C. §§ 9601-9675 (1994); Announcement of Proposal Deadline for the Competition for the 1998 National Brownfields Assessment Demonstration Pilots, 62 Fed. Reg. 52,720 (1997). "EPA seeks to identify applications that demonstrate the integration or linking of brownfields assessment pilots with other federal, state, tribal, and *local* sustainable development, community revitalization, and pollution prevention programs. Special consideration will be given to Empowerment Zones and Enterprise Communities (EZ/ECs) and communities with populations of under 100,000." *Id.* at 52,720 (emphasis added).

Professor Ruhl offers this introduction to the origins of the ubiquitous notion of "sustainable development":

> [T]he 1987 World Commission on the Environment and Development, better known as the Brundtland Commission, named after its chairperson, . . . defined sustainable development as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs." At the core of this concept is "[a] process in which the exploitation of resources, the direction of investments, the orientation of technological development and institutional change are all in harmony and enhance both current and future potential to meet human needs and aspirations." The Brundtland Commission thus pulled together environmental, social, and economic agendas into a concise statement with a strong normative theme in which no one of these agendas predominates and all three agendas focus on intergenerational sustainability. The increasing use of the label — sustainable development — allows its advocates to avoid the need to explain what lies behind it.

J.B. Ruhl, *The Seven Degrees of Relevance: Why Should Real-World Environmental Attorneys Care Now about Sustainable Development Policy?*, 8 DUKE ENVTL. L. & POL'Y F. 273, 277-78 (1998) (footnotes omitted) (quoting WORLD COMM'N ON ENV'T AND DEV, OUR COMMON FUTURE (1987)). He

Unfortunately, central city residents, many of whom live in current and soon-to-be-designated federal enterprise zones, are caught in a double bind. First, there is very little likelihood that today, or in the foreseeable future, federal or state elected officials will decide to pay the multi-billion dollar bill to clean up hundreds of thousands of brownfields to Superfund standards. Therefore, if we continue to see no or comparatively little effort to address the problem of abandoned industrial sites, urban residents will continue to face an unacceptably high level of environmental risk. Second, recycling brownfields according to the most popular voluntary state model means that cleanups will not be required to meet the most rigorous standards. Therefore, the exposure rate for residents nearby will continue to exceed those of other, more affluent (and politically effectual) Americans. For a society that prides itself on justice for all, neither situation is tolerable.

All indications are that, barring a catastrophe that would garner national attention, the trend toward modifying cleanup standards is not likely to be reversed in the foreseeable future. First, as evidenced by the welfare reform movement, devolution to state regulators is a public policy that is advanced and admired by Republicans and Democrats alike.[93] Second, the private development, real estate, and commercial sectors are avid supporters of realistic proposals for brownfields reuse.[94] Third, state officials are confident in their ability to monitor cleanup procedures and anxious to see urban redevelopment efforts proceed.[95]

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also notes that "any doubt that sustainable development is a widely discussed topic is quickly dispelled by plugging 'sustainable development' into any Internet search engine, which produces thousands of 'hits' evidencing the grass-roots level and international scope of sustainable development dialogue." *Id.* at 277 n.6. *See also* Joel B. Eisen, *Brownfields Policies for Sustainable Cities*, 9 DUKE ENVTL. L. & POL'Y F. 187 (1999).

93. *See, e.g.*, Mary L. Heen, *Welfare Reform, Child Care Costs, and Taxes: Delivering Increased Work-Related Child Care Benefits to Low-Income Families*, 13 YALE L. & POL'Y REV. 173, 174 n.2 (1995).

94. *See* William W. Buzbee, *supra* note 2, at 47-52 (noting that private parties have a substantial interest in state programs that provide certainty and finality).

95. In discussing the effectiveness of state voluntary cleanup programs in Minnesota, Missouri, and Kansas, the attorneys general of

In addition, there are very few prospects for a "new SARA,"[96] that is, an overhaul of CERCLA that increases enforcement mechanisms, strengthens cleanup standards, and provides significant new federal funding for top-down, federally supervised or authorized remediations of non-NPL and non-CERCLIS sites. Even in a time of budget surpluses (real or on paper), there is little likelihood that a Republican-dominated Congress will approve more expenditures in this area, that a President and Vice President who pride themselves on reinventing and shrinking the federal government would propose a significant bureaucratic expansion at the expense of state voluntary cleanup programs, and that the administration would put all of its environmental program improvements in this one (costly) basket, at the expense of other, pressing concerns (for example, new clean air[97] and clean water[98] initiatives, and the rescue and reauthorization of endangered species protections[99]).

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these states note:

> [T]here is a developing partnership between U.S. EPA, states, and local governments that will improve the chance of success with more and more brownfields projects. This partnership between EPA and the states has been built upon a recognition by EPA that states are the pioneers and the leaders in voluntary clean-up programs. As this partnership continues to develop, it is important for the agency to focus on policies that allow states with successful programs the freedom to continue their work and then assist new programs to grow; EPA must be careful not to impose federal criteria or policies that will constrain or limit successful state programs.

Hubert H. Humphrey, III, et al., *Brownfields Legislation: Three States' Experiences*, 12 NAT'L ENVTL. ENFORCEMENT J. 3, 4 (1997).

96. Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (1986) (codified as amended in scattered sections of 10 U.S.C., 26 U.S.C., and 42 U.S.C.).

97. *See, e.g., Unified Air Toxics Website: Urban Air Toxics Program Development* (last modified July 1, 1999) <http://www.epa.gov/ttn/uatw/urban/urbandev.html>.

98. *See, e.g., Clean Water Initiative: Restoring and Protecting America's Waters* (last modified May 26, 1999) <http://www.cleanwater.gov>.

99. *See, e.g.*, May 6, 1998, *Babbitt Announces New Policy & Plans to "Delist" Endangered Species, News Release* (visited June 25, 1999) <http://www.fws.gov/r9extaff/delstvnt.html>.

We have grown accustomed to the notion of "Cadillac cleanups" for NPL sites, using Superfund dollars. When we move down the hierarchy from the nation's most notorious contaminated parcels to the overwhelming majority of brownfield sites found in the nation's central cities, however, there are tremendous pressures to settle for "SUV (sport utility vehicle) cleanups," less pricy remediations that are trendy, yet eminently functional. If lawmakers continue to make concessions to those pressures, at a minimum environmental justice means that there must be in place, before the fact, a package of significant, though not unnecessarily onerous, legal protections to mitigate the potential for serious harm to sensitive and vulnerable populations.

III. THE PUBLIC PARTICIPATION PANACEA?

While notice and comment and public hearing provisions are found in a number of state voluntary cleanup programs, public participation is not a universal feature.[100] In the conclusion to his exhaustive study of state brownfield experimentation, Professor Eisen counsels:

> The states must provide for meaningful opportunities for community input in the process, both in the planning stage and during the cleanup process. The suspect legitimacy of the states' decision making under voluntary cleanup statutes should be addressed by increased public participation in statewide decision-making bodies. . . . Finally, the EPA should be given authority to disapprove of a state's program if it does not impose protective cleanup standards or provide for effective community input.[101]

Commentators who urge caution in brownfields reuse emphasize the need for meaningful public involvement at every conceivable stage: from setting cleanup standards through site evaluation and reuse of the site.[102]

There is even strong sentiment that public participation is the public policy component that most efficiently addresses environ-

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100. *See* Eisen, *supra* note 2, at 972-77.

101. *Id.* at 1031-32.

102. *See* McWilliams, *supra* note 2, at 773-77; Skelley, *supra* note 37, at 392-93.

mental justice concerns. In 1995, a series of "Public Dialogues on Urban Revitalization and Brownfields: Envisioning Healthy and Sustainable Communities"[103] was held in five cities, sponsored by the National Environmental Justice Advisory Council (NEJAC) Waste and Facility Siting Subcommittee and the EPA.[104] The first recommendation that emerged from these meetings, designed to "provide for the first time an opportunity for environmental justice advocates and residents of impacted communities to systematically provide input regarding issues related to the EPA's Brownfields Economic Redevelopment Initiative,"[105] centered on "Informed and Empowered Community Involvement":

> Early, ongoing, and meaningful public participation is the hallmark of sound public policy and decision making. The community most directly impacted by a problem or project is inherently qualified to participate in the decision-making process. Mechanisms must be established to ensure their full participation, including training and support for community groups, technical assistance grants, community advisory groups, and others.[106]

Unfortunately, developers, local government officials, and landowners will be quick to point out that providing generous opportunities for public input could inordinately delay and ultimately stymie many worthwhile projects. In other words, as public access to the decision-making process widens, so do the chances that the brownfields reuse process will be "NEPA-ized,"[107] that is,

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103. U.S. ENVIRONMENTAL PROTECTION AGENCY, ENVIRONMENTAL JUSTICE, URBAN REVITALIZATION, AND BROWNFIELDS: THE SEARCH FOR AUTHENTIC SIGNS OF HOPE 1 (1995).

104. *See id.* at es-i.

105. *Id.*

106. *Id.* at es-iii.

107. "Public participation is a hydra-headed theme of environmental law, and it long has been a conspicuous landmark of the NEPA landscape." RODGERS, *supra* note 6, § 9.1, at 814. *See also Stephen M. Johnson, NEPA and SEPA's in the Quest for Environmental Justice*, 30 LOY. L.A. L. REV. 565 (1997):

> The NEPA environmental review process is time-consuming, and citizens can delay it through litigation if the government does not fully comply. For instance, if the government attempts to take an action that disparately impacts a minority or low-income community without preparing an EIS or an EA, and NEPA requires the government to prepare one of

plagued with so many time-consuming and costly delays that the project is abandoned.

Besides delay, there are two other fundamental reasons why it is unwise to place too much reliance on increased public participation as the panacea for environmental justice and other public health concerns.[108] These reasons are illustrated by two questions. First, residents in the vicinity of the brownfield reuse site should ask, "Who speaks for me and does anyone have to listen?" Second, public health officials should ask, "Who speaks for future residents (newcomers both alive and unborn)?"

The first inquiry highlights the serious problems posed by relying on elected officials and, to a lesser (but still significant) extent on community-based organizations, many of which develop specific agendas that are not universally shared or, as they become more and more successful and "legitimate," stray too far from their roots. We can learn a lot about the difficulties of achieving effective public participation in the urban redevelopment and revitalization arena from the first round of federal urban empowerment zone nominations and selections. Government regulators urged applicant cities to involve local residents and community organizations in meaningful ways in a wide range of decisions, including those regarding proposed boundaries for the nominated zone, goals for the zone, and allocation of funds directed to the zone.[109] Moreover, program designers

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> those documents, representatives of the community can sue the government to force compliance. Similarly, if the government prepares an inadequate EA or EIS, representatives of the community can file suit to challenge the document.

Id. at 578-79 (footnotes omitted).

108. In a recent provocative article, Professor Gauna "advocates an 'environmental justice style' public participation model as a more promising approach because it calls for a recasting of the role of community participation in environmental decision-making — a recasting which transcends traditional, modern, and proposed decision-making paradigms." Eileen Gauna, *The Environmental Justice Misfit: Public Participation and the Paradigm Paradox*, 17 STAN. ENVTL. L.J. 3, 5 (1998).

109. When HUD Secretary Andrew Cuomo was Assistant HUD Secretary for Community Planning and Development, he wrote: "HUD recognizes the path to economic recovery and community development begins with broad participation by all members of the community. In asking for grassroots organizations to identify problems and propose solutions, the program has sought to make all members of the commu-

anticipated that this important role for local residents would expand after selection of the "winning" zones.[110]

As is so often the case with well-intentioned, ambitious government initiatives,[111] there has been a significant gap between the ideas envisioned by empowerment zone policymakers and the reality experienced on the ground. In some cases, pre-nomination community participation was not home-grown, but instead orchestrated by government officials or community organization "insiders."[112] The documents forwarded to HUD officials too often reflected the ideas of government experts and consultants (from within and without the target locality), rather than the needs and aspirations of residents. Moreover, the public participation record in the early implementation stages of designated empowerment zones has been uneven, as city officials have been anxious to impose their will on government-dominated boards created to oversee the allocation of zone benefits.[113]

In the empowerment zone sweepstakes, a $100 million deposit and promises of billions more were dangled before distressed communities throughout America. Sadly, too often it boiled down to politics as usual, first in designation, then in implemen-

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nity stakeholders in their futures." *See* Andrew Cuomo, *U.S. Seeks to Rebuild Battered Inner Cities*, F. FOR APPLIED RES. & PUB. POL'Y, Winter 1995, at 94.

110. "Through the Empowerment Zone and Enterprise Community process, the Federal government offers a compact with communities and State and local governments: if you plan comprehensively and strategically for real change, if the community designs and drives the course, we, the Federal government, will waive burdensome regulations whenever possible, and work with you to make our programs responsive to your plan." *EZ/EC Initiative: A Discussion of the Program's Guiding Principles* (visited June 25, 1999).

111. *See, e.g.*, CHARLES M. HAAR, BETWEEN THE IDEA AND THE REALITY: A STUDY IN THE ORIGIN, FATE, AND LEGACY OF THE MODEL CITIES PROGRAM (1975).

112. *See, e.g.*, Marilyn Gittell, *Growing Pains, Politics Beset Empowerment Zones*, F. FOR APPLIED RES. & PUB. POL'Y, Winter 1995, at 107-09 (stating that "professional bureaucrats and politicians shaped the plan" and that "public participation in the New York EZ process was merely an afterthought").

113. *See, e.g.*, Greg Hinz, *Empowerment Definitely Hasn't Found the Zone: Three-Year-Old Fed Program Starts to Crawl*, CRAIN'S CHIC. BUS., Jan. 6, 1997, at 3 (remarking on the early difficulties of EZ implementation in Chicago).

tation processes that are too "top-down."[114] Why should we think that the public participation experience will be any better with regard to individual brownfields, when the potential gains are much less significant and when the negative repercussions are much more serious than gentrification, dislocation, and alienation?

The words of the second inquiry highlight the difficulties involved in making public policy decisions that protect and bind parties who were not around to voice their individual concerns at the time agreement was reached regarding crucial issues, particularly reduced cleanup standards. What kind of notice will be sufficient to warn prospective purchasers of properties near a reused brownfields site of the compromises regarding remediation that might have emerged even from an open decision-making process? Given the nagging uncertainties involved in pathology and epidemiology,[115] can current residents ever be fully, or even adequately, informed regarding the risks of environmental harm to unborn generations?

While there are real benefits to increased public participation, it would be ill-advised to trade increased opportunities for the public to voice its concerns, or even to join in decision-making, for solid and enforceable assurances from all levels of government that brownfields redevelopers and landowners will be shielded from liability under environmental cleanup statutes and regulations. There must be an additional quid pro quo in this bargain, one that does a better job of protecting today's and tomorrow's neighbors from hazards apparent and unseen.

IV. USING "PLUS" TO CRAFT A FAIRER BARGAIN

There is another strategy for limiting the harm to local residents posed by site-specific cleanup standards that landowners, developers, and an increasing number of elected officials view as essential to brownfield redevelopment. Moreover, in the tradition of a long line of environmental and land-use law commentators

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114. *See, e.g.*, Alfred Charles and Darryl Fears, *Slow Steps to Progress, Empowerment Zone Business Push Brings Few Success Stories*, ATLANTA J., Dec. 20, 1996, at F1.

115. *See, e.g.*, Mark Eliot Shere, *The Myth of Meaningful Environmental Risk Assessment*, 19 HARV. ENVTL. L. REV. 409, 433-34, 433 n.111 (1995).

who added NIMBY,[116] LULU,[117] TOADS,[118] FONSI,[119] and countless other memorable terms to our nomenclature, I am pleased to label this mitigation strategy with a clever acronym — "PLUS," the Protective Land-Use Scheme.

The idea behind PLUS is quite simple. Before the EPA signs off on a state voluntary cleanup program, thus providing liability assurance to landowners and developers of brownfields properties, state law must contain a set of conventional and moderately modified land-use regulatory tools that are directed to two important goals: (1) protecting local residents from the increased risks attributable to brownfields remediation at lower-than-CERCLA levels, and (2) guaranteeing that only industrial uses will be permitted on the reused site. The first objective should be noncontroversial, except to those critics of hazardous waste regulation who believe that scientists and politicians have wildly exaggerated environmental risks.[120] The second goal requires fur-

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116. The acronym NIMBY is short for Not In My Back Yard. Michael B. Gerrard, *The Victims of NIMBY*, 21 FORDHAM URB. L. J. 495, 495 (1994). "It is a syndrome, a pejorative, and an acronym of our times." *Id.*

117. LULU stands for Locally Undesirable Land Uses. *See, e.g.*, A. Dan Tarlock, *Benjamin Davy's Essential Injustice: A Comparative and Philosophical Analysis of the LULU Siting Mess*, 22 HARV. ENVTL. L. REV. 607 (1998) (book review).

118. The acronym TOADS stands for Temporarily Obsolete Abandoned Derelict Sites, and has been used to refer to brownfields. *See, e.g.*, Tondro, *supra* note 54, at 790 n.2 (citing Michael R. Greenburg, *Finding Treasure in TOADS*, PLANNING, Apr. 1994, at 24).

119. A Finding Of No Significant Impact eliminates the need to file an Environmental Impact Statement under Section 102(2)(C) of NEPA, 42 U.S.C. § 4332(2)(c) (1994). *See* 40 C.F.R. § 1508.13 (1998).

120. *See, e.g.*, Peter Manus, *One Hundred Years of Green: A Legal Perspective on Three Twentieth Century Nature Philosophers*, 59 U. PITT. L. REV. 557 (1998).

> The supporters of the Contract [with America] believed that federal environmental regulation in particular was creating a drag on the national economy, that the costs of this regulation often outweighed its benefits, that biased, overly conservative, and inaccurate information about the risks posed by regulated activities often resulted in over regulation, that commitment of environmental policy decisions to federal bureaucrats interfered with government accountability, and that

ther explanation.

The most ambitious advocates of brownfields recycling envision a wide range of uses for abandoned sites. To these redevelopment boosters there is no good reason to confine reuse solely to the industrial category; commercial, even residential, uses on former brownfields parcels could help energize and revitalize the inner city.[121] To brownfields skeptics (concerned with heightened exposure to serious harm and with environmental racism), this is a frightening proposition. It is one thing to propose locating a shopping mall, an apartment complex, or a subdivision on a "greenfield," for example, on a piece of farmland in the suburbs or exurbs where there is no evidence of contaminated soil, groundwater, or building stock in or near the development site. It is quite another thing to promote the same (re)uses for a brownfield located in or adjacent to an inner-city neighborhood.

Simply put, as one moves up the land-use designation ladder from the least restricted use (typically heavy industrial), to moderately restricted uses (offices and retail establishments), to multi-family dwellings, and to the cherished single-family, detached dwelling, the likelihood of widespread, human exposure to contaminants increases.[122] In fact, this reality is reflected in

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> environmental regulation caused unjustifiable if not unconstitutional invasions of private property rights. As a result, Contract proponents declared that their goals were to eliminate the inefficiencies in resource allocation attributable to regulation that was not cost-justified or that was based on "bad science," to devolve decision making responsibility to the states to restore accountable government, and to buttress the protections afforded to private property rights against regulatory intrusions.

Id. at 675 n.426 (footnotes omitted in original) (citing Robert L. Glicksman & Stephen B. Chapman, *Regulatory Reform and (Breach of) the Contract with America: Improving Environmental Policy or Destroying Environmental Protection?*, 5 KAN. J.L. & PUB. POL'Y 9, 16 (1996)).

121. *See* Eisen, *supra* note 2, at 936-48.

122. The regulations for Ohio's voluntary cleanup program provide the following definitions of three land-use categories (with clarifying examples):

> (i) Residential land use category.
>
> Residential land use is land use with a high frequency of potential exposure of adults and children to dermal contact

with soil, inhalation of vapors and particles from soil and ingestion of soil. The current or intended uses of the property includes, but is not limited to housing, education, or long-term health care for adults, children, the elderly, or the infirm, where exposure routes to soil from the property are reasonably anticipated to exist. Examples of residential land uses include, but are not limited to: residences; day care facilities; schools, colleges and other educational institutions; nursing homes, elder care and other long-term health care facilities; and correctional facilities. (ii) Commercial land use category. Commercial land use is land use with potential exposure of adult workers during a business day and potential exposures of adults and children who are customers, patrons or visitors to such facilities. Commercial land use includes potential exposure of adults to dermal contact with soil, inhalation of vapors and particles from soil and ingestion of soil. Exposures to soil on the property must be short and infrequent. The current or intended use of the property includes, but is not limited to facilities which supply goods or services and are open to the public. Examples of commercial land uses include, but are not limited to: warehouses; building supply facilities; retail gasoline stations; automobile service stations; automobile dealerships; retail warehouses; repair and service establishments for appliances and other goods, professional offices; banks and credit unions; office buildings; retail businesses selling food or merchandise; hospitals and clinics; religious institutions; hotels; motels; personal service establishments; and parking facilities. (iii) Industrial land use category. Industrial land use is land use with exposure of adult workers during a business day. Industrial land use must reliably exclude the general public and children from access to the facility. Industrial land use involves potential exposure of adults to dermal contact with soil, inhalation of vapors and particles from soil and ingestion of soil. The current or intended use for the property includes, but is not limited to, transportation or the manufacture or assembly of goods such as parts, machines or chemicals. Examples of industrial land uses include, but are not limited to: lumberyards; power plants; manufacturing facilities such as metal-working shops, plating shops, blast furnaces, coke plants, oil refineries, brick factories, chemical plants and plastics plants; assembly plants; non-public airport areas; limited access highways; railroad switching yards and marine port facilities.

provisions of state voluntary cleanup statutes and regulations that explicitly differentiate between categories of land uses.[123] State laws employ a variety of methods, such as detailing a land-use-based range of allowable risk of carcinogens,[124] providing separate lists of direct-contact soil standards for chemicals based on different types of land use,[125] reducing (for industrial and commercial uses) the minimum soil depths to which such standards apply,[126] and allowing a developer to demonstrate that the

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OHIO ADMIN. CODE § 3745-300-08(B)(2)(c)(i)-(iii) (1998) (comments omitted).

123. *See* Eisen, *supra* note 2, at 944.

124. *See, e.g.*, 415 ILL. COMP. STAT. ANN. 5/58.5(d) (West 1997).

> In developing remediation objectives . . . the methodology proposed and adopted shall establish tiers addressing man-made and natural pathways of exposure, including but not limited to human ingestion, human inhalation, and groundwater protection. For carcinogens, soil and groundwater remediation objectives shall be established at exposures that represent an excess upper-bound lifetime risk of between 1 in 10,000 and 1 in 1,000,000 as appropriate for the post-remedial action use, except that remediation objectives protecting residential use shall be based on exposures that represent an excess upper-bound lifetime risk of 1 in 1,000,000.

Id.

125. *See, e.g.*, OHIO ADMIN. CODE §§ 3745-300-08(B)(3)(c) ("Table II: 'Generic direct-contact Soil Standards for Carcinogenic and Non-carcinogenic Chemicals of Concern — Residential Land Use Category' "), (d) ("Table III: 'Generic direct-contact Soil Standards for Carcinogenic and Noncarcinogenic Chemicals of Concern — Commercial Land Use Category' ") (1998).

126. *See* OHIO ADMIN. CODE § 3745-300-08(B)(2)(d) (1998).

> A volunteer or owner, if different from the volunteer, must meet and maintain compliance with the applicable generic direct-contact soil standards to a depth where it is reasonably anticipated that surficial soils will be made available for direct-contact through excavation, grading, drilling, or other circumstances. The following minimum soil depths to which the generic direct-contact soil standards apply are as follows: (i) For the residential land use category, the generic direct-contact soil standards . . . apply to chemical(s) of concern that are present in soils from the surface to a minimum depth of ten feet. The volunteer or owner, if different from the volunteer, must comply with generic direct-contact soil

(re)use of the parcel will be and will remain nonresidential.[127]

State regulators can be exceedingly accommodating to brownfields redevelopers. In one egregious example, the Ohio state voluntary cleanup rules actually encourage a "bifurcated" approach to a multi-use project, so that the more onerous residential requirements will not apply throughout the site:

> [I]f a volunteer has an intended use for a property which is listed in the residential, commercial or industrial land use categories below but the exposure assumptions which are determined for a portion of that property are not consistent with exposure factor distributions used to calculate the generic direct-contact soil standards for that land use category, the volunteer may divide the property into two (or more) properties and apply the appropriate generic direct contact standards to each property separately. For example, if a volunteer has a property that is a university where the land use exposure assumptions for the area where the dormitories are located are consistent with

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standards at depths below ten feet when it is reasonably anticipated that soils will be made available for chronic direct-contact exposure through excavation, grading, drilling or other circumstances. (ii) For both the commercial and industrial land use categories, the generic direct-contact soil standards listed in paragraph (B)(3) of this rule apply to chemical(s) of concern in the soils from the surface to a minimum depth of two feet. The volunteer or owner, if different from the volunteer, must comply with generic direct-contact soil standards at depths below two feet when it is reasonably anticipated that soils will be made available for chronic direct-contact exposure through excavation, grading, drilling or other circumstances. *Id.* (comment omitted).

127. *See, e.g.*, 30 TEX. ADMIN. CODE § 335.563(e) (West 1997):

> In determining media cleanup levels . . ., persons shall use the standard exposure factors for residential use of the facility . . . unless the person documents to the satisfaction of the executive director that:
>
> (1) site-specific data warrant deviation from the standard exposure factors; or (2) a land use other than residential is more appropriate based on:
>
> (A) historical, current, and probable future land use; and
>
> (B) effectiveness of institutional or legal controls placed on the future use of the land.

> the residential exposure factor distributions and the land use exposure assumptions for the area where the teaching facilities are located are consistent with the commercial exposure factor distributions, the volunteer may submit two no further action letters (one no further action letter for the dormitory area employing the residential standards and one no further action letter for the teaching facilities employing the commercial standards). In all situations where a volunteer chooses to assign different land uses to different portions of a property, each different land use will be considered a separate property for purposes of the voluntary action program and a separate no further action letter must be prepared for that portion.[128]

It would be hard to devise a more revealing scenario for illustrating the dangers of "mixed-use" brownfields reuse.

Given the dangerously poor track record of states in controlling contamination in the period prior to CERCLA, why, before state voluntary cleanup programs have recorded a sustained history of adequate remediation even for industrial sites, should federal officials provide liability protection to brownfields landowners and redevelopers who plan to conduct activities that involve a greater frequency of human exposure to contaminants? One answer might be that there is a wide variety of legal devices — derived from statutory, administrative, and common-law sources — that, in theory, could be employed to protect residents who live, work, are schooled, and recreate in close proximity to brownfields remediated in compliance with these reduced standards.

The CERCLA term of art for these devices is "institutional controls."[129] One commentator (in the pages of this journal) who favors expanded use of such controls at brownfields sites has provided a helpful introduction to the concept.[130] She notes:

> Institutional controls are legal constraints which limit human activities at, or access to, real property. Exam-

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128. OHIO ADMIN. CODE § 3745-300-08(B)(2)(c) (1998) ("Comment").

129. *See, e.g.*, Susan C. Borinsky, *The Use of Institutional Controls in Superfund and Similar State Laws*, 7 FORDHAM ENVTL. L.J. 1 (1995) (footnotes omitted).

130. *See id.* at 3. "This Article concludes that the use of institutional controls are necessary for the effective remediation of contaminated sites, and that they are the next logical step in dealing with the problems created by hazardous waste left on real property." *Id.*

> ples of institutional controls include use restrictions and requirements of notices in deeds or leases, notices in property transfer documents, building permits, easements, well-drilling prohibitions, and zoning ordinances. Superfund and similar state laws employ institutional controls to restrict use at properties that have experienced the release of hazardous substances, and that have residual on-site contamination.[131]

At first glance, this seems to be an impressive arsenal of protective apparatuses. Unfortunately, there are reasons, noted by other commentators,[132] why existing controls are inadequate in reality to provide enduring protections for nearby residents.

Two examples should suffice to illustrate the limitations of institutional controls. First, as every first-year, property law student schooled in the intricacies of common-law servitudes could testify, the most common form of use restriction found in private law — the real covenant — is an eminently unwieldy and unreliable mechanism to bind subsequent purchasers of the brownfield parcel to the promises made by the original redeveloper.[133] Second, zoning classifications are by no means chiseled in stone; a public use restriction placed on an industrial brownfield is only as permanent as the predilection of a majority of the local legislature.[134]

Given these (and other) serious shortcomings with the controls currently used to protect neighbors from contamination, proponents of brownfields recycling for industrial use bear a heavy enough burden of demonstrating that cleanup should be permitted at less-than-CERCLA ("SUV") levels. I propose, therefore, that, before providing the liability protection so desired by brownfields landowners and developers (and their supportive partners in state and local government), federal regulators insist on a stiffer set of controls. It would be ill-advised for any admin-

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131. *Id.* at 1-2 (footnotes omitted).

132. *See, e.g.*, ROBERT HERSH ET AL., LINKING LAND USE AND SUPERFUND CLEANUPS: UNCHARTED TERRITORY 51-68 (Internet ed. 1997); Krista J. Ayers, Comment, *The Potential for Future Use Analysis in Superfund Remediation Programs*, 44 EMORY L. J. 1503, 1523-29 (1995).

133. *See* HERSH, *supra* note 132, at 57; Ayers, *supra* note 132, at 1525-26.

134. On the nagging problem of zoning amendments, *see* CHARLES M. HAAR & MICHAEL ALLAN WOLF, LAND-USE PLANNING: A CASEBOOK ON THE USE, MISUSE, AND RE-USE OF URBAN LAND 313-43 (4th ed. 1989).

istration, especially one committed to protecting the human and nonhuman environment and ensuring environmental justice,[135] to seriously entertain the notion of liability releases for owners and developers of brownfields slated for sub-CERCLA cleanup and then nonindustrial use.

The challenge, then, is three-fold: ensuring that the selected set of restrictive tools place neighbors in a position that is no worse than what they would have faced had the industrial use been placed on a "pristine" (that is, undeveloped and uncontaminated) parcel, crafting these tools so that they can withstand the vicissitudes of time, and maintaining oversight of private and public partners in the brownfields redevelopment alliance. Stated otherwise, we need to implement effective institutional controls while effectively controlling institutions.

The Clinton Administration has stated its intention of using the urban empowerment zone and enterprise community program, and brownfields recycling initiatives in economically stressed communities, as testing grounds for reinvented government, bottom-up community planning, and neighborhood-scale redevelopment.[136] Because of these interconnections, and because these federal enterprise zones are typically plagued by abandoned industrial sites and constrained by arcane land-use planning and zoning schemes, PLUS provides an opportunity to meet these various goals. With these mechanisms firmly in place, what might otherwise be a dangerous crossing could result in an auspicious marriage.

A. *Doing Business in the "BIZ"*

The heart of PLUS is a new state zoning classification to be known as the "Brownfield Investment Zone," or "BIZ." While zoning (in accordance with the specifications contained in the state enabling act) is typically a local government responsibil-

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135. *See United States EPA – OSPS – Environmental Justice Homepage* (last modified Nov. 25, 1998) <http://www.epa.gov/swerosps/ej/index.html>.

136. *See, e.g., Brownfields Showcase Communities* (last modified June 16, 1998) <http://www.epa.gov/swerosps/bf/showcase.htm>; *Key Principles: A Discussion of the Program's Guiding Principles* (visited June 25, 1999) <http://www.ezec.gov/About/4_keys.html>.

ity,[137] there is ample precedent in the environmental realm for a more active role for state authorities.[138] Statewide planning, though by no means the norm, has seen greater acceptance over the past few decades,[139] inspired in no small part by the geographic reality that pollution and other negative externalities do not respect artificial political boundaries and by the political reality that local officials are too easily "captured" by "interest groups" (at times developers seeking zoning changes, at other times home-ownership associations concerned about NIMBYs). Elected officials representing residents of distressed neighborhoods who are hungering for an economic boost might be tempted to accept land-use based differentials in cleanup standards if that is a concession deemed essential by brownfields developers who promise higher tax ratables and increased neighborhood employment.

State BIZ designations will create a uniform method for assuring a zone of comfort around certain brownfields, while removing the pressure from local officials to cut corners in the quest for neighborhood rebirth. The BIZ designation will signify that (1) the parcel has been cleaned up in accordance with the "federally approved," state voluntary cleanup program; (2) in a departure from the cumulative nature of traditional Euclidean zoning,[140] only industrial uses may be conducted on the parcel (unless a residential-level remediation has been performed on the parcel prior to nonindustrial use); (3) certain accessory

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137. *See* HAAR & WOLF, *supra* note 134, at 743-56. *See also* DANIEL R. MANDELKER, LAND USE LAW § 4.16 (3d ed. 1993).

138. *See, e.g.*, HAAR & WOLF, *supra* note 134, at 743-56; James H. Wickersham, Note, *The Quiet Revolution Continues: The Emerging New Model for State Growth Management Statutes*, 18 HARV. L. REV. 489 (1994).

139. *See, e.g.*, Michael Allan Wolf, *Fruits of the "Impenetrable Jungle": Navigating the Boundary Between Land Use Planning and Environmental Law*, 50 WASH. U. J. URB. & CONTEMP. L. 5, 56 n.271 (1996).

140. Typically, Euclidean zoning has been cumulative, that is, less intensive uses are allowed in more intensive zoning districts. "Under this system a residential use can locate in a commercial or industrial zone, and commercial uses can locate in industrial zones." MANDELKER, *supra* note 137, § 5.36. The converse of this scheme is noncumulative zoning, in which "[t]he land use permitted in each district is the exclusive and only use allowed." *Id.*

uses[141] commonly found in 1990s-style factories — such as on-site child-care facilities, classrooms for after-school instruction programs, outdoor picnic and dining tables, and sleeping quarters for employees — will not be allowed; (4) the industrial use designation is not subject to change by the normal means employed by local planning and zoning authorities (that is, by a zoning amendment (rezoning), variance, or special use permit);[142] (5) signs, fences, and other devices are employed and maintained to restrict public access to the site;[143] and (6) deed restrictions have been recorded in the appropriate chain(s) of title that specifically describe the nature and extent of the BIZ restrictions.[144] Moreover, as suggested by one recent commentator (who, I am pleased to report, is a former student), the process of designating or changing a zoning classification involves significant opportunities for public participation.[145] It would be a seamless task to link BIZ designations with the public notice and hearing provisions typically found in state zoning enabling legislation.[146]

B. *Complementary Tools*

While BIZ designation is the key element of the PLUS approach, there are several other devices that states and localities should implement to provide the necessary balance of private sector assurance and public protection: (1) "devastation easements;" (2) GIS-enhanced brownfields inventories; (3) a "Megan's Law" for brownfields, even formerly contaminated, reused sites; (4) easements or set-asides in fee to create buffer zones; (5) pre-construction bonds to guarantee remediation completion and to fund perpetual maintenance; and (6) environmental awareness and safety programs. A brief explanation of each tool follows.

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141. "Accessory uses are secondary activities that are necessary and convenient to the principal use of the property." *Id.* § 5.14.

142. For a discussion of the methods used by local governments to accommodate changes in zoning classifications, *see* HAAR & WOLF, *supra* note 134, at 285-362. *See also* MANDELKER, *supra* note 137, at §§ 6.24-6.61.

143. *See, e.g.*, 1 GERRARD, *supra* note 1, § 24.02[3].

144. *See, e.g.*, *id.* § 24.02[1].

145. *See* Skelley, *supra* note 37, at 399-401.

146. *See* MANDELKER, *supra* note 137, § 4.19.

As noted previously, there are problems with relying on traditional, common-law servitudes to assure that the reused brownfield maintains its industrial character.[147] Luckily, several state legislatures have responded to the need for a widely enforceable device that will ensure that environmentally sensitive lands will remain less intensively developed or even undeveloped in perpetuity: the conservation easement.[148] The statutes creating conservation easements-rights in property that can be retained by a landowner who alienates the underlying tract, or assigned to a third party (typically an environmental organization) — make clear that the limitations placed on the formation, use, and enforcement of traditional easements are not applicable.[149]

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147. *See supra* note 133 and accompanying text.

148. The Uniform Conservation Easement Act provides the following definition:

> A nonpossessory interest of a holder in real property imposing limitations or affirmative obligations the purposes of which include retaining or protecting natural, scenic, or open-space values of real property, assuring its availability for agricultural, forest, recreational, or open-space use, protecting natural resources, maintaining or enhancing air or water quality, or preserving the historical, architectural, archaeological, or cultural aspects of real property.

UNIF. CONSERVATION EASEMENT ACT § 1.1, 12 U.L.A. 170 (1996). Other brownfields commentators have considered the use of conservation easements in the brownfields reuse context. *See* Ayers, *supra* note 132, at 1529-31; Andrea Lee Rimer, *Environmental Liability And The Brownfields Phenomenon: An Analysis of Federal Options for Redevelopment*, 10 TUL. ENVTL. L.J. 63, 98-99 (1996); Skelley, *supra* note 37, at 416 n.133 ("brownfield easement"). *But see* Lauri DeBrie Thanheiser, *The Allure of a Lure: Proposed Federal Land Use Restriction Easements in Remediation of Contaminated Property*, 24 B.C. ENVTL. AFF. L. REV. 271 (1997) (cautioning against proposals for the federal government to use eminent domain power to acquire hazardous substance easements).

149. *See, e.g.*, HAW. REV. STAT. § 198-5(a) (1997). The Hawaii statute provides:

> All conservation easements, whether held by public bodies or qualifying private organizations, shall be considered to run with the land, whether or not such fact is stipulated in the instrument of conveyance or ownership, and no conservation easement shall be unenforceable on account of the lack of privity of estate or contract, or on account of such conserva-

The "devastation easement" is a brownfields version of this conservation tool. Any inherent "right" to develop or use the BIZ parcel for anything other than industrial purposes will be transferred, in exchange for token consideration, from the landowner to a governmental unit (preferably the state) with local neighborhood organizations as co-owners. Should the current owner, or any agent or assignee (immediate or remote) of the owner attempt to convert the property to nonindustrial use (without the appropriate additional remediation), any one of these owners will have standing to enforce a violation of this perpetual servitude.

Fear is a palpable legacy of decades of environmental contamination in the nation's cities. Landowners and business owners (past and present) are afraid that one day (perhaps in the distant future) a release of a hazardous substance (even one about which they had no knowledge) on a brownfields parcel will result in serious liability under CERCLA or its state counterparts. Inner-city residents are afraid of the hazards hidden in the brownfields' soil that is tossed about by the forces of nature, or much worse, buried in their children's fingernails or polluting water supplies. Estimates of the number of brownfields are far from consistent, a factor that only heightens the fear that harbingers of disease, birth defects, and death are next door or down the block.

The BIZ designation process will afford government officials the opportunity to create much-needed state-by-state inventories of brownfields sites. Any landowner who applies for the BIZ classification should be required to furnish details concerning the size, topography, geology (including groundwater and wetlands information), infrastructure (public and private), improvements, other industrial and commercial activities, and population patterns in and in close vicinity to the brownfields site. Geographic Information Systems (GIS) technology[150] makes it easier and

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> tion easement not being an appurtenant easement, or because such easement is a general easement.

Id.

150. "A GIS is a computer data base management system that allows multiple sources and types of geocoded data, including satellite multispectral scanner data sets, to be entered and analyzed." Sharon

more affordable to collect these data and enhances their usefulness for policy makers in the land-use planning and environmental areas.[151]

The information gathered from brownfields owners and state officials should not be withheld from the public, especially from prospective tenants or buyers of nearby housing units. Indeed, local government officials could easily (and at very little expense) put this information on planning department web sites.[152] Lately, the federal government has mandated that states pass legislation creating registries of sex offenders and authorizing states

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Hatch Hodge, Note and Comment, *Satellite Data and Environmental Law: Technology Ripe for Litigation Application*, 14 PACE ENVTL. L. REV. 691, 727 (1997). One professor notes that "GIS involves a combination of computer mapping and data base analysis. A GIS program can plot and simultaneously review multiple layers of spatial information." Bradford C. Mank, *Preventing Bhopal: "Dead Zones" and Toxic Death Risk Index Taxes*, 53 OHIO ST. L. J. 761, 782 (1992) (footnotes omitted). *See also Geographic Information Systems — GIS* (last updated July 1, 1997) <http://info.er.usgs.gov/research/gis/title.html> (part of United States Geological Survey web site).

151. EPA's Office of Solid Waste and Emergency Response is promoting a special GIS tool that it believes is ideally suited for brownfields reuse projects. *See LandView™ III: A Tool for Community Brownfields Projects* (visited June 25, 1999) <http://www.epa.gov/swerosps/bf/html-doc/lv3.htm>:

> *LandView™ III* can provide brownfields project managers, brownfields stakeholders, community activists, and the general public with a variety of useful information and tools to enhance brownfields projects. Statistics and graphic representations of environmental, geographic, and demographic information provide important insights into selection of targeted brownfields properties and community outreach activities. . . . Once the area of interest is defined, *LandView™ III* can provide relevant demographic and economic information, enabling users to develop appropriate communications strategies for community outreach efforts.

Id.

152. Local planning department web sites abound on the World Wide Web. For an extensive list of links to these sites, *see Cyburbia — Planning Departments and Commissions* (visited June 25, 1999) <http://www.arch.buffalo.edu/cgi-bin/pairc/plan_dep>.

to grant public access to the information contained therein.[153]

The "Megan's Law" movement to provide neighbors with notice of sex offenders in their communities, inspired by a horrific case of child murder in New Jersey, has swept the state legislative corridors throughout the nation.[154] Given parents' equally important concerns about their children's exposure to hazardous materials, there should be a similar effort to inform community residents of the potential environmental hazards in their midst. After all, Congress has already recognized and protected the public's right to know about the use and abuse of a wide range of harmful substances by ongoing and operating concerns.[155]

In a very limited number of cases, traditional institutional controls such as signs and barriers may not be enough to separate the general public from contaminated soils or structures. It would be wise in those instances for landowners to create a buffer zone around those sections of the parcel adjacent to living units, schools, recreational facilities, and other high-exposure areas.[156] In some cases, the buffer could be effected by dedication of a public easement, which would allow the landowner to continue to use existing roads, paths, or even the sub-surface. In other cases, as part of the arrangement that would give rise to a less costly, sub-CERCLA cleanup, the landowner would, in exchange for nominal consideration, grant to the public in fee the acreage needed to create an adequate "comfort zone."

The remediation of an inner-city brownfield site poses problems that are not confronted in less-congested settings that are more removed from population centers. With homes, schools, parks, and shopping areas nearby, there is a greater risk posed by cleanups that are inordinately delayed or even abandoned. Therefore, brownfield owners and developers should be required to post performance bonds as a way of guaranteeing

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153. *See* 42 U.S.C. § 14071 (1994 & Supp. II 1996).

154. *See, e.g.*, Stephen R. McAllister, *Megan's Laws: Wise Public Policy or Ill-Considered Public Folly?*, 7 KAN. J.L. & PUB. POL'Y 1 (1998).

155. *See* Emergency Planning and Community Right-to-Know Act, 42 U.S.C. §§ 11001-11050 (1994).

156. *Cf.* Mank, *supra* note 150 (citing the need to establish buffer zones around potentially hazardous sites to prevent disasters such as the cyanide leak that occurred in Bhopal, India).

that the remediation will be finished satisfactorily.[157] It is not unusual to find state requirements that such assurances be provided for new construction projects, where the risk of harm to those nearby is typically much smaller.[158]

There is a second "special" risk posed by urban brownfield remediation that can be addressed by bond requirements as well. Sadly, as we know all too well from the proliferation of abandoned, urban, industrial sites over the past few decades, the useful life of an inner-city factory is often relatively short. Many of the same factors that contributed to the plant closing that preceded remediation-disintegrating social and economic conditions in the community, attractive incentive packages or lower labor costs elsewhere, or regional or national economic dislocations-can easily reappear. Without an "up-front" requirement preceding an "SUV" cleanup, the parties responsible for reuse of urban brownfields will bear no obligation to ensure that after "re-abandonment" the site will not pose environmental harm to children who cut across the "old Smith Factory" lot to get to school faster, or to homeless people who move in when the loaded moving trucks depart. Upon completion of the remediation to the satisfaction of state authorities, the performance bond described above could "roll over" into a "perpetual maintenance" policy, with any difference in premium returned to the landowner or developer.[159]

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157. *Cf.* McWilliams, *supra* note 2, at 719 (suggesting that "owners and operators of new industrial facilities" on *greenfield* sites "be required as a permit prerequisite to set aside adequate financial resources to clean up their properties after they cease operations").

158. *See, e.g.*, N.Y. TOWN LAW § 277.9 (Consol. 1998).

> As an alternative to the installation of infrastructure and improvements . . . prior to planning board approval, a performance bond or other security sufficient to cover the full cost of the same, as estimated by the planning board or a town department designated by the planning board to make such estimate, where such departmental estimate is deemed acceptable by the planning board, shall be furnished to the town by the owner.

Id.

159. As an alternative, in states in which Tax Increment Financing (TIF) is authorized by state law, anticipated increased local revenues

The final complement to BIZ found in the PLUS package is a comprehensive educational program targeted to local residents — schoolchildren and adults — that informs neighbors of recycled brownfields of the dangers posed by the handling, illegal disposal, and ingestion of the wide range of hazardous substances covered by the CERCLA umbrella. The reuse of a formerly abandoned factory can be an exciting opportunity for a federal urban enterprise zone, indeed for any economically distressed inner-city neighborhood, especially if it means new, living-wage jobs for local residents with real opportunities for advancement. In the not-too-distant past, however, inner-city industrial America's legacy of environmental contamination was more significant (and long-lasting) than any socioeconomic advancement for that nation's poorest citizens. In our quest for that lofty (perhaps utopian) goal of sustainable development,[160] environmental safety programs would seem to be a simple, but crucial, step in a different direction.

V. BREAKING THE CYCLE

Over the next several months, we will have a much clearer picture of the future of CERCLA and state programs for brownfields reuse. Congressional liberals and conservatives alike have weighed in on reform issues such as modifying cleanup standards, deferring to state programs, and relaxing liability. What one observer sees as good-faith efforts to make federal hazardous waste programs more equitable and efficient, another perceives as a back-door effort to dismantle CERCLA's protective scheme. Unfortunately, what often gets lost in the ideological struggle over reauthorization of massive federal regulatory programs featuring mammoth budgets and unwieldy bureaucracies is the effect program reforms have on the people who are not listed on the agency payroll. In the case of setting brownfields

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could be used to finance "perpetual maintenance" and other protective tools. *See* McWilliams, *supra* note 2, at 753-54.

160. Sustainable development boosterism can be found at the highest level of the American polity. *See Home Page for the President's Council on Sustainable Development* (visited June 25, 1999) <http://www.whitehouse.gov/PCSD/>.

cleanup policy, especially in federal empowerment zones and enterprise communities, we are often talking about decisions that have their greatest potential impact on residents, most of them poor, many of them people of color, who either cannot, or choose not to, abandon our decaying urban centers.

It is common to talk optimistically about "recycling" brownfields, that is, returning businesses on contaminated sites to their productive heyday. As the century draws to a close, federal urban EZs and ECs (building on their state precursors) seem to be a promising mechanism for ensuring that a wide swath of Americans share in the social and financial benefits of a national economic recovery. Not surprisingly, there has been an effort to include brownfields reuse in the enterprise zone package of benefits and incentives. However, if the kinds of protections outlined in this essay are not put in place before the recycling begins, we run the real risk of a new cycle of hopes raised by bold visions of community revitalization and redevelopment, then dashed owing to economic exploitation (perhaps even re-contamination) of urban neighborhoods.

The futures of federal enterprise zones and brownfields programs are already intertwined. Insisting on PLUS-type protections in exchange for liability assurances for industrial brownfields remediated under state voluntary cleanup regimes will enable the federal government to continue to experiment, even to "reinvent," its regulatory role in EZs and ECs, without compromising the health of the people who live there. Given the relatively small cost to the public and private sectors attributable to BIZ designation and to the complementary tools discussed in this essay, how would subsequent generations judge policy makers who insisted on anything less?