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THE URBAN NEXUS: OPEN SPACE, BROWNFIELDS, AND JUSTICE

*Paul Stanton Kibel**

The belief among suburbanites that they are independent of central cities is a delusion.¹

INTRODUCTION: RECLAIMING THE CITY

It is a common instinct to adopt simple explanations for complex problems. To make sense of the crises that confront us, we seek to isolate the trigger, the underlying force behind all that is not right. The declining state of America's urban centers provides a prime example of our drive to pinpoint the cause, to name and reveal the particular policy, institution, or group of persons that is the true culprit.

The reality of urban decline in America, particularly in our older cities, is one of the only points not in dispute.² The statistics provide clear evidence of the situation and of the general trends that are at work. For several decades the U.S. population has been moving from urban centers to suburban locations, and the number of citizens living in the suburbs now exceeds the number of citizens living in the cities.³ Open space surrounding urban centers is rapidly being converted to residential and commercial use, while large tracts of urban housing

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¹ ANTHONY DOWNS, BROOKINGS INST. AND LINCOLN INST., *NEW VISIONS FOR METROPOLITAN AMERICA* 52 (1994).

² See generally *id.*

³ *Id.* at 57.

and commercial property are now vacant, polluted, or both.⁴ The gap in per capita income between urban residents and suburban residents is growing ever wider, and the crime and unemployment rates in urban areas are growing higher.⁵ Minority populations in declining urban cores have become more geographically isolated, creating a situation of de facto segregation.⁶ As the city tax base declines, municipal governments have less resources to support education, police, and other essential services, thereby furthering urban decline and the exodus to the suburbs.⁷

These statistics and observations are not offered in support of any argument. They are simply a summary of a broad economic, environmental, and racial phenomenon that most of us have observed with our own eyes and experienced in our own lives. In its most condensed form, this phenomenon is as follows: Jobs and people are moving out of urban centers into formerly pristine surrounding areas leaving behind polluted vacant lots and unemployed minority populations.⁸

⁴ See Steven F. Fairlie, *The New Greenfields Legislation: A Practitioner's Guide to Recycling Old Industrial Sites*, 5 DICK. J. ENVTL. L. & POL'Y 77, 78 (1996).

⁵ See DOWNS, *supra* note 1, at 47.

Another force weakening ties between central cities and suburbs is an increasingly geographic separation of socioeconomic groups. In 1990, median household income was 38 percent higher in the suburbs than in the central cities. In metropolitan areas of 1 million or more residents, household income was 45 percent higher in suburbs; in smaller metropolitan areas the difference was 26 percent. Low-income people are becoming more and more concentrated in central cities . . .

Id.

⁶ See PENNSYLVANIA HORTICULTURAL SOC'Y, URBAN VACANT LAND: ISSUES AND RECOMMENDATIONS 17 (1995) [hereinafter URBAN VACANT LAND].

In the years after World War II people—primarily Whites—lured by the dream of single family houses with yards and the availability of cheap mortgage financing, and driven by racial fears, began moving to suburban communities. . . . This pattern has . . . also contributed to center city abandonment and the isolation of disadvantaged urban communities that are increasingly segregated by both race and class.

Id.

⁷ See Steven K. Koyasako, *Brownfields—California EPA's Policy and Legal Response*, 4 LAND USE & ENV'T F. 155, 155 (1995). "Vacant brownfields sites are not only a wasted resource; they also significantly erode the tax base and contribute to urban blight and economic decline in historically industrial urban centers." *Id.*; see also William B. Shore, *Recentralization: The Single Answer to More Than a Dozen United States Problems and a Major Answer to Poverty*, J. AM. PLANNING ASS'N, at 500 (Fall 1995). "As more well-to-do households and major non-residential taxpayers moved out of the cities and the burdens of poverty become more concentrated in cities, taxes went up and services declined for those who remained." *Id.* (emphasis in original); see also URBAN HABITAT PROGRAM, THE BROWNFIELDS LEADERSHIP DEVELOPMENT AND COMMUNITY REVITALIZATION PROJECT 1 (1995) ("Urban communities of color bear the brunt, battered by unemployment, deepening environmental inequities and cutbacks in social services, health care and education.")

⁸ See PETER CALTHORPE, *THE NEXT AMERICAN METROPOLIS: ECOLOGY, COMMUNITY AND THE AMERICAN DREAM* 9 (1993). "The result of this era is that both the city and the suburb are

Although it is not too difficult a task to describe the reality of urban decline, it is another task altogether to identify and isolate the underlying trigger of this decline. Many different culprits have been proposed, including racism, capitalism, environmental extremism, post-industrialism, technology, drugs, the media, the automobile, the police, the public school system, too much government regulation, and too little government regulation. Is one of these issues or entities the true cause? Is there a precise cause and effect explanation for why our cities are now subject to such powerful and destructive economic, environmental, and racial pressures?

These are important questions, but questions that I will not try to answer in this Essay. Regardless of whether there initially was an underlying trigger, we have reached a point where the various components of urban decline are now feeding on and reinforcing each other.⁹ They are all interconnected contributors to the downward spiral that has left our urban cores in their current condition.¹⁰ Therefore, instead of arguing for or against a particular underlying cause, this Essay will focus on the relation among certain critical components of the urban decline cycle. More specifically, I will assess three particular components: (1) the impact of suburban sprawl and open space conversion on the urban economy and the environment; (2) the impact of environmental hazardous waste liability on the development of urban neighborhoods and the urban economy; and (3) the impact of suburban sprawl and environmental hazardous waste liability on the health conditions and economic welfare of poor, primarily minority, communities living in the urban core. Although my analysis will draw extensively on the experience in the San Francisco Bay Area, this Essay is not city-specific. The Essay addresses issues that are affecting virtually every major U.S. metropolitan area.

To be certain, open space loss, abandoned brownfields, and economic inequity are not the only components of the urban decline cycle. However, they are three areas in which existing law, especially in terms of land-use zoning and environmental liability, has played a crucial role. They therefore are also areas where legal reform poten-

now locked in a mutually negating evolution toward loss of community. In practical terms, these patterns of growth have created on one side congestion, pollution and isolation, and on the other urban disinvestment and economic hardship." *Id.*

⁹ See URBAN VACANT LAND, *supra* note 6, at 18; see generally JAMES BOYD ET AL., RESOURCES FOR THE FUTURE, THE IMPACTS OF UNCERTAIN ENVIRONMENTAL LIABILITY ON INDUSTRIAL REAL ESTATE DEVELOPMENT: DEVELOPING A FRAMEWORK FOR ANALYSIS (1994).

¹⁰ See Carl Anthony, *Making Brownfields Bloom*, LAND AND PEOPLE, Fall 1996, at 25.

tially can play a crucial role in reversing the pattern of urban decline. By providing a useful framework in which to evaluate such reform, this Essay should assist lawyers and other citizens who are working to reclaim our cities as beautiful, vibrant, and just communities.

Section I discusses the origins and impacts of, and responses to, open space conversion. Section II addresses the impact of hazardous waste liability laws on the abandonment of urban properties, and how new federal and state reforms might enable reclamation of these so-called "brownfields." Section III explains how zoning, environmental liability, and brownfields reclamation have impacted the economic and health conditions of poor communities living in the urban core. Section IV discusses strategies to reconcile the goals of open space preservation, hazardous waste remediation, and justice.

I. OPEN SPACE AND THE EXPLODING METROPOLIS

For the past half century, there has been one dominant paradigm for metropolitan growth in the United States. That paradigm has been described as unlimited suburban sprawl¹¹ or "low density discontinuous development."¹² The basic component of this metropolitan paradigm has been the conversion of wilderness and farmland, commonly called open space, to commercial and residential use.¹³ In this conversion scenario, the emphasis has been on the development of shopping centers and business/industrial parks (for commercial use), and planned communities with detached, single family homes with yards (for residential use).¹⁴

Before turning to the present day economic and environmental consequences of this development pattern, I will first revisit its origins. In the modern context, the terms "city" and "suburb" have taken on very strong political and cultural meanings. As Zignew Rybczynski, an urban historian at the University of Pennsylvania, explained in his 1995 book, *City Life*, the two terms "are often only polemical categories: depending on your point of view, either bad (dangerous,

¹¹ See BANK OF AMERICA, THE CALIFORNIA RESOURCES AGENCY, GREENBELT ALLIANCE AND THE LOW INCOME HOUSING FUND, *BEYOND SPRAWL: NEW PATTERNS OF GROWTH TO FIT THE NEW CALIFORNIA 1-5* (1995) [hereinafter *BEYOND SPRAWL*].

¹² See STEVEN HAYWARD, CALIFORNIA BLDG. INDUS. ASS'N, *PRESERVING THE AMERICAN DREAM: THE FACTS ABOUT SUBURBAN COMMUNITIES AND HOUSING CHOICE 1* (1996).

¹³ See Jim Sayer, *Green Edges for Healthy Cities*, *THE URBAN ECOLOGIST*, Spring 1994, at 1; see also ROBERT FISHMAN, *BOURGEOIS UTOPIAS: THE RISE AND FALL OF SUBURBIA* 157 (1987).

¹⁴ See *URBAN VACANT LAND*, *supra* note 6, at 14-15.

polluted, concrete) cities and good (safe, healthy, green) suburbs, or good (diverse, dense, stimulating) cities and bad (homogeneous, sprawling, dull) suburbs."¹⁵ Beneath these polarized meanings, however, there is a great deal of historical and ideological undergrowth. We must examine this undergrowth to make sense of where we are today, to place the debate over open space conversion and the exploding metropolis in a broader context.

Although the conversion of open space to commercial and residential use is often thought of as a recent trend, in many ways it is a continuation of a deeply ingrained American tradition.¹⁶ This tradition is based on the frontier. For hundreds of years, the American experience involved the push westward across the continent, clearing wilderness and breaking the land.¹⁷ The American frontier provided an outlet for those who were dissatisfied with their economic or social prospects in a given location; they could vote with their feet, by moving west to a less congested, less socially stratified, or less expensive region of the country.¹⁸

The outlet of the frontier played a critical role in shaping the U.S. economy and American society. It meant that the upward mobility of the lower and middle classes need not come at the direct expense of the more established upper class; that issues of economic equity and justice could be put off indefinitely. It meant that Americans were less tied to geographic place, and therefore when confronted with regional problems, were more likely to move than to seek place-specific solutions.¹⁹ The national experience with the western frontier helped establish the values and patterns that would later lead to suburban sprawl and urban decay.

The forces that would contribute to the geographic decentralization of urban areas were identified early on. In 1900, H.G. Wells published

¹⁵ ZIGNEW RYBCZYNSKI, *CITY LIFE* 176 (1995).

¹⁶ See Dan Tarlock, *City Versus Countryside: Environmental Equity in Context*, 21 *FORDHAM URB. L.J.* 461, 482-83 (1994).

¹⁷ See BROOKINGS INST. AND THE LINCOLN INST. FOR LAND POL'Y, *ALTERNATIVES TO SPRAWL* 4 (1995). "Many observers see sprawl as the natural product of an inherit trait in the American character. Peter Linneman, for instance, advances the notion that modern-day sprawl can be traced to the historic American drive to push back the frontier and settle a vast continent." *Id.*

¹⁸ See generally KENNETH JACKSON, *CRAIGGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES* (1985).

¹⁹ See generally JAMES KUNSTLER, *THE GEOGRAPHY OF NOWHERE: THE RISE AND DECLINE OF AMERICA'S MAN-MADE LANDSCAPE* (1993).

a prophetic essay entitled *The Probable Diffusion of Great Cities*.²⁰ In this essay, Wells forecast that urban regions would become so vast that the very concept of the city would become "as obsolete as the mailcoach."²¹ From Wells' perspective, this diffusion was not altogether negative. It offered people the possibility of a healthier and less congested life, of an alternative to the disease and filth that often characterized turn of the century industrial cities.²²

As Wells' 1900 essay suggests, initially the concept of suburbs and suburbanization did not carry with it the cultural and environmental stigma that it carries today. The first generation of suburbs in the U.S., such as Philadelphia's Chestnut Hill, Chicago's Lake Forest, and Cleveland's Shaker Heights, bore little resemblance to the suburbs of today.²³ Unlike contemporary sprawl, the first generation of suburbs in America were equated with innovative land-use planning, high-quality architecture, pedestrian access, and good suburban-urban public transportation (usually by train).²⁴ In fact, it was the success of these early "garden suburbs" that created the market for, and the allure of, suburbanization. Prior to Chestnut Hill, Lake Forest, and Shaker Heights, the American dream, at least residentially speaking, focused mostly on the city, the farm or, perhaps if you were rich enough, the country estate. The garden suburbs of the early twentieth century moved the suburban ideal towards the center of the American identity.

The tragedy is that the very characteristics that drew people to the first generation of suburbs began to disappear as more and more people moved out of the city.²⁵ Suburban development began to fill in the open space, and the high demand for housing meant that land-use planning, quality architecture, and good suburban-urban public transportation fell by the wayside. The garden suburb gave way to the subdivision, the shopping mall, and the freeway, and suburbanization began to take on a new and more ominous meaning.²⁶ Although initially envisioned as a means to escape the congestion of the city, the

²⁰ See FISHMAN, *supra* note 13, at 186 (discussing Wells' essay).

²¹ *Id.*

²² *See id.*

²³ See RYBCZYNSKI, *supra* note 15, at 190-97.

²⁴ *See id.*

²⁵ See V. GAIL EASLEY, AM. PLAN. ASS'N, *STAYING INSIDE THE LINES: URBAN GROWTH BOUNDARIES* 1 (1992). "The irony, of course, is that the characteristics that initially draw people to the urban fringe disappear as more and more people come. The fringe becomes more dense and congested, and the quality of life goes down. People look to move further away, creating more sprawl." *Id.*

²⁶ See RYBCZYNSKI, *supra* note 15, at 194.

suburbanization process eventually created its own brand of overgrowth—decentralized congestion.²⁷ As Lewis Mumford observed in 1961, “The ultimate effect of the suburban escape in our time is, ironically, a low-grade uniform environment from which escape is impossible.”²⁸ Mumford continued, “A universal suburb is almost as much a nightmare, humanly speaking, as a universal megalopolis; yet it is toward this proliferating nonentity that our present random or misdirected urban growth has been steadily tending.”²⁹

Lewis Mumford’s critique of suburbanization was based largely on aesthetic and cultural grounds, on the dull and prefabricated landscape it tends to create. His critique, although not at the core of my analysis, is closely related to this Essay’s central point. There are identifiable reasons why cities traditionally have served as important cultural centers. The reasons include the face-to-face interaction of people from different economic classes and ethnic backgrounds, the architectural and historical heritage of neighborhoods and city centers, and the maintenance of parks, commons, and other public spaces. Land-use zoning, open space preservation, environmental liability, and justice—the issues addressed in this Essay—provide the legal framework that helps determine whether these urban amenities will endure or decline.

With this historical context in place, we now can turn to the modern consequences of, and responses to, the exploding metropolis. Environmentally and economically, the impact of suburbanization has been profound. Environmentally, commercial and residential development has now pushed deep into natural canyon, coastal, and woodland ecosystems, with a corresponding loss of habitat for wildlife and public recreation areas for people.³⁰ The conversion of surrounding farmland to subdivisions and industrial uses has destroyed beautiful landscapes and has displaced rural communities.³¹ The lack of adequate public transportation, the reliance on automobiles, and the increasing distance of commutes have also led to severe air pollution in many metropolitan areas.³²

²⁷ See FISHMAN, *supra* note 13, at 157.

²⁸ LEWIS MUMFORD, *THE CITY IN HISTORY: ITS ORIGINS, ITS TRANSFORMATION AND ITS PROSPECTS* 486 (1961).

²⁹ *Id.* at 496.

³⁰ See BEYOND SPRAWL, *supra* note 11, at 8; see also MIKE DAVIS, *CITY OF QUARTZ: EXCAVATING THE FUTURE IN LOS ANGELES* 131 (1992).

³¹ See GREENBELT ALLIANCE, *THE BAY AREA’S FARMLANDS* 17 (1991).

³² See generally ANTHONY DOWNS, BROOKINGS INST., *STUCK IN TRAFFIC: COPING WITH PEAK-HOUR TRAFFIC CONGESTION* (1992).

Economically, the impacts of suburbanization have been a mixed blessing. For the automobile and construction industries, and for the treasuries of many suburban municipal governments, suburbanization has been a boon.³³ For city centers, however, it has been a disaster. As businesses and residents have left for the suburbs, cities have seen a decline in tax revenues and municipal services, and a rise in unemployment and crime.³⁴

Although this shift in fortunes between cities and suburbs initially seemed justified on market grounds, it has become increasingly clear that this shift has also created new economic problems. As urban unemployment rises, the rest of society, including those in the suburbs, are required to fund state and federal welfare assistance programs.³⁵ As air quality declines, open space vanishes, and malls and subdivisions come to dominate the landscape, the region becomes less desirable vis-à-vis other regions.³⁶ Thus, over time, the economic welfare of the entire metropolitan area begins to suffer: the problems of the city begin to pull the suburban economy down with it.

The economic, environmental, and political unsustainability of suburban efforts to disengage from urban cores has been recognized not only by open space and urban poor advocates, but by the business community as well. In 1995, Bank of America, the largest bank in California and one of the largest banks in the United States, co-published a major report entitled *Beyond Sprawl*.³⁷ In this report, Bank of America concluded that "unchecked sprawl has shifted from an engine of California's growth to a force that now threatens to inhibit growth and degrade the quality of our life,"³⁸ and that "allowing sprawl may be politically expedient in the short run, but in the long run will create social, environmental and political problems that we may not be able to solve."³⁹

Similarly, in 1991 the Bay Area Council, a policy organization representing major employers and businesses in the San Francisco re-

³³ See HAYWARD, *supra* note 12, at 10-11.

³⁴ See Dean Calland, *Salvaging Our Urban Brownfields*, CLEV. PLAIN DEALER, Apr. 5, 1995, at 11B.

³⁵ See DOWNS, *supra* note 1, at 204. "But in the long run, gains for the nonpoor majority obtained at the expense of the poor minority will be outweighed by mutual losses from the resulting weakening of the overall metropolitan and national economies. Many non poor, however, do not recognize this reality." *Id.*

³⁶ See *id.*

³⁷ BEYOND SPRAWL, *supra* note 11.

³⁸ *Id.* at 1.

³⁹ *Id.* at 2.

gion, published a report on growth management.⁴⁰ In its report, the Bay Area Council argued that current growth patterns would lead to "economic and environmental decay" in the area, and that new strategies were needed to protect open space.⁴¹ The report even went so far as to suggest the creation of a Bay Area Greenbelt, a ring of undeveloped open space surrounding the entire metropolitan area.⁴²

In response to the problems created by sprawl, local governments and communities have developed strategies to control suburban growth. Three of the most widely used strategies for controlling sprawl are slow-growth initiatives, residential lot requirements, and private land trusts.⁴³ Slow-growth initiatives place an absolute percentage limit, or even an absolute moratorium, on the amount of new residential units that can be built in a given time period. Residential lot requirements establish rules regarding the size or type of new residential construction, such as only single-family homes with a minimum amount of acreage. Private land trusts enable local citizens to purchase open space or farmland collectively, and thereby prevent such properties from being converted to commercial or residential use.⁴⁴

Slow-growth initiatives, residential lot requirements, and private land trusts have helped individual communities block the development of new, less upscale, housing. However, they have not addressed the problems that are prompting urban flight, nor have they prevented sprawl from leapfrogging over regulated slow-growth areas to other undeveloped and less regulated areas.⁴⁵ Moreover, in many instances, local anti-sprawl measures were based more on a concern for property values than for open space preservation.⁴⁶ The environment was often only a pretense for the rich to exclude the poor and middle classes from certain neighborhoods.⁴⁷ In such situations, the

⁴⁰ See generally BAY AREA COUNCIL, *FOUR REASONS WHY BAY AREA BUSINESS SHOULD PUSH FOR REGIONAL GROWTH MANAGEMENT* (1991).

⁴¹ See *id.* at 2.

⁴² See *id.* at 3.

⁴³ See DOWNS, *supra* note 1, at 31-42.

⁴⁴ See generally CALIFORNIA STATE COASTAL CONSERVANCY, *EVALUATION OF AGRICULTURAL LAND TRUSTS* (1989).

⁴⁵ See *id.*

⁴⁶ See TARLOCK, *supra* note 16, at 482-83. "There is, however, a less attractive side to open space preservation. It has served to exclude poor and minorities from preexisting land uses and to limit housing opportunities in the suburbs." *Id.*

⁴⁷ See DAVIS, *supra* note 30, at 173. "Although the protracted struggle against the corporate

economic inequities initially created by sprawl were only intensified by local efforts to stop it.

The U.S. experience with suburbanization and open space conversion has taught environmentalists, urban poor advocates, policy makers, and the business community an important lesson. Suburbanization may provide select individuals and companies with a short-term escape from the problems of urban decline, but it does not provide society with a long-term policy solution. Economically and environmentally, the paradigm of the exploding metropolis, of suburbs geographically and politically segregating themselves from the city, cannot be sustained.⁴⁸

II. THE UNTOUCHABLES: BROWNFIELDS UNDER SUPERFUND

Abandoned, deteriorating property has become one of the dominant images of our cities. It has come to represent the ghost town quality, the so-called blight, of so many of our urban areas.⁴⁹ The vision of the vacant urban lot embodies most of the elements commonly associated with the decline of our cities: pollution and garbage, unemployment, poverty, racial isolation, crime, drugs, declining public services, and architectural eyesores.⁵⁰

As discussed earlier, the causes of the vacant urban lot, and of urban decline in general, cannot be readily reduced to a single issue. While there may have been an initial cause or trigger, we now have reached a point where several factors are reinforcing the process of abandonment, decay, and disinvestment.⁵¹ One of the most significant factors in this process is the liability associated with properties that are

exploitation of the mountains had injected environmental issues into city politics, the hillside homeowners were still caricaturable as limousine conservations." *Id.*

⁴⁸ See Bradley Inman, *Greenbelts to Tighten Urban Limit Lines*, S.F. EXAMINER, May 6, 1990, at B16.

⁴⁹ See URBAN VACANT LAND, *supra* note 6, at 15.

Vacant land is a common sight in virtually every American city. Scattered among houses in residential areas, especially in distressed neighborhoods, small and large vacant, trash-filled lots contribute to an appearance of deterioration and blight. Countless abandoned factories and warehouses—some with decaying buildings, others cleared of structures but containing hazardous wastes in their soil and groundwater—mar waterfronts and old industrial corridors. Derelict railroads, canals, docks, housing projects, and landfills all add to the growing acreage of urban land left unoccupied and untended.

Id.

⁵⁰ See Stefanie B. Goldberg, *Let's Make a Deal: Cooperation, Not Litigation Is the Newest Way to Clean Up Urban Wastelands*, ABA J., Mar. 1997, at 42-43.

⁵¹ See Brian C. Walsh, *Seeding the Brownfields: A Proposed Statute Limiting Environmental*

perceived to be, or are in fact, contaminated with hazardous materials.⁵²

Liability for the cleanup of contaminated property is established primarily under federal and state environmental laws.⁵³ The most far-reaching of these laws is the 1980 Comprehensive Environmental Responses, Compensation and Liability Act (CERCLA).⁵⁴ CERCLA is often referred to as Superfund, after the revolving cleanup trust fund established under the law. Most of the state hazardous waste cleanup laws were based largely on the federal Superfund model.⁵⁵ Therefore, by examining Superfund we can observe how environmental liability laws in general are affecting the use or abandonment of urban properties.

The core objective of CERCLA is to identify parties responsible for contaminating property, and then to require these parties to pay, or reimburse the government, usually the Environmental Protection Agency (EPA), directly for the costs of environmental remediation.⁵⁶ CERCLA refers to persons who are subject to remediation liability as potentially responsible parties (PRPs). On its face, CERCLA appears to be a workable and appropriate piece of legislation; a straightforward law based on the polluter pays principle, which holds that the burden of cleanup should fall on the shoulders of those who pollute.⁵⁷ In practice, however, CERCLA has proven difficult and somewhat dysfunctional.⁵⁸

CERCLA's troubles can be traced in part to the expansive interpretations of the term PRP, and PRP remediation liability, adopted by EPA and the courts.⁵⁹ These expansive interpretations resulted in the following liability rules: (1) *strict liability*, in which intent or

Liability for Prospective Purchasers, 34 HARV. J. ON LEGIS. 191, 198 (1997). "Looming environmental liability is not the only factor contributing to the brownfields problem; other significant factors include perceptions of crime, tax rates, municipal services, and possibly racism." *Id.*

⁵² See Ravi Arulanantham & Steven Morse, *Brownfields . . . Everybody's Doing It*, 5 ENV'T L. NEWS 1, 5-6 (1996).

⁵³ See BOYD ET AL., *supra* note 9, at 7-8.

⁵⁴ 42 U.S.C. §§ 9601-9675 (1994).

⁵⁵ See Terry J. Tondro, *Reclaiming Brownfields to Save Greenfields: Shifting the Environmental Risks of Acquiring and Reusing Contaminated Land*, 27 CONN. L. REV. 789, 790-91 (1995) (referring to state hazardous waste liability laws as "little CERCLAs").

⁵⁶ See Charles de Saillan, *In Praise of Superfund*, 35 ENV'T 42, 42 (1993).

⁵⁷ See DAVID PEARCE & R. KERRY TURNER, *ECONOMICS OF NATURAL RESOURCES AND THE ENVIRONMENT* 173, 175 (1990).

⁵⁸ See Senator John H. Chafee, *Superfund Reform: Use Brownfields to Save Green Ones*, PROVIDENCE J.-BULL., July 2, 1996, at B04.

⁵⁹ See Walsh, *supra* note 51, at 194.

negligence were not required to impose remediation liability on a PRP;⁶⁰ (2) *joint and several liability*, in which a party who contributed a small portion of the pollution could be responsible for the entire cost of remediation;⁶¹ (3) *lender liability*, in which banks and lending institutions that influenced the management decisions of property owners could be subject to PRP liability;⁶² (4) *retroactive liability*, in which a party could be subject to PRP liability notwithstanding that its hazardous waste disposal practices were legal at the time the disposal occurred;⁶³ and (5) *open-ended liability*, in which a party was uncertain as to when remediation was completed, or what cleanup standards would satisfy its remediation responsibilities.⁶⁴

Although CERCLA's expansive liability rules were intended to facilitate comprehensive and speedy cleanup of contaminated sites, often this was not the result. Frequently, the liability for PRPs was so extensive that parties found it cheaper to litigate for years rather than to pay for remediation.⁶⁵ Frequently, the specter of lender liability meant that banks would refuse to foreclose on loans, and properties would be abandoned.⁶⁶ Frequently, investors and banks would

⁶⁰ See DAVID CARPENTER, ROBERT CUSHMAN & BRUCE ROZONOWSKI, ENVIRONMENTAL DISPUTE HANDBOOK: LIABILITY AND CLAIMS 31-32 (1991). "[CERCLA] imposed strict liability, without regard to fault, on certain broadly defined categories of persons who either owned or operated the sites that became the subject of government removal or remedial action, or who either generated or transported the hazardous substances that were disposed of in these sites." *Id.*

⁶¹ See CARPENTER, CUSHMAN & ROZONOWSKI, *supra* note 60, at 189 (Volume II).

Early case law under CERCLA established that joint and several liability, even though not expressly authorized by the statute, could be imposed on the four types of PRPs. Under joint and several liability, each defendant is liable for the entire harm, not just the harm for which it is proximately responsible.

Id.

⁶² See *United States v. Fleet Factors Corp.*, 901 F.2d 1550, 1557-58 (11th Cir. 1990) (holding that lenders could be held liable for environmental/hazardous waste remediation if they participated sufficiently in a company's management). EPA issued a regulation that sought to limit the *Fleet Factors* holding, but this regulation was found to be inconsistent with CERCLA's liability scheme. See *Kelley v. Environmental Protection Agency*, 15 F.3d 1107, 1110 (D.C. Cir. 1994).

⁶³ See CARPENTER, CUSHMAN & ROZONOWSKI, *supra* note 60, at 356. "[CERCLA] is unprecedented, in that liability for environmental cleanup is being mandated for businesses even when prior handling and disposal activities were conducted using methods which constituted perfectly acceptable practices within the legal and regulatory framework of those times. . . . The retroactivity implication of Superfund have cast a cloud of uncertainty over business conduct within the private sector of the U.S. economy." *Id.* See also *United States v. Northeastern Pharm. & Chem. Co. Inc.*, 810 F.2d 726, 732-34 (8th Cir. 1986).

⁶⁴ See BOYD ET AL., *supra* note 9, at 10. See generally Frederick W. Addison, *Reopener Liability Under Section 122 of CERCLA: "From Here to Eternity,"* 45 Sw. L.J. 1081 (1991).

⁶⁵ See *Superfund as a Threat*, ENVTL. F. July-Aug. 1994, at 15.

⁶⁶ See generally Scott Wilsdon, Note, *When a Security Becomes a Liability: Claims Against Lenders in Hazardous Waste Cleanup*, 38 HASTINGS L.J. 1261 (1987).

refuse to redevelop contaminated property, or even property that might be contaminated, for fear of becoming a PRP.⁶⁷ Frequently, landowners would avoid undertaking a preliminary environmental assessment of their property, because such an assessment could unearth information that might trigger PRP liability.⁶⁸

Under the above liability scenario, environmental lawyers and remediation consultants made substantial profits. Despite the enormous activity surrounding CERCLA's implementation, however, there often was a disturbing lack of activity on the actual remediation front.⁶⁹ Lawyers and consultants were hired to help determine CERCLA remediation liability, but much of their work never translated into tangible cleanup of contaminated properties.⁷⁰

The subject matter of CERCLA, the polluted sites, generally remained just that—polluted sites. Especially in former industrial urban areas, the American landscape remained littered with abandoned, contaminated properties.⁷¹ Although CERCLA environmental liability certainly was not the only factor contributing to this situation, it nonetheless helped to deepen the post-industrial economic decline in many city neighborhoods.⁷² From an investment and business standpoint, these abandoned properties, or brownfields, became untouchables.

Abandoned brownfields tended to drag surrounding properties and communities down with them, thereby reinforcing the decline cycle.⁷³

⁶⁷ See Charles Bartsch, *Financing Brownfield Cleanup and Redevelopment*, NE-MW ECON. REV., June 1995, at 4.

⁶⁸ BOYD ET AL., *supra* note 9, at 25.

For this reason, it may be in the interest of those who currently own brownfields properties to withhold them from the market. The increased probability of detection that accompanies a sale in effect imposes the property transfer tax that can lead to deadweight losses in brownfield property markets. This distortion underlies the following type of complaint, made in arguments for a recent environmental liability reform initiative in the Pennsylvania Senate: "Companies in Pittsburgh, Johnstown and other communities have deliberately let industrial property stand idle indefinitely rather than even look to see what contamination might exist because they were afraid to deal with state environmental agencies."

Id. (quoting *Clean Up Pollution, Protect Farmland, Create Jobs: How a Sensible Industrial Site Recycling Policy Will Benefit Pennsylvania* (PRESS RELEASE, PENNSYLVANIA SENATORS BRIGHTBILL, MUSTO, STEWART, AND SHAFFER), Apr. 1, 1993)).

⁶⁹ See *Superfund as a Threat*, *supra* note 65, at 15. EPA "now spends only about 45 percent of its Superfund monies on core activities, such as waste removal and remediation. The rest goes for administrative oversight, studies, design, investigation, monitoring, enforcement, and legal costs." ENV'T WK., July 21, 1997, at 345.

⁷⁰ See ENV'T WK., *supra* note 69, at 345-46.

⁷¹ See URBAN VACANT LAND, *supra* note 6, at 15.

⁷² See *id.* at 57.

⁷³ See, e.g., John Carey, *Urban Fields of Dreams*, BUS. WK., May 27, 1996, at 80-86. See also

As discussed earlier in this Essay, the increase in untouchable brownfields also encouraged suburban sprawl and the destruction of open space.⁷⁴ This pattern of metropolitan expansion only further diminished the economic resources and political power of many cities.

The point here is not to blame CERCLA for the woes of post-industrial urban America. Rather, the point is simply to demonstrate the particular role that environmental liability rules played in diverting investment and economic development away from our cities.

In response to the economic and environmental problems relating to PRP liability rules, there have been some attempts to reform CERCLA. The first significant attempt to reform CERCLA was the Superfund Amendments and Reauthorization Act (SARA) of 1986.⁷⁵ Among other things, SARA sought to establish a viable "innocent landowner defense" for parties who purchased real property *after* contamination occurred.⁷⁶ Under SARA's provisions, a purchaser would not be liable for remediation costs if the party could demonstrate that it "did not know nor had reason to know" of the hazardous waste contamination when the party acquired the property.⁷⁷ The objective of this language was to provide the prospective purchaser with sufficient protection, or immunity, so that polluted properties could be redeveloped.

Due to inconsistent interpretations of the innocent landowner defense, however, SARA did not achieve this goal. More specifically, EPA and the courts did not clearly establish what the prospective purchaser must do, in terms in environmental investigation, to demonstrate that it "did not know nor had reason to know" of existing contamination.⁷⁸ In the absence of such specific criteria, SARA's protections could not be relied upon. As one commentator explained, in

KARL LINN, *URBAN HABITAT PROGRAM, FROM RUBBLE TO RESTORATION* 2 (1994). "The loss of an economic base has left many cities with extensive areas of unused land. Acre upon acre of vacant litter strewn land symbolizes many cities as places of desolation and decay in the minds of residents and visitors alike." *Id.* at 2.

⁷⁴ See *supra* text accompanying notes 11-48.

⁷⁵ See 42 U.S.C. § 9601(35)(A) (1994).

⁷⁶ The origins of CERCLA's innocent landowner defense can be traced to 42 U.S.C. § 9607(b)(3), which establishes a third party defense. SARA sought to clarify and expand this third party defense.

⁷⁷ 42 U.S.C. § 9601(35)(A) (1994).

⁷⁸ See generally Phillip B. Rarick, *The Superfund Due Diligence Problems: The Flaws in the ASTM Proposal and an Alternative Approach*, 21 ENVTL. L. REP. 10505 (1991); see also *In Re Hemingway Transp.*, 993 F.2d 915 (1st Cir. 1993); *United States v. A & N Cleaners & Launderers, Inc.*, 788 F. Supp. 1317 (S.D.N.Y. 1992); *United States v. Serafini*, 791 F. Supp. 107 (M.D. Pa. 1990); *United States v. Pacific Hide & Fur Depot, Inc.*, 716 F. Supp. 1341 (D. Idaho 1989);

practice CERCLA's innocent landowner defense turned out to be more of a mirage than an oasis.⁷⁹ As a result, acquisition and redevelopment of polluted properties did not occur, and the untouchables remained largely untouched.

The second major wave of CERCLA reform, EPA's Brownfields Action Agenda (EPA Agenda), began near the end of President Clinton's first term.⁸⁰ The EPA Agenda emerged from the ashes of the proposed 1994 Superfund Reform Act (SRA), a Clinton-sponsored bill which Congress did not pass. In the absence of strong congressional action, the focus of CERCLA reform shifted to the administrative arena.⁸¹ What could not be achieved through broad-based legislation would now be attempted through a package of agency policies and operating procedures.⁸²

Prior to the EPA Agenda, the term brownfield generally held a negative meaning, both environmentally and investment-wise. It referred to former industrial properties that were now unused due to uncertainty over environmental remediation liability.⁸³ EPA's program sought to transform this meaning, to change the language of brownfields from talk of obstacles to talk of opportunity. An April 1996 report issued by EPA reflects this shift: "Implementation of the Brownfields Action Agenda will help reverse the spiral of unaddressed contamination, declining property values and increased unemployment often found in inner city industrial areas."⁸⁴ As such, the

Washington v. Time Oil Co., 687 F. Supp. 529 (W.D. Wash. 1988); BCW Assocs. v. Occidental Chem. Corp., 1988 WL 102641 (E.D. Pa. 1988).

⁷⁹ See generally L. Jager Smith, *CERCLA's Innocent Landowner Defense: Oasis or Mirage?*, 18 COLUM. J. ENVTL. L. 155 (1993).

⁸⁰ U.S. ENVIRONMENTAL PROTECTION AGENCY, THE BROWNFIELDS ACTION AGENDA 1 (Apr. 1996) [hereinafter EPA AGENDA].

⁸¹ See William Keener, *Brownfields—The United States EPA's Policy and Legal Responses*, LAND-USE AND ENV'T F., at 144–45 (Summer 1995). As EPA headquarters in Washington, D.C. "struggled to respond individually to each of these requests, it pinned its hopes on the Clinton Administration's 1994 Superfund Reform Act (SRA) . . . [a]lthough the bill failed to pass in the last week of the 103rd Congress." *Id.* at 144. "In the wake of SRA's demise, the EPA is not sitting still, waiting for a new version of SRA to hit the President's desk. The EPA is pushing ahead with its own program to implement some of that taken from SRA. Known as the 'CERCLA administrative reform,' they include a package of policies that encourages economic development of real estate under the umbrella of the EPA's brownfields action agenda." *Id.* at 145.

⁸² See *id.*

⁸³ See Tondro, *supra* note 55, at 789–90. Terry T. Tondro defines brownfields as "productive property now unused due to uncertainty over who bears the responsibility for undertaking environmental cleanup." *Id.*

⁸⁴ EPA AGENDA, *supra* note 80, at 1.

EPA Agenda suggested that the brownfields issue was not just about limiting the liability of banks and real estate developers; it was also about providing inner-city residents with a strategy to improve the economy and environmental health of their communities.⁸⁵

In terms of CERCLA implementation, the EPA Agenda called for several changes in agency policy and operating procedures. These changes included, among other things, (1) *CERCLIS delisting*, in which EPA removed over 25,000 properties from the national tracking list of contaminated sites;⁸⁶ (2) *prospective purchaser agreements*, in which EPA agreed not to sue new owners for environmental remediation costs for contamination that occurred prior to purchase;⁸⁷ (3) *comfort letters*, in which EPA set forth its remediation goals regarding formerly federally owned property;⁸⁸ (4) *land-use restrictions*, in which new owners agreed to limit future use to commercial and industrial purposes in exchange for EPA's release of remediation liability; (5) *national and regional brownfields pilots*, in which EPA provided grants to states and local governments to help promote environmental cleanup and redevelopment of contaminated properties;⁸⁹ and (6) *Community Reinvestment Act (CRA) credits*, in which federal guidelines were changed to permit banks to fulfill CRA's local-lending obligations by providing loans for environmental remediation and brownfields redevelopment.⁹⁰

In addition to the EPA Agenda's administrative reforms, Congress recently passed legislation that could provide further liability protections for banks and other lending institutions. The 1996 Asset Conservation, Lender Liability and Deposit Insurance Protection Act (part of the Omnibus Appropriations Act), signed into law by Presi-

⁸⁵ See URBAN HABITAT PROGRAM, *supra* note 7, at 1-2. "While the EPA initiative has put brownfields redevelopment on the agenda of almost every government entity, developing a coordinated approach to urban revitalization that places inner city-based community groups on the same footing as private and public initiatives is crucial . . ." *Id.*

⁸⁶ CERCLIS is short for the Comprehensive Environmental Response, Compensation & Liability Information System, the EPA database/inventory of potential hazardous waste sites. See EPA AGENDA, *supra* note 80, at 5. See also Elizabeth M. Weaver, *New Life for Brownfields: Contaminated Sites Can Be Successfully Redeveloped*, HOUSE COUNSEL MAG., Winter 1997, at 25.

⁸⁷ See OFFICE OF SOLID WASTE AND EMERGENCY RESPONSE, U.S. ENVTL. PROTECTION AGENCY, LIABILITY AND OTHER GUIDANCES 1 (Mar. 1996).

⁸⁸ See EPA AGENDA, *supra* note 80, at 7 (discussing Model Comfort Letter for Transfers of Federally Owned Property).

⁸⁹ See generally OFFICE OF SOLID WASTE AND EMERGENCY RESPONSE, U.S. ENVTL. PROTECTION AGENCY, BROWNFIELDS NATIONAL PILOTS (June 1996) [hereinafter CRA Credits].

⁹⁰ See *id.*

dent Clinton on September 20, 1996, creates a new "lender exemption" under CERCLA.⁹¹ This exemption permits a bank or lender to take certain specified actions to protect its security interest in a contaminated property without triggering Superfund's PRP liability. These exempt actions include foreclosure, resale and leasing of the premises.⁹² Although there still remain many pre-foreclosure actions that could trigger PRP liability, especially lender actions that might influence how a landowner manages environmental problems on a given site, the federal legislation does provide greater clarity and certainty. At least in regard to the actions specifically exempted, banks and other lending institutions should be better able to determine their potential remediation liability.⁹³

As discussed earlier, CERCLA is not the only law that creates liability for the cleanup of contaminated properties. There are laws in virtually every state that establish CERCLA-type liability schemes for environmental remediation.⁹⁴ The policy debates around brownfields reclamation therefore have focused not only on CERCLA, but on state hazardous waste laws as well.⁹⁵

III. ECONOMIC AND ENVIRONMENTAL JUSTICE: RECLAMATION FOR WHOM?

As the previous sections on open space conversion and brownfields reveal, metropolitan land-use and hazardous waste remediation are closely linked to the fate of the urban poor. Because the urban poor often tend to be people of color, frequently African-American or Latino citizens, these issues also raise difficult questions of equity and justice. How does the location of contaminated sites, and the rules governing environmental liability, impact the economic and health conditions in communities of color? Do the negative economic and environmental consequences of open space conversion affect all ethnic groups equally? Will brownfields reclamation provide tangible benefits, in terms of economic development or environmental quality,

⁹¹ 42 U.S.C. § 9601(20)(E)-(G) (1994); 42 U.S.C. § 9607(n) (1994).

⁹² 42 U.S.C. § 9601(20)(E)(ii).

⁹³ See Maurine C. Padden, *Toxic Liability Reform for Lenders and Fiduciaries*, 15 CAL. REAL PROP. J. 15, 25 (1997).

⁹⁴ See BOYD ET AL., *supra* note 9, at 7-8. "Superfund is only one element of a greater patchwork of legal rules and regulations that can create uncertain liability for property owners. . . . Property owners who are not liable under CERCLA may nevertheless be liable under state law." *Id.*

⁹⁵ See *id.*

for the communities where brownfields are located, or will reclamation mostly benefit investors from outside the communities?

The questions presented above all fall within the larger policy issue of what is now generally called "environmental justice."⁹⁶ The environmental justice movement is based on the growing recognition that poor communities and minority populations are subject to disproportionately high health and environmental risks.⁹⁷ Government policies that have either encouraged or ignored this disproportionate allocation of risks have been classified justifiably as examples of environmental racism.⁹⁸ The goal of the environmental justice movement is to ensure that environmental protection policies benefit all citizens, not just the white and the rich, by empowering disadvantaged communities and educating and pressuring government agencies.⁹⁹

From both a racial and an environmental standpoint, environmental justice is a significant, and arguably a long-overdue, development. The movement represents the convergence of two agendas that traditionally had little interest in or understanding of each other—civil rights and environmental protection.¹⁰⁰ More specifically, it forced the environmental movement to confront some of the racist and class-driven aspects of its political platform. Environmentalists had come to consider environmental protection as something distinct from, or something above, the struggle for justice and equity.¹⁰¹ By demonstrating that levels of environmental protection were closely related to citi-

⁹⁶ See generally William A. Shutkin & Charles P. Lord, *Environmental Law, Environmental Justice and Democracy*, 96 W. VA. L. REV. 1117 (1994).

⁹⁷ See Ann Bastian & Dana Alston, *Writing Our Own History: New Developments in the Environmental Justice Movement*, 5 RACE, POVERTY & THE ENV'T 8, 8 (1994-1995). "Environmental justice struggles have been around a long time, but they only gained self-consciousness and recognition as a movement over the last few years. Broadly defined, this movement links grassroots activism around environmental protection to issues of economic development, social equality and community empowerment." *Id.*; see also Tomas Aragon & Kevin Grumbach, *Bayview Hunters Point Community Health and Environment Check Up* (May 17, 1997) (documenting different health risks in predominantly white versus predominantly minority neighborhoods in San Francisco).

⁹⁸ See Regina Austin & Michael Schill, *Black, Brown, Poor and Poisoned: Minority Grassroots Environmentalists and the Quest for Eco-Justice*, 1 KAN. J.L. & PUB. POL'Y 69, 69 (1991).

⁹⁹ See *Preamble*, in *Principles of Environmental Justice* (adopted at the First National People of Color Environmental Leadership Summit, Washington, D.C., Oct. 1991).

¹⁰⁰ See generally Alice L. Brown, *Environmental Justice and Civil Rights*, 5 RACE, POVERTY & THE ENV'T 39 (1994-1995).

¹⁰¹ For a comprehensive discussion of the environmental movement's failure to respond to issues of equity and racism see MARK DOWIE, *LOSING GROUND: AMERICAN ENVIRONMENTALISM AT THE CLOSE OF THE TWENTIETH CENTURY* (1995).

zens' race and wealth, environmental justice advocates laid bare the falsity of this position.¹⁰²

By the time EPA began developing its Brownfields Action Agenda, the environmental justice movement was already in high gear. For several years, disadvantaged communities had begun to organize around health and environmental issues, and had managed to force changes in government and corporate policy.¹⁰³ Several successful environmental justice lawsuits and administrative challenges had been filed.¹⁰⁴ Additionally, President Clinton took two actions that helped raise the political profile of the movement. First, on September 30, 1993, he established the National Environmental Justice Advisory Council (NEJAC) to provide independent advice, consultations, and recommendations to the EPA Administrator on environmental justice matters.¹⁰⁵ Second, on February 11, 1994, President Clinton issued Executive Order 12,898, entitled *Federal Actions to Address Environmental Justice in Minority Populations and Low Income Populations*.¹⁰⁶

Given these developments in the area of environmental justice, the push for brownfields reclamation was met with both anticipation and skepticism. On the one hand, brownfields reclamation provided an opportunity to clean up and improve economic and environmental

¹⁰² See *Unequal Protection: The Racial Divide in Environmental Law*, NAT'L L.J., Sept. 21, 1992, at S2.

¹⁰³ See generally Luke W. Cole, *Empowerment as the Key to Environmental Protection: The Need for Environmental Poverty Law*, 19 ECOLOGY L.Q. 619 (1992) (explaining why real action, and real successes, in environmental justice happen at community level, not in courtroom because filing suit is often an indication of failure at community organizing level).

¹⁰⁴ See Luke Cole, *Lawyers, the Law & Environmental Justice: Dangers for the Movement*, 5 RACE, POVERTY & THE ENV'T 3, 3 (1994-1995).

Community groups, environmental and civil rights organizations, and private attorneys have filed dozens of lawsuits in community struggles for environmental justice in the last five years. Some of these lawsuits have been suits using environmental law, some have been straight up civil rights suits, some have been interesting blends of these two disciplines. . . . Many of these suits have been successful, and the legal piece to the environmental justice movement is becoming every more sophisticated. . . . The legal struggle has moved beyond the courtroom, as well. More than 20 administrative complaints under Title VI of the Civil Rights Act of 1964, alleging environmental racism, have been filed with U.S. EPA in the past 15 months, with more being filed each month.

Id.

¹⁰⁵ See U.S. ENVIRONMENTAL PROTECTION AGENCY, OFFICE OF ENVIRONMENTAL JUSTICE, *THE MODEL PLAN FOR PUBLIC PARTICIPATION* ii (Nov. 1996).

¹⁰⁶ Exec. Order No. 12,898, 3 C.F.R. 859 (1994), reprinted as amended in 42 U.S.C. § 4321 (1994).

conditions in many poor and minority neighborhoods.¹⁰⁷ On the other hand, brownfields reclamation also called for less stringent cleanup standards and shielding banks and investors from remediation liability.¹⁰⁸ Furthermore, there were no guarantees that the new jobs made possible by reclamation would go to the people who lived in the communities where brownfields were located.¹⁰⁹ Thus, it was possible that brownfields reclamation could lead to a continuation or worsening of health and economic conditions in poor and minority neighborhoods.

Skepticism about brownfields reclamation was based on more than environmental justice concerns. It was based on the negative experiences of many communities with urban renewal policies. During the 1960s, state and federal governments implemented many programs aimed at improving housing and economic development in inner cities.¹¹⁰ On the whole, these programs failed to achieve their goals.¹¹¹ The housing projects often tended to isolate and stigmatize poor, minority populations, and thus led to increased segregation and crime.¹¹² The renovation of older neighborhoods often resulted in gentrification, in which neighborhood residents were priced out of their own communities.¹¹³ The economic development programs often focused on businesses that, for reasons of both racism and work skills, did not hire from the community.¹¹⁴ Thus, the jobs that were created did not benefit inner-city residents. As one observer put it, "urban renewal means negro removal."¹¹⁵

Many suspected that the 1990s brownfields agenda would be a repeat of the 1960s urban renewal experience. Olin Webb, a construc-

¹⁰⁷ See Goldberg, *supra* note 50, at 42.

¹⁰⁸ See Tondro, *supra* note 55, at 801 ("Differential clean-up standards, if set at a lower level 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 . . .").

¹⁰⁹ See Alan Edson, Presentation at the Conference on Community Development and Environmental Restoration: The Language and Practice of Brownfields Redevelopment in San Francisco (May 10, 1997). ("Local Communities are concerned that the brownfields movement is really about a 'one shot deal,' where minority populations are given jobs to build businesses and housing, and not the jobs to work or live there.")

¹¹⁰ See RYBCZYNSKI, *supra* note 15, at 172.

¹¹¹ See generally MARTIN ANDERSON, *THE FEDERAL BULLDOZER: A CRITICAL ANALYSIS OF URBAN RENEWAL, 1949-1962* (1964).

¹¹² See *id.*

¹¹³ See Tarlock, *supra* note 16, at 481.

¹¹⁴ Interview with Alan Edson of the African American Development Association and Olin Webb of the Bayview-Hunters Point Contractors Association (conducted Feb. 10, 1997).

¹¹⁵ See Editorial, *Bringing New Life to a Troubled Area*, S.F. CHRON., Aug. 29, 1994, at A18.

tion engineer and long-time resident of the Bayview-Hunters Point neighborhood in San Francisco, expressed these concerns poignantly. Bayview-Hunters Point contains numerous contaminated and abandoned properties, and a majority of its residents are minorities.¹¹⁶ The neighborhood has therefore been a focal point for government and private sector brownfield initiatives in the San Francisco Bay Area. Many of these initiatives have been portrayed by government and investors as community redevelopment projects. Mr. Webb, however, views these initiatives as part of a longer and more disturbing pattern:

As far as I'm concerned, a brownfield is just a Superfund site. African-Americans bore the brunt of the poison and pollution when they were Superfund sites, but now they are not going to be a part of cleanup and redevelopment. From my neighborhood's perspective, brownfields redevelopment means that African-Americans are being passed over and moved out.¹¹⁷

As discussed in the previous section on CERCLA reform efforts, EPA began developing its Brownfields Action Agenda in early 1995, after Congress failed to pass the 1994 Superfund Reform Act.¹¹⁸ By early 1995, the environmental justice movement had become a powerful political force, and President Clinton had issued his 1994 Executive Order on Environmental Justice.¹¹⁹ Thus, at least at the level of government policy, environmental justice and brownfields reclamation became major political priorities at a similar point in time.

The concurrent political ascendance of environmental justice and brownfield issues forced the Clinton Administration to develop new strategies to handle this emerging policy nexus. In terms of a best-case scenario, the Clinton Administration sought to stitch the two movements together—to integrate equity, environmental cleanup, and economic revitalization into one coherent and mutually reinforcing policy agenda. In terms of damage control, the Clinton Administration wanted to avoid a situation where the environmental justice and brownfields agendas were in visible contradiction, mutually undermining each other.

¹¹⁶ See Jane Kay, *Pollution Fears Stir Activists in Hunters Point*, S.F. EXAMINER, Feb. 26, 1996, at A1; see also Clifford Rechtschaffen, *Fighting Back Against a Power Plant: Some Lessons From the Legal and Organizing Efforts of the Bayview-Hunters Point Community*, 3 HASTINGS W. N.W. J. ENVTL. L. & POL'Y 407, 408 (1996).

¹¹⁷ Edson and Webb Interview, *supra* note 114.

¹¹⁸ See *supra* text accompanying notes 80–82.

¹¹⁹ See *supra* text accompanying note 106.

The Clinton Administration's first significant effort to integrate environmental justice and brownfields policies took place in the context of the National Environmental Justice Advisory Committee (NEJAC), created in 1993 to advise EPA.¹²⁰ In 1995, NEJAC's Waste and Facility Siting Subcommittee and EPA cosponsored a series of public dialogues entitled *Public Dialogues on Urban Revitalization and Brownfields: Envisioning Healthy and Sustainable Communities*.¹²¹ The dialogues were held in five cities (Boston, Philadelphia, Detroit, Oakland, and Atlanta) and were intended to provide a forum to discuss EPA's plans to adopt new administrative policies to help encourage the redevelopment of contaminated urban properties.¹²² NEJAC's public dialogues involved persons from varied backgrounds and with varied objectives. Among those who participated were representatives from community groups, government agencies, religious groups, unions, universities, banks, and philanthropies.¹²³

Although the NEJAC dialogues revealed that there was broad interest in the issue of brownfields, they also revealed the profound gulf in both objectives and language that existed between different stakeholders.¹²⁴ Every participant in the NEJAC dialogues used the word "redevelopment," but the term clearly meant different things to different people. For the real estate investors and banks, redevelopment meant removing the liability risks associated with property transactions at sites where there were toxic contamination concerns.¹²⁵ For environmental justice advocates, redevelopment meant ensuring that health conditions and the economic self-reliance of poor, inner-city residents were improved, not worsened, by brownfields reclamation.¹²⁶

¹²⁰ For a discussion of NEJAC, see *supra* text accompanying note 105.

¹²¹ See URBAN HABITAT PROGRAM, ENVIRONMENTAL JUSTICE, URBAN REVITALIZATION, AND BROWNFIELDS: THE SEARCH FOR AUTHENTIC SIGNS OF HOPE 1 (1995).

¹²² See *id.*

¹²³ See *id.*

¹²⁴ See *id.*

¹²⁵ See *id.*

Concerns were raised [at the NEJAC dialogues] by members of the public about the Brownfields Initiative, i.e., whether or not the brownfields issue was a smoke screen for gutting cleanup standards, environmental regulations, and liability safeguards. Heretofore, public policy discourse around the brownfields issue has revolved around removing barriers to real estate and investment transactions at sites where there exists toxic contamination concerns—real or perceived.

URBAN HABITAT PROGRAM, *supra* note 121, at 1.

¹²⁶ See *id.* at ii. "Environmental justice and brownfields are inextricably linked. All stakeholder

The divisions that emerged at the 1995 NEJAC dialogues have continued to define the evolution of the brownfields issue. In the San Francisco Bay Area, for instance, many of the local participants in the Oakland NEJAC dialogue went on to form the San Francisco Bay Area Regional Brownfields Working Group (SF Brownfields Working Group).¹²⁷ Although the group includes members from the lending, business, and regulatory communities, the main foci of the group's work are to promote environmental justice in the context of the brownfields issue, and to strengthen community leadership and participation in efforts to redevelop contaminated properties.¹²⁸

To help advance these environmental justice goals, in May of 1997 the SF Brownfields Working Group organized a workshop entitled *Community Development & Environmental Restoration: The Language & Practice of Brownfields Redevelopment*. Unlike the 1995 NEJAC dialogues, the SF Brownfields Working Group workshop was not designed to help EPA formulate new hazardous waste remediation policies. Rather, the goal of the 1997 workshop was to educate community leaders on existing government policies and lending/financing options in the brownfields area.¹²⁹ It provided information on how local non-profits and small businesses can take the lead, and leverage resources, to clean up sites and put them back into productive use. As such, the focus of the workshop was on helping neighborhoods become the initiators, rather than the victims, of brownfields reclamation.

At the same time as groups like the SF Brownfields Working Group are pushing ahead on the environmental justice front, other stakeholders are seeking to frame the brownfields issues in terms of pure investment opportunities. For instance, in March of 1997, a new national magazine, *Brownfield News*, was launched in Chicago. The magazine proclaims itself to be "The Source of the Distressed Property

groups must recognize that the inescapable context for discussion of the brownfields issue is environmental justice and urban revitalization." *Id.*

¹²⁷ The author is a member of the San Francisco Bay Area Brownfields Working Group, and therefore the discussion that follows is based largely on the author's experience with the group.

¹²⁸ See URBAN HABITAT PROGRAM, THE SAN FRANCISCO BAY AREA REGIONAL BROWNFIELDS WORKING GROUP: REDEVELOPMENT GOALS, PRINCIPLES AND ACTIVITIES TO DATE 1 (1996).

¹²⁹ See *Community Development & Environmental Restoration: A Workshop on the Language & Practice of Brownfields Redevelopment* (1997) (mailing flyer from the San Francisco Bay Area Brownfields Working Group) (on file with author). "The workshop will focus on ways in which community leaders and community groups can capture the resources necessary to move a brownfields redevelopment project forward." *Id.*

Market," and contains articles on industrial real estate forecasts, investor insurance coverage, strategies to reduce expenditures on environmental cleanup, and new legislative proposals to reduce investor and lender liability.¹³⁰ In the pages of *Brownfield News*, one is not likely to find discussion of economic equity, public participation, or environmental racism. These issues simply fall outside the investment scope of the publication.

The point here is not to portray the SF Brownfields Working Group and *Brownfield News* as two opposite ends on a spectrum of good and evil. Clearly, environmental justice advocates need to access and leverage private capital to achieve their community empowerment goals.¹³¹ Local non profits and government agencies can take the lead in defining how neighborhood redevelopment should proceed, but only the private sector can provide the financial resources to make these plans work.¹³² Given that the private sector will be the ultimate engine of brownfields reclamation, much of the information presented in *Brownfield News* could be used to further the environmental justice agenda. It could be viewed as a tool for helping communities take control of their economic and environmental future.

Despite the potential confluence of interests, however, environmental justice advocates remain wary of the lending and investment communities' growing role in brownfields redevelopment.¹³³ As with urban renewal in the 1960s, there is concern that the brownfields issue is being economically and politically hijacked by interests that have no connection with, or true concern about, the communities they claim to be helping. In the language of investors and lenders, struggling communities and poisoned citizens can be readily reduced to the term "distressed property market," a market in which profit alone becomes the governing redevelopment principle.¹³⁴

In the brownfields debate, environmental justice advocates have posed a critical question: Can there be a commitment to urban neighborhoods, economic equity, and public health when remediation policy

¹³⁰ See generally BROWNFIELD NEWS, Mar. 1997, at 1.

¹³¹ See Edson and Webb Interview, *supra* note 114.

¹³² See *id.*

¹³³ See Tondro, *supra* note 55, at 801 ("The rapidly developing concern for environmental equity is the wild card in any effort to cut the costs of remediating contaminated land.").

¹³⁴ See Evan C. Henry & Randy A. Mueller, *Banking on Properties: Brownfields Financing—Financial Institution Consideration for the Private Sector*, BROWNFIELD NEWS, May 1997, at 20 ("[I]n the financial community's language there are only two words: dollars and cents.").

and investment are driven by profit alone?¹³⁵ The answer to this question will impact citizens and communities across the nation.

IV. BEYOND THE NEXUS: POLICY RESPONSES TO THE PROBLEM

The origins of suburban sprawl, toxic contamination, and inner-city decline are complex. Given this complexity, there are no simple policy solutions to these problems. The scope and interrelatedness of the issues do not lend themselves to tidy, reductionist answers.

While there may not be simple solutions, there are nonetheless specific and important policy steps that can be taken to improve the situation. Particularly in the areas of metropolitan land governance and the remediation regulatory framework, there are policy options that can and should be pursued.

In the area of metropolitan land governance, there needs to be a recognition that our municipal governments often lack the legal capacity to deal with the problems facing our cities.¹³⁶ Jurisdiction over land regulation generally exists at the county level, yet the problems of open space loss and inner-city disinvestment frequently operate on a larger metropolitan scale.¹³⁷ As long as land-use planning, property taxes, and municipal services are handled by county governments, different counties will lack either the means or the incentive to deal with metropolitan-wide land-use problems.¹³⁸

Illustrations of the inadequacy of current metropolitan governance are easy enough to find. A county that chooses to protect open space generally cannot prevent a neighboring county from encouraging

¹³⁵ See URBAN HABITAT PROGRAM, *supra* note 7, at 1-2.

The environmental justice movement has been instrumental in focusing brownfields issues to address economic development and urban revitalization as central to the nation's economic and environmental future. By placing the intersection of race and environmental degradation at the center of the agenda of environmental protection, brownfields redevelopment has the potential to address the social, economic and environmental needs of multicultural urban communities in tandem with the regional needs for land use reform.

Id.

¹³⁶ See Myron Orfield, *Metropolitics: Coalitions for Regional Reform*, BROOKINGS REV., Winter 1997, at 8.

¹³⁷ See DOWNS, *supra* note 1, at 31. "Each jurisdiction tends to adopt policies designed to benefit its own residents and disregards their effects on the rest of the metropolitan area. This parochial viewpoint causes serious discrepancies between the welfare of individual communities and that of the entire metropolitan area." *Id.*

¹³⁸ See URBAN VACANT LAND, *supra* note 6, at 65. "Those interested in the root cause of urban abandonment should look beyond the limits of the central city and seek ways to engage in region-wide planning efforts that transcend jurisdictional boundaries." *Id.*

sprawl, and adding to traffic and air pollution.¹³⁹ Inner-city counties containing large numbers of contaminated properties cannot require that surrounding suburban counties help fund remediation. In many metropolitan areas, there is no way to ensure the availability of affordable housing to middle and lower income residents, because each county is seeking to upgrade its tax base.¹⁴⁰

The inadequacy of metropolitan governance is particularly acute in the land-use area. As Joe Bodovitz of California Environmental Trust, a non-governmental organization focused on growth-management issues, observed:

Sustainable environmental planning comes down to three basic elements: land, air and water. In the Bay Area, the Regional Water Quality Control Board has the region-wide institutional capacity to deal with water quality and the nine-county Bay Area Air Quality Management District has the institutional capacity to deal with air quality. The problem is that there is no region-wide institution with the capacity to adequately deal with land, and without the land element, the environmental quality of the Bay Area cannot be preserved.¹⁴¹

In 1991, state legislation was introduced in California that would have helped establish the foundation for meaningful metropolitan governance in the San Francisco Bay Area. The proposed legislation called for the consolidation of three existing regional institutions and agencies, the Association of Bay Area Governments, the Bay Area Air Quality Management District, and the Metropolitan Transportation Commission, into one governmental entity called the Regional Commission.¹⁴² Proponents of the Regional Commission legislation also envisioned that two other regional bodies, the Regional Water Quality Control Board and the Bay Conservation and Development Commission, could later be integrated into the new comprehensive metropolitan entity.¹⁴³

¹³⁹ See BAY AREA COUNCIL, *supra* note 40, at 2.

¹⁴⁰ See *id.*

¹⁴¹ Interview with Joe Bodovitz (conducted Mar. 7, 1997).

¹⁴² See S. 797, Reg. Sess. (Cal. 1991).

¹⁴³ See BAY VISION 2020 COMMISSION, FINAL REPORT 16 (1991).

The merger would link, in one agency with one governing board, responsibility for regional air quality, regional transportation, and regional aspects of land use; it would also make possible effective planning and actions for other, related matters. . . . Other regional agencies should be considered for later consolidation into the new Regional Commission. These could include the San Francisco Bay Regional Water Quality

Despite the support of the environmental, minority rights, and affordable housing advocates, the bill creating the Regional Commission was rejected by the California legislature. This rejection was due in large part to two factors. First, some existing agencies proved unwilling to transfer authority or funding to the new Regional Commission.¹⁴⁴ Second, many less populated Bay Area suburban communities were convinced that the Regional Commission's agenda would be dominated by urban interests.¹⁴⁵

Although recent efforts to strengthen metropolitan-wide governance did not succeed in the San Francisco Bay Area, other cities have had better luck. In 1978, for instance, Portland, Oregon voters approved the creation of a new multi-county agency, the Metropolitan Services Agency, with significant land-use authority.¹⁴⁶ The Metropolitan Services Agency, or "Tri-Met," whose councilors are elected from the city's three counties, has jurisdiction over development, housing, and open space preservation for the entire Portland metropolitan area.¹⁴⁷ Portland's multi-county agency has been credited with preventing the sprawl, traffic congestion, and affordable housing shortages that have plagued many other cities.¹⁴⁸

While an agency like Tri-Met may not be the appropriate solution for all cities, Portland has at least provided an important model for metropolitan governance. The citizens of Portland have demonstrated that it is indeed politically possible to create metropolitan institutions that operate at the same scale as the land-use problems confronting our cities.¹⁴⁹

In the area of brownfields remediation policy, the critical task will be to place environmental and economic justice issues at the center of the redevelopment process. Through the federal EPA Brownfields Action Agenda, and similar state environmental reforms, the liability

Control Board, the Bay Conservation and Development Commission, and other single-purpose agencies acting on issues of regional concern.

Id.

¹⁴⁴ See Bodovitz Interview, *supra* note 141.

¹⁴⁵ See *id.*

¹⁴⁶ See John King, *Portland's Metro Government Role, Power Still Being Defined*, CONTRA COSTA TIMES, Oct. 25, 1990, at 1A.

¹⁴⁷ See *id.* at 9A.

¹⁴⁸ See generally Charles A. Hales, *Higher Density Plus Certainty Equals Affordable Housing for Portland*, URB. LAND, Sept. 1991, at 12-15.

¹⁴⁹ See DOWNS, *supra* note 1, at 182. "Unless Americans confront this reality by creating institutions that operate at the same scale as their major problems, their problems will only get worse." *Id.*

framework for contaminated properties is beginning to change.¹⁵⁰ State and federal laws and regulations increasingly offer enhanced protection to investors who are willing to purchase sites with real or perceived hazardous waste problems.¹⁵¹ While these investors will likely help put brownfields back into economic use, it remains unclear what impact this redevelopment will have on inner-city communities and the environment.

State and federal governments can play an important role in shaping the redevelopment process. Most significantly, governments can provide a regulatory framework that will point the private sector, the underlying engine of brownfields redevelopment, in a more environmentally progressive and equitable direction.¹⁵² Governments can refuse to accept lower cleanup and health standards for properties located in poor inner-city neighborhoods. They can develop more powerful tax incentives, along the lines of the federal Community Reinvestment Act (CRA), to ensure that brownfield redevelopment loans from private banks are made to businesses from within distressed neighborhoods.¹⁵³ They can adopt policies that link prospective purchaser and lender liability protections to whether the proposed redevelopment project will have tangible health and economic benefits to the local community.

One possible model for integrating remediation reform with environmental justice is the federal Small Business Administration (SBA).¹⁵⁴ SBA establishes a program which encourages federal agencies to favor small business enterprises (SBEs) in the awarding of government contracts, as long as these SBEs possess the capacity and expertise to perform the contracts.¹⁵⁵ SBA's program recognizes that: (1) smaller enterprises, because of economies of scale and vertical integration, are often underbid by larger national or international companies; and (2) there are valid policy reasons for providing some degree of protection for these smaller enterprises, which are often owned by and employ workers from the local community, notwithstanding that these smaller enterprises can be underbid by larger

¹⁵⁰ See *supra* text accompanying notes 80-93.

¹⁵¹ See *id.*

¹⁵² See NRDC Official: *Brownfields Programs Offer E-Justice to Communities*, ENV'T WK., June 16, 1997, at 287-88.

¹⁵³ See CRA Credits, *supra* note 89.

¹⁵⁴ See 15 U.S.C. § 637(a) (1994).

¹⁵⁵ See Timothy S. Kerr, *Small Business Preferences in Federal Procurement*, LEGAL INTELLIGENCER, May 18, 1992, at 4.

national and international companies.¹⁵⁶ SBA provides a means to protect and promote these neighborhood, community focused, businesses.

EPA and other state environmental agencies could establish liability release programs that operated similar to the SBA program. The decision of whether to release a private party from future remediation liability could be based, in part, on whether the private party is a community enterprise. EPA and other state environmental agencies could establish a policy expressly favoring community enterprises in the granting of liability releases, or granting non-community enterprises less extensive releases from future remediation liability. SBA-type liability release programs would promote environmental justice goals by helping to ensure that community enterprises participate in the economic benefits of brownfields reclamation.

Another possible model for integrating remediation reform with environmental justice are the Restoration Advisory Boards (RABs), created to help deal with environmental cleanup issues relating to military base closures.¹⁵⁷ RABs are charged with helping develop and monitor the remediation process.¹⁵⁸ In theory, RAB plans recognize that military bases operate as integrated economic communities rather than as isolated parcels of property, and that closure and remediation have broad community repercussions.¹⁵⁹ EPA and other state environmental agencies could establish community based boards, along the lines of RABs, that would help guide neighborhood remediation policy and objectives. These RAB-type boards would help ensure that government decisions regarding cleanup standards

¹⁵⁶ See William J. Dennis et al., *Small Business Job Creation: The Findings and Their Critics*, BUS. ECON., July 1994, at 23.

¹⁵⁷ See Lenny Siegel, *Key Lessons for Brownfields from the Base Closure Cleanup Process*, at 1 (Sept. 20, 1996) (unpublished fact sheet prepared in conjunction with CAREER/PRO, a program of the San Francisco Urban Institute) (on file with author). This proposal is also based on Lenny Siegel's presentation to the San Francisco Brownfields Working Group in July 1996, during which he elaborated on how the RABs can serve as a potential model for increasing the community focus of brownfields remediation.

¹⁵⁸ See Naval Center Seeks Help From Public, INDIANAPOLIS STAR, Mar. 5, 1996, at B3.

¹⁵⁹ See Raymond Takashi Swenson, *Remediating Military 'Brownfields'*, NAT'L L.J., Nov. 6, 1995, at C11.

The community and its citizens are given a formal voice in the remedial process through a restoration advisory board that meets monthly with the EPA and state remedial project managers at each closing base. The board is provided updates on the progress of remedial investigation and action, and its input is solicited.

Id.

and liability are dealt with from a community-based, rather than a parcel-by-parcel, perspective.

Through the 1993 Executive Order¹⁶⁰ and the 1995 NEJAC public dialogues,¹⁶¹ the Clinton Administration has taken several bold symbolic steps in the area of environmental justice. Now what is needed are policies to translate this rhetoric into political and economic reality, so that brownfields reclamation can contribute to the larger reclamation of America's troubled cities. The Community Reinvestment Act, the Small Business Administration, and Restoration Advisory Boards provide a starting point for developing and implementing such policies.

CONCLUSION: THE CITY IN CONTEXT

For centuries, the U.S. frontier was about breaking the land, pushing the geographic edges of development continuously outward. As suburban sprawl, urban decay, and environmental pollution have made plain, however, that frontier has reached its end. Ecologically, economically, and politically, the paradigm of uncontrolled and continuous outward land development cannot be sustained.

The frontier before us now is about forging new relationships among our cities, farmlands, and wildlands. It is about constructing policies and economies that promote the health and livelihood of all our citizens, not just the privileged. The effort to reconcile open space, brownfields, and justice issues is on the leading edge of this new frontier. The success or failure of this effort will impact not only the fate of our cities, but the fate of our ecology and economy as well.

¹⁶⁰ See Exec. Order No. 12,898, 3 C.F.R. 859 (1994) (*reprinted as amended in 42 U.S.C. § 4321* (1994)).

¹⁶¹ See *supra* text accompanying notes 120–26.