12-1-1997

The Allure of a Lure: Proposed Federal Land Use Restriction Easements in Remediation of Contaminated Property

Lauri DeBrie Thanheiser

Follow this and additional works at: http://lawdigitalcommons.bc.edu/ealr

Part of the Environmental Law Commons, and the Land Use Law Commons

Recommended Citation
http://lawdigitalcommons.bc.edu/ealr/vol24/iss2/2

This Article is brought to you for free and open access by the Law Journals at Digital Commons @ Boston College Law School. It has been accepted for inclusion in Boston College Environmental Affairs Law Review by an authorized editor of Digital Commons @ Boston College Law School. For more information, please contact nick.szydlowski@bc.edu.
THE ALLURE OF A LURE: PROPOSED FEDERAL LAND USE RESTRICTION EASEMENTS IN REMEDIATION OF CONTAMINATED PROPERTY

Lauri DeBrie Thanheiser*

INTRODUCTION

Proposed amendments to the Comprehensive Environmental Response Compensation and Liability Act (CERCLA),1 introduced in the House of Representatives on October 18, 1995, proposed to amend Section 104 by providing for acquisition of hazardous substance easements by the President.2 This proposed reauthorization bill provided

---

* B.S. Col. State 1980; J.D. S. Texas Coll. of Law, 1992; LL.M. Univ. of Houston L.C., 1996. The author is an associate at the firm of Bayko, Gibson, Carnegie, Hagen, Schoonmaker & Meyer. This thesis was developed as a curriculum requirement towards an LL.M. in Energy, Environmental and Natural Resources Law at the University of Houston Law Center.

1 Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) 42 U.S.C. §§ 9601–9675 (1994), as amended by SARA. This article will use the term CERCLA, or its popular name “Superfund” to mean the original Act and the Act as amended by SARA. SARA will be used to refer only to specific provisions of the amendment.

2 H.R. 2500, 104th Cong., 1st Sess. § 113 (1995). Section 113, Hazardous Substance Property Use, provides:

Section 104 (42 U.S.C. § 9604) is amended by adding at the end the following:

(k) HAZARDOUS SUBSTANCE PROPERTY USE.—

(1) AUTHORITY OF PRESIDENT TO ACQUIRE EASEMENTS.—In order to prevent exposure to, reduce the likelihood of, or otherwise respond to a release or threatened release of a hazardous substance, the President may acquire, at fair market value, or for other consideration as agreed to by the parties, a hazardous substance easement which restricts, limits, or controls the use of land, water, or other natural resources, including specifying permissible or impermissible uses of land, prohibiting specified activities upon property, prohibiting the drilling of wells or use of ground water, or restricting the use of surface water.

(2) USE OF EASEMENTS.—A hazardous substance easement and notice of a property use restriction under this subsection may be used wherever institutional controls have
been selected as a component of a removal or remedial action in accordance with this Act and the National Contingency Plan. Such easements and notices shall not be used in cases in which institutional controls are not relied upon in a removal or remedial action. Whenever such controls are selected as a component of a removal or remedial action, the President shall ensure that the terms of the controls and, as appropriate, the easement are specified in all appropriate decision documents, enforcement orders, and public information regarding the site.

(3) PERSONS SUBJECT TO EASEMENTS.—A hazardous substance easement shall be enforceable for 20 years and may be renewed for additional 20-year periods (unless terminated and released as provided for in this section) against any owner of the affected property and all persons who subsequently acquire interest in the property or rights to use the property, including lessees, licensees, and any other person with an interest in the property, without respect to privity or lack of privity of estate or contract, lack of benefit running to any other property, assignment of the easement to another party, or any other circumstance which might otherwise affect the enforceability of easements or similar deed restrictions under the laws of the State. The easement shall be binding upon holders of any other interests in the property regardless of whether such interests are recorded or whether they were recorded prior or subsequent to the easement, and shall remain in effect notwithstanding any foreclosure or other assertion of such interests.

(4) CONTENTS OF EASEMENTS.—A hazardous substance easement shall contain, at a minimum—

(A) a legal description of the property affected;

(B) the name or names of any current owner or owners of the property as reflected in public land records;

(C) a description of the release or threatened release; and

(D) a statement as to the nature of the restriction, limitation, or control created by the easement.

(5) USE RESTRICTION NOTICE.—Whenever the President acquires a hazardous substance easement or assigns a hazardous substance easement to another party, the President shall record a notice of property use restriction in the public land records for the jurisdiction in which the affected property is located. Such a notice shall specify restrictions, limitations, or controls on the use of land, water, or other natural resources provided for in the hazardous substance easement.

(6) FILING OF NOTICE.—Wherever recording in the public land records is required under this subsection, the President shall file the notice or other instrument in the appropriate office within the State (or governmental subdivision) in which the affected property is located, as designated by State law. If the State has not by law designated one office for the recording of interests in real property or claims or rights burdening real property, the document or notice shall be filed in the office of the clerk of the United States district court for the district in which the affected property is located.

(7) METHODS OF ACQUIRING EASEMENTS.—The President may acquire a hazardous substance easement by purchase or other agreement, by condemnation, or by any other means permitted by law. Compensation for such easement shall be at fair market value, or for other consideration as agreed to by the parties, for the interest acquired. The direct cost of such easements, ensuring adequate public notice of such easements, and otherwise tracking and maintaining the protections afforded by the easements shall be considered response costs which are recoverable under this Act.

(8) ASSIGNMENT OF EASEMENTS TO PARTIES OTHER THAN THE PRESIDENT.—

(A) AUTHORITY TO ASSIGN.—The President may assign an easement acquired under this subsection to a State or other governmental entity that has the capability of effectively enforcing the easement over the period of time necessary to achieve the purposes of the easement. In the case of any assignment, the easement shall be fully enforceable by the assignee. Any assignment of such an easement by the President
that the President could acquire an easement through response or remedial actions as a type of institutional control.\(^3\) Through negoti-

\(^3\) Id. § 113(k)(2). Institutional controls are used to restrict access to a site or assure the effectiveness of a remedy, and may include deed restrictions or restrictive easements. See infra Section II.
ated consent agreements with property owners or purchasers, the easement would have been available for use in a Brownfields redevelopment project.⁴

Easements have traditionally been used to provide access or otherwise allow specific conduct by the easement holder. Easements are more frequently being used as a means of conveying development rights associated with property; these negative easements may be known as conservation or preservation easements. The term land use restriction easement and its acronym, LURE, applies to federal land use restriction easements authorized under various federal statutes.⁵

The United States Environmental Protection Agency (EPA) already has statutory authority under Section 104(e) of CERCLA to enter contaminated property, or adjacent lands, to carry out the remedial purposes of CERCLA.⁶ Existing Section 104(j)⁷ grants EPA broad authority to acquire property by purchase or condemnation for longer term access and remediation purposes.⁸ Unlike these other provisions, the hazardous substance easement proposed at Section 104(k) was not designed simply to provide access. Rather, Section

---

⁴ “EPA defines brownfields as ‘abandoned, idled or underused industrial and commercial facilities where expansion or redevelopment is complicated by real or perceived environmental contamination.’” See Peter F. Guerrero, General Accounting Office Report, Superfund—Barriers to Brownfield Redevelopment, GAO/RCED-96-125 (June 1996) (report to Congressional requestors).


⁶ Congress amended Section 104(e) through SARA to respond to a United States Court of Appeals decision which held that CERCLA as originally enacted did not grant statutory authority to EPA to enter without consent. Outboard Marine Corp. v. Thomas, 773 F.2d 883, 889–91 (7th Cir. 1985). See infra notes 38–50 and accompanying text.

⁷ 42 U.S.C. § 9604(j) (1994). The Section states:

(j) Acquisition of property.

(1) Authority. The President is authorized to acquire, by purchase, lease, condemnation, donation, or otherwise, any real property or any interest in real property that the President in his discretion determines is needed to conduct a remedial action under this chapter. There shall be no cause of action to compel the President to acquire any interest in real property under this chapter.

(2) State assurance. The President may use the authority of paragraph (1) for a remedial action only if, before an interest in real estate is acquired under this subsection, the State in which the interest to be acquired is located assures the President, through a contract or cooperative agreement or otherwise, that the State will accept transfer of the interest following completion of the remedial action.

(3) Exemption. No Federal, State, or local government agency shall be liable under this chapter solely as a result of acquiring an interest in real estate under this subsection.

⁸ United States v. Hardage, 58 F.3d 569, 577 n.7 (10th Cir. 1995).
104(k) was a direct attempt by the federal government to regulate land use by purchase.

Parcel by parcel, community by community, the federal government would be allowed to acquire a partial fee in industrial, commercial, or residential property that was either a Superfund site, a site adjacent to a Superfund site, a site to which contaminants may have migrated through the soil or surface or groundwater, or any contaminated site. EPA would determine acceptable future uses of the property and generally engage in land use planning. Interests retained by the federal government would be subject to the property power under Article IV of the United States Constitution, arguably giving the federal government a superior right to regulate with respect to the land. Even without the property power, the broad public purpose of Section 104(k) would accomplish the same result.

This federal land acquisition initiative continues the efforts begun through various farm programs and conservation and preservation programs pursuant to which the federal government may acquire interests in farmland, scenic areas, forests, historic buildings, wetlands, and other areas deemed worthy of national protection. But unlike acquisition of easements by the federal government for these conservation purposes, as well as the environmental remediation purposes of Superfund, acquisition of easements for land-use planning purposes is not a valid public purpose.

Proposed Section 104(k) would have created a federal scheme of land-use regulation that would not only preempt inconsistent state property laws but also would create a federal property interest. While the use of servitudes typically substitutes private arrangements for governmental intervention, the use of servitudes by the federal government as part of a regulatory scheme increases federal control of land and replaces state law policy choices with federal ones. At its extreme, Section 104(k) gives the federal government an interest in property that begins to eliminate the sovereign power of the states altogether. I will argue that this is not only unwise, but unconstitutional.

In particular, the broad public purpose associated with federal involvement effects a change in the nature of property rights and modifies common law rights and remedies. The provision for fed-

---

9 The use of Section 104(k) to acquire easements is related to the use of institutional controls. This section would apply not only to Superfund cleanups but also to redevelopment efforts under the Brownfields Initiative. See infra Section II.C. The authorization is broad enough to apply to the cleanup of any spill supportable under CERCLA.

10 See infra Section III.C.

11 See infra Section III.
eral hazardous substance easements appeared for the first time in a reauthorization bill introduced in the 103d Congress.\(^\text{12}\) Although Superfund also was not reauthorized by the 104th Congress, the provision is likely to appear again in this or another form.\(^\text{13}\) Therefore, this paper will use H.R. 2500 and proposed Section 104(k) for illustrative purposes to show how the nature of property interests would be affected by attaching a broad public purpose to such an easement. In fact, the same result is being attained—without requiring a transfer of a property interest—through recent initiatives to increase public participation. This theme of increased public participation appears in connection with not only remedial actions,\(^\text{14}\) but also in environmental permitting.\(^\text{15}\) Further, courts have denied or withdrawn state authorization to administer federal environmental programs on the basis that state standing laws are not sufficiently “consistent” with Article III standing under federal law.\(^\text{16}\)

Section II of this article will review EPA’s need for access to contaminated property and adjacent lands, and examine the use of institutional controls to implement remedial actions under Superfund as well as in redevelopment. Section III will look at easements and their acquisition in the context of environmental federalism, and the di-


\(^\text{13}\) The 104th session of Congress closed without reauthorizing Superfund. Chairman Oxley, who sponsored H.R. 2500, announced repeatedly during negotiations that the House Commerce Committee would consider Brownfields separately. A separate Brownfields bill was introduced in the Senate on August 2, 1996, and was referred to the Environment and Public Works Committee. There were hearings on Capitol Hill on September 16, 1996, and an EPA-sponsored conference on Brownfields in Pittsburgh beginning September 20. EPA is moving forward with its Brownfields Initiative through pilot programs, negotiation of state agreements, and related proposals. A HUD appropriations bill signed September 26, 1996, included funding for Brownfields redevelopment but no legislative provisions.

\(^\text{14}\) EPA has undertaken several recent administrative initiatives under the Superfund program, including a CERCLA Land Use Directive, see infra Section II.B, and a community-based remedy selection pilot program. See Corrective Action for Releases From Solid Waste Management Units at Hazardous Waste Management Facilities, 61 Fed. Reg. 19,432, 19,440 (1996) (Advance notice of rulemaking proposed May 1, 1996). These administrative reforms would apply to corrective actions under RCRA as well as to Superfund cleanups. See id. at 19,439.


\(^\text{16}\) See Virginia v. Browner, 80 F.3d 869, 883 (4th Cir. 1996) (disapproving Virginia’s program for issuing air pollution permits under Title V based on differences in judicial review of permitting decisions under state law). Under Virginia law, a challenger must show a pecuniary and substantial interest in order to have standing to review the permit decision, a higher standard than that of Article III standing under federal law. See infra Section III.C.
lemma created when environmental regulation comes into tension with land-use regulation and federal laws conflict with state laws. Section IV considers the "Madisonian" dilemma of Section 104(k) in more detail, examining recent Supreme Court decisions construing the federal government's power under the Commerce Clause and the Spending Clause, the doctrine of unconstitutional conditions, and the limitations of the Tenth Amendment on federal action. I conclude that, although CERCLA's remediation purposes represent a valid exercise of the commerce power, Section 104(k) is not a legitimate use of the federal commerce power and, in contrast to Section 104(j), is not merely incidental to the nationwide regulatory program. In effect, Section 104(k) would commandeer the state legislative process by allowing the federal government to regulate local land use by purchase in violation of the Tenth Amendment's reservation of power to the states. For this reason, Section 104(k)'s land-use planning purpose also is not a valid public purpose for exercise of the federal government's power of eminent domain.

II. CERCLA RESPONSES AND LAND USE IMPLICATIONS

CERCLA authorized the President to respond to any actual or threatened release of a hazardous substance into the environment which may present an imminent and substantial danger to the public health or welfare. 17 CERCLA delegated the primary authority for carrying out its objectives to the EPA. 18 A "response" under CERCLA may be either a removal 19 or a remedial action, 20 including re-

19 “Remove” or “removal” under Section 101(23) is defined as:
 [T]he cleanup or removal of released hazardous substances from the environment; such actions as may be necessary taken in the event of the threat of release of hazardous substances into the environment; such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances; the disposal of removed material; or the taking of such other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare of the United States or to the environment, which may otherwise result from a release or threat of release. The term includes, in addition, without being limited to, security fencing or other measures to limit access, provision of alternative water supplies, temporary evacuation and housing of threatened individuals not otherwise provided for, action taken under section 104(b) of CERCLA, post-removal site control, where appropriate, and any emergency assistance which may be provided under the Disaster Relief Act of 1974. For the purpose of the NCP, the term also includes enforcement activities related thereto.
20 “Remedy” or “remedial action (RA)" means:
lated enforcement actions. All responses must be consistent with the National Contingency Plan (NCP).

A removal is a short-duration action with an expenditure cap which allows EPA to respond quickly to an emergency condition. A remedial action is of longer duration and is consistent with a permanent remedy. A response is initiated when EPA is notified of a release. EPA undertakes a preliminary assessment to determine the nature and scope of the release and whether an immediate removal action is necessary. If a removal action is needed, it will be performed according to the procedures for such action in the NCP. If a removal action is not required, then EPA will undertake a remedial site evaluation to further characterize the release. These sites are included on CERCLIS, and EPA performs a preliminary assessment to allow a decision on whether to list the site on the National Priorities List.

Those actions consistent with permanent remedy taken instead of, or in addition to, removal action in the event of a release or threatened release of a hazardous substance into the environment, to prevent or minimize the release of hazardous substances so that they do not migrate to cause substantial danger to present or future public health or welfare or the environment. The term includes, but is not limited to, such actions at the location of the release as storage, confinement, perimeter protection using dikes, trenches, or ditches, clay cover, neutralization, cleanup of released hazardous substances and associated contaminated materials, recycling or reuse, diversion, destruction, segregation of reactive wastes, dredging or excavations, repair or replacement of leaking containers, collection of leachate and runoff, on-site treatment or incineration, provision of alternative water supplies, any monitoring reasonably required to assure that such actions protect the public health and welfare and the environment and, where appropriate, post-removal site control activities. The term includes the costs of permanent relocation of residents and businesses and community facilities (including the cost of providing “alternative land of equivalent value” to an Indian tribe pursuant to CERCLA section 126(b)) where EPA determines that, alone or in combination with other measures, such relocation is more cost-effective than, and environmentally preferable to, the transportation, storage, treatment, destruction, or secure disposition off-site of such hazardous substances, or may otherwise be necessary to protect the public health or welfare; the term includes off-site transport and off-site storage, treatment, destruction, or secure disposition of hazardous substances and associated contaminated materials. For the purpose of the NCP, the term also includes enforcement activities related thereto.

40 C.F.R. § 300.5.


2242 U.S.C. § 9604(a). The National Contingency Plan is the “blueprint” for cleanup and remedial action originally developed under Section 311 of the Clean Water Act. CROWELL & MORING, THE SUPERFUND MANUAL 4-1 (5th ed. 1993). It was extensively revised, reorganized and recodified in March 1990. Id. at 4–1 n.1; see generally National Oil and Hazardous Substance Contingency Plan, 55 Fed. Reg. 8666 (1990) (codified at 40 C.F.R. § 300 et seq.).

23CERCLIS, which stands for CERCLA Information System, is EPA's data base and management system that inventories and tracks releases addressed by the Superfund program. 40 C.F.R. § 300.5.
(NPL).24 Only sites actually listed on the NPL will be remediated under Superfund. Sites not listed on the NPL, as well as those for which a “no action” alternative is selected,25 may be candidates for Brownfields redevelopment, however.26

As part of the response, EPA may make a future use determination that bases response actions and remedies on the anticipated future use of the land.27 In this context, institutional controls may allow flexible risk-based decisionmaking despite CERCLA’s preference for permanent solutions and treatment.28

However, institutional controls may be considered during any phase of the response, to limit human activities at or near facilities.29 EPA may also use institutional controls to supplement engineering controls as part of the final remedy.30 An institutional control may consist of restrictions on future uses of land such as an easement, a recorded deed restriction, or a provision included within a local zoning plan or ordinance. An institutional control may prohibit the use of groundwater for drinking, or otherwise restrict resource use. These controls may be prohibitions on future well-drilling that would compromise a remedy, or prohibitions on issuing building permits for certain structures. Institutional controls also include fences, well-use advisories

24 The National Priorities List, codified at Appendix B of 40 C.F.R. § 300, is a list of national priorities among the known or threatened releases of hazardous substances, pollutants, or contaminants in the United States for which a remedial action will be considered under Superfund. 42 U.S.C. § 9605(a)(8)(B). This is only a fraction of those sites evaluated. At the time of the 1995 annual update to the NPL, EPA had completed approximately 37,000 preliminary assessments (PAs) and approximately 18,000 site investigations (SIs). National Priorities List for Uncontrolled Hazardous Waste Sites, 60 Fed. Reg. 20,330, 20,332 (1995).

25 EPA’s national assessment program identifies and prioritizes sites that will be remediated under Superfund as well as those for which “no further remedial action [is] planned” (NFRAP). For those sites listed on the NPL, a “no action” alternative is considered for each as part of the remedy selection process.

26 The Brownfields Initiative is an effort to redirect development from greenfields to brownfields. Brownfields are generally industrial or commercial sites that have contamination or other problems that impose a barrier to future use because of the threat of environmental liability to lenders or potential purchasers. See infra Section II.C.

27 The future use is usually classified as residential, commercial/industrial, or recreational. See Krista J. Ayers, Comment, The Potential for Future Use Analysis in Superfund Remediation Programs, 44 EMORY L.J. 1503, 1513 n.48 (1995). The classification looks at the amount of time humans will spend at the site and whether sensitive populations such as children will be exposed to any contaminants remaining at the site following the remediation. See id. at 1515.

28 See id. at 1515.


and deed notices. Institutional controls may be used to "further responsible development" under EPA's new prospective purchaser policy.31

It is in this context that EPA's need for access to adjacent property arises, and in which CERCLA's use of institutional controls in remedy selection or redevelopment affects local land-use decisions.

A. The Need for Access

Under state common or statutory law, local governments can exercise their police power to abate a nuisance.32 This power has been used to enter property and cleanup contamination.33 Where such a hazard is a nuisance, there is no unconstitutional taking since landowners have no right to use their property in a manner that creates a nuisance; it is not part of their bundle of property rights.34

Additional problems of access have arisen as the nation undertakes the massive cleanup efforts contemplated under CERCLA and analogous state statutes. On average, it takes eight years from site awareness to selection of a Superfund remedy, and the actual cleanup effort takes an additional forty-three months.35 EPA has listed more than 1200 sites on the national priorities list,36 and EPA estimates that eventually it will evaluate over 30,000 sites for inclusion.37

In carrying out the extensive remediation activities under these programs, governmental agencies have done more than simply enter and remove contamination. The remedial design, and the investigatory efforts which precede it, often require offsite soil and groundwater sampling to determine the extent of the contamination. The Agency has installed groundwater monitoring wells on adjacent properties to


33 See id.

34 See id. at 991-93; see also Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1022-23 (1992) (stating that "harmful or noxious uses of property may be proscribed by government regulation without the requirement of compensation").


37 CROWELL & MORING, supra note 22, at 4-32 & n.65.
measure migration of contaminants and the effectiveness of cleanup efforts. The EPA uses these wells prior to, during, and in the several years following a remediation. In some cases, where contaminated soil must be excavated, the government will use adjacent lands to accumulate the spoils or for other staging and storage functions.

In *Outboard Marine Corp. v. Thomas*, the United States Court of Appeals for the Seventh Circuit denied the EPA access to property adjacent to a contaminated site for what they called Phase I activities of a CERCLA remedial design. EPA desired to perform a walk-through of the property, survey the site, set markers, and collect up to twenty-three soil borings. The walk-through would include sixteen EPA officials in seven vehicles. Three people in a van would perform the survey. Seventeen people in sixteen vehicles would collect the soil borings. This activity would require 1000 square feet of parking area. The EPA intended to take up to seventy days to accomplish the work. EPA obtained an ex parte warrant from a district court when Outboard Marine Corporation (OMC) refused permission to enter, which OMC sought to quash. The Seventh Circuit reversed the decision to issue the warrant, finding that CERCLA did not authorize access for remediation activities. In response to the decision in *Outboard Marine*, Superfund Amendment Reauthorization Act (SARA) amendments to the Superfund access provisions explicitly gave EPA authority to “compel the release of information and to enter property to undertake response activities.” The same provision gave federal courts authority to enjoin property owners from interfering with the response. This authority does not preclude compensation for a taking.

---

40 *Id.* at 885.
41 *Id.*
42 *Id.*
43 *Id.*
44 *Outboard Marine*, 773 F.2d at 885.
45 *Id.*
46 *Id.* at 886.
47 *Id.* at 890–91.
48 42 U.S.C. § 9604(e)(2)–(3).
49 *Id.* § 9604(e)(5)(B)(i).
50 See Hendler v. United States, 952 F.2d 1364, 1378 (Fed. Cir. 1991) [hereinafter *Hendler III*].
As was the case in *Outboard Marine*, the property owner may not consent to EPA access or acquisition. The privacy or property interest implicated depends on the level of intrusiveness of the governmental action.\(^{51}\) As a constitutional matter, "[w]arrantless activity is permissible only if no ‘search’ has taken place on commercial property . . . ."\(^{52}\) For certain entries and inspections, the government may act only pursuant to a warrant supported by administrative "probable cause."\(^{53}\) With increasing duration and intrusiveness of the governmental action, compensation for a governmental taking may be required.\(^{54}\) All of the major environmental statutes now authorize EPA to enter a facility and conduct inspections or remedial activities without explicitly requiring a warrant.\(^{55}\) A statutory right of entry gives EPA officials a "right to a warrant" whether or not the Fourth Amendment requires one for the proposed activity.\(^{56}\)

When the landowners’ right to exclude others is trumped by a governmental warrant or order, property owners may choose to seek compensation for the taking of their property interests.\(^{57}\) Early court

\(^{51}\) See Robert M. Andersen, *Technology, Pollution Control, and EPA Access to Commercial Property: A Constitutional and Policy Framework*, 17 B.C. ENVTL. AFF. L. REV. 1, 6 (1989) (describing the rights as a continuum of escalating privacy and property interests, starting with governmental observations performed without entering commercial property, to compliance inspections of short durations on commercial property, to long-term governmental presences on commercial property to design and effectuate remedial actions).

\(^{52}\) *Id.*

\(^{53}\) *Id.*

\(^{54}\) *Id.*

\(^{55}\) See, e.g., Clean Air Act (CAA), 42 U.S.C. § 7414(d) (1994) (authorizing representatives of EPA to enter emission sources); Clean Water Act (CWA), 33 U.S.C. § 1318(a) (1994) (authorizing representatives of EPA to enter premises of an effluent source); Safe Drinking Water Act (SDWA), 42 U.S.C. § 300j-4(b) (1994) (authorizing representatives of EPA to enter the facilities of water suppliers and other permittees); Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6927(a) (1994) (authorizing officers, employees, and representatives of EPA to enter facilities where hazardous wastes are stored, handled, disposed, etc, as well as premises with underground storage facilities); Toxic Substances Control Act (TSCA), 15 U.S.C. § 2610(a) (1994) (authorizing representatives of EPA to enter facilities where chemicals are made, stored, or processed); Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. §§ 136f-g (1994) (authorizing officers and employees of EPA to enter facilities where pesticides and other regulated chemicals are held for distribution or sale); Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9604e (1994) (authorizing officers, employees, and representatives of EPA to enter facilities or vessels described in the Act). FIFRA is the only environmental statute that mentions warrants. 7 U.S.C. § 136g(b).

\(^{56}\) Andersen, *supra* note 51, at 32 (citing See v. City of Seattle, 387 U.S. 541 (1967); Bunker Hill Co. v. EPA, 658 F.2d 1280 (9th Cir. 1981); Midwest Growers Coop. v. Kirkemo, 533 F.2d 455 (9th Cir. 1976)).

decisions found EPA’s “minor” intrusions justified by concerns about protecting health and the environment, and one court found the notion that such activity could be a taking “frivolous.” As takings jurisprudence evolved over this same period, courts began to recognize, that while the activity may be justified, landowners should not have to bear the burden of this public benefit.

In Hendler v. United States, owners of property adjacent to the Stringfellow Acid Pits Superfund site brought an action in the United States Claims Court for just compensation after EPA issued an administrative order granting access to their property for the purpose of “locating, constructing, operating, maintaining, and repairing monitor/extraction wells.” Further, the order required plaintiffs not interfere with the activities of the EPA and State of California under threat of civil penalties, including punitive damages. On appeal, the United States Court of Appeals for the Federal Circuit found that installation of the groundwater monitoring wells was a per se taking as a permanent physical invasion at least as intrusive as the cable boxes at issue in Lorretto v. Teleprompter Manhattan CATV Corp.

At the time of trial, in 1991, at least twenty-two wells had been installed. These wells were “100 feet deep, lined with plastic and stainless steel, and surrounded by gravel and cement. Each well was capped with a cement casing lined with reinforcing steel bars, and enclosed by a railing of steel pipe set in cement.” In comparison, the CATV equipment the Supreme Court found was a permanent physical invasion in Loretto consisted of only a few cables attached by screws and nails and a box attached by bolts. The vehicle traffic associated with installation and monitoring of the wells was also a permanent physical taking even though this activity was intermittent.

---

58 See United States v. Fisher, 864 F.2d 434, 438 (7th Cir. 1988).
60 Hendler v. United States, 11 Cl. Ct. 91, 93 (1986) [hereinafter Hendler I].
61 Id.
62 Hendler III, 952 F.2d at 1376 (citing Lorretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982)). The Claims Court had decided that neither the administrative order nor the installation of the monitoring wells were a taking and denied plaintiff’s motion for summary judgment. Hendler I, 11 Cl. Ct. at 95–97. The Circuit Court of Appeals upheld the finding that mere issuance of the administrative order was not a regulatory taking; however, this ruling was limited to the order per se and did not decide whether the order subsequently applied amounted to a taking since that issue had not been addressed by the lower court. Hendler III, 952 F.2d at 1375.
63 Hendler III, 952 F.2d at 1376.
64 Id. (citing Loretto, 458 U.S. at 422).
65 Id. at 1377–78.
ernment had been using plaintiff's property in their cleanup efforts at Stringfellow since 1983.66

Instead of relying on Section 104(e)'s access provisions and requiring a landowner to file an inverse condemnation action, EPA can purchase or condemn a full or partial fee in the property under the authority of Section 104(j). The activities the court considered a taking in *Hendler* are the type that would justify EPA's use of authority to acquire property needed to carry out the remedial action.67

B. Remedy Selection and the Use of Institutional Controls

Among other things, the NCP sets forth EPA’s decisionmaking process for selecting CERCLA remedial actions.68 EPA included in the codified rule a national program goal69 as well as six “expectations” for developing remediation alternatives.70 These expectations are non-binding.71

The national goal of the remedy selection process is to select remedies that are protective of human health and the environment, that maintain protection over time, and that minimize untreated waste.72 EPA may select between the remediation alternatives of treatment, engineering controls, and institutional controls, or a combination of these, to achieve its stated goal.73

66 *Id.* at 1367.

67 *Id.*


70 *Id.* § 300.430(a)(1)(iii).


72 40 C.F.R. § 300.430(a)(1)(i).

73 *Id.* § 300.430(a)(1)(iii). In relevant part, EPA shall consider the following expectations in developing appropriate remedial alternatives:

(A) EPA expects to use treatment to address the principal threats posed by a site, wherever practicable.
Remedy selection is probably the most important part of the Superfund program since it determines the private and public costs of the cleanup.\textsuperscript{74} CERCLA provided that its goal of protection of human health and the environment be achieved by selecting remedial actions which "permanently and significantly [reduce] the volume, toxicity or mobility of the hazardous substances, pollutants and contaminants ...."\textsuperscript{75} SARA added specific provisions requiring that remedial actions result in a level of cleanup or standard of control that at least meets the legally applicable or otherwise relevant and appropriate federal or state requirements.\textsuperscript{76} These Section 121 cleanup standards are known as Applicable, Relevant, Appropriate Requirements or ARARs.\textsuperscript{77} EPA must look to both federal and state substantive re-


\textsuperscript{75} Id.; see 42 U.S.C. § 9621(b).

\textsuperscript{76} See 42 U.S.C. § 9621(d)(2)(A).

\textsuperscript{77} The statute does not define ARAR standards. Through its implementation of CERCLA in the NCP, EPA has defined the standards as follows: "Applicable requirements" means those cleanup standards, standards of control, and other substantive requirements, criteria, or limitations promulgated under federal environmental or state environmental or facility siting laws that specifically address a hazardous substance, pollutant, contaminant, remedial action, location, or other circumstance found at a CERCLA site. Only those state standards that are identified by a state in a timely manner and that are more stringent than federal requirements may be applicable. 40 C.F.R. § 300.5. "Relevant and appropriate requirements" are defined as those cleanup standards, standards of control, and other substantive requirements, criteria, or limitations promulgated under federal environmental or state environmental or facility siting laws that, while not "applicable" to a hazardous substance, pollutant, contaminant, remedial action, location, or other circumstance at a CERCLA site, address problems or situations sufficiently similar to those encountered at the CERCLA site that their use is well suited to
requirements to determine the level of cleanup that is applicable, relevant, and appropriate. The ARAR process preempts state permitting and other procedural requirements that would otherwise apply "onsite." The remedial investigation/feasibility study (RI/FS) process follows a decision to list the release or facility on the NPL, and develops the factual record upon which EPA will base the remedy selection decision. Once the possible remedies are determined to (1) be protective of the environment and (2) meet ARARs—both threshold criteria—the remedy selected must be judged to be cost effective and yet must utilize permanent solutions to the maximum extent practicable.

As part of the remedial investigation, EPA considers both current and potential land-use conditions during the site-specific exposure and risk assessment. This process requires a determination of "how clean the particular site. Only those state standards that are identified in a timely manner and are more stringent than federal requirements may be relevant and appropriate. Id. Applicable requirements are jurisdictional; relevant and appropriate requirements are not. See Whitney, supra note 74, at 192.

The EPA ARARs Manual establishes three subcategories of ARARs: (1) ambient or chemical specific requirements, (2) performance, design or other action-specific requirements, and (3) location specific requirements. Whitney, supra note 74, at 229 (citing EPA CERCLA COMPLIANCE WITH OTHER LAWS, GENERAL RULES, RCRA, CWA, SDWA, GROUND WATER PROTECTION, EPA/540/6–88/009, OSWER Directive No. 9234.1–01 (1988) [hereinafter ARARS MANUAL, PART II]); ARARs MANUAL, PART I, supra, at xiv. Location specific requirements may include restrictions placed on the concentration of hazardous substances or remediation activities solely because they occur in locations such as wetlands or floodplains. Id. Recognizing that remediation is not always confined to the contaminated property, EPA defines "onsite" as "the areal extent of contamination and all suitable areas in very close proximity to the contamination necessary for implementation of the response action." 40 C.F.R. § 300.5. In its proposed rulemaking, EPA rejected an alternative definition of on site which would have equated "onsite" with "facility." National Contingency Plan, 55 Fed. Reg. 8666 (1990) (Preamble discussion); see 40 C.F.R. § 300.430(f)(1)(i)(B); Ohio v. EPA, 997 F.2d 1520, 1532 (D.C. Cir. 1993).


is clean” and is thus cost-sensitive. Institutional controls may be used during the RI/FS, in implementing the remedial action, or as a component of the completed remedy. The EPA cannot substitute institutional controls for active response measures as the sole remedy unless active measures are determined not to be practicable.

EPA has been criticized for overestimating the potential for human exposure in evaluating alternative remedies by assuming that the future use of land will be residential. Acknowledging this criticism, EPA developed a land-use directive to assist the Regional Offices in conducting the baseline risk assessment. In considering anticipated future land uses, site managers are to use existing information from local land-use planning authorities to the extent possible. Sources and types of information include:

- current land use;
- zoning laws;
- zoning maps;
- comprehensive community master plans;
- population growth patterns and projections (e.g., Bureau of Census projections);
- accessibility of site to existing infrastructure (e.g., transportation and public utilities);
- institutional controls currently in place;
- site location in relation to urban, residential, commercial, industrial, agricultural and recreational areas;
- federal/state land use designation (federal/state control over designated lands range from established uses for the general public, such as national parks or state recreational areas, to governmental facilities providing extensive site access restrictions, such as Department of Defense facilities);
- historical or recent development patterns;
- cultural factors (e.g., historical sites, Native American religious sites);
- natural resources information;
- potential vulnerability of ground water to contaminants that might migrate from soil;
- environmental justice issues;
- location of onsite or nearby wetlands;
- proximity of site to a floodplain;
- proximity of

---

83 See 40 C.F.R. § 300.430(a)(1)(iii).
84 Id.
85 Under land-use principles, it is not clear to me that EPA can constitutionally dictate a future use of the land that is incompatible with the surrounding uses, by requiring cleanup to residential standards when the property is located in an industrial area, for example. See Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 379, 387–89 (1926) (upholding constitutionality of zoning on its face by equating such land-use restrictions to nuisance law, both of which use the police power to prohibit incompatible uses of land). See also DANIEL R. MANDELKER, LAND USE LAW § 1.03 (3d ed. 1993).
87 LAND USE DIRECTIVE, supra note 86, at 5.
site to critical habitats of endangered or threatened species; geographic and geologic information; location of Wellhead Protection areas, recharge areas, and other areas identified in a state's Comprehensive Groundwater Protection Program.88

Most of these considerations would indeed affect future land use and may lead to selection of institutional controls. Some institutional controls may be accomplished through an exercise of the police power; others, such as acquisition of an easement or imposition of a deed restriction, would require a transfer of the property right from the landowner. The Directive therefore anticipates that site managers will consult with local planning authorities and other officials as well as the greater community.89 Federal officials use "moral suasion" to affect local land use decisions,90 and the offer of federal funding to the states.91 Because EPA has no legal authority to do more than persuade, neither the policy statements reflected in the directive nor the "communications" taken pursuant thereto are "policies that have takings implications" or "actions" as those terms are defined in Executive Order 12,630, Governmental Actions and Interference with Constitutionally Protected Property Rights.92

88 Id.
89 Id. at 1.
90 See Flowers Mill Assocs. v. United States, 23 Cl. Ct. 182, 187–89 (1991). In Flowers Mill, the United States Claims Court ruled that, because FAA had no power to prohibit or limit proposed construction, an advisory determination that a landowner's proposed building would be a hazard to air navigation was not a taking by the federal government even though the State had conditioned a construction permit on a favorable opinion. Id. at 188–89. Under the FAA regulations, the landowner is not required to secure a permit from the FAA and the FAA has no power to prevent construction; therefore, the hazard/no hazard opinion had no enforceable legal effect. The regulation is instead designed to use "moral suasion" to encourage voluntary cooperation with the regulatory framework. Id. at 187 (quoting Air Line Pilots Ass'n Int'l v. Department of Transp., FAA, 446 F.2d 236, 241 (5th Cir. 1971)). A remedy under the Tucker Act for inverse condemnation is not available when the federal agency does not have the authority to condemn property in carrying out their regulatory functions. See id.
Not only is EPA without authority now to engage in land-use planning, they may have no authority to implement institutional controls at a site. For example, were a modification to a local zoning ordinance required, only the local authority could adopt the necessary change. Further, state statutes may specify who can be a holder of the easement, and in some states, the federal government may not acquire certain interests within the state. EPA's authority to acquire property is also limited by Section 104(j)(2). EPA may only acquire an interest in property when the state has provided assurances through a contract or cooperative agreement that it will take title upon completion of the remedial action.

Under the Land Use Directive, as well as proposed Section 104(k), land-use planning occurs as part of remedy selection and is therefore unreviewable until after the cleanup is complete. The remedy selection decision is documented in a Record of Decision (ROD). The ROD may be prepared by EPA, or by a state delegated as the lead in the cleanup.

When the cleanup will be financed from the Trust Fund, CERCLA provides that the federal government may enter into cooperative agreements with states under which the state assumes the lead in the remedial response. States may also participate in fund-financed re-

---

93 Ohio v. EPA, 997 F.2d 1520, 1547 (D.C. Cir. 1993); National Contingency Plan, 55 Fed. Reg. 8666, 8706 (1990) (noting addition of 40 C.F.R. § 300.510(c)(1)).

94 Jordan, supra note 5, at 480.

95 42 U.S.C. § 9604(j)(2); 40 C.F.R. § 300.510(f).


97 See 40 C.F.R. § 300.430(f)(5). The ROD explains the rationale by which the remedies were selected and the remediation goals developed by the feasibility study. Id.; see also EPA, (INTERIM FINAL) GUIDANCE ON PREPARING SUPERFUND DECISION DOCUMENTS: THE PROPOSED PLAN, THE RECORD OF DECISION, EXPLANATION OF SIGNIFICANT DIFFERENCES, THE RECORD OF DECISION AMENDMENT, EPA/540/G-89/007, OSWER Directive No. 9355.3--02 (July 1989) [hereinafter EPA ROD GUIDANCE]. The ROD Decision Summary describes the site history and the nature of the contamination, the site characteristics, and the site risks including human health and environmental risks. See id. at ch. 6. It includes a description of the alternative remedial plans which were considered and a discussion of the remedy selected. Id. The Decision Summary will identify the major treatment components of the selected remedy and any engineering controls or institutional controls that will be used. Id. It will state how the selected remedy meets the statutory ARAR requirements of § 121. Id.

98 See 40 C.F.R. § 300.500–525 (codifying all regulatory requirements for state participation and involvement in CERCLA-authorized response actions).

99 CERCLA authorized an initial $1.6 billion federal trust fund from which the name “Superfund” was coined. 42 U.S.C. § 9611(a).

100 40 C.F.R. § 300.500(b); 42 U.S.C. § 9604(d)(1)(A). See generally Adam Babich, Environmental Federalism: Our Federalism, Our Hazardous Waste, and Our Good Fortune, 54 Md. L. Rev. 1516, 1535 (1995). However, states were not allowed to direct the cleanup of released
responses as the support agency in an EPA-led response. Where EPA has the lead in the response, the state must enter into a Superfund state contract to provide certain "assurances," including an assurance that, where institutional controls are used, these institutional controls are in place, are reliable and will remain in place after initiation of operation and maintenance. To further encourage state involvement, states may enter into an EPA/state Superfund Memorandum of Agreement (SMOA).

The ROD may specify that adjacent properties be acquired for the remedial action. The Potentially Responsible Parties (PRPs) will often donate or purchase adjoining property or an easement. For instance, in carrying out the remedial action in cleanup of the Hardage Superfund Site, the ROD assigned to the PRPs the task of acquiring interests in adjacent property that were needed for a containment

---

hazardous substances for more than a decade. Id. EPA was authorized to delegate authority to the states but had not done so for 13 years. Following the decision in Ohio v. EPA, a portion of the NCP was remanded to EPA to either delegate or offer a reasoned explanation of its refusal to do so. Ohio v. EPA, 997 F.2d 1520, 1541-43 (D.C. Cir. 1993).

101 See 40 C.F.R. § 300.500(b).

102 A "Superfund state contract" is:

103 "Operation and maintenance (O&M) means measures required to maintain the effectiveness of response actions." Id. § 300.5. CERCLA requires that the state assume responsibility for future operations and maintenance (O&M) for the expected life of the remedial action. 42 U.S.C. § 9604(c)(3). After the remedy is constructed, there is a one-year period during which the remedy is operational and functional before maintenance operations are turned over to the state. If a remedy, such as containment, will result in hazardous substances remaining at the site above levels that allow for unlimited use, then CERCLA requires that the remedial action be reviewed every five years. Id. § 9621(c); 40 C.F.R. § 300.430(f)(4)(ii).

104 40 C.F.R. § 300.500(a). "Superfund Memorandum of Agreement (SMOA)" means:

105 See United States v. Hardage, 58 F.3d 569, 576-77 (10th Cir. 1995).
remedy. That containment remedy included recovery wells in an interceptor trench, surface water monitoring, a water treatment system for groundwater, liquid recovery wells, and the use of institutional controls "to limit public access to affected areas, to prohibit future withdrawal of affected groundwater, and to continue the public water supply to area residents." When the negotiations broke down with one landowner, the PRPs sought to use the authority of the court under the All Writs Act to force the sale. On review, the United States Court of Appeals for the Tenth Circuit found this action to be improper, but did note that EPA has adequate authority under Section 104(j) to purchase or condemn property for this purpose although it had not been invoked.

C. The Brownfields Initiative and Institutional Controls

Proposed Section 104(k) would have been available through the Brownfields Initiative to acquire interests in property not subject to remedial actions. The threat of Superfund liability has been enough to stifle development in many areas surrounding Superfund sites, as well as on any "contaminated" property. Where contamination from a site has migrated to adjacent properties or into the groundwater, many "innocent" landowners are threatened with a possible cleanup action for the contamination. EPA estimates that more than eighty-five percent of NPL sites have contaminated aquifers. Even more frequently, lenders and developers are reluctant to acquire or finance development of any contaminated commercial or industrial properties out of fear of liability. It is estimated there are "hundreds of thousands" of these brownfields nationwide.

The Brownfields Initiative is intended to encourage states to undertake redevelopment of these sites. Because most Brownfields

---

107 Id.
108 Id. at 573.
109 Id. at 576–77 n.7.
112 Id. See also H.R. 2500, § 301(a)(2).
113 GAO Report, supra note 111, at 2.
sites are not contaminated enough to be Superfund sites, however, the federal initiative actually substitutes the stigma with actual exposure to liability. EPA's authority to take action under Sections 106 and 107 of CERCLA is limited now to sites at which EPA can prove the following elements of liability:

(1) each site in question is a "facility"; (2) a "release" or "threatened release" of a "hazardous substance" from the site has occurred or is occurring; (3) the release or threatened release has caused the United States (or a private party plaintiff) to incur response costs; and (4) the defendants fall within at least one of the classes of liable persons described by sections 107(a)(1)-(4).

If parties are not potentially liable under the statute, EPA has neither jurisdiction to order a cleanup of the site under CERCLA, nor can EPA make a covenant not to sue. In other provisions of the Reauthorization bill, Congress proposed to limit the liability of lenders, innocent landowners, and bona fide purchasers. The requirements for investigation and inquiry in these provisions seem to shift the burden of proof to these parties. EPA would thus have presumptive jurisdiction. This same shifting of proof and presumed jurisdiction occurs when EPA offers to grant a covenant not to sue associated with a Brownfields cleanup. Thus, any incentive offered by EPA, and accepted by the states (or by the developer, prospective purchaser, or other "innocent party") to encourage redevelopment of sites not listed on the NPL actually gives federal jurisdiction where before there was none. At the least, it shifts the burden of proof from EPA to the landowner/developer.

EPA interprets the liability provisions of CERCLA to apply to owners of sites located above a groundwater plume. EPA reasons that liability may be imposed on owners of facilities where a hazardous substance has come to be located, although its enforcement policy is

114 Id. at 3.
115 Section 106 authorizes EPA to take actions to abate a release that represents an imminent and substantial endangerment to health and safety (abatement actions). 42 U.S.C. § 9606. Section 107 allows EPA to recover its response costs when they have used the trust fund to take remedial action (cost recovery action). 42 U.S.C. § 9607.
116 CROWELL & MORING, supra note 22, at 5-27. Parties may be liable if they are the current owner or operator of the facility, a prior owner or operator, a person who arranged for treatment or disposal of a hazardous substance, or a transporter. 42 U.S.C. § 9607(a).
not to pursue these parties unless the homeowner’s activities led to a release. EPA has issued a similar policy to forego enforcement action against lenders who have only a security interest in a property. EPA’s determination of liability, however, is not binding. Only the courts may make that determination under the current scheme of CERCLA.

For federal guarantees of non-liability, the primary incentive to the landowner, lender or prospective landowner is a covenant not to sue given by EPA. These covenants not to sue have been used with settling landowners where there is an ongoing response action, especially with de minimis contributors to the release. With the Brownfields Initiative, EPA will use these covenants to settle with prospective purchasers of “contaminated” property at “sites where federal involvement has occurred or is expected to occur.”

EPA will not give a covenant without adequate “consideration.” The previous policy called for a monetary payment to EPA from the developer. An amended policy is more flexible and will allow EPA to accept “indirect” benefits in consideration of the covenant not to

---


120 CERCLA Enforcement Against Lenders and Government Entities That Acquire Property Involuntarily, 60 Fed. Reg. 63,517, 63,517–18 (1995). EPA had issued a regulation interpreting CERCLA’s liability provisions as excluding these parties from liability. Lender Liability Under CERCLA, 57 Fed. Reg. 18,344 (1992). In a subsequent court challenge, the rule was vacated. Kelley v. EPA, 15 F.3d 1100 (D.C. Cir. 1994), cert. denied, American Bankers Ass’n v. Kelley, 115 S. Ct. 900, 900 (1995). Although EPA has discretion to choose parties against whom it will seek recovery, it may not prevent third parties from bringing a cost recovery action. Kelley, 15 F.3d at 1107–08. This snag was addressed through the Reauthorization bill as well. See H.R. 2500, § 304.

121 Kelley, 15 F.3d at 1107–08.

122 Id.

123 EPA’s Covenant Not to Sue protects the settling purchaser, lender or landowner from actions “for any and all civil liability for injunctive relief or reimbursement of response costs pursuant to Sections 106 or 107(a) of CERCLA.” 60 Fed. Reg. 34,792, 34,797 (1995). EPA reserves its rights to sue for any contamination not expressly defined in the agreement, as well as for natural resource damages, violation of other environmental regulations, and the right to take response actions under CERCLA at the site. Although a settling party would not have to pay for such a future response action, they would have to prove that the release was attributable to the “Existing Contamination” covered by the agreement. Id.


125 EPA’s prior policy was to offer a covenant not to sue only at sites “where enforcement action is anticipated.” 60 Fed. Reg. 34,792, 34,793.

126 Id.
EPA's stated intent is to influence land-use decisions through this process. They explain that:

[I]ndirect benefits to the community include measures that serve to reduce substantially the risk posed by the site, creation or retention of jobs, development of abandoned or blighted property, creation of conservation or recreation areas, or provision of community services (such as improved public transportation and infrastructure). ... [EPA intends to continue its] commitment to environmental protection [and] environmental justice [and therefore will] carefully weigh the public interest considerations of creating jobs in the inner city, where older contaminated industrial properties are often located, against the possibility of further environmental degradation of industrial property in mixed industrial/residential areas.

Therefore, EPA will work with purchasers to "ensure proper cleanup and promote responsible land use."

The Brownfields Initiative is an ongoing effort to "facilitate the productive use of industrial and commercial properties by addressing the existing regulatory impediments to the financing, transfer and appropriate reuse of these properties." Toward this end, the states, using a Superfund Memorandum of Agreement (SMOA), are entering into agreements with EPA to "exercise their authorities and use their resources in ways that are mutually complementary and are not duplicative." EPA is seeking to formalize the state programs with new authority under Superfund Reauthorization.

Section 104(k) would facilitate EPA's involvement by allowing EPA to accept institutional controls as consideration for a covenant not to sue. The new policy requires a calculation offsetting benefits or "windfall[s]" that will accrue to the landowner or purchaser from cleanup. According to the policy, institutional controls may be considered as an

---

127 Id.
128 Id. at 34,794.
129 Id.
130 See Superfund Memorandum of Agreement Between the Indiana Department of Environmental Management and the USEPA, Region V, Addendum (executed December 4, 1995).
131 See Superfund Memorandum of Agreement between the Illinois Environmental Protection Agency and the USEPA, Region V, Addendum No. 1 (executed April 6, 1995).
132 The purpose of federal action in cleaning up Brownfields is to "significantly increase the pace of response activities at contaminated sites by promoting and encouraging the creation, development, and expansion of State voluntary response programs." H.R. 2500, 104th Cong., 1st Sess. § 301(b) (1995). This will occur by using "[s]tate voluntary programs to address environmental contamination, and Federal liability reforms to encourage lenders and developers to invest in brownfield sites." Id. § 301(a)(6).
offsetting value in EPA's favor. Although H.R. 2500 proposed to use voluntary state programs to carry out the cleanups and manage the program, with the new authority from Section 104(k), EPA could retain the property interest acquired with the institutional control. Or, the hazardous substance easement could be assigned to a state or other governmental entity capable of enforcing the provisions. In either case, EPA could require public participation or other requirements to further federal goals.

States are proceeding without federal authorization to enact voluntary remediation programs for sites not listed on the NPL. The states also are offering agreements not to take enforcement action under state law against non-responsible parties. The state SMOAs may include promises by EPA to the state to refrain from enforcement when the parties participate in a voluntary cleanup.


Section 104(j) of CERCLA currently allows the EPA to acquire property, including easements, to accomplish Superfund's remediation goals. If EPA has authority under Section 104(j) to acquire easements for access and to implement and assure the effectiveness of the remedy, then what additional authority would be granted by Section 104(k)? Upon examination, it is clear that where Section 104(j) has an environmental purpose, Section 104(k) has a land use purpose. In addition, Section 104(j) allows acquisition of a state law property interest, whereas Section 104(k) creates a federal property interest that includes regulatory powers.

This section makes three points. First, the property interest that could be acquired by the EPA under Section 104(k) has a broad public purpose and is not incidental to Superfund's environmental purpose. Second, the power of the federal government to purchase or condemn property has constitutional limits that are exceeded by the grant of authority in Section 104(k). Third, this overreaching invades the sovereignty of the states and thus raises federalism concerns.

134 Id.
135 H.R. 2500, § 104(k)(8)(A).
137 Id.
138 Four principal values support preservation of the federal system: (1) a dual system of government checks abuses of power in any branch of the system; (2) state and local governments
A. The Property Interest

All “easements” are not created equally.139 In the traditional sense, the law used all types of servitudes to “recogniz[e] and facilitat[e] the right of private parties to reallocate and rearrange the benefits and burdens of property ownership and occupancy.”140 Easements have been used to create transportation and utility corridors, to exploit natural resources, to limit development, to secure mortgages, to enforce subdivision or condominium regulations including architectural modifications to structures, maintenance of property, or use of common areas, and to levy assessments to pay for operations of neighborhood associations.141

The purpose of a traditional common law easement is very narrow because it benefits and burdens a particular piece of property. Construe the opportunities for citizens to participate actively in the democratic process and create diverse cultural and political environments; (3) the distribution of power among fifty-one different governments enhances opportunities for innovation and experimentation; and (4) state and local governments check federal authority by regulating areas that the federal government chooses to ignore. Babich, supra note 100, at 1516 (citing Gregory v. Ashcroft, 501 U.S. 452 (1991)). But see generally Edward L. Rubin & Malcolm Feeley, Federalism: Some Notes on a National Neurosis, 41 UCLA L. Rev. 903 (1994), arguing that the dual sovereign structure of federalism should be replaced with managerial decentralization. Rubin and Feeley observe that the federal courts have been “consistent opponents” of federalist positions over the years as we have “tried to extricate ourselves from federalism for at least the last 130 years.” Id. at 908.

Although state interests are protected in federal legislation to a great degree through the political process, our congressional legislators are primarily representatives of the national government and not of the states. U.S. Term Limits, Inc. v. Thornton, 115 S. Ct. 1842, 1855 (1995) (congressional representatives owe primary allegiance not to the people of a state, but to the people of a Nation).

139 Jeffrey A. Blackie, Note, Conservation Easements and the Doctrine of Changed Conditions, 40 Hastings L.J. 1187 (1989). The term easement here is used generically to apply to any servitude, whether a classic easement, a real covenant or equitable servitude. A classic easement is a non-possessory interest in property. RESTATEMENT (FIRST) OF PROPERTY § 450 (1944). It runs with the land. Id. A real covenant is a promise respecting the use of land that will bind both the parties to the covenant as well as successors to their real property rights. Blackie, supra, at 1188 n.6. An equitable servitude is similar but does not meet the formal requirements of a real covenant; it will therefore be enforced only against successors who have knowledge of the original agreement. Id. at 1188 n.7.

140 Susan F. French, Gallivan Conference: Tradition and Innovation in the New Restatement of Servitudes: A Report From Midpoint, 27 Conn. L. Rev. 119, 123 (1994). Generally, servitudes have been used to implement four distinct kinds of modifications to the underlying land law: (1) shared use arrangements in which users need not acquire an “ownership” interest in the land; (2) arrangements to limit development of land; (3) arrangements to assure a flow of payments, goods, services, or other benefits from the owner or occupant of land; and (4) arrangements by which land is subjected to a local governance structure and provides the resources for governmental operations. Id. at 120.

141 Id.
Common law easements are generally classified as either (1) in gross,\(^{142}\) (2) appurtenant and reciprocal,\(^{143}\) or (3) appurtenant and nonreciprocal.\(^{144}\) Appurtenant easements are between neighbors.\(^{145}\) They may be affirmative or negative. Where an affirmative easement (easement appurtenant) permits specific conduct by the easement holder, a negative easement (easement in gross) disallows conduct by the landowner. The common law disfavored negative easements because they lacked the flexibility of appurtenant covenants that also require neighborly accommodation and goodwill.\(^ {146}\) There are common law policy reasons against enforcement of in gross covenants as well, particularly to prohibit dead hand control of property.

In contrast to traditional easements, easements acquired pursuant to the Uniform Conservation Easement Act and state laws providing for conservation easements\(^{147}\) are intended to benefit the public, rather than a specific parcel of land or a private individual.\(^{148}\) Most state conservation easement statutes allow landowners to grant an easement to governmental units or private nonprofit organizations known as land trusts.\(^ {149}\) "Land trusts are private, charitable organizations that acquire and hold full and partial interests in property to preserve the property in perpetuity."\(^ {150}\) Some state statutes prohibit the federal government from holding such an interest in the state.\(^ {151}\)

---

\(^{142}\) The benefit of the servitude is not associated with a dominant parcel owned by the covenantee. \textit{Restatement (First) of Property} §§ 453-54 (1944).

\(^{143}\) The land of covenantor A, is burdened by a real covenant for the benefit of neighboring property owned by covenantee B, whose own parcel is burdened by an identical covenant for the benefit of A's land. Especially a reciprocal subdivision covenant.


\(^{145}\) Id.

\(^{146}\) \textit{Id.} at 468, 473.

\(^{147}\) A conservation easement is created when a grantor sells specified development rights in a piece of property but retains the underlying fee.

\(^{148}\) Blackie, \textit{supra} note 139, at 1200–01. The Uniform Conservation Easement Act provides that the purposes of a valid conservation easement must "include retaining or protecting the natural, scenic, or open-space values of real property, assuring the availability of real property 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." \textit{Uniform Conservation Easement Act}, 12 U.L.A. § 1(1) (1996).


\(^{150}\) \textit{Id.} at 825 n.9.

\(^{151}\) Jordan, \textit{supra} note 5, at 479.
The purpose of an easement authorized by statute is found in both the enabling statute and within the four corners of the easement deed. The statement of purpose in a deed usually mirrors the language in the statute. The purpose may thus be broadly worded to reflect a regulatory goal or public purpose. As with traditional servitudes, the party granting a statutory easement seeks to gain some benefit in exchange for the burden placed upon the property. Easements granted for conservation purposes, for example, may create burdens, such as restrictions on development, restrictions on agricultural use, or dedication of lands to wetlands preservation, in return for benefits such as property tax abatement, tax deductions, debt forgiveness, crop subsidy payments, or technical assistance. Landowners may realize income, estate, or property tax benefits by donating a conservation easement to a qualifying agency or organization. Many state conservation easement statutes provide that imposing a conservation restriction on the property will reduce the property tax valuation of the burdened land.

When the easement has a public beneficiary and a public purpose, the nature of the property interest changes. There is a shift in power from the private property owner to the public, and in the case of federal LURES, from the state and local government to the federal

---

152 See Blackie, supra note 139, at 1200.
153 Id.
154 Id. at 1198 n.67 (discussing both the statutory and non-statutory characteristics of conservation easements, and noting that another author suggested that "whether a conservation easement is analogous to a traditional easement or covenant depends on the type of grant in the conservation easement"— while "prohibiting billboards would be similar to a negative easement, prohibiting subdivision for commercial development is closer to a traditional real covenant, while prohibiting excavation or dumping of trash is closer to a restriction"). See also infra Section III.C.
155 Stockford, supra note 149, passim.
156 Id. at 830. In California, for example, the state legislature acted to halt the conversion of farm land and open lands as cities and suburbs sprawled outward. Joel Cutler, Book Review, 12 B.C. ENVTL. AFF. L. REV. 215, 217 (1985) (reviewing Thomas S. Barrett & Putnam Livermore, THE CONSERVATION EASEMENT IN CALIFORNIA (1983)). The California Constitution required property tax assessments be based on the land's highest and best economic use of land, which had resulted in inflation of land values as market demand for undeveloped land increased. Id. at 215. A subsequent Constitutional amendment permitted the legislature to specify that certain lands be taxed on a present use value rather than their highest economic use value. The state then passed the Open Space Easement Act authorizing preferential tax treatment for locally approved conservation easements. Open-Space Easement Act of 1974, CAL. GOV'T. CODE §§ 51070–51097 (West 1983). This statute provides that a local government or a qualified non-profit conservation organization may obtain a conservation easement on farm or open land. The easement must be granted for at least ten years, run with the land, and be approved by the local governing body consistent with a locally adopted open space plan. Cutler, supra, at 218.
government. Professor Korngold has cautioned that the veto power held by owners of private conservation servitudes in gross preempts the democratic debate that normally attends community decisions over the amount and type of community growth that is desirable.

A federal easement would have a similar but more radical effect. The power to control community development has traditionally been reserved to local governments through their exercise of the planning, zoning and subdivision approval processes. When the federal government acquires an interest in the land, it may acquire regulatory powers over the land as well, depending on what interest is assigned. When the government is the holder of the easement, it may incorporate terms and conditions into the instrument that resemble regulations, to the extent the terms are consistent with the purpose of the acquisition.

As noted, the easement deed mirrors the statutory authorization. Therefore, by comparing the nature of the interest granted in a classic easement deed with a grant of a public interest, the shift in power that would occur by modifying the statutory purpose becomes more apparent. To the extent the transfer is compensated through the taking of a property interest, there is generally no constitutional infirmity. However, too great a shift in power to the federal government implicates federalism concerns.

158 Korngold, supra note 144, at 458–61.
159 The National Conference of State Legislatures and others, as amici curiae in United States v. Lopez opposing the Gun Free Schools Act, were concerned that injecting federal officials into local problems causes friction and diminishes political accountability of state and local governments. United States v. Lopez, 115 S. Ct. 1624, 1641 (1995).
160 See Korngold, supra note 144, at 458.
161 The federal government has authority to incorporate rules and regulations into easement agreements. See North Dakota v. United States, 460 U.S. 300, 305 n.6 (1983). This is not authority for the idea that federal regulations can create property interests not recognized by state law. See Jordan, supra note 5, at 466. Consider the effect of easements acquired pursuant to the farm programs. See infra notes 255–60. The landowner may be required under the terms and conditions of the easement to maintain the property—affirmative obligations—for the life of the easement or in perpetuity. Even when a federal land-use restriction easement is acquired voluntarily, the federal agency includes conditions in the deed resembling regulations or incorporates regulations by reference. Thus the regulations sought to be avoided by property owners are incorporated into a deed and are an encumbrance on the property. The enforcement mechanisms available to the grantee are also more severe than enforcement of similar police power regulations. The landowner may risk forfeiture of property for noncompliance with the conditions and may have to repay the consideration given for property interest.
A “negative restrictive deed” is the type of interest generally used and recognized in private real estate transactions. It states the “do’s and don’ts respecting how the land will be managed.” If additional uses or prohibitions are desired at some time in the future, additional compensation will have to be paid and another instrument drafted, making negative restrictive deeds inflexible to a grantee agency. These deeds also present challenges to enforcement. As a response, federal agencies acquiring conservation easements began to use “results-oriented deeds” that read more like a regulation, stating the easement’s conservation goals rather than the specific activities allowed or prohibited. This instrument gave the agency a veto power when an activity was not consistent with the goal. The agency’s right to say “no” in a results-oriented deed is effectively a “duty to negotiate.”

More recently, the Forest Service and others have begun to use a “reserved interest deed.” With this instrument, the grantee acquires all rights, title and interests in a property except those rights specifically reserved by the landowner. Any interest not expressly reserved is transferred to the easement holder.

---


163 Id. For example, the deed might state that: Landowner conveys to Grantee a perpetual easement whereby Landowner agrees for himself and his heirs and assigns that he will not do any of the following: no structures shall be built, no subdivision, no draining, etc. Id. at 4.

164 Id. at 3.

165 Id. at 3-4. For example, the deed may state that the landowner agrees not to do anything that would “substantially impair scenic, pastoral, fish and, wildlife values of the area.” Id. at 4.

166 Id.


168 Id. For example, the deed may provide that Landowner conveys to Grantee all right, title and interest in the property, reserving to himself and his heirs and assigns only the following rights in the property: the right to plant and grow row crops, orchards, etc. Id.

169 Id. Easements conveyed under a reserved interest deed are deceptive. If the only interest reserved to the fee holder is the equivalent of a license, such as the grazing permit at issue in McKinley v. United States, 828 F. Supp. 888 (D.N.M. 1993), and that license can be amended or revoked at will by the legislature or their delegate, then it seems there is really a taking in the first instance of all the incidents of the property. In McKinley, the United States District Court for the District of New Mexico found that the United States Forest Service was not required to perform a takings implication assessment (TIA) prior to modifying a grazing permit in a national forest. McKinley, 828 F. Supp. at 893. Presumably, grazing was a permitted use under an easement granted to the Forest Service; the permit holder was the owner of the fee. McKinley, 828 F. Supp. at 893. The Forest Service is authorized to issue grazing permits on lands within the National Forests. Id. at 890; 16 U.S.C. § 580i. The court found that, even if modification of the permit reduced the value of the property base and the economic viability of the ranching operation, the grazing permit nonetheless added value to his property and was a “benefit and privilege bestowed by the government” specifically excluded from activities subject
Now compare the statutory purpose of Section 104(j) with that of Section 104(k). The statutory authorization for an easement acquired pursuant to Section 104(j) is restricted to purposes "needed to conduct a remedial action."\textsuperscript{170} This purpose is incidental to the environmental and remedial nature of the statute as a whole.\textsuperscript{171} EPA would have to justify its use of authority to acquire property in each instance. Under this section, it is the various state laws which determine how the interest must be created and construed.\textsuperscript{172} The easement is privately negotiated even though the selection of institutional controls occurs during the Superfund remedy selection process.\textsuperscript{173}

In contrast to the purpose of Section 104(j), the purpose of proposed Section 104(k) is public in nature: "to prevent exposure to, reduce the likelihood of, or otherwise respond to a release or threatened release of a hazardous substance."\textsuperscript{174} This statement offers an aspirational goal as broad as CERCLA itself, but divorced from any of the regulatory standards that implement it. It would convey unlimited rights to the grantee, to be used at the Agency's discretion, similar to the reserved interest deed. It would therefore give EPA authority to make decisions regarding land-use that it can only influence now under its Land Use Directive.\textsuperscript{175} Even the title of the section, "[h]azardous substance property use" reflects a broader purpose to control land use.

EPA's use of Section 104(k) would not be limited to remedial actions but could extend to Brownfields redevelopment. Under the prospective purchaser policy, EPA will only consider entering into a settlement agreement when a settlement is "practicable and in the public interest;" the surrounding community and other members of the public must be afforded an opportunity to comment on the settlement, including the institutional controls that may be exchanged in return.
for EPA's covenant not to sue. Although notice and comment is not a "legal requirement" for prospective purchasers, who cannot be liable parties until they acquire the land, EPA wants to "seek cooperation with state and local government" and "facilitate public input" because of the land use issues involved.

Through the public participation process, there is an expanded federal role. Public participation is a regulatory process that assumes a public decisionmaker acting in the public interest. In this manner, EPA enters the local land-use decisionmaking process as an arbiter of "rights," acting in a regulatory capacity.

Section 104(k) thus accomplishes a transfer of regulatory power over land-use planning from state and local governments to the federal government through its broad public purpose. Additional evidence of Section 104(k)'s public nature is found in Paragraph eleven, giving private rights of enforcement through citizen's suits. The nature of the interest that is authorized by Section 104(k) raises serious federalism concerns.

B. The Power

Whether imposed by an easement deed acquired through purchase or condemnation, or as an exercise of the police power, there are conditions on the use of land inherent in any land-use regulation.
Even easements between purely private parties involve some legislative restrictions. But the nature of those restrictions varies depending on the nature of the interest and the holder of the interest. It is therefore necessary to determine whether the land-use planning purpose of Section 104(k) is a valid public purpose for exercise of the federal power of eminent domain as well as the constitutionality of the land-use planning purpose pursuant to the commerce and spending powers of Congress.

An interest in property may be acquired by the government by purchase, condemnation, or as an exaction or condition on the grant of a benefit conferred by government. Constitutional restrictions on the exercise of governmental power limit all three methods.

Congress may authorize a taking of private property for a public purpose provided just compensation is paid. The power of eminent domain is an inherent power of sovereignty and no statutory authorization is necessary. The mechanism for exercising that authority is nonetheless provided at 40 U.S.C. § 257, which authorizes an officer of the United States to acquire land by condemnation "in every case in which [the officer] ... has been, or hereafter shall be, authorized to procure real estate ... for public use." All federal condemnations are brought under Rule 71A, a procedural rule intended to provide

---

180 See Epstein, supra note 157, at 1359.
181 U.S. CONST. amend. V.
183 40 U.S.C. § 257. See Swan Lake Hunting Club v. United States, 381 F.2d 238, 240 (5th Cir. 1967). EPA, who has only delegated authority, can exercise the power of eminent domain to the extent authorized by Congress. When an agency of the federal government is granted the power to acquire property under other statutes, the agency may elect to proceed either under the specific grant or under § 257. When Congress delegates eminent domain authority to a federal agency, that agency’s exercise of their eminent domain authority may be reviewed under an ultra vires standard to determine whether they have acted within the scope of their authority and under an arbitrary and capricious standard for the manner in which they exercised their authority. Department of Interior v. 16.03 Acres of Land, 26 F.3d 349, 355 (2d Cir. 1994). Under the federal condemnation statute, the federal government may acquire the interest it believes is required by bringing an eminent domain action in federal court. 40 U.S.C. § 257. A “quick take” has been available under § 258; this section was omitted in 1995 as being superseded by Rule 71A of the Federal Rules of Civil Procedure. The nature and extent of the interest to be acquired are in the government’s sole discretion. See United States v. 101.88 Acres of Land, 616 F.2d 762, 767 (5th Cir. 1980). The landowner may recover damages for the actual taking which is not included in the declaration of taking by seeking compensation under the Tucker Act, but
some uniformity to federal condemnation procedures;\textsuperscript{184} however, the substantive law of the state defines the property interest at stake.\textsuperscript{185}

Other than the requirement to pay compensation, the only effective constitutional limitation on congressional power to condemn land is the public purpose requirement. Although the public purpose requirement is coterminous with the sovereign’s police power,\textsuperscript{186} what is a public purpose for one sovereign may not be a public purpose for another.\textsuperscript{187}

Our government is a government of dual sovereigns. Those powers not provided to the federal government by the United States Constitution were reserved to the States. Because the power to condemn is considered to be co-extensive with the power to purchase,\textsuperscript{188} it is necessary to look at the respective state and federal powers in general to determine whether the exercise of eminent domain would be appropriate for land-use planning purposes.

State and local governments have plenary power to regulate for the general welfare of their citizens. It has long been recognized that state and local governments may engage in land-use planning constitutionally.\textsuperscript{189} A municipality may under the police power prevent development from harming the health, safety or welfare of its citizens, or the municipality may allow the developer to internalize any harms or costs to the community and proceed with the development.\textsuperscript{190} A common practice in local land-use regulation is to require that developers provide public amenities as a condition for receiving permission to

\textsuperscript{184} FED. R. CIV. P. 71A(k). See CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3041 (2d ed. 1982).
\textsuperscript{185} See WRIGHT & MILLER, supra note 184, at § 3042.
\textsuperscript{187} See United States v. Certain Lands in Louisville, 78 F.2d 684, 687 (6th Cir. 1935) (citing Clark v. Nash, 198 U.S. 361 (1905)). Therefore, in Certain Lands in Louisville, the federal government did not have the authority to condemn property for public housing, although state and local governments could do so. Id.
\textsuperscript{188} Swan Lake Hunting Club v. United States, 381 F.2d 238, 240 (5th Cir. 1967) (noting that 40 U.S.C. § 257 has been consistently interpreted to authorize acquisition by condemnation where authority to purchase has been conferred); Hanson Lumber Co. v. United States, 261 U.S. 581, 581 (1923).
\textsuperscript{190} This would be the exercise of a lesser power. When the authority has the greater power to prevent the activity, it also has the lesser power to allow the activity with conditions. See Vicki Been, “Exit” as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine, 91 COLUM. L. REV. 473, 474 n.7 (1991); see also infra Section IV.D.
develop property in a manner that government could otherwise prohibit through exercise of its police power.191

The federal government exercises its power for the purpose of this discussion through the Commerce Clause, the spending power, and the property power. The federal government has authority to engage in land-use planning for public lands under the Property Clause of the United States Constitution.192 Congress regulates private activity pursuant to its authority under the Commerce Clause.193 The federal government may exercise its power under the Commerce Clause to regulate for the general welfare when the activity will have a substantial effect on interstate commerce.194 In addition, the United States Supreme Court has upheld federal legislation that has imposed conditions on the receipt of federal spending in areas where Congress could not regulate directly.195 Courts have held that Congress may exercise its taxing and spending power as necessary and appropriate to carry out its legitimate government functions.196

Generally, the federal government may acquire land for military purposes,197 navigation purposes,198 and as necessary and proper to carry out its legitimate functions.199 Although rarely questioned, the power of eminent domain is not unlimited; it must be used toward a legitimate end.200 The United States Supreme Court in Berman v. Parker201 noted, as evidence of the broad scope of eminent domain rather than its limitation: "Once the object is within the authority of

191 See Been, supra note 190, at 479. Exactions are related to the older practice of levying "special assessments" to pay for public improvements on land that will receive a direct and special benefit from improvements such as paving or infrastructure. Id. The initial difference was that exactions were imposed up front as a way to shift the initial cost and risk to the developer. Id. Later, communities began to require dedications for park space, schools and other amenities, or a fee in lieu of land. Id. at 480.

192 Kleppe v. New Mexico, 426 U.S. 529, 546 (1976); see infra Section III.C.


194 See infra Section IV.B.


196 Helvering v. Davis, 301 U.S. 619, 640–41 (1937) (finding social security tax on employees and employers a constitutional exercise to address national problem of unemployment); United States v. Butler, 297 U.S. 1, 70 (1936) (finding use of spending power to enter into agriculture production contracts with farmers coercive).


199 See Pollard's Lessee v. Hagan, 44 U.S. 212, 223 (1845) (stating that sovereign power of eminent domain does not mean all sovereign power but only those powers given to the federal government by the Constitution).


Congress, the right to realize it through the exercise of eminent domain is clear. For the power of eminent domain is merely the means to the end.”

Because it is an attribute of federal as well as state sovereignty, a state may not interfere with the legitimate exercise of the federal government's power of eminent domain. In North Dakota v. United States, the United States Supreme Court reviewed the federal power to acquire wetlands under the Migratory Bird Conservation Act. Under that statute, Congress had conditioned the federal government's power to acquire wetlands easements on prior state consent. It was clear that, in the absence of federal legislation to the contrary, the United States could acquire the easements by purchase or condemnation without state consent.

It is the legitimacy of the power to purchase or condemn for land-use planning purposes that is questionable in proposed Section 104(k). The purpose is so broad that there is no effective limit on the use of the power to acquire interests in property. The bill specifically withdraws the requirements of Section 104(j) that the easements be “needed to conduct a remedial action.” There is no “nexus” required at all. With the absence of a nexus, the purpose of the acquisition could fall outside the bounds of legitimate commerce or spending powers, invading the province of the states to otherwise regulate land use. The public purpose requirement as a limitation on federal power thus protects federalism values.

C. The Dilemma

At the same time that limits on the Commerce Clause are being rediscovered, and the role of states reemphasized, a stronger federal
role is being asserted in land-use decisions through environmental controls.\textsuperscript{210}

The tension between land-use regulation and environmental regulation was observed by the United States Supreme Court in \textit{California Coastal Commission v. Granite Rock Co.}.\textsuperscript{211} In finding that a state environmental regulation was not preempted by the Forest Service regulation of federal lands, the court noted that land-use planning chooses particular uses for the land, whereas environmental regulation requires that, however the land is used, damage to the environment is kept within prescribed limits.\textsuperscript{212}

Although the federal government has plenary authority to regulate land use on federal lands, as in \textit{Granite Rock}, regulation of land use of other than federal lands has historically been the exclusive province of state and local governments.\textsuperscript{213} Through increasing environmental regulation of land use, there has been some convergence between environmental regulation and land-use planning as federal policies have directly impacted local land use, state police power, and personal property rights.\textsuperscript{214}

This push-pull of interests is reflected in the national policy for protecting coastal lands in the Coastal Zone Management Act (CZMA) which promotes both protection and development.\textsuperscript{215} To avoid direct federal regulation of land-use planning, the CZMA presumes that state land-use planning is a state affair and provides federal oversight in the form of conditional funding and program review.\textsuperscript{216} To encourage states to engage in land-use planning along the coasts, the federal government provides funding for program development and implementation.\textsuperscript{217} To be eligible for funding, a state must develop a federally-approved program under which the state identifies permissible land uses which will have a “direct and significant impact on the

\footnotesize{Pub. L. No. 104-4, 109 Stat. 48. See infra Section IV and Conclusion.}

\textsuperscript{210} See LINDA A. MALONE, ENVIRONMENTAL REGULATION OF LAND USE § 1.01 (1991).

\textsuperscript{211} See 480 U.S. 572, 587 (1987).

\textsuperscript{212} Id.

\textsuperscript{213} MALONE, supra note 210, at §§ 1.02, 2.01.

\textsuperscript{214} Id. at xi.

\textsuperscript{215} See 16 U.S.C. § 1452(1). A state program shall give “full consideration to ecological, cultural, historic, and esthetic [sic] values as well as the needs for compatible economic development . . . .” Id. § 1452(2).


\textsuperscript{217} See Houck & Rolland, supra note 216, at 1294.
coastal waters." The state must also develop means by which the state will exert control, and guidelines on how the state will prioritize land and water uses in affected areas. Under the CZMA, the federal government does not provide criteria for determining development outcomes but provides only a review of the process. By participating in coastal zone planning, the states also subject federal lands and federal projects to a review for consistency with state programs, activities which would otherwise be preempted. Importantly, states retain authority for making basic land-use policy choices. Whatever use is made of the land, the use continues to be subject to all environmental permitting and other requirements.

"Environmental federalism" describes the federal-state relationship in protecting the environment. As commentators have observed, the strong federal role now played by EPA occurred because of the states' failure to address environmental problems satisfactorily. By establishing uniform standards, states would be prevented from "harmful competition" with each other to attract polluting industries. Federal regulation would also address transboundary pollution problems.

The federal government currently uses three general approaches to environmental federalism. The first approach is to "provide financial or regulatory incentives which encourage states to adopt environmental standards on their own." This model continues to be used

---

218 Id. at 1295.
219 Id.
220 Id. at 1297.
221 See id. at 1298. States have implemented the CZMA with widely varied outcomes. Id. Some states have passed set-back ordinances and other land-use restrictions or even banned industrial development. Id. Other states have continued to facilitate condominium development projects or other uses along the coast, denying very few uses. Id.
223 This theme of preventing harmful competition, also known as a race-to-the-bottom, is repeated in most justifications for allowing the federal government to regulate where the states have failed to do so. See generally Steward Machine Co. v. Davis, 301 U.S. 548 (1937). For a view of how this rationale continues to influence environmental regulation, see David R. Hodas, Enforcement of Environmental Law in a Triangular Federal System: Can Three Not Be A Crowd When Enforcement Authority Is Shared By The United States, The States, and Their Citizens?, 54 Md. L. Rev. 1552, 1615 (1995).
224 Houck & Rolland, supra note 216, at 1246 (noting that in passing the Clean Water Act and its amendments, Congress recognized that virtually all Americans live downstream).
225 Percival, supra note 222, at 1173.
226 Id.
where environmental regulation most affects land-use regulation, such as under the Coastal Zone Management Act.227

The second and most prominent model for environmental federalism is that of cooperative federalism.228 States may assume responsibility for administering and enforcing the environmental program once their state program is determined by EPA to be capable of meeting minimum federal standards.229 This approach is used in the Clean Air Act, the Clean Water Act, the Resource Conservation and Recovery Act (RCRA), and the Safe Drinking Water Act.230 A program of cooperative federalism should: "(1) provide for state implementation; (2) set clear standards; (3) reflect respect for state autonomy; (4) provide mechanisms to police the process; and (5) apply the same rules to government and private parties."231 This model has been successfully used in delegating permitting authority under the Clean Water Act's National Pollutant Discharge Elimination System (NPDES) regulations, for example.232

A third approach to environmental federalism favors federal pre-emption of inconsistent state standards and federal control.233 The Toxic Substance Control Act (TSCA) and Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) use this approach, as do the Clean Air Act's vehicle emissions standards.234 CERCLA's ARAR process preempts state environmental permitting requirements but incorporates state substantive standards.235 States retain limited authority to

227 Id.
228 Id. at 1174.
229 Id.
231 Babich, supra note 100, at 1534 (discussing cooperative federalism in the context of hazardous waste management and cleanup).
233 Percival, supra note 222, at 1176.
234 Id.
235 When states attempted to control federal discretion by independently enforcing state standards at Superfund sites, EPA asserted a right to preempt state environmental laws in the 1985 NCP. EPA's general counsel had advised then EPA administrator, Lee M. Thomas, that CERCLA impliedly preempted all otherwise applicable state and federal environmental laws. Memorandum from Francis S. Blake, EPA General Counsel to Lee M. Thomas, EPA Administrator, CERCLA Compliance with Other Environmental Laws, General Counsel Opinion (Nov. 22, 1995), available in LEXIS, ENVIRN Library, ALLEPA File. Several states appealed EPA's assertion of authority in the NCP, an action Congress mooted with the 1986 reauthorization. See, e.g., Ohio v. EPA, No. 86–1096 (D.C. Cir. filed 1986). When CERCLA was amended, SARA
enforce state standards under authority of state law. 236 CERCLA's liability provisions specifically do not preempt state statutory or common law actions. 237

Because of the overlap in environmental regulation and land-use regulation, federal environmental regulation may preempt not only state environmental regulation but also state land-use regulation. This is not popular and Congress has sought to avoid the appearance of regulating land use, if not the result. 238 Although the federal government's authority to regulate interstate commerce or spend for the general welfare may preempt certain state land-use regulation when there is a conflict, the real property interests are still defined by state law. 239 Those advancing the idea of greater federal government control over land use have recognized that direct regulation is not required if the government simply acquires an interest in the land. 240 At one end, the federal government can be a holder of the property interest like any other, through the exchange of mutual covenants similar to any contractual obligation. At the other extreme, the federal government acquires preemptive regulatory powers over the land by acquiring the property interest. 241

rejected such an intention by requiring that cleanups meet all applicable or otherwise relevant and appropriate state and federal standards (now ARAR). SARA § 121(d), 42 U.S.C. § 9621. EPA is thus required to incorporate state standards into the remedial action plan as part of the ARAR process. Ohio v. EPA, 997 F.2d 1520, 1526–27 (D.C. Cir. 1993); see also Babich, supra note 100, at 1536. The D.C. Circuit upheld EPA's interpretation that the ARAR requirement means compliance with the substantive requirements of federal and state laws and not the procedural requirements of those same laws. Ohio, 997 F.2d at 1527.

236 See Babich, supra note 100, at 1536–37.
238 See Jordan, supra note 5, at 403.
240 Jordan, supra note 5, passim. This idea of regulation by purchase is not novel and was raised by the Supreme Court in Berman v. Parker, 348 U.S. 26, 34–35 (1954) (noting police power authority of District of Columbia to redevelop blighted areas by taking full or partial fee, as needed).
241 Even though purchased pursuant to the commerce or spending power, if retained by the federal government, the easement would be subject to the federal government's property power. Federal lands may be managed pursuant to the Article I property power for federal enclaves over which the national government has exclusive jurisdiction, or the Article IV property power for those federal lands that remain subject to the jurisdiction of the state government as well as the federal government. See U.S. Const. art. I, § 8, cl. 14, art. IV, § 3, cl. 2.
Pursuant to the Article IV property power, Congress has both legislative and proprietary powers, and may make all “needful rules and regulations” respecting federal lands.\(^{242}\) Thus, in *Kleppe v. New Mexico*,\(^ {243}\) the federal Wild Free-roaming Horses and Burros Act, enacted to protect unclaimed horses and burros on public lands, could preempt state laws that allowed their capture when the animals strayed from public lands.\(^ {244}\) This was not an impermissible intrusion into state sovereignty in an area traditionally regulated by the state “but the necessary consequence of valid legislation under the Property Clause.”\(^ {245}\)

Commentators do not agree on the extent to which the exercise of the property power preempts state and local laws, if at all.\(^ {246}\) Many believe *Kleppe* was wrongly decided.\(^ {247}\)

The federal government currently owns more than one-third of the lands in the United States.\(^ {248}\) At one time, public land laws were laws

\(^{242}\) *Id.* at art. IV, §3, cl. 2. The Article IV Property Clause provides: “The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . .” *Id.*


\(^{244}\) *Id.*

\(^{245}\) *Id.* at 545. The decision applied to actions of the New Mexico Livestock Board who entered public lands to remove the wild burros. *See id.* at 546. The Court did not decide whether the Act could be sustained in all applications. *See id.*

\(^{246}\) *See generally* Eugene R. Gaetke, *Refuting the “Classic” Property Clause Theory*, 63 N.C. L. Rev. 617 (1985). Although the Supreme Court has recently viewed the property power broadly, critics of this view assert that Congress has only the power of an ordinary proprietor under its Article IV powers and there is no preemptive capability. Some classic theorists argue that Congress has no authority to retain ownership of lands within the states at all. *See id.* at 619. These theorists recognize two exceptions from the case law. First, congressional action under the Article IV property power may have preemptive effect when Congress acts solely to control title upon disposition of Article IV lands. *Id.* at 651–2. Second, Congress may act to protect federal lands from harm. *Id.* at 652. Classic theorists would also agree that the property power can be used to effectuate an enumerated power, believing that the Article IV property power is not itself an enumerated power. *Id.* at 651 n.223. Although the *Kleppe* Court stated that the Article IV power is “without limitations,” even those who agree with a broader view of the property power would find limitations on the power. In particular, the “needfulness” of the regulation is a constitutional limitation of the use the power. *Id.* at 656 n.252 (citing *Light v. United States*, 220 U.S. 523, 537 (1911)). Other Supreme Court cases recognizing limitations include *Leo Sheep Co. v. United States*, 440 U.S. 668, 677–88 (1979) (assertion of easement across private land to reach federal lands not authorized); *Colorado v. Toll*, 268 U.S. 228, 230 (1925) (rights of states over roads in national park are unaffected by federal Act creating the park); *Curtin v. Benson*, 222 U.S. 78, 86 (1911) (property clause regulation interfering with private property constituted a taking).

\(^{247}\) Classic theorists believe *Kleppe* broke with established case precedent as well as with the Framers’ intent in drafting the Constitutional provisions. Gaetke, *supra* note 246, at 619.

“governing the alienation of the public land,” providing the means through which minerals and lands were conveyed to private interests. 249 Certain lands were “reserved” for public interests such as national forests, wildlife refuges, and the national monuments. 250 The Bureau of Land Management manages those public lands not reserved for special purposes. 251 The Federal Land Policy and Management Act (FLPMA), passed in 1976, represented a shift from this policy of disposition to one of retention, providing that “the public lands [should] be retained in Federal ownership, unless as a result of land-use planning procedure provided for in this Act, it is determined that the disposal of a particular parcel will serve the national interest.” 252

More recently, federal legislation has provided for acquisition of property and creation of easements, primarily for conservation and preservation programs. 253 These easements have been referred to as federal land use restriction easement or “LURES.” 254 Among the federal programs are the Wetlands Reserve Program (WRP), 255 the Conservation Reserve Program (CRP), 256 the Environmental Easement Program (EARP). 257 The WRP was created with the 1990 Farm bill. See Conservation Program Improvements Act of 1990, Pub. L. No. 101--624, § 1237(a), 104 Stat. 3359, amending subtitle D of Title XII of the Food Security Act of 1985, Pub. L. No. 99--198 (codified at 16 U.S.C. § 3837(a) (1994)). The WRP falls under the umbrella of the Environmental Acreage Reserve Program (ECARP) along with the CRP program and the Environmental Easement Program, among others. Linda A. Malone, Reflections on the Jeffersonian Ideal of an Agrarian Democracy and the Emergence of an Agricultural and Environmental Ethic in the 1990 Farm bill, 12 STAN. ENVTL. L.J. 3, 40 (1993). To participate in the Wetlands Reserve Program, the property owner must grant an easement to the Secretary of Agriculture with a recorded deed restriction that will preserve the wetland values of the property. Malone, supra, at 41; 16 U.S.C. § 3837a(a). The term of the easement must be for at least 30 years or the maximum allowed under state law. 16 U.S.C. § 3837a(e). Under the implementing regulations, the agency expressed a preference for permanent easements and, initially, would accept only permanent easements.

ment Program (EEP), the Forest Legacy Program, the FmHA Debt Cancellation Conservation Easement Program, and the Wa-

the 1990 Farm bill, the CRP program has been extended to other types of environmentally sensitive land. Malone, supra note 255, at 19; see Pub. L. No. 99–198, § 1231 (codified as amended at 16 U.S.C. § 3831(b)). The provisions become binding through the use of contractual provisions rather than by creating interests in land; however, lands subject to certain useful life easements may be eligible to be included in the CRP program. Malone, supra note 255, at 24; 7 C.F.R. § 1410 (1995). To put eligible land into the conservation reserve, the owner must contractually agree to: (1) apply an approved conservation plan removing the land from commodity production for a less intensive use; (2) place the land in the reserve; (3) not use the land for agricultural purposes, except as permitted by the Secretary; (4) establish approved vegetative cover or watercover on the land; (5) forfeit the right to receive rental and cost sharing payments, refund all payments received plus interest for a violation of the contract warranting termination, and refund or accept adjustments to the rental and cost sharing payments for any violations not warranting termination of the contract; (6) forfeit the right to receive rental and cost sharing payments, refund such payments as the Secretary considers appropriate upon transfer of the land, subject to the contract, unless the transferee agrees to assume the contract or the Secretary and the transferee agree to modifications of the contract; (7) not conduct harvesting, grazing or commercial use of forage except as permitted by the Secretary; (8) not make commercial use of trees, unless expressly permitted in the contract; (9) not adopt any practice specified by the Secretary in the contract as a practice which would tend to defeat the purposes of the program; (10) comply with any additional requirements the Secretary might include in the contract; and (11) under a 1990 amendment, not produce an agricultural commodity on any other highly erodible land purchased after November 28, 1990 that has not been used to produce an agricultural commodity other than forage crops. Malone, supra note 255, at 21–22 (citations omitted). Participants are also subject to additional regulatory provisions that are incorporated by reference as a contract condition. Id. at 28–29; 7 C.F.R. § 1410. The contracts are for terms from 10 to 15 years and, if the land under contract is transferred, the new owner may assume the contractual obligations, enter a new contract, or elect not to participate. Malone, supra note 254, at 23.

257 The Secretary of Agriculture has authority under the Environmental Easement Program (EEP) to acquire easements on land enrolled in the CRP program or other cropland that is environmentally sensitive. 16 U.S.C. § 3839(b)(1). Under the EEP, the easements must be permanent or for the maximum duration permitted under state law. Id. § 3839(a). The owner has affirmative obligations under the EEP to develop and carry out a natural resources conservation management plan. The easement management plan may prohibit certain commercial or other uses or provide for the permanent retirement of cropland base. Id. § 3839a(b); see Malone, supra note 255, at 44.

258 16 U.S.C. § 2103c(a). The Forest Legacy Program, also part of the 1990 Farm bill, authorizes the United States Forest Service (USFS) to use conservation easements and other mechanisms to protect and conserve forest areas. Id. Under the Legacy Program, only the USFS may hold title to these interests. Id. § 2103c(c). The easement must specify the environmental values the USFS seeks to protect, the types of activities landowners will conduct, and the effects those activities will have on the land. Id. § 2103c(d). The Legacy Program requires state government consent before the USFS can acquire an easement within the state's borders. Id. § 2103c(g); see Laura S. Beliveau, The Forest Legacy Program: Using Conservation Easements to Preserve the Northern Forest, 20 B.C. ENVTL. AFF. L. REV. 507, 513–21 (1993).

259 The 1985 Farm bill authorized the Secretary to acquire LUREs as a means of debt restructuring on Farmers Home Association (FmHA) loans. 7 U.S.C. § 1997(b) (1994). If the realty is secured by a FmHA loan, a farmer may be eligible for a write-down of the debt in exchange for granting an easement for not less than 50 years to the federal government. Id.
When similar regulation would effect a taking, the cost of paying for an easement is equivalent to paying just compensation.\(^{261}\)

Most of these existing programs are voluntary. Prior to passage of the 1985 Farm bill, the Iowa Natural Heritage Foundation studied the use of conservation easements in the federal agricultural programs.\(^{262}\) The Agricultural Land Trust (ALT) was an attempt to combine the goals of agricultural conservation with credit relief for farmers.\(^{263}\) The program was thought to be attractive because the easements would be obtained through voluntary arm's length negotiation and bargaining which would be less oppressive than regulatory restrictions or the use of eminent domain.\(^{264}\) The federal government is more likely to use their power of eminent domain to condemn an interest under the Migratory Bird Conservation Act\(^{265}\) or the Trails Act.\(^{266}\)

The property power itself does not authorize the acquisition of property, however, federal property interests acquired under LURE

\(^{260}\) The Watershed Protection Program (Watershed Program) was created in 1954 to protect and improve the nation’s land and water resources. Watershed Protection and Flood Prevention Act, Pub. L. No. 83-566, § 1, 68 Stat. 666, 666 (1954) (codified as amended at 16 U.S.C. § 1001 (1994)). The 1990 Farm bill expanded the Watershed Program by authorizing cost-sharing for perpetual LUREs on wetlands or floodplains to perpetuate, restore, and enhance the natural capabilities of land and water resources. 16 U.S.C. § 1003a(a); see Jordan, supra note 5, at 421. Like easements acquired under Section 104(j), the Watershed Program provides that the easement be held by the states rather than the federal government. Jordan, supra note 5, at 421.

\(^{261}\) Jordan, supra note 5, at 434.

\(^{262}\) See generally Neil D. Hamilton, Legal Authority for Federal Acquisition of Conservation Easements to Provide Agricultural Credit Relief, 35 Drake L. Rev. 477 (1985/1986) (reviewing the proposed Agricultural Land Trust that was subsequently used as a basis for the debt restructuring provisions of the 1985 Farm bill).

\(^{263}\) Id. at 484.

\(^{264}\) Id. at 486.

\(^{265}\) The Migratory Bird Conservation Act authorizes the federal government to acquire areas of land and water suitable for migratory waterfowl, or the “interests therein.” 16 U.S.C. §§ 715a, 715d (1994).

\(^{266}\) The National Trails System Act (Trails Act) authorized conversion of unused railroad rights-of-way to recreational trails. 16 U.S.C. §§ 1242–46 (1994). Private lands may be obtained through condemnation if voluntary means fail. Id. § 1246(g).
acquisition programs fall within the scope of Article IV if the federal government retains the interest acquired.\textsuperscript{267} The property power has been applied to dispositions of partial interests in land including mineral leases, energy and transmission lines.\textsuperscript{268} Federal regulations "respecting" federal lands may preempt state and local laws.\textsuperscript{269} It has been urged that the federal government can and should, pursuant to the property power, acquire conservation and preservation easements in perpetuity even when the right to do so does not exist under state law.\textsuperscript{270} Although the dicta in Kleppe would indicate the property power could be used to preempt state law, the more recent concern of the Supreme Court in preserving the structure of the federal system would indicate a more narrow construction is likely.\textsuperscript{271} It is a factor in the equation nonetheless, because "[w]hen one undertakes to develop for private purposes a project involving the use of lands encumbered by a government interest, one's expectations are, or should be, that a certain amount of process and expense will be involved . . . ."\textsuperscript{272}

\textsuperscript{267} See Jordan, supra note 5, at 454 (recognizing that the general language of Article IV Property Clause encompasses all property owned by United States, including personality and intangible property as well as interests in reality).

\textsuperscript{268} See, e.g., Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 330 (1936). This is one of the recognized exceptions even under the classic view of the property power. Gaetke, supra note 246, at 651–52.


\textsuperscript{270} Jordan, supra note 5, at 465–70. Although acquisition of federal easements may be authorized under the commerce power for various conservation and preservation purposes, Professor Jordan would use the spending power in combination with the property power to transform the interest acquired. \textit{Id.} at 470. She argues that legislation conditioning the availability of federal funds in exchange for a LURE on terms requiring the LURE to be perpetual is a conditional offer of federal funds within Congress's spending power. \textit{Id.} at 443. Further, in cases where the federal government is the holder, the LURE creates enforceable rights in the federal government. Legislation authorizing the LURE is analogous to a rule respecting property interests belonging to the United States and is a means within Congress's property power. Therefore, the federal legislation can be characterized as an exercise of the spending power for the general welfare and as an exercise of the property power to create enforceable rights protecting the federal interest in conservation. \textit{Id.} at 443–44.

\textsuperscript{271} See supra Section IV.

\textsuperscript{272} Friends of the Shawangunks v. Clark, 754 F.2d 446, 452 (2d Cir. 1985). Although not decided under the property power, \textit{Friends of the Shawangunks} was a dispute over a proposed amendment to a conservation easement acquired by the National Park Service (Secretary of the Interior) pursuant to the Land and Water Conservation Fund Act of 1965, 16 U.S.C. §§ 460l–4 to 460l–11 (1994). Under the terms of the easement, the fee owner was not allowed to develop or erect new facilities, alter the landscape or terrain, or cut trees, but could operate, maintain and reconstruct existing facilities within the easement area, including buildings, roads, utilities
Although lands subject to a federal easement are still considered *private* as opposed to *public lands*, the federal interest in the land opens the door to assertions of additional public rights in the property.\(^{273}\) For this reason, landowners have been reluctant to sell easements to the federal government under the Forest Legacy Program, fearing that future use of the land will implicate the Endangered Species Act (ESA)\(^{274}\) or the National Environmental Policy Act (NEPA).\(^{275}\) As with other conservation easements, these easements have a decidedly *public nature*.\(^{276}\)

At the heart of many land-use conflicts is whether or to what extent there are "societal rights" over private land.\(^{277}\) This debate exists whether or not an interest in the property has been conveyed, and is central to understanding current initiatives for increased community participation in remediation and permitting decisions.\(^{278}\)

---

\(^{273}\) Generally, the term "public lands" is applied to lands managed by the federal Bureau of Land Management (BLM). 43 U.S.C. § 1702(e) (1994); see Mansfield, *supra* note 249, at 198–99. Professor Mansfield discusses "public lands" as well as those lands federally owned and accessible to the public, such as national parks, national forests, and national wildlife refuges, and how to resolve conflicts between traditional private property rights and "collective or non-consumptive" rights. *Id.*


\(^{275}\) 42 U.S.C. §§ 4321–4370; see Beliveau, *supra* note 258, at 526. Generally, NEPA is triggered when there is a federal action, i.e., a federal program or federal funding. EPA actions, including those taken under CERCLA, are generally not subject to NEPA as such. Instead, EPA is obligated to consider the same environmental values in carrying out all of the programs delegated to the agency.

\(^{276}\) See *supra* Section III.A.

\(^{277}\) See Jordan, *supra* note 5, at 426–30, (discussing Professor Caldwell's theory of property which would impose obligations of stewardship on landowners not present under common law principles of private land ownership).

\(^{278}\) See *supra* notes 14–16 and accompanying text.
Some suggest that our notion of private property has become outdated and does not appropriately recognize non-developmental rights in the property. The idea of a land ethic was championed years ago by Aldo Leopold who mourned the loss of species and ecosystems to unchecked development and resource exploitation. He urged upon Americans a greater sensitivity to the cycles of nature and a respect for the land, and his influence has led to a dedication of economic resources to conservation and preservation values. Societal interests are much broader than environmental interests, and presumably include any public purpose. The concept is incorporated into the broad grant of authority under Section 104(k). EPA's Land Use Directive and Prospective Purchaser Policy imply as much, extending the future use determination to include considerations for mass transit, revitalization of the inner city, infrastructure improvements, environmental justice, and more.

The notion of societal interests in private property is inconsistent with the protections of private property provided in the Fifth Amendment. The public interest is accounted for in the concept of eminent domain and in the police powers of the states to regulate for the safety, health, and welfare of the community. Attaching an unnamed and global "societal interest" to an interest in property amounts to a plenary grant of authority that circumvents the legislative process and the requirement to identify a substantial government interest in a particular activity as well as a nexus between the governmental action and the means employed. When the grantee is the federal government, the constitutional structure may be redefined by a public purpose that is too broad.

Other proponents of greater federal control speak of protecting "federal interests." Through citizen suits or other provisions pro-

---


280 See Aldo Leopold, A SAND COUNTY ALMANAC, WITH ESSAYS ON CONSERVATION FROM ROUND RIVER (1966).

281 See supra Section III.A.

282 See supra text accompanying notes 126-27.

283 A public purpose may include preservation and protection of aesthetic values as well. Berman v. Parker, 348 U.S. 26, 32-33 (1954). The rationale for just compensation under the Takings Clause is that an individual should not bear the entire burden for what is intended to benefit the public at large. Agins v. City of Tiburon, 447 U.S. 255, 260 (1980). Increasingly, a taking will be found when a regulation goes too far.

viding for federal approval of state environmental programs, state policy choices are being challenged as inconsistent with federal law for this reason. In some cases, the result of these suits is a modification of state property law. In Virginia, for example, the state program to administer the Clean Air Act's Title V operating permits was recently disapproved based on the differences in judicial review of permitting decisions under state law.\textsuperscript{285} Under Virginia law, members of the public are only aggrieved by a permitting decision, for the purpose of seeking judicial review, if they suffer an invasion of an "immediate, legally protected, pecuniary and substantial interest . . . .\textsuperscript{286} This was determined to be violative of the Clean Air Act because it was more restrictive than Article III standing, which would grant standing to someone with injury to health, aesthetic, environmental, or recreational interests.\textsuperscript{287} In this way, protection of the federal interest modifies rights and remedies under state property law by attaching public rights to the use of private property.

But what is the federal interest at stake? It is difficult to imagine that federal interests could be anything more than or apart from those values that are incorporated into our constitutional structure. Thus, the federal system should protect federal interests by operation of the Supremacy Clause but should not protect any interests that would define federal interests at the expense of the federal system.

The importance of the underlying constitutional structure in limiting the scope of federal authority was central to the Court's recent decision in \textit{Seminole Tribe of Florida v. Florida}.\textsuperscript{288} In \textit{Seminole Tribe}, the Court found that Congress lacked the power to abrogate the states' Eleventh Amendment immunity under the Indian Commerce Clause.\textsuperscript{289} In so ruling, they overturned their earlier decision in \textit{Penn-
sylvania v. Union Gas upholding Article I authority under CERCLA to waive state sovereign immunity from suits for money damages.290

On the one hand, the Seminole decision—and others that will be discussed in the following section—restores power to the states by reaffirming limits on Congress's authority to regulate. At the same time—perhaps in response—federal regulatory power is being asserted in bold new ways. In addition to the exercise of federal power over land use that accompanies environmental controls in general, EPA is placing new and additional conditions on the initial delegation of federal programs to the states. The federal government also is regulating by purchase through provisions such as that proposed for hazardous substance easements under CERCLA.

With the broad public nature of the easement interest that could be acquired pursuant to Section 104(k), preemption begins to run afoul of the Tenth Amendment.

IV. PROPOSED SECTION 104(K) WOULD COMMANDEER THE STATE LEGISLATIVE PROCESS AND IS THUS UNCONSTITUTIONAL ON ITS FACE

With its broad public purpose and the authority it conveys, proposed Section 104(k) would effect a transformation of the property interest that would normally be conveyed to the EPA for Superfund's environmental purposes (for access and to assure the effectiveness of the Superfund remedy) into a federal right in the property to regulate the use and disposition of land into the future. I submit this new purpose is not allowable under the commerce power nor related to Congress's exercise of the spending power. Its effect is to commandeer the legislative process of the states in contravention of the Tenth Amendment.

Initially, we must determine whether Section 104(k) is allowable under the Commerce Clause.291 If the answer is no, then federal law may not preempt state law.292 Even so, Congress may still be able to

290 Seminole Tribe, 116 S. Ct. at 1128. Under CERCLA, "states" are included within the statutory definition of "persons" who may be liable for cleanup. 42 U.S.C. § 9601(21) (1994). Section 9601(20)(D) provides that "such a state or local government shall be subject to the provisions of this chapter in the same manner and to the same extent . . . as any nongovernmental entity, including liability under section 9607 of this title." Id. § 9601(20)(D). The Court in Union Gas had determined that, because this language mirrored the language of Section 120(a)(1), waiving the federal government's immunity from suit, Congress had intended to likewise waive the states' immunity. Union Gas, 491 U.S. at 10.

291 U.S. Const. art. I, § 8, cl. 3.

292 But see discussion of preemption under the federal property power, supra Section III.C.
exercise its spending power to indirectly condition the use of federal funds. This is an independent inquiry. The conditions imposed under the spending power must be (1) for the general welfare, (2) unambiguous, (3) reasonably related to the federal purpose, and (4) not prohibited by an independent constitutional bar.

Principals of federalism embodied in the Tenth Amendment constrain the legitimacy of Congressional authority pursuant to the commerce power. The fact that the states are given no way to avoid Section 104(k)'s reach is apparent when looking at the preemptive effect the provision would have. Congress may not "use the States as implements of regulation" by demanding that states regulate or legislate in a particular manner. Congress, however, may finance such regulation itself as a federal program or provide a choice to the states to adopt the federal program. The Tenth Amendment also protects against coercive use of the spending power.

If Congress does have power under the Commerce Clause to regulate land use in the manner proposed by Section 104(k), then it has the authority to displace state laws since federal law is supreme. A statute that is permissible under the Commerce Clause and the spending clause may still be unconstitutional on its face. In the land-use context, the government may not condition the exercise of a constitutional right unless the condition survives strict scrutiny. The inquiry must establish an essential nexus between the condition and the legislative purpose that is roughly proportional in both nature and degree.

A. The Madisonian Dilemma

This question presents a classic "Madisonian dilemma," which is the tension between democratic authority and individual liberty, and how the Constitution reconciles these competing principles through

293 See infra Section IV.E.
296 U.S. CONST. amend. X. The Tenth Amendment provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." Id.
297 New York v. United States, 505 U.S. 144, 161 (1992); see also infra Section IV.A.
298 New York, 505 U.S. at 167.
299 See infra Section IV.E.
300 See infra Section IV.D.
301 Id.
its definition of governmental structure, competence, and authority.303 Recently, the importance of the underlying constitutional structure and the role of dual federal and state sovereigns has been reemphasized in our jurisprudence.304

It is precisely this issue that confronted the Supreme Court in New York v. United States.305 In reviewing the constitutionality of the Low-Level Radioactive Waste Policy Amendments Act of 1985, the Court addressed the proper division of authority between the federal government and the states.306 Under the 1985 Act, Congress imposed upon the states an obligation to provide for disposal of waste within their borders, and offered three statutory incentives to compliance: (1) monetary incentives under which a portion of surcharges received by states currently operating disposal sites would be put into an escrow fund for disbursement to states that met statutory deadlines; (2) access incentives that denied access to disposal sites in other states when the statutory deadlines were not met; and (3) a take-title provision requiring states that failed to provide for disposal of locally-generated wastes to take title to and possession of the waste. The Court upheld the exercise of congressional authority where the statute provided the states with choices to accept monetary incentives and access incentives in return for regulating in a certain manner when the exercise was within Congress's commerce and spending powers. The Court found the take title provisions of the Act to be a choice between two unconstitutionally coercive alternatives outside of Congress's enumerated powers and inconsistent with the Tenth Amendment.307

In determining the division of authority between the federal government and the states, the Court stated that whether Congress has been delegated authority to regulate under the Commerce Clause and

303 Id. Structural elements in the Constitution include separation of powers, checks and balances, judicial review, and federalism. See United States v. Lopez, 115 S. Ct. 1624, 1637 (1995) (Kennedy, J., concurring). With the first three elements, the standards are clear and well accepted, but with federalism, the role of the Court has been less clear. Id. The Court's "institutional capacity to intervene" is more in doubt in Commerce Clause matters because of the "substantial element of political judgment" in those issues. Id. at 1640.


305 505 U.S. at 144.

306 Id. at 149.

307 Id. at 174–77.
whether Congress has invaded the province of the states under the Tenth Amendment are questions that are "mirror images" of each other.\textsuperscript{308} The Tenth Amendment analysis was, thus, whether an incident of state sovereignty is protected by a limitation on an Article I power.\textsuperscript{309}

In \textit{New York}, the Court was concerned that Congress was using the states as "implements of regulation," commanding the states to accept federally-mandated choices.\textsuperscript{310} The Court distinguished these coercive actions from valid means to encourage states to act in a particular way. First of all, under the spending power, Congress may attach conditions on the receipt of federal funds, provided the conditions meet the four criteria set out in \textit{South Dakota v. Dole}.\textsuperscript{311} Second, where Congress has Commerce Clause authority, it may provide the states with the choice of (1) regulating the activity according to federal standards, or (2) having state law preempted by federal regulation.\textsuperscript{312} With these and other permissible methods, the "residents of the State retain the ultimate decision as to whether or not the State will comply."\textsuperscript{313}

The Court upheld the monetary and access incentives of the Low-Level Radioactive Waste Policy Amendments Act as permissible means of encouraging state compliance.\textsuperscript{314} The take-title provision of the Act, however, offered coercion rather than encouragement and was thus an unconstitutional intrusion on state sovereignty.\textsuperscript{315} This provision offered a choice to the states of either accepting ownership of the radioactive waste or regulating according to the instructions of Congress.\textsuperscript{316} In this instance, Congress had neither the authority to require transfer of the waste (and the associated liability) from the generator to the state, nor the authority to direct the states to regu-

\begin{itemize}
\item \textsuperscript{308} \textit{Id.} at 155–56.
\item \textsuperscript{309} \textit{Id.} at 157.
\item \textsuperscript{310} \textit{New York}, 505 U.S. at 157.
\item \textsuperscript{311} \textit{Id.} at 167 (citing \textit{South Dakota v. Dole}, 483 U.S. 203, 207–08 (1987)).
\item \textsuperscript{312} \textit{Id.} at 167–68. This Commerce Clause authority of "cooperative federalism" is the means employed to achieve the federal environmental and safety goals under various federal Acts. See supra Section III.C for a discussion of environmental federalism.
\item \textsuperscript{313} \textit{New York}, 505 U.S. at 168.
\item \textsuperscript{314} \textit{Id.} at 171–74. The first set of incentives (the monetary incentives) in which Congress conditioned grants to the states upon the attainment of several milestones was within congressional authority under the Commerce and Spending Clauses. The second set of incentives (the access incentives) allowed the states to deny access to non-complying states. This was within Congress's authority to allow discrimination against interstate commerce. \textit{Id.}
\item \textsuperscript{315} \textit{Id.} at 174–77.
\item \textsuperscript{316} \textit{Id.}
\end{itemize}
late. There was no threat that Congress could exercise either the commerce or spending power to require the states to either take title to radioactive waste or to regulate disposal of such waste. Therefore, they could not offer a choice between the two.317 The Court in New York believed the take-title provision to be unique, having been referred to "no other federal statute ... which offers a state government no option other than that of implementing legislation enacted by Congress."318 Section 104(k) offers a similarly coercive scheme under which the federal government would regulate by purchase.

B. Commerce Clause Authority

Courts have interpreted the federal government's authority to regulate under the Commerce Clause generously, but there are limitations on the federal power in areas where the states have historically been sovereign, such as education and criminal law enforcement.319 In United States v. Lopez, the United States Supreme Court found that Congress lacked authority to make the possession of a firearm in a school zone a federal offense.320 Lopez differed from the situation in New York "where the etiquette of federalism [had] been violated by a formal command from the National Government directing the State to enact a certain policy."321 The intrusion on state sovereignty was nonetheless significant absent a stronger connection with commercial concerns that would justify regulation under the Commerce Clause.322 The Gun-Free School Zones Act of 1990323 did not fall into any of the three broad categories of activities that Congress could regulate under its commerce power: (1) the use of the channels of interstate commerce; (2) the instrumentalities of interstate commerce; or (3) activities having a substantial relation to interstate commerce.324 Justice Rehnquist wrote the majority opinion in Lopez, in which he explained and clarified the Court's Commerce Clause jurisprudence under the third category of activities.325 The Court reemphasized that

---

317 Id. at 176.
318 Id. at 177. For a subsequent decision, see generally ACORN v. Edwards, 81 F.3d 1387 (5th Cir. 1996).
320 Id. at 1626.
321 Id. at 1642 (Kennedy, J., concurring).
322 Id.
324 Lopez, 115 S. Ct. at 1629–32.
325 Id. at 1624.
the test for determining whether an activity is within Congress's power to regulate under the Commerce Clause is whether it "substantially affects" interstate commerce.\textsuperscript{326} This activity, mere possession of a firearm, was not an essential part of a larger regulation of economic activity in which the regulatory scheme could be undercut unless the intrastate activity was regulated.\textsuperscript{327} The Lopez court distinguished possession of firearms from activities which do substantially affect interstate commerce, such as the activities regulated by the statute upheld in \textit{Hodel v. Virginia Surface Mining & Reclamation Ass'n}.\textsuperscript{328} This citation to \textit{Hodel} is significant because the federal mining regulations, which the Court noted with approval, had survived a Commerce Clause attack on the Act's alleged interference with local land-use decisions, also an area of traditional state sovereignty.\textsuperscript{329} \textit{Hodel v. Virginia Surface Mining} involved a preenforcement review of the constitutionality of the Surface Mining and Reclamation Act of 1977.\textsuperscript{330} The stated purpose of the Act was to ensure that production of coal for interstate commerce would not be at the expense of agriculture, the environment, or public health and safety.\textsuperscript{331}

The Virginia Surface Mining and Reclamation Association questioned Congress's authority under the Commerce Clause to regulate land use, arguing that Congress could only regulate land use to the extent the Property Clause gave the federal government control over federal lands.\textsuperscript{332} The Court rejected this framing of the issue.\textsuperscript{333} Based on the extensive legislative record reciting the damage associated with surface disturbance during mining operations, the Court found

\begin{itemize}
\item \textsuperscript{326} Id. at 1630 (admitting that recent case law had not been clear about whether activity must "affect" or "substantially affect" interstate commerce to fall within Congress's power to regulate).
\item \textsuperscript{327} Id. at 1631.
\item \textsuperscript{328} Id. at 1631–34; see also \textit{Hodel v. Virginia Surface Mining}, 452 U.S. 264, 269 (1981).
\item \textsuperscript{329} \textit{See supra} Section III.
\item \textsuperscript{330} \textit{Virginia Surface Mining}, 452 U.S. at 268; Surface Mining Control and Reclamation Act of 1977 (Surface Mining Act), 30 U.S.C. § 1201 et seq. (1994).
\item \textsuperscript{331} \textit{Hodel v. Indiana}, 452 U.S. 314, 329 (1981). Because the permanent regulations had not gone into effect, only the interim regulations of the Surface Mining Act's two-stage program were reviewed. \textit{Virginia Surface Mining}, 452 U.S. at 273. The Act established interim performance standards governing: (a) restoration of land after mining to its prior condition; (b) restoration of land to its approximate original contour; (c) segregation and preservation of topsoil; (d) minimization of disturbance to the hydrologic balance; (e) construction of coal mine waste piles used as dams and embankments; (f) revegetation of mined areas; and (g) spoil disposal. Id. at 269. The Act also prohibited surface coal mining near churches, schools, parks, public buildings, and occupied dwellings. \textit{Indiana}, 452 U.S. at 329.
\item \textsuperscript{332} \textit{Virginia Surface Mining}, 452 U.S. at 275–76.
\item \textsuperscript{333} Id.
that Congress rationally determined that regulation of surface coal mining is necessary to protect interstate commerce from adverse effects that may result from that activity.\textsuperscript{334}

In the companion case of \textit{Hodel v. Indiana}, the Supreme Court separately upheld the prime farmland provisions of the Surface Mining and Reclamation Act, again despite the Act's alleged interference with local land-use decisions.\textsuperscript{335} The \textit{Hodel v. Indiana} Court refused to review separate facets of the regulatory program when the challenged provisions were an "integral part of a regulatory program" and the regulatory scheme considered as a whole was authorized under the Commerce Clause.\textsuperscript{336}

The Surface Mining Act, in the Court's opinion, was not a land-use measure similar to the zoning ordinances enacted by state and local government.\textsuperscript{337} The regulation of prime farmland and the restrictions on land use imposed by the Act were "temporary and incidental" to its primary purpose of regulating the conditions and effects of surface coal mining and did not extend to post-reclamation use.\textsuperscript{338}

Similarly, the authority given to EPA under Section 104(j) of CERCLA to acquire property "needed to carry out remedial actions" would undoubtedly withstand Commerce Clause scrutiny as a \textit{temporary and incidental} measure to effect Superfund's remediation goals.\textsuperscript{339} However, we have seen that Section 104(k)'s public purpose is anything but temporary and incidental. Section 104(k) would allow EPA to regulate land use and land-use planning well into the future. Instead of acquiring a \textit{property interest}, the federal government would acquire \textit{regulatory power}, displacing state and local authority in the process.\textsuperscript{340} Justice Rehnquist wrote separately in \textit{Hodel v. Virginia}

\textsuperscript{334} Id. at 281.

\textsuperscript{335} \textit{Indiana}, 452 U.S. at 335–36. Among these provisions were requirements that distinct soil layers on prime farmland be separately removed, segregated, stockpiled, and then properly replaced and regraded; that the mine operator show it can meet the soil reconstruction standards; that the operator demonstrate its technological capability to restore the mined area to equivalent or higher levels of yield; and that the operator's performance bond be released only upon a showing that such yields have been achieved. \textit{Id.} at 319.

\textsuperscript{336} Id. at 329 n.17. The Supreme Court has been willing to look at components of a statute that are separable from the statutory scheme in reviewing their constitutionality. \textit{See New York v. United States}, 505 U.S. 144, 186–87 (1992).

\textsuperscript{337} \textit{Indiana}, 452 U.S. at 330 n.18.

\textsuperscript{338} Id.

\textsuperscript{339} \textit{But see} United States v. Olin, 927 F. Supp. 1502, 1532–33 (S.D. Ala. 1996) (finding that, as applied, consent decree negotiated under CERCLA violated Commerce Clause, and questioning whether cleanup could be considered "economic" activity).

\textsuperscript{340} \textit{See supra} Sections II–III.
Surface Mining, concurring in the judgment but noting the misstatement of the test used by the majority.\textsuperscript{341} To Rehnquist, and now a majority of the Court, "the law is not indifferent to considerations of degree."\textsuperscript{342} Proposed Section 104(k) is different enough in degree to be different in kind.

One of the fatal aspects of the Gun-Free School Zones Act struck down in Lopez was the lack of a "jurisdictional element" to ensure, through case-by-case inquiry, that the illegal act in question affects interstate commerce.\textsuperscript{343} Section 104(k) is also flawed for this reason.

Easements acquired under Section 104(j) are subject to a case-by-case inquiry as to whether they are actually "needed to conduct a remedial action."\textsuperscript{344} EPA's application of this authority could be unconstitutional in a particular remedial action. The language of the statute provides both a standard to EPA in exercising its authority and the opportunity for those who would challenge it. As with a results-oriented deed, there is an opportunity to say "no," in this case to agency action.

There is no similar jurisdictional element in Section 104(k).\textsuperscript{345} The broad public purpose is aspirational and therefore standardless, resulting in an impermissible delegation of authority to the executive branch and no measure for judicial review.\textsuperscript{346} There can thus be no assurance that on a case-by-case basis the property was acquired pursuant to a valid public purpose. The effect in this instance is analogous to the use of a reserved interest deed—all authority has been transferred. This is especially threatening to our constitutional values because, although the PRPs and the public have an opportunity to comment on the remedial alternatives during the process, a remedy selection decision is not subject to pre-enforcement judicial review.\textsuperscript{347} With the exception of suits based on state law over which

\textsuperscript{342} Id. at 310.
\textsuperscript{344} See supra Section III.A.
\textsuperscript{345} See id.
\textsuperscript{346} The analysis requiring a jurisdictional element in exercising the commerce power shares much in common with the non-delegation doctrine, which requires Congress to be specific in its delegation of power to an executive branch agency to maintain the separation of powers between the two branches of government. The Olin court was also concerned about improper delegation to the executive branch under CERCLA when it held that CERCLA could not be applied retroactively because Congress had not made its intent to do so sufficiently clear. See United States v. Olin, 927 F. Supp. 1502, 1520–21 (S.D. Ala. 1996).
\textsuperscript{347} Section 113(h) withdraws federal jurisdiction to review Section 104 response actions or 106
standards are applicable or relevant and appropriate, parties cannot generally obtain court jurisdiction until the remedy is complete or EPA seeks to recover its costs or enforce a remedial order. If institutional controls are given in exchange for a covenant not to sue in a Brownfields redevelopment or de minimis contributor settlement, the settling party also covenants not to sue EPA. There would thus be no judicial review at all.

C. Preemption

The provisions of Section 104(k) can be distinguished from the land-use regulation in Hodel for two reasons. First, the regulation in Hodel, like the provisions of Section 104(j), fell within the Commerce Clause authority. Second, the residents of the states had a choice in that case to accept or reject the federal provisions. It is necessary to complete the commerce power inquiry by looking at the preemptive effect of Section 104(k). Again, the test is whether an incident of state sovereignty is protected by a limitation on an Article I power by the Tenth Amendment.

As the Court noted in New York v. United States, where Congress has Commerce Clause authority, they may preempt state law by federal regulation when the states choose not to adopt conforming regulations. This was, of course, the case in Hodel v. Virginia Surface Mining, when the Court reaffirmed the power of Congress to displace state police power law by regulating private activity under the Commerce Clause:

abatement orders except in one of the following actions: (1) a Section 107 cost recovery action; (2) an action by the government under Section 106 to obtain injunctive relief or to enforce a Section 106(a) order; (3) an action by a PRP seeking cost reimbursement for compliance with an order under Section 106(b)(2); or (4) a Section 310 citizen's suit challenging the terms of a response under Section 104 or a Section 106 order. CROWELL & MORING, supra note 22, at 5-53, 5-54.

348 Id. at 5–54.
351 See id.
352 See id.
353 See supra Section IV.A.
355 Virginia Surface Mining, 452 U.S. at 292.
Congressional power over areas of private endeavor, even when its exercise may pre-empt express state-law determinations contrary to the result that has commended itself to the collective wisdom of Congress, has been held to be limited only by the requirement that "the means chosen by [Congress] must be reasonably adapted to the end permitted by the constitution."\(^\text{356}\)

The Surface Mining & Reclamation Act was a "comprehensive statute designed to 'establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations.'\(^\text{357}\) Under the Act's interim program, a federal enforcement and inspection program was to be established for each State and was to remain in effect until a permanent program was implemented.\(^\text{358}\) Although the states could issue surface mining permits during the interim program, the operations authorized by the permits were required to meet federal interim performance standards.\(^\text{359}\)

For regulation of private activity to withstand Tenth Amendment scrutiny, the states must be given the option of avoiding the federal regulatory program and policy choices offered under the Commerce Clause.\(^\text{360}\) Under the Surface Mining Act, states could choose to regulate according to federal standards or choose not to regulate, in which

\(^{356}\) Id. at 286 (quoting Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 262 (1964)).

\(^{357}\) Id. at 268.

\(^{358}\) Id. at 270.

\(^{359}\) Id.

\(^{360}\) New York v. United States, 505 U.S. 144, 175–76 (1992). Relying upon National League of Cities v. Usery, the United States District Court for the Western District of Virginia found that the Surface Mining Act was in violation of the Tenth Amendment because it interfered with the "traditional governmental function" of regulating land-use and impermissibly constricted the state's ability to make "essential decisions." Virginia Surface Mining, 452 U.S. at 284–85 (citing National League of Cities v. Usery, 426 U.S. 833, 833 (1976)). The District Court found "the Act accomplished this result through forced relinquishment of state control of land-use planning; through loss of state control of its economy; and through economic harm, from expenditure of state funds to implement the act and from destruction of the taxing power of certain counties, cities, and towns." Id. Because the Surface Mining Act regulated the conduct of private persons and businesses and did not present a case of state sovereign immunity, the United States Supreme Court correctly found the rationale of National League of Cities to be inapplicable. Virginia Surface Mining, 452 U.S. at 287–88. National League of Cities, 426 U.S. 833 (1976), as well as Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 557 (1985), which overruled it, were cases in which Congress sought to subject a state government to generally applicable laws. See New York, 505 U.S. at 160. The issue in Garcia was a question of state sovereignty under the Tenth Amendment as that provision limits congressional authority. Garcia, 469 U.S. at 537. The Court in New York did not revisit the holdings of Garcia or National League of Cities in that regard. New York, 505 U.S. at 155–59. Garcia overruled National League of Cities, finding that provisions in the FLSA did not contravene the Commerce Clause or the Tenth Amendment. Garcia, 469 U.S. at 547. The FLSA conditions under review in Garcia, requiring states to pay overtime wages to state employees were, however, conditions imposed under
case the federal government would assume the burden and the cost of regulating.\textsuperscript{361} Unlike the take-title provisions struck down in \textit{New York v. United States}, there was no commandeering of the states' legislative process in \textit{Hodel v. Victoria Surface Mining}.\textsuperscript{362}

Even when a federal regulation has preempted state property laws, the regulation is valid in most cases by operation of the Supremacy Clause. In \textit{Preseault v. Interstate Commerce Commission}, the United States Supreme Court reviewed congressional authority under the Commerce Clause to adopt amendments to the National Trails System Act (Trails Act) that would have the effect of cutting off or delaying a landowner's reversionary interest in property pursuant to easements initially acquired for railroad rights-of-way.\textsuperscript{363} Under the rationality standard of review the Court upheld the Act.\textsuperscript{364} Although proposed Section 104(k) would not preempt explicitly state property laws, it does so implicitly by writing into the Superfund law how the property interest is to be construed.\textsuperscript{365} At Section 104(k)(3), the bill provides that:

A hazardous substance easement shall be enforceable for 20 years and may be renewed for additional 20-year periods (unless terminated and released as provided for in this section) against any owner of the affected property and all persons who subsequently

\textsuperscript{361} \textit{New York,} 505 U.S. at 168. The United States District Court for the Western District of Virginia had tried to make out a case of coercion, finding that the choice of a state to have its own regulatory program was not a choice at all because the state program must comply with federally prescribed standards. \textit{Virginia Surface Mining,} 452 U.S. at 285 n.25. Unpersuaded, the United States Supreme Court found that the Surface Mining Act established a program of cooperative federalism that allowed the States to enact and administer their own regulatory programs within the limits of federal minimum standards. \textit{Id.} at 289. The States were not compelled to enforce the federal standards, to expend any state funds, or to participate in the federal regulatory program in any manner. \textit{Id.} at 288. If they chose not to implement a regulatory program that complied with the Act, then the full regulatory burden would be borne by the federal government. \textit{Id.}

\textsuperscript{362} \textit{Compare Virginia Surface Mining,} 452 U.S. at 288 with \textit{New York,} 505 U.S. at 187.

\textsuperscript{363} \textit{Preseault v. Interstate Commerce Comm'n,} 494 U.S. 1, 19 (1990).

\textsuperscript{364} \textit{Id.} (deferring to congressional findings "given the long tradition of congressional regulation of railroad abandonments"). Although the federal law was preemptive, the fee holders could seek compensation in the claims court for the additional property interest taken.

\textsuperscript{365} H.R. 2500, 104th Cong., 1st Sess. Section 104(k)(3) (1995). Federal law can preempt state law if (a) federal law explicitly preempts state law, (b) the federal law is sufficiently comprehensive to infer that Congress left no room for supplemental state regulation, or (c) state law actually conflicts with the federal law so that the state law will be preempted to the extent of the actual conflict. Hodas, \textit{supra} note 223, at 1590 (citing \textit{International Paper Co. v. Oullette,} 479 U.S. 481, 491 (1987)).
acquire interest in the property or rights to use the property, including lessees, licensees, and any other person with an interest in the property, without respect to privity or lack of privity of estate or contract, lack of benefit running to any other property, assignment of the easement to another party, or any other circumstance which might otherwise affect the enforceability of easements or similar deed restrictions under the laws of the state. The easement shall be binding upon holders of any other interests in the property regardless of whether such interests are recorded or whether they were recorded prior or subsequent to the easement, and shall remain in effect notwithstanding any foreclosure or other assertion of such interests.\textsuperscript{366}

The creation of a federal interest is not unprecedented. Federal easements have been defined in the Wild and Scenic Rivers Act\textsuperscript{367} and in the Forest Legacy Programs of the 1990 Farm bill.\textsuperscript{368} This was partly in response to lawsuits seeking to defeat federal easements with state property law.\textsuperscript{369} The state law of servitudes has evolved into a complex layering of doctrines that has become so confused and complex even state courts have refused to enforce it.\textsuperscript{370} The Uniform

\textsuperscript{366} H.R. 2500, Section 104(k)(3).
\textsuperscript{367} 16 U.S.C. § 1286(c) (1994) (defining scenic easement as “right to control the use of land (including the air space above such land) for the purpose of protecting the natural qualities . . . [of a designated river]”); Snow, supra note 162, at 3.
\textsuperscript{368} Snow, supra note 162, at 3 (discussing conservation easements created under Forest Legacy Program).
\textsuperscript{369} See United States v. Albrecht, 496 F.2d 906, 911 (1974) (holding that application of state law prohibiting easements in gross could not defeat federal easement).
\textsuperscript{370} Because of various policy concerns, state courts have refused to enforce many of these common law arrangements, borrowing doctrines from other sources of law. See Susan F. French, Servitudes Reform and the New Restatement of Property: Creation Doctrines and Structural Simplification, 73 CORNELL L. REV. 928, 928–29 (1988). At common law, courts have not permitted servitudes that imposed affirmative burdens or that created benefits in gross. Id. at 929. The doctrine of changed conditions operates to terminate a real covenant or equitable servitude when changed conditions in or around the burdened land frustrated the purpose of the restriction or created an undue hardship on the owner. Blackie, supra note 139, at 1188. A number of states have enacted marketable title acts which provide that after a certain number of years, generally 20 or 30, claims to or restrictions on real property are automatically extinguished. JANET DIEHL & THOMAS S. BARRETT, THE CONSERVATION EASEMENT HANDBOOK 132 (1988); see, e.g., Presbytery of S.E. Iowa v. Harris, 226 N.W.2d 232, 242 (Iowa 1975) (holding that Iowa marketable title act did not unconstitutionally deprive holder of vested right in that it did not alter right but rather conditionally limited time for enforcement of right). Conservation easements may or may not be exempted under a particular state law from the operation of the act. Presbytery of S.E. Iowa, 226 N.W.2d at 239–40 (stating that Massachusetts and Wisconsin statutes exempt conservation easements). At least one court has applied the law of contracts to construe a restrictive covenant. In Streets v. JM Land & Developing Co., the Supreme Court of Wyoming recently applied the law of contracts to uphold a restrictive covenant against a purchaser with notice. See 898 P.2d 377, 377–81 (Wyo. 1995).
Conservation Easements Act (UCEA), after which Section 104(k) and many state conservation easement statutes are modeled, sought to avoid problems associated with the common law of servitudes. Also recognizing the problems of the common law (as well as notice statutes that made some provisions obsolete), the draft Restatement (3d) of Property defines a new law of servitudes which unifies "the heretofore separate bodies of law governing easements, profits, irrevocable licenses, equitable servitudes, and real covenants." It is and will remain a state law choice to adopt all or part of the UCEA as well as the Restatement of Servitudes.

A federal grant of jurisdiction over suits brought by the United States does not require that federal law be applied. In most real property transactions, the federal government will follow the property law of the state. This is the case when property is acquired under the authority of Section 104(j). However, when deciding a choice of law question under the Migratory Bird Conservation Act, the Supreme Court held that state laws which are hostile to federal interests will not be applied. As long as landowners are willing to negotiate such agreements, the agreements may not be abrogated by state law. Therefore, when there is an actual conflict with a federal law over the same activity, federal law is supreme. State law is not without consideration, however. First, when a regulatory regime does

371 See Blackie, supra note 139, at 1198–1200. Thus, like a conveyance under the Uniform Conservation Easements Act (UCEA), a hazardous substance easement under Section 104(k) would be valid "even though it is not appurtenant, is assignable, is not traditionally recognized at common law, imposes a negative burden, does not touch or concern real property, and is without privity of estate or contract." Despite the effort to promote uniformity, state statutes authorizing easements for conservation or preservation purposes are diverse. Jordan, supra note 5, at 408. These statutes vary considerably in how the easements are created, and in the easements' authorized purposes, qualified holders, acceptance, duration, enforcement, modification, and termination. Id. at 409.

372 French, supra note 140, at 119. The Restatement replaces the common law doctrines with three discrete inquiries: creation, validity, and termination and enforcement. Id. at 125.


374 Snow, supra note 162, at 3.


376 North Dakota, 460 U.S. at 319 (noting that United States v. Burnison, 339 U.S. 87, 93 (1950) was not to the contrary). In Burnison, the Court upheld a state law prohibiting a testamentary transfer of property to the United States, but specifically stated that the holding did not affect the right of the United States to acquire property by purchase or eminent domain in the face of a prohibitory statute of the state. North Dakota, 460 U.S. 319 n.22 (citing Burnison, 339 U.S. at 93 n.14).

preempt state law interests, the regulation may effect a taking requiring compensation. 378 Further, even when the federal action preempts "the operation and effect of certain state laws, those actions do not displace state law as the traditional source of the real property interests." 379

Both Section 104(j) and Section 104(k) are preemptive to the extent of a legitimate federal interest and could not be defeated by a hostile state law. At issue, then, is not whether the federal law should be upheld against contrary state laws when there is a conflict, but whether a new property interest can and should be created under federal law. As we have seen, the broad public purpose of Section 104(k) is not contractual in nature but regulatory. Nor is it incidental to Superfund's environmental purposes. This distinguishes the rationale of North Dakota v. United States and the voluntary agreements the Court reviewed therein. 380 EPA would be allowed to acquire more than simply an interest in property, as under Section 104(j). The easements created pursuant to the authority of Section 104(k) would have the coercive effect of displacing state and local authority over land-use regulation altogether. The Tenth Amendment should apply to limit the Article I power in this case because Section 104(k) invades an incident of state sovereignty.

D. Unconstitutional Conditions

Even when there is clear authority to acquire easements, that authority may be used in an unconstitutional manner. The facial con-

378 Preseault v. Interstate Commerce Comm'n, 494 U.S. 1, 22 (1990) (O'Connor, J., concurring) (conclusion that federal agency power to preempt conflicting state regulation is also power to preempt rights guaranteed by state property law would be incompatible with Fifth Amendment); Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1012 (1984).

379 Preseault, 494 U.S. at 22 (O'Connor, J., concurring). For example, in Formanek v. United States, the United States Claims Court found that the Army Corps of Engineer's denial of a permit to discharge fill on the landowner's property was a compensable regulatory taking which interfered with the investment-backed expectations of the property owners. 26 Cl. Ct. 332, 335-40 (1992). The Department of Natural Resources had previously offered to buy the property which contained several acres of wetlands containing calcareous fen, but negotiations ceased when the parties could not agree on its value. Id. at 334. The Corps subsequently sought to prohibit development on the land through its discretionary authority to override the nationwide permit requirement. Id. The court recognized the legitimate state interest in denying the permit application. Id. The court also determined that the development would have been allowed under local zoning and land-use procedures. Id. at 337. Denial of the permit was thus a taking requiring just compensation. Id. at 332; see also Loveladies Harbor Inc. v. United States, 28 F.3d 1171, 1183 (Fed. Cir. 1994) (denial of Corps of Engineers permit to allow construction on wetlands was regulatory taking because restriction was not supported by state nuisance law).

380 See supra notes 375-76 and accompanying text.
stitutionality of Section 104(k), if otherwise valid, may thus be unconstitu­tional if the provision would impose conditions on the exercise of a constitutional right.

Chief Justice Rehnquist, writing for the majority, explicitly recognized the current viability of the doctrine of unconstitutional conditions in Dolan v. City of Tigard.\footnote{114 S. Ct. 2309, 2317 (1994).} When an agency would make the exercise of a constitutional right contingent on observance of a condition, the condition must withstand strict scrutiny, evaluated using a two-part test.\footnote{Id.} First, the condition must have an essential nexus to the legitimate public purpose to be served.\footnote{Id. at 2318.} Second, the condition must be roughly proportional to that purpose, in both nature and degree.\footnote{Nollan v. California Coastal Comm’n., 483 U.S. 825, 836 (1987).} This test recognizes that the greater power to prohibit necessarily includes the lesser power to condition.\footnote{Dolan, 114 S. Ct. at 2317 (citing First Amendment cases for statement of doctrine).}

The Court’s statement of the doctrine in Dolan is that “the govern­ment may not require a person to give up a constitutional right—in that case the right to receive just compensation when property is taken for a public use—in exchange for a discretionary benefit con­ferred by the government where the property sought has little or no relationship to the benefit.”\footnote{See, e.g., Posadas de Puerto Rico Ass’n v. Tourism Co. of P.R., 478 U.S. 328, 346 (1986) (when legislature has authority to ban conduct, it can take less intrusive step to allow the conduct but reduce its demand through restrictions on advertising).} The doctrine of unconstitutional conditions would also apply to and protect rights exercised under the First and Fourth Amendments, among others.\footnote{Gary Feinerman, Note, Unconstitutional Conditions: The Crossroads of Substantive Rights and Equal Protection, 43 STAN. L. REV. 1369, 1370 (1991).} The doctrine is not an­chored in a single provision of the Constitution.\footnote{Been, supra note 190, at 484. The five most prominent theories are (1) the extortion theory, (2) the coercion theory, (3) the inalienability theory, (4) Kathleen Sullivan’s balance of power theory, and (5) Richard Epstein’s bargaining failure theory. Id. at 486–504. The extortion theory holds that “[a]cts generally lawful may become unlawful when done to accomplish an unlawful end, and a constitutional power cannot be used by way of condition to attain an unconstitutional result.” Id. at 486. Proponents of the extortion theory generally favor a nexus requirement that would allow the unlawful purpose to be identified. See id. A purpose may be unlawful because it is either (1) not a legitimate state interest or (2) although legitimate, it is not sufficiently related or germane to the purpose which an exercise of the greater power would serve. Id. at}
trine of unconstitutional conditions is that "government may not grant a benefit on the condition that the beneficiary surrender a constitutional right, even if the government may withhold that benefit altogether." 390 The conditioned benefits view of the doctrine was first applied by the *Lochner* Court to prohibit conditions on the grant of corporate privileges. 391 The *Warren* Court applied the doctrine to protect personal liberties. 392 This formulation of the doctrine is thus intertwined with the protection of substantive due process rights. This view is incompatible with the doctrine that the greater power to prohibit or deny includes the lesser power to condition. 393 Stating the theories in terms of conditioned benefits mischaracterizes the debate. 394

486–87. The coercion theory finds a conditional offer is unconstitutional when it has the effect of coercing, or improperly obtaining, the surrender of constitutional rights. *Id.* at 492. The coercion theory is the same as the extortion theory provided no other baselines are advanced for measuring the result. *See id.* Professor Kreimer's coercion theory offers three baselines: a predictive baseline, an historical baseline, and an equality baseline to distinguish "consent" from "coercion." Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1415, 1450 (1989). To employ his theory, it is necessary to distinguish between benefits that enhance and those that reduce liberty, which requires value judgments. *Id.* at 1422–25. Kathleen Sullivan would apply the doctrine to two sorts of benefits: (1) exemption from regulation, taxation or other burden that could be imposed constitutionally, and (2) direct subsidies or governmental distributions of wealth. *Id.* at 1424. Her balance of power theory is a justification for the doctrine's use. An intermediate view of the doctrine is that of Richard Epstein who would apply the doctrine using a benefits approach, but only as a "second-best" alternative to check abuses in the legislative process. *Id.* at 1418; Richard A. Epstein, *The Supreme Court 1987 Term Forward: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 5, 28 (1988). Because the constitutional defect is based in the process, the conditions imposed must be "germane." Epstein defends the doctrine based on a version of the public choice theory. Epstein's application of the doctrine requires an economic valuation of the choices. Epstein uses a law and economics approach, applying the prisoner's dilemma and various bargaining theory models to arrive at an economically efficient decision. *See id.*

390 Sullivan, *supra* note 389, at 1415. Most advocating the use of this theory accept the premise that the Constitution does or should protect substantive rights. The debate over the doctrine of unconstitutional conditions thus tends to focus on what rights are being threatened rather than their basis in the constitution. To protect the recipients of various substantive government benefits, commentators have tried to discredit the greater/lesser power argument. *See* Brooks R. Fudenberg, *Unconstitutional Conditions and Greater Powers: A Separability Approach*, 43 UCLA L. REV. 371, 371 n.1, 379–80 (1995).


392 *Id.*

393 Kathleen Sullivan's view was that the former view triumphed over the latter. *Id.* at 1415. But that was prior to the Supreme Court's more recent pronouncements to the contrary.

394 See generally Fudenberg, *supra* note 390. According to Fudenberg, there are four basic positions regarding conditioned benefits: (1) The benefit programs themselves are unconstitutional; (2) the benefit and the condition can each be created, so long as a rational reason exists (the basic "greater power" position); (3) the conditions require more than a rational basis (the basic "unconstitutional conditions" position); and (4) the "benefits" themselves are constitutionally mandated. *Id.*
The application of the doctrine is actually a battle over the acceptance or not of the greater/lesser power argument.\footnote{Id. Noting that a consistent application of the principle that the greater power includes the lesser power seems to negate the benefits along with the conditions. Id. This adds a political dimension to the analysis since the powers to provide these benefits are not explicitly listed in the Constitution, but are there only because of judicial interpretations. See id. He would actually “separate” the greater/lesser powers doctrine from the unconstitutional conditions doctrine. Id.} The current view would not apply to protect conditioned benefits per se. The current Court’s application of the doctrine of unconstitutional conditions is not triggered by the granting of a government benefit at all, but on the exercise of a constitutional right.\footnote{See Dolan v. City of Tigard, 114 S. Ct. 2309, 2316–17 (1994).}

The doctrine of unconstitutional conditions is tied to the potential abuse of government power, but it does not require a per se invalidation of all conditional grants.\footnote{Richard A. Epstein, The Legacy of Goldberg v. Kelly: A Twenty Year Perspective: No New Property, 56 BROOK. L. REV. 747, 763 (1990).} Most theories of the doctrine would permit the condition if it survives strict scrutiny.\footnote{But see Fudenberg, supra note 390, at 394–95 (stating that greater/lesser power doctrine in most cases applies rational basis test).} In land-use cases, this requires the two-pronged nexus inquiry applied in Dolan.\footnote{Dolan, 114 S. Ct. at 2317.}

The exaction found to be unconstitutional in Dolan was a public easement to be used for both flood control and a bike path.\footnote{Id.} The landowner had applied for a building permit to expand a plumbing and electric supply business at an existing location.\footnote{Id. at 2313.} The City Planning Commission found that the additional paving and footprint of the building would create an increase in stormwater runoff into the creek behind the property.\footnote{Id. at 2315.} The Commission also found that the expanded store would increase traffic and congestion on existing roads.\footnote{Id.} The Dolan Court agreed that the permit conditions had a sufficient nexus to the burdens created by the development (the alleviation of which were legitimate public purposes).\footnote{Dolan, 114 S. Ct. at 2317.} Under the second part of the test, however, the Court found that the conditions were not roughly proportional to that purpose.\footnote{Id. at 2319–21.} There was no rationale to support why a private easement would not serve the public purpose of flood control as well as a public easement. There was also insufficient justification...
for the bike path. To withstand strict scrutiny, there must be an individualized determination that this nexus is met in the requisite nature and degree.\textsuperscript{406}

The unconstitutional conditions doctrine has been applied to test the facial constitutionality of a statute as well.\textsuperscript{407} In Posadas \textit{v. Tourism Co.}, the Court upheld the constitutionality of a statute that allowed restrictions on advertising of casino gambling against a First Amendment challenge.\textsuperscript{408} The Court reviewed the conditions to determine whether they were permissible restrictions on commercial speech.\textsuperscript{409} Because of Puerto Rico's substantial interest in reducing casino gambling, Puerto Rico had the power to ban gambling altogether. It was therefore permissible for Puerto Rico to take the less intrusive step of allowing the conduct, but reducing the demand through restrictions on advertising.\textsuperscript{410} The conditions were thus permissible, having met the constitutional standards for regulation of commercial speech.

As applied to Section 104(k), the question is: if Congress (acting through the EPA) has the greater power to acquire the easement through purchase or condemnation, can they acquire the easement with the condition that the easement preempt state interests and is public in nature? It is clear that the federal interest can constitutionally preempt state property interests when there is Commerce Clause authority.\textsuperscript{411} Whether there is an essential nexus between the environmental purpose of the statute as a whole and the additional conditions of Section 104(k) should be judged under strict scrutiny. On the face of the bill, there are conditions providing for citizen suit enforcement of the easement terms;\textsuperscript{412} the potential for excessive fines;\textsuperscript{413} and

\textsuperscript{406} \textit{Id.} at 2319.
\textsuperscript{408} Id. at 347–48.
\textsuperscript{409} The Court applied the test from \textit{Central Hudson}, which allows restrictions on commercial speech if the government's interest in doing so is substantial, the restrictions directly advance the government's asserted interest, and the restrictions are no more extensive than necessary to serve that interest. \textit{Id.} at 340 (citing \textit{Central Hudson Gas \\& Elec. Corp. v. Public Serv. Comm'n of N.Y.}, 447 U.S. 557, 566 (1980)). The substantial interest in this case was in protecting its residents from excessive casino gambling which would have the harmful effects of disrupting moral and cultural patterns, increasing local crime, fostering prostitution, developing corruption and allowing infiltration of organized crime. \textit{Id.} at 341.
\textsuperscript{410} \textit{Id.} at 346.
\textsuperscript{411} See \textit{supra} notes 354–56 and accompanying text.
\textsuperscript{412} H.R. 2500, 104th Cong., 1st Sess. § 113 (1995) (proposing amendments to Section 104(k)(11)).
\textsuperscript{413} H.R. 2500, § 113. Relief may be sought through enforcement under Section 106(b)(1) of CERCLA, which provides for fines of up to $25,000 per day. \textit{Id.}
the insertion of federal authority over land-use decisions (as opposed to moral suasion) that amount to a surrender of dual sovereignty.414

Assuming that, facially, Section 104(j) would impose conditions related in nature and degree to the environmental purpose of the statute, as measured against the jurisdictional requirement that the conditions are "needed to conduct a remedial action,"415 what justification would authorize the taking of the additional property interests? It is not clear that Congress has considered this aspect of Section 104(k). The findings that would have authorized the voluntary state programs for Brownfields redevelopment in H.R. 2500 are insufficient justification to withstand strict scrutiny.416 As noted, it is only the stigma associated with the property and not the prospect of actual liability that is impeding redevelopment.417 The purpose is, therefore, unrelated to conditions that would be imposed on the future use of the land.

414 Id. Through the broad public purpose of the statute, the agency could acquire regulatory powers rather than simply an interest in land. See supra Section III.A.
415 CERCLA, 42 U.S.C. § 9604(j)(1) (1994); see supra Section III.A.
416 H.R.2500, § 301(a):
Sec. 301. State voluntary response programs.
(a) Findings. Congress finds the following:
(1) Brownfields are abandoned or underutilized industrial sites that may contain environmental contamination, often located in urban and economically distressed areas.
(2) Brownfields, which may number in the hundreds of thousands nationwide, devalue surrounding property, erode local tax bases, and prevent job growth.
(3) Despite potentially great productive value, prospective developers avoid brownfields because of the uncertainty of cleanup and development costs, which leads to construction on undeveloped so-called greenfield sites, contributing to urban sprawl, creating infrastructure problems, and reducing the amount of open spaces.
(4) Lenders and fiduciaries hesitate to finance or encourage projects to redevelop brownfields because of liability for environmental contamination and the uncertainty of cleanup and development costs, and therefore brownfields remain undeveloped and the environmental contamination is not quickly addressed.
(5) Redevelopment and cleanup of brownfields would reduce environmental contamination, encourage job growth, and curb the development of greenfields.
(6) State voluntary programs to address environmental contamination, and Federal liability reforms to encourage lenders and developers to invest in brownfield sites, can be very effective in promoting the redevelopment of brownfields.
(b) Purposes and Objectives. The purposes and objectives of this section are to—
(1) significantly increase the pace of response activities at contaminated sites by promoting and encouraging the creation, development, and expansion of state voluntary response programs; and
(2) benefit the public health, welfare, and the environment by returning contaminated sites to economically productive or other beneficial uses.

Id.
417 See supra Section II.C.
E. Spending Power

Where Congress is unable to regulate directly, it may condition the use of federal funds under the spending power and accomplish indirectly the same end.\(^{418}\) The United States Supreme Court, in *South Dakota v. Dole*, stated four restrictions on the conditions Congress may impose. First, the exercise of the spending power must be in pursuit of the general welfare.\(^{419}\) Second, the fact that the money is conditional must be unambiguous so the states can exercise their choice knowingly and with awareness of the consequences.\(^{420}\) Third, the conditions must be “related” to the federal interest in particular national projects or programs.\(^{421}\) As a fourth condition, “other constitutional provisions may provide an independent bar to the conditional grant of federal funds.”\(^{422}\)

In *Dole*, the Court reviewed a federal law that directs the Secretary of Transportation to withhold a percentage of federal highway funds otherwise allocable from states “in which the purchase or public possession... of any alcoholic beverage by a person who is less than twenty-one years of age is lawful.”\(^{423}\) The State of South Dakota, where the lawful drinking age was 19, challenged the law as a violation of the spending power and the Twenty-first Amendment.\(^{424}\) The case did not require the Court to determine whether Congress had the power to legislate a national drinking age directly.\(^{425}\) Because Congress had acted indirectly to condition the receipt of federal funds, the Court reviewed their exercise of the spending power that gives Congress the authority to “lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States.”\(^{426}\) This power can be used by

---

\(^{418}\) See *South Dakota v. Dole*, 483 U.S. 203, 206 (1987). Under the spending power, Congress may spend for the general welfare whether or not those purposes fall within the enumerated powers. See Epstein, *supra* note 389, at 45.

\(^{419}\) *Dole*, 483 U.S. at 207.

\(^{420}\) See *id.*

\(^{421}\) See *id.*

\(^{422}\) *Id.* at 208.

\(^{423}\) *Id.* at 205.

\(^{424}\) *Dole*, 483 U.S. at 205. The “Twenty-first Amendment grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system.” *Id.* (citing *California Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 110 (1980)).

\(^{425}\) *Id.* at 206.

\(^{426}\) See *id.* (quoting U.S. CONST. art. I, § 8, cl. 1).
Congress “to further broad policy objectives.”\textsuperscript{427} Congress’s authority to condition federal spending is thus not limited by its authority under the Commerce Clause.\textsuperscript{428} For this reason, the Tenth Amendment also imposes fewer limitations under the spending power than under the Commerce Clause.\textsuperscript{429}

The fourth criterion that may limit the conditional spending power of Congress is an independent constitutional bar. As with limitations on the police power, this ban generally would arise from the property, speech, contract, religion, or equal protection guarantees of the Constitution.\textsuperscript{430} As phrased by the Court, the spending power may not be used to induce the states to engage in activities that would themselves be unconstitutional.\textsuperscript{431} The Twenty-first Amendment did not provide such a bar in this case.\textsuperscript{432} This independent constitutional bar is not “a prohibition on the indirect achievement of objectives which Congress is not empowered to achieve directly.”\textsuperscript{433} This fourth criterion demands only that Congress not induce states to do that which would otherwise be unconstitutional.\textsuperscript{434}

The third criterion under the conditional spending analysis requires that the condition be related to the federal interest.\textsuperscript{435} This criteria checks the exercise of the spending power against the Tenth Amendment.\textsuperscript{436} Where the conditions are reasonably related to the federal interest, there is less concern that the national government will use its powers to “control, unduly interfere with, or destroy a State’s ability to perform essential services.”\textsuperscript{437} Because the \textit{Dole} Court found

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{427} Id. at 206 (citing Fullilove v. Klutznick, 448 U.S. 448, 474 (1980)).
\item \textsuperscript{428} Id. at 206–07.
\item \textsuperscript{429} \textit{Dole}, 483 U.S. at 209 (citing United States v. Butler, 297 U.S. 1 (1936)). This is not the case, however, if the conditions involve an attempt by Congress to expand its power over those interests reserved to the states under the Tenth Amendment. Epstein, \textit{supra} note 389, at 45–46. Congress must then show a compelling interest. \textit{Id.} at 45.
\item \textsuperscript{430} See Epstein, \textit{supra} note 389, at 59. Determining whether police power measures are appropriate requires an analysis of the fit between the ends to be served and the means to be used. The level of scrutiny applied to these decisions is significant to this determination.
\item \textsuperscript{431} \textit{Dole}, 483 U.S. at 210.
\item \textsuperscript{432} \textit{Id.} at 209.
\item \textsuperscript{433} \textit{Id.} at 210. The \textit{Dole} Court clearly rejected this formulation of the doctrine of unconstitutional conditions, which is a variation of the conditional benefits view.
\item \textsuperscript{434} \textit{Dole}, 483 U.S. at 210. The unconstitutional conditions doctrine is applied to the fourth prong of the conditional spending analysis.
\item \textsuperscript{435} \textit{Id.} at 207–08.
\item \textsuperscript{436} See Massachusetts v. United States, 435 U.S. 444, 460–67 (1978).
\item \textsuperscript{437} \textit{Id.} (upholding aviation fees against Tenth Amendment challenge and addressing Justice Marshall’s concern that using taxing power as a regulatory device will unduly burden essential state activities, i.e., the power to tax is the power to destroy).
\end{itemize}
\end{footnotesize}
that the condition imposed on highway funds was directly related to one of the primary purposes for which highway funds are expended—safe interstate travel—they did not address the "outer bounds" of the germaneness requirement.\textsuperscript{438} To the contrary, the condition that Section 104(k) recognize broad societal rights in the property is unrelated to Superfund's remediation goals.\textsuperscript{439}

A key to the constitutionality of financial inducements under the spending power, like the inducements offered by Congress under the commerce power, is that the states retain a choice. The Tenth Amendment does provide protection when the inducements offered by Congress become so coercive as to exceed the point at which "pressure turns into compulsion."\textsuperscript{440} This would require two showings.\textsuperscript{441} First, that when the inducements are separated from the regulation, the regulation is incapable of standing by itself.\textsuperscript{442} Second, that the two in combination are weapons of coercion, destroying or impairing the autonomy of the states.\textsuperscript{443} In \textit{Steward Machine v. Davis}, the Court reviewed certain revenue provisions of the Social Security Act of 1935 against this standard.\textsuperscript{444} Because the conditions were terms of a statute which could be altered or repealed, and the state's consent could be revoked, the Act did not "call for a surrender by the states of powers essential to their quasi-sovereign existence."\textsuperscript{445}

It is not clear whether the conditional spending analysis would apply to contracts made directly with individuals, or whether federal authority to make those contracts is limited to the reach of the com-

\textsuperscript{438} \textit{Dole}, 483 U.S. at 208-09.
\textsuperscript{439} See supra Section III.A and the relatedness discussion in Section IV.D.
\textsuperscript{440} \textit{Dole}, 483 U.S. at 211 (citing Steward Machine Co. v. Davis, 301 U.S. 548, 590 (1937)).
\textsuperscript{441} \textit{Steward Machine}, 301 U.S. at 586.
\textsuperscript{442} Id.
\textsuperscript{443} Id.
\textsuperscript{444} Social Security Act, 42 U.S.C. §§ 301-1397 (1994). At issue were title IX, Tax on Employers of Eight or More, and title III, Grants to States for Unemployment Compensation Administration. \textit{Steward Machine}, 301 U.S. at 574. Under the Act, the federal government would collect a tax from employers, but would credit 90\% of the tax if the states administered an unemployment compensation plan that met certain conditions of the Act. \textit{Id.} at 574-77. The tax was well within the powers of the federal government to collect excise taxes. \textit{Id.} at 578-83. In finding the excise not void as involving coercion of the states in contravention of the Tenth Amendment, they distinguished duress from inducement and, in particular, the decision a year earlier in \textit{Butler}. \textit{Id.} at 586-87 (citing United States v. Butler, 297 U.S. 1, 65, 66 (1936)). Most importantly, the condition in the Social Security Act was not linked to an irrevocable agreement; at any time the state could repeal its unemployment law, terminate the credit, and place itself where it was before the credit was accepted. \textit{Id.} at 592-93.
\textsuperscript{445} \textit{Steward Machine}, 301 U.S. at 593. The Court, however, did not believe the result would be different if the conditions were imposed by contract rather than by statute. \textit{Id.} at 597.
merce power. In *New York v. United States*, the Court differentiated the commerce and spending powers by stating that: “Congress regulates private activity pursuant to its authority under the Commerce Clause . . . [and w]here the recipient of federal funds is a State . . . the conditions attached to the funds by Congress may influence a State’s legislative choices.”

In *United States v. Butler*, the Court first articulated the distinctions between the spending power and the power to regulate under the Commerce Clause. The *Butler* court struck down an emergency act regulating agricultural production that allowed the federal government to enter into agreements with farmers to reduce acreage or production of certain crops. There was no question in the Court’s mind that the Act was beyond the reach of the commerce power since the control of agricultural production was a purely local activity; this fact, however, was irrelevant to the decision. The Court adopted the Hamiltonian view that the power to spend for the general welfare was separate and distinct from the enumerated powers given to Congress.

The Court nonetheless found that the Act was not a valid exercise of the spending power. According to the opinion, the *Butler* decision did not rest on a conditional appropriation of money under the spending clause. Rather, the Court found that the Act invaded the powers reserved to the states by the Tenth Amendment. The Court found no difference between Congress compelling the state to regulate the local affairs of the state’s citizens and Congress making a contract

---

446 If the spending power cannot be used to purchase the power to regulate otherwise state or local affairs, and the Tenth Amendment’s limitation on Congress’s regulatory powers is a mirror image of its commerce power, then it would seem that the federal government could not contract with individuals (as opposed to condition grants to the states) in a way that would exceed their powers to regulate under the Commerce Clause.


448 *Butler*, 297 U.S. at 1. The Agricultural Adjustment Act was considered outside the commerce power; however, similar subsidies are now allowed under the Conservation Reserve Program now believed to be within the commerce power.

449 Id. at 64.

450 Id. at 65–66.

451 Id.

452 Id. at 73. “There is an obvious difference between a statute stating the conditions upon which moneys shall be expended and one effective only upon assumption of a contractual obligation to submit to a regulation which otherwise could not be enforced.” Id.; see also *South Dakota v. Dole*, 483 U.S. 203, 216 (1987) (O’Connor, J., dissenting) (observing that Butler Court saw Agricultural Adjustment Act for what it was—an exercise of regulatory, not spending, power).
relating to their conduct. The Court reasoned that, since the United States can make a contract only if the federal power to tax and appropriate reaches the subject-matter of the contract, when such a contract does reach the subject-matter, the state by virtue of the Supremacy Clause is without power to declare the contract void.

Butler has been the only Supreme Court case finding an exercise of the spending power beyond the presumptive powers of Congress. It was distinguished in Steward Machine based on the coerciveness of the condition. We know from the decision in Dole that conditions on the exercise of the spending power may be so coercive as to require a surrender of state sovereignty, akin to compelling state regulation directly. In this case, Congress would regulate by purchasing interests in land. This regulation, as in Butler, is not conditional spending. It is a commandeering of the state legislative process.

Congress does invoke its spending power to encourage state participation in CERCLA cleanups. Superfund does not preempt state liability or a state cleanup. It does encourage state participation in implementing a remedial action, giving the states a choice to accept federal funding for state-led responses. But consider as well the use of institutional controls with EPA's Brownfields Initiative. The states have a choice to participate with EPA through SMOAs or voluntary state programs that essentially invite EPA to use their CERCLA authority in redevelopment. Through this process, however, the states may not consent to additional conditions that are beyond the commerce and spending powers of Congress.

453 Butler, 297 U.S. at 74.
454 Id.
456 Id. at 1139.
458 See Butler, 297 U.S. at 70.
460 40 C.F.R. § 300.500(b) (1995). There may be two types of state-led response actions: (1) state-led, fund-financed, or (2) state-led, non-fund-financed. Id. § 300.515. Under the first type, the state is required to enter into a cooperative agreement with the EPA to receive fund financing. Id. § 300.515(a). EPA retains final approval and must concur in and adopt the ROD. Id. § 300.515(e). In a state-led, non-fund-financed cleanup, the state is not required to get EPA approval of the remedy but also may not invoke CERCLA authority, thus leaving the states exposed to the possibility that EPA will later take actions that are different from those selected under the state-led cleanup. Id. § 300.515(e)(2)(ii); see also Ohio v. EPA, 997 F.2d 1520, 1540 (D.C. Cir. 1993).
461 See supra Section II.C.
CONCLUSION

In *New York v. United States*, the Court looked at the expanded federal role under the commerce and spending powers, and the significance of the Supremacy Clause when there is an actual conflict, to determine the balance between state and federal powers in that case. The Court emphasized that, although "[t]he actual scope of the Federal Government's authority with respect to the States has changed over the years, . . . the constitutional structure underlying and limiting that authority has not." This rationale supported their decision to invalidate a statutory provision that was contrary to the federal structure protected by the Tenth Amendment even though the provision had been proposed by the states' governors. Because the fundamental purpose served by the federal structure is to protect individuals, state officials may not consent:

The Constitution does not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities, or even for the benefit of the public officials governing the States. To the contrary, the Constitution divides authority between federal and state governments for the protection of individuals.464

In the case of hazardous substance easements, the fact that the states have consented through cooperative agreements or SMOAs is also of no import.465

The Tenth Amendment is also important in preserving a land ethic. Some may be overly devoted to the idea that the federal government is more sensitive to environmental concerns and would be a superior steward of the land. There is direct evidence to the contrary provided by simply looking at the environmental record at federal facilities, which is poor.466 Because of the United States Department of Justice (DOJ) "unitary executive policy," EPA has been unable to address effectively the pollution problems at federal facilities. It is the Tenth Amendment and state sovereignty that has been the most effective

---

463 Id. at 159.
464 Id. at 181.
465 See supra Section IV.E.
466 Babich, supra note 100, at 1522. "The most dangerous hazardous waste sites in the United States generally are those that the federal government created itself." Id. Babich offers the further view that, in practice, state governments are as capable as federal agencies and more responsive. Id.
467 This policy is based on the premise that all agencies of the federal government work for the same sovereign; therefore, EPA cannot sue itself.
response to the federal government's inability to deal with polluted federal facilities.\textsuperscript{468} Therefore, in \textit{United States v. Colorado},\textsuperscript{469} Colorado was not barred from enforcing state law at a federal facility within the state even though there was an ongoing CERCLA cleanup.\textsuperscript{470}

It is alarming how casually we are abandoning our idea of self-government. By constitutional design, when we own property in the United States, we exercise rights of ownership within the limitations of the law, including laws protecting the health and safety of our neighbors. Likewise, we exercise rights as citizens when we bring a lawsuit to restrain another's wrongful use of their property or to recover damages for injuries caused by others' actions. Through this system, our idea of wrongful use can change over time, and the community standards are reflected through the jury system, the availability of common law remedies, and through our choice of elected representatives.\textsuperscript{471} When, however, we delegate all decisions to bodies of experts or representatives, the property owner (or operator) is no longer required to exercise the same degree of self-restraint or judgment. And the decisionmaker has no vested interest in the outcome, especially when the decision-maker is not a member of the community. This is totalitarian in design. It was also not what Aldo Leopold intended. It is ironic that we want to remove local primacy in land-use planning in the name of assuring community participation.

The purported purpose of federal involvement in the Brownfields Initiative is to provide technical assistance to the states and federal "liability reform."\textsuperscript{472} As discussed, however, most Brownfields sites are not actually subject to Superfund liability. The legislative reform would provide a federal role, replacing the stigma with actual jurisdiction. Further, Congress is aware of other means to remove the

\textsuperscript{468} Babich, \textit{supra} note 100, at 1544. The Unfunded Mandates Reform Act of 1995 (UMRA), S. 1, 104th Cong., 1st Sess. (1995), was, however, an "isolated misstep ..., an unfortunate by-product of an essentially healthy tension between sovereigns." Babich, \textit{supra} note 100, at 1549. The UMRA is not about federal mandates to states to implement federal regulations without adequate funding (distinguished from incentives)—this coercive action was not allowed before the Act. \textit{See supra} Section IV.A; \textit{see also} Babich, \textit{supra} note 100, at 1547-48. The UMRA adopted a lesser federal standard for governments than applies to private facilities. \textit{Id.} at 1546-47.

\textsuperscript{469} United States \textit{v.} Colorado, 990 F.2d 1565, 1565 (10th Cir. 1993).

\textsuperscript{470} \textit{Id.} The United States had argued that the states' role was confined to the ARAR's process. The court determined that, because Colorado had been delegated independent RCRA authority, they were not limited to that mechanism. \textit{Id.} at 1581.

\textsuperscript{471} Note the renewed use of common law rights of action to recover for pollution damages.

\textsuperscript{472} \textit{See supra} note 398.
threat of Superfund liability from innocent landowners, lenders and purchasers without adding conditions to a site-by-site covenant not to sue by EPA that assures federal involvement rather than non-involvement.\textsuperscript{473} The opposite effect is as likely. EPA’s continued involvement at the site and the threat of civil fines that would accompany a Section 104(k) interest may actually discourage the private sector from developing these properties. Congress is also aware of valid means of encouraging land-use planning by the states if there is a specific need not being met.\textsuperscript{474} Section 104(k) is not necessary to the Brownfields Initiative.

Section 104(k) is also not related to Superfund’s remediation goals. Under Section 104(j), EPA is allowed to acquire an interest in land. Under Section 104(k), EPA would acquire the right to regulate land-use with respect to the land. It is a coercive spending scheme which invades the sovereignty of the states. Section 104(k) violates the Commerce Clause because it is not incidental to CERCLA’s environmental purposes and it contains no jurisdictional element to allow review of EPA’s property acquisitions on a case-by-case basis. Further, its preemptive effect in replacing state and local land-use planning with federal regulation is an invasion of powers reserved to the states under the Tenth Amendment.

Congress has no authority to engage in local land-use planning under its commerce or spending powers. There is thus no public purpose to justify its exercise of eminent domain. The offer to pay compensation, as well as the covenant not to sue in a Brownfields redevelopment, is a false choice. Even if Congress does have the greater power to regulate for this purpose, the conditions offered on the exercise of the power could not survive strict scrutiny. Section 104(k) is not only unwise, it is unconstitutional.

\textsuperscript{473} See supra Section II.C.
\textsuperscript{474} See discussion of CZMA, supra Section III.C.