

5-15-2008

The Practical Effects of Delegation: Agencies and the Zoning of Public Lands and Seas

Josh Eagle

Follow this and additional works at: <https://digitalcommons.pepperdine.edu/plr>



Part of the [Administrative Law Commons](#), [Environmental Law Commons](#), and the [Land Use Law Commons](#)

Recommended Citation

Josh Eagle *The Practical Effects of Delegation: Agencies and the Zoning of Public Lands and Seas*, 35 Pepp. L. Rev. Iss. 4 (2008)

Available at: <https://digitalcommons.pepperdine.edu/plr/vol35/iss4/1>

This Article is brought to you for free and open access by the Caruso School of Law at Pepperdine Digital Commons. It has been accepted for inclusion in Pepperdine Law Review by an authorized editor of Pepperdine Digital Commons. For more information, please contact bailey.berry@pepperdine.edu.

The Practical Effects of Delegation: Agencies and the Zoning of Public Lands and Seas

Josh Eagle*

- I. INTRODUCTION
- II. PURPOSES AND MECHANISMS OF ZONING
 - A. *Purposes of Municipal Zoning*
 - B. *Purposes of Zoning Public Property*
 - C. *Mechanisms of Zoning*
- III. HYPOTHESES REGARDING AGENCIES
 - A. *Lack of Political Capacity and Limits on the Usefulness of Expertise*
 - B. *Incentives of Agency Officials*
 - C. *Influence of Concentrated Groups*
- IV. THE EFFECTS OF DELEGATION: PREDICTIONS AS TO HOW AGENCIES WILL (OR WON'T) ZONE
 - A. *Delay*
 - B. *Multiple-Use "Zoning"*
 - C. *Failure to Remediate Pre-Zoning Allocation Problems*
- V. THE CASE STUDIES
 - A. *The National Marine Sanctuaries Act*
 - B. *Areas of Critical Environmental Concern*
 - C. *Essential Fish Habitat*
 - D. *California's Marine Life Protection Act*

* Assistant Professor, University of South Carolina School of Law. The author appreciates the helpful comments of Josie Brown, Margaret Caldwell, Kim Connolly, Brant Hellwig, Pat Hubbard, Phillip Lacy, and David Schoenbrod. University of South Carolina School of Law students Amanda June Bernard, Cheves Ligon, Rachel Hutchens, Michael Corley, Paula Leverett Cobb, Anna Stonecypher, and Catherine Bryan provided invaluable research assistance. This research was funded, in part, by a grant from the David and Lucile Packard Foundation.

VI. LEGISLATURES CAN ZONE

- A. *The Municipal Experience*
- B. *The Public Property Experience*
- C. *The Great Barrier Reef*

VII. CONCLUSION

I. INTRODUCTION

As compared to municipal zoning, the institutional framework of public property zoning remains in flux.¹ In writing the laws that enable municipal zoning, state legislatures have consistently vested complete responsibility for the two central zoning functions, mapping and rule-writing, in elected bodies—that is, in city and county councils.² At the same time, legislatures and courts have strictly circumscribed the amount of discretion that local governments can delegate to unelected officials, such as zoning boards, to administer and enforce zoning rules.³ The central role that elected officials

1. By “public property,” I mean those lands and ocean areas that are owned by, or subject to the sovereign control of, states or the federal government and that are open to the general public. *Cf.*, Robert C. Ellickson, *Controlling Chronic Misconduct in City Spaces: Of Panhandlers, Skid Rows, and Public-Space Zoning*, 105 *YALE L.J.* 1165, 1174 (1996) (“[T]o be truly public, a space must be orderly enough to invite the entry of a large majority of those who come to it.”). By “public property zoning,” I mean the division of what are currently multiple-use areas (in which agencies balance competing interests through a statutorily-described administrative process) into landscapes or seascapes fully or partially comprised of uniform-use areas, also known as dominant-use areas (where rules give absolute or presumptive priority to certain specified uses or to groups of closely related, compatible uses).

2. Section 1 of the Standard State Zoning Enabling Act provides that “the legislative body of cities and incorporated villages is hereby empowered to regulate and restrict” land uses. A STANDARD STATE ZONING ENABLING ACT (Rev. ed. 1926) [hereinafter SSZEA], available at <http://www.planning.org/growingsmart/pdf/SZEnablingAct1926.pdf>. Section 2 provides that “the local legislative body may divide the municipality into districts . . .” *Id.* § 2. The elected bodies do not usually draw the maps and write the rules, instead using planning commissions; however, maps and rules must be approved by elected officials. *Id.* “Every state adopted the [SSZEA], either as published or with minor variations.” DANIEL R. MANDELKER, *LAND USE LAW 1-2* (5th ed. 2003).

3. Section 7 of the SSZEA grants zoning administrators the power to hear and decide appeals of enforcement decisions and to hear and decide applications for special exceptions and variances. SSZEA § 7. Courts have been extremely strict in not allowing city and county councils to exceed these delegative limits. Some courts narrowly interpret enabling acts. *See, e.g.*, *PRB Enters. v. S. Brunswick Planning Bd.*, 518 A.2d 1099, 1102 (N.J. 1987) (“The Municipal Land Use Law . . . grant[s] limited authority to a municipality to delegate to its planning board discretion to consider the suitability of a permitted use for particular sites.”); *Smith v. Bd. of Appeals*, 65 N.E.2d 547, 549 (Mass. 1946) (“[H]owever laudable the purpose may be, a municipality cannot . . . wander beyond the confines of the statutory authority under which alone it can act . . .”). Other cases have invoked state constitutional law concerns, such as due process, equal protection, and separation of powers. *See, e.g.*, *City of Hammond v. Red Top Trucking, Co.*, 409 N.E.2d 655 (Ind. Ct. App. 1980); *Waterville Hotel Corp. v. Bd. of Zoning Appeals*, 241 A.2d 50, 52 (Me. 1968) (“The legislative body cannot, however, delegate to the Board a discretion which is not limited by legislative standards.”); *Phillips Petroleum Co. v. Anderson*, 74 So.2d 544, 547 (Fla. 1953) (“An intelligible principle [must be] laid down for the guidance of an administrative official in the

play in municipal zoning decisions is illustrated by the fact that it has been incorporated into the very definition of zoning: “Zoning is the *legislative* division of a community into areas in each of which only certain designated uses of land are permitted”⁴

By contrast, legislatures and executives have used two distinct institutional approaches in zoning public lands and seas.⁵ In some cases, they have employed a *direct* zoning model similar to the municipal model. Congress and Presidents have directly zoned about forty percent of federal public lands through, respectively, legislation⁶ and Presidential proclamations.⁷ In other cases, however, they have opted to make use of a

performance of his duties.”); *Union Nat’l Bank & Trust Co. of Joliet v. Village of New Lenox*, 505 N.E.2d 1, 3 (Ill. App. Ct. 1987) (“[T]he ordinance is unconstitutionally vague because it does not prescribe any standards or criteria upon which the village can determine whether a proposed use, that is not specifically listed, is permitted, prohibited or special.”). For other similar cases, see W.E. Shipley, Annotation, *Attack on Validity of Zoning Statute, Ordinance, or Regulation on Ground of Improper Delegation of Authority to Board or Officer*, 58 A.L.R.2d 1083 (2006).

State courts are particularly skeptical of elected officials’ attempts to delegate map-drawing power to agencies, because “this power is of the essence of the legislative function.” *Id.* § 3(b). See, e.g., *Auditorium, Inc. v. Bd. of Adjustment*, 91 A.2d 528, 532 (Del. 1952) (“[O]nly the legislative body of the municipality may establish the boundaries of the zone districts. This as a general proposition is uniformly the law.”).

The firm entrenchment of nondelegation principles in municipal zoning law is perhaps best illustrated by the fact that land-use law professors feel comfortable arguing that a zoning law giving agency officials power to fine citizens for maintaining “junkyards,” without further defining the term, invests those officials with too much power. Orlando E. Delogo & Susan E. Spokes, *The Long-Standing Requirement that Delegations of Land Use Control Power Contain “Meaningful” Standards to Restrain and Guide Decision-Makers Should Not Be Weakened*, 48 ME. L. REV. 49, 68 (1996) (describing a 1994 Maine case as “troubling” because the court did not find ordinance terms “automobile graveyard” and “junkyard” unconstitutionally vague).

4. 1 E.C. YOKLEY, *ZONING LAW AND PRACTICE* § 2-1, at 2-3, 2-4 (4th ed. 2000) (“[B]y its very nature, zoning is a legislative function.”) (emphasis added).

5. The term “public seas” refers to those marine waters under the jurisdiction of the states (zero to three nautical miles offshore, with a few exceptions) and the federal government (from the extent of state jurisdiction to 200 nautical miles offshore). One nautical mile equals 1.15 miles. State jurisdiction was established by the Submerged Lands Act. 43 U.S.C. § 1301 (2006); federal jurisdiction was established by Presidential proclamation. Proclamation No. 5030, 48 Fed. Reg. 10605 (Mar. 10, 1983).

6. See, e.g., Act Establishing Crater Lake National Park, ch. 820, (rule 12.4) 32 Stat. 202 (1902) (codified as amended at 16 U.S.C. §§ 121-28 (2006)); Act Establishing Grand Teton National Park, ch. 331, 45 Stat. 1314 (1929) (codified as amended at 16 U.S.C. §§ 406d-1 to 406d-5); Act to Designate Certain Lands in the Okefenokee National Wildlife Refuge, Georgia, as Wilderness, Pub. L. No. 93-429 (1974); Alaska National Interest Lands Conservation Act, Pub. L. No. 96-487, Title II, § 201, 94 Stat. 2377 (1980) (codified as amended at 16 U.S.C. § 410hh) (creating five national parks, three national preserves, and two national monuments); Nebraska Wilderness Act of 1985, Pub. L. No. 99-504 (1986).

7. Congress gave the President the power to create national monuments through the Antiquities Act of 1906, 16 U.S.C. §§ 431-33 (2006). See, e.g., Proclamation No. 2028, 36 C.F.R. § 7.26 (1933)

delegated zoning model, directing administrative agencies to perform key functions such as map-drawing and rule-writing. For example, in the National Marine Sanctuaries Act (“NMSA”)⁸ and the Federal Land Policy and Management Act (“FLPMA”),⁹ Congress gave the National Oceanic and Atmospheric Administration and the Bureau of Land Management, respectively, the responsibility for establishing National Marine Sanctuaries¹⁰ and Areas of Critical Environmental Concern.¹¹ Presidents have also, from time to time, given zoning responsibilities to federal agencies.¹²

Three of the most recent ocean-zoning initiatives in the United States employ a delegated zoning model.¹³ First, in 1999, then-California governor

(establishing Death Valley National Monument); Proclamation No. 7647, 68 Fed. Reg. 7053 (Feb. 7, 2003) (establishing the Governors Island National Monument); Proclamation No. 8112, 72 Fed. Reg. 10031 (Feb. 28, 2007) (establishing the Papahānaumokuākea Marine National Monument. See generally HAL ROTHMAN, PRESERVING DIFFERENT PASTS: THE AMERICAN NATIONAL MONUMENTS (1989). Although one can view the Antiquities Act as a form of delegation, it is distinguished from instances of Congressional delegation to administrative agencies because Presidential decision-making is, in key aspects, closer to Congressional decision-making than it is to agency decision-making. For example, the President is not constrained by the same procedural requirements as agencies, such as those that are found in the National Environmental Policy Act. See 40 C.F.R. § 1508.12 (2008). Also, unlike agencies, the President is directly accountable to voters, heightening the degree of his or her “political capacity.” The importance of these two factors is discussed *infra* in Parts III and IV of this Article.

8. 16 U.S.C. §§ 1431-45 (2006).

9. 43 U.S.C. §§ 1701-84 (2006).

10. “Marine sanctuaries” are statutorily defined as “areas of the marine environment which are of special national significance” because of “conservation, recreational, ecological, historical, scientific, educational, cultural, archaeological, or esthetic qualities,” “the communities of living marine resources [they] harbor[],” or “[their] resource or human-use values.” 16 U.S.C. §§ 1431(a)-(b), 1433(a)(2) (2007).

11. Areas of Critical Environmental Concern are places on Bureau of Land Management land: [W]here special management attention is required (when such areas are developed or used or where no development is required) to protect and prevent irreparable damage to important historic, cultural, or scenic values, fish and wildlife resources or other natural systems or processes, or to protect life and safety from natural hazards.

43 U.S.C. § 1702(a) (2006).

12. See, e.g., Exec. Order No. 11,644, as amended by Exec. Order No. 11,989, 42 Fed. Reg. 26,959 (May 24, 1977) (directing federal land management agencies to “develop and issue regulations and administrative instructions . . . to provide for administrative designation of the specific areas and trails on public lands on which the use of off-road vehicles may be permitted, and areas in which the use of off-road vehicles may not be permitted”); Exec. Order No. 13,158, 65 Fed. Reg. 34,909 (May 26, 2000); see also *infra* note 18 and accompanying text.

13. Although the exact reasons for the recent spate of legislative and executive initiatives toward ocean zoning are not entirely clear, it is likely that scientists, marine conservation groups unhappy with current governance structures, and recent high-level policy reports on ocean policy each have played a role. For example, the Report of the United States Commission on Ocean Policy suggests that a spatial approach to the management of federal waters might have benefits. U.S. COMM’N ON OCEAN POLICY, AN OCEAN BLUEPRINT FOR THE 21ST CENTURY: FINAL REPORT OF THE UNITED STATES COMMISSION ON OCEAN POLICY 103-06 (2004). Other commission or committee proposals that examine the benefits of zoning include NATIONAL RESEARCH COUNCIL, MARINE PROTECTED AREAS: TOOLS FOR SUSTAINING OCEAN ECOSYSTEMS (2001) and PEW OCEANS COMMISSION,

Gray Davis signed the Marine Life Protection Act (“MLPA”),¹⁴ the main purpose of which was “to reexamine and redesign California’s MPA [marine protected area] system to increase its coherence and its effectiveness at protecting the state’s marine life, habitat, and ecosystems.”¹⁵ As part of this overhaul, the system was to include an improved “marine life reserve component,” that is, an increase in the percentage of California waters dedicated to uniform-use conservation areas where extractive uses would be prohibited.¹⁶ In the MLPA, the California Legislature delegated

AMERICA’S LIVING OCEANS 34 (2003), available at http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Protecting_ocean_life/env_pew_oceas_final_report.pdf.

For examples of scientists’ proposals, see Gary W. Allison et al., *Marine Reserves Are Necessary But Not Sufficient for Marine Conservation*, 8 ECOLOGICAL APPLICATIONS S79 (Supp. 1998); Larry B. Crowder et al., *Resolving Mismatches in U.S. Ocean Governance*, 313 SCI. 617 (2006); Jane Lubchenco et al., SCIENTIFIC CONSENSUS STATEMENT ON MARINE RESERVES AND MARINE PROTECTED AREAS, NATIONAL CENTER FOR ECOLOGICAL ANALYSIS AND SYNTHESIS (2001), available at <http://www.nceas.ucsb.edu/consensus/>. For lawyers’ proposals, see Jeff Brax, *Zoning the Oceans: Using the National Marine Sanctuaries Act and the Antiquities Act to Establish Marine Protection Areas and Marine Reserves in America*, 29 ECOLOGY L.Q. 71 (2002); Donna R. Christie, *Marine Reserves, the Public Trust Doctrine and Intergenerational Equity*, 19 J. LAND USE & ENVTL. L. 427 (2004); Robin K. Craig, *Taking the Long View of Ocean Ecosystems: Historical Science, Marine Restoration, and the Oceans Act of 2000*, 29 ECOLOGY L.Q. 649 (2002); John Charles Kunich, *Losing Nemo: The Mass Extinction Now Threatening the World’s Ocean Hotspots*, 30 COLUM. J. ENVTL. L. 1 (2005); Kelly McGrath, *The Feasibility of Using Zoning to Reduce Conflicts in the Exclusive Economic Zone*, 11 BUFF. ENVTL. L.J. 183 (2004); Stephanie Young, Editorial, *Would Ocean Zoning Be an Effective Management Tool For the Waters Off the Coast of Massachusetts?*, VT. J. ENVTL. L., May 2, 2006, available at <http://www.vjel.org/eidotrials/ED10051.html>. For an economist’s proposal, see James N. Sanchirico, *Zoning the Oceans, in NEW APPROACHES ON ENERGY AND THE ENVIRONMENT: POLICY ADVICE FOR THE PRESIDENT 9* (Richard D. Morgenstern & Paul R. Portney, eds. 2004). For proposals made by non-profit marine conservation groups, see JACK SOBEL & CRAIG DAHLDRON, THE OCEAN CONSERVANCY, MARINE RESERVES: A GUIDE TO SCIENCE, DESIGN, AND USE (2004); FIONA R. GELL & CALLUM M. ROBERTS, WHY MARINE RESERVES? (2003); WORLD WILDLIFE FUND, THE FISHERY EFFECTS OF MARINE RESERVES AND FISHERY CLOSURES (2002); KATE WING, KEEPING THE OCEANS WILD (2001).

14. CAL. FISH & GAME CODE §§ 2850-63 (2007).

15. *Id.* § 2853(a). “Marine protected areas,” or MPAs, are “delineated areas in the oceans, estuaries, and coasts with a higher level of protection than prevails in the surrounding waters.” NATIONAL MARINE PROTECTED AREAS CENTER, A FUNCTIONAL CLASSIFICATION SYSTEM FOR MARINE PROTECTED AREAS IN THE UNITED STATES, available at http://mpa.gov/pdf/helpful-resources/factsheets/final_class_system_1206.pdf [hereinafter NMPAC]. Rules for MPAs vary around several axes, including the “level of protection afforded,” “permanence of protection,” and the “constancy of protection.” *Id.*

16. § 2853(c)(1). Such areas are also generally known as “marine reserves.” See NMPAC, *supra* note 15. The MLPA also required that the California Fish and Game Commission establish “[a] process for the establishment, modification, or abolishment of existing MPAs or new MPAs established pursuant to this program . . .” § 2853(c)(5). In 2002, the California Department of Fish and Game issued regulations defining three types of MPAs. CAL. PUB. RES. CODE § 36700 (2007). In addition to marine reserves, the regulations define “state marine park” as a part of the sea where

responsibility for mapping and rule-writing to the state's Department of Fish and Game.¹⁷ Second, in 2000, President Clinton issued Executive Order 13158 on Marine Protected Areas.¹⁸ The goal of this order was to "strengthen the management, protection, and conservation of existing marine protected areas and establish new or expanded MPAs"¹⁹ and to "develop a scientifically based, comprehensive national system of MPAs representing diverse U.S. marine ecosystems, and the Nation's natural and cultural resources."²⁰ Although it does not explicitly direct federal agencies to create uniform-use zones, Executive Order 13158 implies that such zones would be a necessary part of a functional system of MPAs.²¹ The Executive Order fully delegates the responsibility for enhancing and enlarging the current MPA system to existing federal agencies.²² Most recently, Massachusetts' legislature has been considering "An Act Relative to Oceans," which would require the creation of a comprehensive ocean management plan including "management measures . . . as may be applicable to specific geographic areas."²³ Under this law, the state's Secretary of Energy and Environmental Affairs would be charged with drafting and approving a comprehensive ocean plan that could include zoning mechanisms.²⁴

In this Article, I argue that the delegated zoning model is not likely to produce the beneficial effects that zoning public property is intended to create. Resource management agencies such as the Bureau of Land Management, the California Department of Fish and Game, and the National

"it is unlawful to injure, damage, take or possess any living or nonliving marine resource for commercial exploitation purposes," and "state marine conservation area" as a place where "it is unlawful to injure, damage, take or possess any living, geological or cultural marine for commercial, recreational purposes, or a combination of commercial and recreational purposes . . ." § 36710(b), (c).

17. CAL. FISH & GAME CODE § 2859. Under the MLPA, the California Department of Fish and Game is to create a "Master Plan" team that drafts the zoning plan. *Id.* It must then be approved by the California Fish and Game Commission, whose five members are appointed by the Governor of California and approved by the Senate. *See* Cal. Fish & Game Commission, <http://www.fgc.ca.gov/> (last visited Mar. 4, 2008).

18. Marine Protected Areas, Exec. Order No. 13,158, 65 Fed. Reg. 34,909 (May 26, 2000).

19. *Id.* § 1(a).

20. *Id.* § 1(b).

21. Section 4(a)(3) of the Executive Order directs federal agencies to develop "a biological assessment of the minimum area where consumptive uses would be prohibited that is necessary to preserve representative habitats in different geographic areas of the marine environment." *Id.* § 4(a)(3).

22. *Id.* § 4. This order was later continued by President Bush. Donald L. Evans, Secretary of Commerce, Statement Regarding Executive Order 13158, Marine Protected Areas (June 4, 2001), available at <http://www.mpa.gov/pdf/helpful-resources/pr/evansstatementjune01.pdf>.

23. S. 2653, § 3(e)(3), 184th Gen. Ct., Reg. Sess. (Mass. 2006), available at <http://www.mass.gov/legis/bills/senate/st02/st02653.htm>.

24. *Id.* § 3(e); *see also* Young, *supra* note 13. In recent months, Hawai'iian legislators have introduced an ocean zoning bill that follows the direct zoning model. *See* S.B. 1914, 24th Leg., (Haw. 2007), available at http://www.capitol.hawaii.gov/session2008/Bills/SB1914_.htm.

Oceanic and Atmospheric Administration have a variety of incentives to avoid dividing the multiple-use areas they currently manage into the kinds of uniform-use areas necessary to achieve zoning's purposes. The likely outcomes of delegated zoning include costly delays in implementation,²⁵ an emphasis on multiple-use "zones" that do not provide the benefits of uniform-use zones,²⁶ and the under-allocation of area rights to user groups that have little political leverage in agency processes. Legislatures, presidents, and governors who wish to reap the potential benefits of ocean zoning would be well advised to employ a direct zoning approach.

Part II of the paper explains the purposes of zoning and how zoning's mechanisms, primarily the division of larger areas into uniform-use zones, are fundamental to and inseparable from those purposes. Because the municipal zoning literature is far more developed than the public property zoning literature, I begin with a discussion of the former's goals and then consider the extent to which similar goals would apply in the context of public property. Part III lays out observations that political scientists have made regarding the incentives of agencies and agency officials. Part IV makes some predictions about how agencies likely will respond when charged with zoning, based on the observations described in Part III. Part V examines four case studies of delegated zoning: the National Marine Sanctuaries Act,²⁷ the Federal Land Policy and Management Act,²⁸ the Magnuson-Stevens Fishery Conservation and Management Act,²⁹ and California's Marine Life Protection Act.³⁰ Agency implementation of these statutes generally is consistent with the predictions made in Part IV. Part VI anticipates a likely practical objection to direct zoning—that legislatures lack the technical expertise to lead the zoning enterprise. There are reasons to believe, based on historical evidence, that legislatures are more than capable of taking the lead role in zoning large and complex areas. Part VII concludes the paper with a suggestion for how

25. Delays are costly not only because process is expensive, but more importantly because existing governance structures are not managing resources for optimal outcomes (hence, the need for zoning). Thus, each day of delay represents a day of continued poor management. Furthermore, delays make the ultimate transition to zoning politically more difficult because they allow private parties to make continued and increased investments in reliance on existing resource allocation rules. *See infra* Parts III-VI.

26. As discussed further below, multiple-use "zones" do not provide the same kind of tool for improved governance as true, uniform-use zones. *See infra* Part II.

27. 16 U.S.C. §§ 1431-45 (2006).

28. 43 U.S.C. §§ 1701-84 (2006).

29. 16 U.S.C. §§ 1801-83 (2006).

30. CAL. FISH & GAME CODE §§ 2850-2963 (2004).

Congress and state legislatures ought to proceed in drafting future ocean zoning statutes.

II. PURPOSES AND MECHANISMS OF ZONING

In this Part of the Article, I explore the stated purposes of municipal and public property zoning and the mechanisms through which zoning laws attempt to accomplish those purposes. It is not the goal of this Article to convince the reader that zoning is capable of achieving the objectives at which it is aimed. For purposes of this paper, I assume that zoning can achieve those objectives. Rather, my goal is to explain why delegating responsibility for the creation of zoning maps and rules to agencies is not the most effective way of bringing a zoning plan into existence.

A. *Purposes of Municipal Zoning*

The term “zoning” is closely associated with the geographically-based, land-use management strategy widely used by cities and counties in the United States.³¹ Cities in the United States began to implement zoning in the second decade of the twentieth century.³² In *Village of Euclid v. Ambler Realty Co.*,³³ decided in 1926, the United States Supreme Court held that zoning private property, so long as it bore a “substantial relation to . . . public health, safety, morals, or general welfare,” was a constitutional exercise of states’ police power.³⁴ Today, about ninety percent of American municipalities with more than 10,000 residents have adopted zoning ordinances.³⁵

31. As Posner has noted:

Two types of zoning should be distinguished. Separation-of-uses zoning divides a city or other local governmental unit into zones and permits only certain land uses in each zone, so that there are separate zones for high-rise apartment houses, for single family homes, for businesses, for factories, and so on. Exclusionary zoning . . . tries to exclude certain land uses altogether. . . .

RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 66 (6th ed. 2003). In this Article, the focus is on the former.

32. New York City’s Board of Estimate and Apportionment passed the United States’ first “comprehensive” zoning ordinance on July 25, 1916. *City Fixes Limit on Tall Buildings*, N.Y. TIMES, July 26, 1916, at 1, available at <http://query.nytimes.com/gst/abstract.html?res=9900E4D8173BE633A25755C2A9619C94679D6CF>. For a description of the early development of zoning in the United States, see YOKLEY, *supra* note 4, at 1-5 to 1-9.

33. 272 U.S. 365 (1926).

34. See *id.* at 395. Municipal zoning is the exercise of a state’s police power, albeit by local government entities. That power is delegated to local governments by state legislatures through zoning enabling acts. PAUL GOLDSTEIN AND BARTON H. THOMPSON, JR., *PROPERTY LAW: OWNERSHIP, USE, AND CONSERVATION* 969 (2006).

35. Rolf Pendall, *Local Land Use and the Chain of Exclusion*, 66 J. AM. PLANNING ASSOC. 125 (2000). Houston, Texas is a notable exception. BERNARD H. SIEGAN, *LAND USE WITHOUT ZONING* 36-42 (Lexington Books 1972).

As explained over the years, zoning is a response to market failure. The critical assumption, which remains contested,³⁶ is that pre-zoning conflict resolution systems could not efficiently resolve conflicts among landowners.³⁷ Prior to zoning, if *A* believed that *B*'s land use unreasonably interfered with *A*'s ability to use or enjoy her property, *A* could sue *B* under a common law nuisance theory either to enjoin *B* from using his land in the unreasonable manner or to recover damages from *B*.³⁸ While this system

36. For a more detailed analysis of the contested nature of this claim, compare Andrew J. Cappel, Note, *A Walk Along Willow: Patterns of Land Use Coordination in Pre-Zoning New Haven (1870-1926)*, 101 YALE L.J. 617, 617-36 (1991), with Mark Fenster, "A Remedy on Paper": *The Role of Law in the Failure of City Planning in New Haven, 1907-1913*, 107 YALE L.J. 1093, 1093-1123 (1998). See also Andrew P. Morriss & Roger E. Meiners, *The Destructive Role of Land Use Planning*, 14 TUL. ENVTL. L.J. 95 (2000) (arguing that governmental controls done for the common good minimize private property rights). But see Jane E. Larson, *Free Markets Deep In the Heart of Texas*, 84 GEO. L.J. 179 (1995) (discussing the various arguments against zoning).

37. See Michael L. Goetz & Larry E. Wofford, *The Motivation for Zoning: Efficiency or Wealth Redistribution?*, 55 LAND ECON. 472, 473, n.4 (1979); Note, *Zoning for the Regional Welfare*, 89 YALE L.J. 748, 748 (1980). The SSZEA lays out the purposes of zoning as follows:

[Zoning] regulations shall be made in accordance with a comprehensive plan and designed to lessen congestion in the streets; to secure safety from fire, panic, and other dangers; to promote health and the general welfare; to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population; to facilitate the adequate provision of transportation, water, sewerage, schools, parks, and other public requirements. Such regulations shall be made with reasonable consideration, among other things, to the character of the district and its peculiar suitability for particular uses, and with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout such municipality.

SSZEA, *supra* note 2, § 3 (internal citation omitted).

38. The law recognizes two kinds of private nuisance actions. The first is meant to provide a remedy when intentional acts of a defendant interfere unreasonably with plaintiff's use and enjoyment of her property. The second is meant to provide a remedy when negligent, ultrahazardous, or abnormally dangerous acts of a defendant interfere with plaintiff's use and enjoyment of her property. JOSEPH WILLIAM SINGER, INTRODUCTION TO PROPERTY 107-08 (2d. ed. 2005). "The heart of nuisance law is the law of intentional nuisance . . ." *Id.* at 109. In other words, most nuisance cases, and the most difficult nuisance cases, arise from non-negligent, faultless activities. The question in such cases is not whether the defendant's land use is unreasonable, but instead whether it constitutes an unreasonable interference with plaintiff's use and enjoyment rights. *Id.* at 108. Answering this question can be very difficult because it requires balancing two "innocent" landowners' rights to use their property as they see fit. Courts sometimes apply a "threshold test," essentially asking whether the interference has gone too far in affecting plaintiff's ability to use and enjoy her property. The Restatement (Second) of Torts contains a more utilitarian test, asking whether "the gravity of the harm outweighs the utility of the actor's conduct." RESTATEMENT (SECOND) OF TORTS § 826(a) (1979). The Restatement contains lists of factors to be considered in assessing the gravity of the harm and the utility of the defendant's conduct. *Id.* at §§ 827-28. While these factors may be helpful in analyzing nuisance claims, they still "leave[] a vast area of discretion in application and room for argument." SINGER, *supra*, at 106. If a court finds a nuisance, it may award damages to the plaintiff to compensate her for her loss of use and enjoyment, or it may issue an order enjoining the defendant from continuing to use his property in the harm-

was capable of producing efficient results under certain conditions, it could not do so under others.³⁹

For example, in situations where *B*'s land use affects *A* and many other landowners, it is possible that the affected parties will have incentives not to bring a useful lawsuit. The cost of a lawsuit to any one affected party might not outweigh the potential benefit of abating *B*'s activities even though, collectively, the benefits of abating do, in fact, exceed the costs of a lawsuit (and the social benefit of *B*'s activity).⁴⁰ Additionally, the price of organizing, as well as free rider problems, operate to deter affected parties from joining together to bring a suit that would net an efficient outcome.⁴¹

Furthermore, the uncertainty created by a string of factually-specific court decisions likely would result, prospectively, in the inefficient under- and over-utilization of property. Under common law, if *B* sought legal counsel about whether he would be liable to his neighbors for the noise and pollution emanating from the factory he wanted to build, his lawyer might be negligent in advising "yes" or "no." The safer answer would explain that common law nuisance tests are vague,⁴² juries are fickle,⁴³ and the relative likelihood of crippling injunctive or affordable damages remedies (if a nuisance is established) is difficult to predict.⁴⁴ Dividing an area into zones where specified land uses (or groups of non-conflicting land uses) are expressly permitted and other uses are prohibited, transforming murky correlative rights into clearer group-based rights, is a solution intended to address both of these problems. By physically separating conflicts, zoning minimizes the chances that a nuisance will actually occur, thus avoiding the inefficiencies associated with common law resolution.⁴⁵ By establishing

producing manner. *Id.* at 111-19. I am assuming, for purposes of this hypothetical, that *A* has no other legal options, such as the enforcement of a private covenant.

39. See POSNER, *supra* note 31, at 60-62.

40. *Id.*

41. *Id.* at 61-62 (describing the free-rider problem in the context of rights transactions, although it should be equally applicable in the context of litigation).

42. See *supra* note 38; see also SINGER, *supra* note 38, at 104 (noting that the "[r]ule" that a nuisance is a "substantial and unreasonable interference with the use and enjoyment of land . . . obviously leaves a little to the imagination").

43. The question of unreasonable interference is one for the finder of fact. See *Prairie Hills Water & Dev. Co. v. Gross*, 653 N.W.2d 745, 750 (S.D. 2002).

44. In determining whether to grant an injunction or damages, courts ordinarily apply a "balancing of the equities" test. For examples illustrating the inconsistent application of injunction tests, see *Georgia v. Tennessee Copper Co.*, 237 U.S. 474 (1915); *Smith v. Staso Milling Co.*, 18 F.2d 736 (2d Cir. 1927); *Little Joseph Realty, Inc. v. Babylon*, 363 N.E.2d 1163 (N.Y. 1977); *Boomer v. Atlantic Cement Co., Inc.*, 257 N.E.2d 870 (N.Y. 1970); *Elliot Nursery Co. v. Du Quesne Light Co.*, 126 A. 345 (Pa. 1924);; *Madison v. Ducktown Sulphur, Copper & Iron Co.*, 83 S.W. 658 (Tenn. 1904).

45. The theory that zoning is more efficient than other methods of land use control is difficult, if not impossible, to prove quantitatively. See Bradley C. Karkkainen, *Zoning: A Reply to the Critics*, 10 J. LAND USE & ENVTL. L. 45, 47-48 (1994). Karkkainen points out that "[the efficiency]

clear rules about the kinds of land uses that are and are not permitted in particular areas, zoning creates greater prospective certainty for those interested in investing in the purchase or development of land.⁴⁶

Beyond aiming at these welfare-enhancing effects, zoning can be used in an attempt to achieve normative goals.⁴⁷ By moving decisions about land use from the market and the courts to the realm of elected officials and city councils, zoning changes the balance of power between individuals and interest groups.⁴⁸ In the pre-zoning environment, neighbors who oppose the development of a piece of property in their neighborhood, such as a gas station, would have several options. They could join together to buy the property from the would-be developer or wait until the gas station is built, and then challenge it as a nuisance. However, both of these options would face the incentive problems discussed above.⁴⁹ In the zoning process, by contrast, residents would have greater power to prevent construction of this gas station.⁵⁰ Assuming that residents had succeeded in having their neighborhood zoned "residential" in the municipal ordinance, the would-be developer's option would either be to apply for a variance or to petition the

rationale is difficult to support with empirical evidence." *Id.* at 48; *see also* Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681, 693-97 (1973). Pogodzinski and Sass explain that "[z]oning is welfare-improving if it reduces the level of negative externalities to which consumers and firms are exposed by an amount greater than the costs associated with implementing and enforcing zoning." J. Michael Pogodzinski & Tim R. Sass, *The Economic Theory of Zoning: A Critical Review*, 66 LAND ECON. 294, 295 (1990). "About half of the studies we review conclude that zoning may be welfare improving, while the other half conclude the opposite." *Id.* at 299.

46. *See, e.g.*, Christophe Defeuilley, *Competition and Public Service Obligations: Regulatory Rules and Industries Games*, 70 ANNALS PUB. & COOPERATIVE ECON. 25, 37 (1999) ("In . . . a stable and favourable regulatory environment, the private firms are in position to have positive expectations about the future market prospects. Therefore, they are encouraged to deepen their involvement in . . . markets and consolidate their leading positions by engaging in ambitious investment programmes."). *But see* WILLIAM A. FISCHEL, *THE ECONOMICS OF ZONING LAWS: A PROPERTY RIGHTS APPROACH TO AMERICAN LAND USE CONTROLS* 23 (1985) ("This may oversimplify the issue, but it often appears that the only time a developer has a true 'vested right' to develop is after he has literally established that right in concrete, the concrete of a building's foundation.").

47. *See* FISCHEL, *supra* note 46, at 19 (noting that zoning can "affect the quality of the environment, the provision of public services, the distribution of income and wealth, the pattern of commuting, development of natural resources, and the growth of the national economy").

48. *See* Sidney Wilhelm & Gideon Sjoberg, *Economic vs. Protective Values in Urban Land Use Change*, 19 AM. J. ECON. & SOC. 151, 152-53 (1960) (exemplifying the process by a case study of Austin, Texas); *see also* FISCHEL, *supra* note 46, at 36-37.

49. POSNER, *supra* note 31, at 61.

50. FISCHEL, *supra* note 46, at 55-56.

city council to rezone her property.⁵¹ Under either of these options, the developer would face a steep uphill climb, and residents would have the advantage.⁵² In addition to moving the decision forum from the court to the city council, zoning effectively shifts the “burden of proof” regarding the effects of proposed changes on existing neighborhoods from communities to those interested in using their property in non-conforming ways.⁵³

51. Typical variance language, for example, requires a showing that (1) not granting the variance “would impose an unnecessary hardship” on the applicant, and (2) “the proposed use would not be contrary to the public interest and would not substantially impair the purpose of the zoning plan and ordinance.” SINGER, *supra* note 38, at 651. In a rezoning, the developer would have to overcome a challenge of “spot zoning,” and then convince the majority of members of the relevant city council (against the protests of the residents) that the proposed inconsistent use is desirable. *Id.* at 654-55.

52. RICHARD F. BABCOCK, *THE ZONING GAME: MUNICIPAL PRACTICES AND POLICIES* 141 (1966) (“It is a rare municipal legislature that will reject what it believes to be the wishes of the neighbors.”).

53. Eric H. Steele, *Participation and Rules—The Functions of Zoning*, 11 AM. B. FOUND. RES. J. 709, 710 (1986) (“[Z]oning has evolved into a mechanism that conserves and protects existing residential communities by moderating the pace of development and change.”); see also FISCHER, *supra* note 46, at 36 (noting that, under a zoning regime, “resident homeowners . . . appear to have a reliable political entitlement to the status quo in land use,” and that the burden of proof a zoning ordinance challenger faces includes proving the community wrong, which costs the community less since “it need not build an elaborate case to exonerate itself”).

In the context of uncertainty, the assignment of the burden of proof has significant impacts on the outcome of a decision process. In the neighborhood case, it would be difficult for the neighbors to completely quantify the effect of a new gas station on their property and their neighborhood. In order to convince a court to enjoin construction of the gas station under a nuisance theory, neighbors would have to rely on at least somewhat inaccurate mathematical models, and perhaps incomplete data, in projecting future increases in traffic and toxic emissions. The effort to measure impacts might be further complicated because of the potentially cloudy relationship between more traffic and quality of life, more traffic and residential property values, and gasoline emissions and human health, etc. Under a zoning regime, the variance applicant would likely rely on similar data and models in convincing the hearing officer that its proposed use would “not conflict with the public interest” and would “not substantially impair the intent and purpose of the zoning plan and ordinance.” YOKLEY, *supra* note 4, at 218-19.

In the first scenario, the court is likely to allow more than the appropriate level of new land uses to proceed, especially where the models and data are highly speculative. Placing the burden of proof on the neighbors represents a value judgment that obstructing economic development and limiting private property rights is more important than preserving community stability. Zoning, on the other hand, represents a value judgment that community stability is more important than private property rights or new development. Under the first system, there will be some unnecessarily foregone community value; under the latter, some unnecessarily foregone economic opportunity. The choice about which type of mistake is preferable, given that some amount of error is inevitable, is clearly normative. As Karkkainen explains:

[A]lthough ultimately we can never be certain, zoning may be welfare-maximizing. Since we must decide amidst uncertainty, we should choose the course that appears most likely to simultaneously protect the welfare of current neighborhood residents and reinforce community values, resources and institutions (which themselves contribute to the welfare of current and future neighborhood residents). We should also recognize that the limits of our knowledge mean that our initial choice of zoning regulations may sometimes be wrong.

Karkkainen, *supra* note 45, at 77.

Empowering neighborhood residents in this way, through the granting of what some have called “collective property rights,”⁵⁴ may have desirable collateral effects. By providing an identity and common cause to similarly-situated property owners, zoning can function as a means of community development.⁵⁵ Both the process of zoning, which provides opportunities for residents to meet and talk to one another, and its substance, which provides residents as a group with a legislatively-created form of power, can contribute to community building.⁵⁶

Zoning’s normative potential can also be viewed in welfare terms. First, it may be that shifting the burden of proof results in efficiency gains. Errors in allowing change to occur too rapidly may be more costly than opposite kinds of errors, particularly when there are difficult-to-value prices associated with neighborhood stability.⁵⁷ More significantly, there may be gains to society, and not just to neighborhood residents, that arise from enhancing the negotiating power of residents. Empowerment may result in a constructive political dialogue about land use planning for the entire jurisdiction, possibly leading to more efficient development over the long-term. Prior to zoning, this conversation would not have been possible.⁵⁸

54. FISCHER, *supra* note 46, at 21.

55. Steele, *supra* note 53, at 710 (“[The] conserving function of zoning is critically important to the maintenance of urban communities as viable places to live and raise families. Even from a strictly rational economic perspective, viable urban communities are an important scarce resource to be protected by land-use regulation in the fully developed urban context. Thus, zoning serves interrelated objectives of community solidarity and cohesion as well as those of economic efficiency and rationality.”).

56. *Id.* at 713 (“[I]n giving voice to the community’s interests and creating a forum in which the community’s will is empowered and can appropriately influence policy affecting its environment, zoning has the effect of fostering both the implicit strengthening of the bonds of community and explicit community organizing.”); see also Arnold Fleischmann & Carol A. Pierannunzi, *Citizens, Development Interests, and Local Land-Use Regulation*, 52 J. POL. 838, 842-43 (1990) (“The planning commission’s public hearing provides a basis for both tempering public protest and allowing participants to discover each other’s strategies. The hearing is designed to encourage citizen participation” (citing ROBERT H. NELSON, *ZONING AND PROPERTY RIGHTS: AN ANALYSIS OF THE AMERICAN SYSTEM OF LAND-USE REGULATION* (1977); CLIFFORD L. WEAVER & RICHARD F. BABCOCK, *CITY ZONING: THE ONCE AND FUTURE FRONTIER* (1979)). It should be noted that community participation in zoning processes also involves organizational costs and faces free-rider problems. However, one can comfortably hypothesize that these problems are not as severe in the zoning context as they would be in the nuisance context. Appearing at a zoning hearing is much cheaper than bringing a nuisance suit. Formation of a neighborhood association is more cost-effective than organizing a group of nuisance plaintiffs because the former is organized to deal with repeated issues.

57. Steele, *supra* note 53, at 714 (arguing some neighborhood residents “are satisfied with the status quo” and value “conservation” of their communities).

58. By giving weak groups the opportunity to shape decisions within one area of the city, zoning forces stronger groups to engage on more equal terms, while at the same time helping weak groups

B. Purposes of Zoning Public Property

The context of public property zoning is different from the municipal context in some important ways. First, municipal zoning addresses conflicts among parties over use of private land. Public property zoning addresses conflicts among parties over use of resources on (and under) public property.⁵⁹ Generally speaking, private parties do not make full and exclusive use claims over particular parcels of public property. Because both the area and the resources within it are publicly owned, only the privilege to use space or resources is at issue.⁶⁰ Second, in the municipal setting, the pre-zoning conflict resolution mechanism is nuisance law.⁶¹ In the public property setting, the background mechanism is administrative process.⁶² Within un-zoned areas of public property, also known as multiple-use areas,⁶³ conflicts are resolved through agency processes that

grow stronger. This process accelerates as weak groups develop necessary leadership and use institutions they control to promote their views to the broader public. The existence of a larger number of equally powerful groups generates the potential for healthier public debate. Heather K. Gerken, *Second-Order Diversity*, 118 HARV. L. REV. 1099, 1126-27, 1145-46, 1161-62 (2005).

59. Resources associated with public property include both obvious commodities such as minerals, oil and gas, timber, and fish, less obvious commodities such as wind, scenery, and experiencing nature, and non-use “commodities” such as wildlife habitat. See generally COGGINS ET AL., FEDERAL PUBLIC LAND AND RESOURCE LAW (6th ed. 2007); JOSEPH J. KALO ET AL., COASTAL AND OCEAN LAW (3d ed. 2006). For other discussions of the potentially beneficial effects of zoning public property, see ONE THIRD OF THE NATION’S LAND, PUBLIC LAND LAW REVIEW COMMISSION 48-52 (1970); Christopher Curtis, *Managing Federal Lands: Replacing the Multiple Use System*, 82 YALE L. REV. 787 (1973); Steven Edwards, *Ocean Zoning, First Possession, and Coasean Contracts*, 32 MARINE POL’Y 46 (2008).

60. Federal or state governments control access to natural resources found in or on public land or ocean space in a variety of ways. Governments own timber and hard minerals in the ordinary sense of the word, because they are attached to the governments’ real property. Although they do not own wildlife, governments can control access to wildlife located on public land through the doctrine of *ratione soli*, by regulating takings pursuant to their role as trustee of wildlife resources, and in the case of the federal government, under the Property Clause of the Constitution. U.S. CONST. art. IV, § 3. In the sea, governments have trustee power, again pursuant to their role as trustees of wildlife, but also under the Public Trust Doctrine. This latter power would also allow limits on access to wildlife in navigable freshwater bodies. As for other fugitive resources, such as oil and gas, governments can fully control rights to drill on public lands or in public seas. Governments grant usufructuary rights in a variety of ways, most commonly by permit and by lease. See, e.g., GEORGE CAMERON COGGINS ET AL., FEDERAL PUBLIC LAND AND RESOURCES LAW 618-57, 767-95 (6th ed. 2007).

61. While there were other formal and informal means of resolving land use disputes in the pre-zoning environment, the law of nuisance set the ground rules for relations between property owners. SINGER, *supra* note 38. It should be noted that there were also statutory rules limiting land use such as building codes. Cappel, *supra* note 36, at 617.

62. Prior to the passage of the Classification and Multiple Use Act of 1964, there were some federal lands that were not subject to any comprehensive, statutory management. 43 U.S.C. §§ 1411-18 (1970) (instructing the Bureau of Land Management to inventory its lands and classify them).

63. The line between uniform-use and multiple-use public property is difficult to draw. First, Congresses and Presidents have designated that many areas somewhere in between “can only be

used in one way” and “can be used in any way imaginable.” Secondly, “one way” does not always mean one way. For example, the national parks are zoned for recreational use. However, recreational use includes both motorized and non-motorized uses, which frequently conflict. See generally JOSEPH L. SAX, *MOUNTAINS WITHOUT HANDRAILS: REFLECTIONS ON THE NATIONAL PARKS* (University of Michigan Press 1980).

More than ninety-nine percent of the 2.1 billion acres of state and federal public seas are managed for multiple-use. Unlike federal lands, management is sector specific. In other words, in any given part of the Exclusive Economic Zone (“EEZ”), the Minerals Management Service of the Department of Interior regulates mineral use, and the National Marine Fisheries Service regulates the use of living marine resources. However, both of these agencies operate under multiple-use mandates, balancing incompatible activities such as resource extraction and the conservation of wildlife habitat. See U.S. Dep’t of the Interior, www.doi.gov (last visited Oct. 14, 2007); see also NOAA Fisheries Serv., www.nmfs.noaa.gov (last visited Oct. 14, 2007).

A rough estimate regarding the approximately 700 million acres of federal lands is that about 413 million acres are managed under multiple-use mandates and about 287 million acres have been zoned as uniform-use. Here is how I arrived at that estimate: federal lands are managed by two Cabinet-level agencies, the Department of the Interior and the Department of Agriculture. Interior’s Bureau of Land Management manages the bulk of Federal lands—about 258 million acres—under a multiple-use mandate set out in the Federal Land Policy and Management Act (FLPMA). Bureau of Land Management, Land Resources and Information, http://www.blm.gov/style/medialib/blm/wo/Business_and_Fiscal_Resources/2006_pls.Par.211111.File.tmp/Part_1A.pdf (last visited Oct. 14, 2007). Most of these generic “public lands” are located in eleven western states; nearly half are in Alaska and Nevada (83 million acres in Alaska and 47 million acres in Nevada). *Id.* Two sub-agencies, the National Park Service (see www.nps.gov) and the U.S. Fish and Wildlife Service (see www.fws.gov) are responsible for most other Interior lands. Pursuant to the National Wildlife Refuge Improvement Act of 1997, Pub. L. No. 105-57, 111 Stat. 1252 (1997), the Fish and Wildlife Service manages 96 million acres of National Wildlife Refuges in forty-two states (77 million acres in Alaska). U.S. Fish & Wildlife Serv., *Alphabetical Refuge List*, <http://www.fws.gov/refuges/profiles/byletterALL.cfm> (last visited Oct. 14, 2007). Under the terms of area-specific legislation or Executive Order and the National Park Service Organic Act, the Park Service manages 84 million acres of national parks, preserves, monuments, battlefields, and historic sites (51 million acres of all national park units are located in Alaska). Nat’l Park Serv., *Frequently Asked Questions*, <http://www.nps.gov/faqs.htm> (last visited Oct. 14, 2007). Pursuant to the terms of multiple-use National Forest Management Act (NFMA), the Department of Agriculture manages 192 million acres of National Forests and National Grasslands in forty-two states; about thirteen percent of National Forest land is located in Alaska. DEPARTMENT OF AGRICULTURE, *REPORT OF THE FOREST SERVICE FY 2002 4* (2003).

Wilderness areas, created occasionally by Congress pursuant to the Wilderness Act of 1964, are an “overlay” designation. In other words, Congress overlays Wilderness Act protections over federal lands such as national forests, national parks, national wildlife refuges, or Bureau of Land Management lands. Management of Wilderness areas falls to those agencies who manage the underlying federal land. Since the Wilderness Act was enacted in 1964, Congress has designated about 107 million acres of previously withdrawn land as wilderness, more than 57 million of that in Alaska. Wilderness.net, *Fast Facts About America’s Wilderness*, <http://www.wilderness.net> (last visited Oct. 14, 2007). About fifteen percent of all public land, and 4.7 percent of all land in the United States, is designated as wilderness. *Id.* In the lower forty-nine states, these numbers are 10 percent and 2.5 percent respectively; in Alaska, about 40 percent of public lands are wilderness. *Id.* Overall, the National Park Service manages the most wilderness—about forty-one percent; the Bureau of Land Management manages the least—only about seven percent of the total. *Id.* The estimate above is based on the assumption that Forest Service and BLM lands (with the exception of

end in a decision giving one (or more) parties the “right” to use resources in a particular place in a particular way.⁶⁴

Even given these differences, the purposes of public property zoning are very similar to those of municipal zoning. Just as one party’s land use may affect another party’s ability to use and enjoy her land, one party’s resource use on public lands may affect another party’s ability to use that resource.⁶⁵ For example, timber harvest on an area of public lands can prevent other members of the public from using the trees (and other resources impacted by harvesting trees) differently. A person who wished to hike in the area would not have the same primitive experience as he would have had the trees not been cut. A hunter who wished to chase woodland game would likewise be unable to use the previously intact forest. In a pre-zoning environment, administrative process would provide a potential avenue for relief. The hunter and the hiker could lobby the land management agency in the hope that timber sales would not be offered in the area they wished to use in the manner they preferred.⁶⁶ Zoning the public land in question, by designating this area *a priori* and exclusively for hiking, hunting, or timber harvest, would preempt the potential administrative conflict, preventing costly disputes.

Like municipal zoning, public property zoning can also provide certainty to those who are deciding whether or not to invest in future resource uses.⁶⁷ Although investment decisions do not concern purchases of land, they can still be significant.⁶⁸ For example, ranchers may purchase private property adjacent to public lands hoping that they will be able to obtain a permit to graze their livestock on those areas. If the lands are under broad, multiple-use agency management, the rancher’s permit will be

wilderness areas) can be classified as multiple-use, and that Park Service and Fish and Wildlife Service lands can be considered uniform-use.

64. Under the FLPMA (Pub. L. No. 94-579, 9 Stat. 2743 (1976)) and the NFMA (16 U.S.C. §§ 1600-14 (1976)) with respect to public lands, and under the MSFCMA (Pub. L. No. 94-265, 90 Stat. 331 (1996)) with respect to public seas, these decisions are made through both long-range planning processes and individual permitting or leasing decisions in furtherance of those plans. *See, e.g.*, 43 U.S.C. § 1712(a), (e); 16 U.S.C. § 1604; 16 U.S.C. § 1853(a)(1), (c).

65. *See* Lloyd C. Irland, *Citizen Participation—A Tool for Conflict Management on the Public Lands*, 35 PUB. ADMIN. REV. 263, 264 (1975).

66. *See* Curtis, *supra* note 59, at 793-95; Sandra K. Davis, *Fighting Over Public Lands: Interest Groups, States and the Federal Government*, in WESTERN PUBLIC LANDS AND ENVIRONMENTAL POLITICS 11, 17-20 (Charles E. Davis ed., 1997).

67. PUBLIC LAND LAW REVIEW COMMISSION, *supra* note 59, at 51.

68. *See* Julie Anderson, Public Lands Council v. Babbitt: *Herding Ranchers Off Public Land*, 2000 B.Y.U. L. REV. 1273, 1273-74 (2000) (stating that “ranchers, lenders, and entire rural communities” depend on federal rangeland); Josh Eagle, *A Window into the Regulated Commons: The Takings Clause, Investment Security, and Sustainability*, 34 ECOLOGY L.Q. 619, 631-33 (2007) (detailing the amount of money one fishing company invested in expectation of a federal fishing permit), available at <http://ssrn.com/abstract=999916>; Don Seastone, *Implications of the Regional Dependency Effect of Federal Land Ownership*, 47 LAND ECON. 394, 394-95 (1970).

contingent on the vagaries of the administrative decision-making process.⁶⁹ On the other hand, if the public lands in question were zoned for grazing, then the investment decision becomes much simpler.

Finally, perhaps even more than it does in the municipal context, public property zoning also has the potential to achieve the normative goal of addressing pre-zoning inequities.⁷⁰ In particular, zoning certain areas for non-use or conservation guarantees an outcome in those areas that is not likely under administrative resource allocation. To the extent that the legislature seeks to ensure some degree of conservation on the public lands, zoning provides a means of guaranteeing that this will occur. History provides substantial evidence that zoning has been used in this way. While nearly one-sixth of all public lands have been zoned as “wilderness” via Congressional designations under the Wilderness Act of 1964,⁷¹ Congress has zoned very little of the public lands to benefit commercial interests such as timber, mining, grazing, or oil and gas development.⁷² Zoning public land for conservation is a way for legislators to provide for interest groups that do not have the financial resources to compete with more powerful, “concentrated” groups in administrative allocation contests.⁷³

69. For an exploration of the boundaries of these vagaries, see Anderson, *supra* note 68.

70. As an example of these inequities, consider that the Bureau of Land Management has leased, or offers for leasing, over 200 million acres of western public lands to private firms for oil and gas production. These 200 million acres represent a significant percentage of all BLM lands and a significant percentage of all federal public lands in the United States. See DUSTY HORWITT ET AL., ENVIRONMENTAL WORKING GROUP, WHO OWNS THE WEST? OIL & GAS LEASES IN AMERICA'S WEST (2004), available at http://www.ewg.org/oil_and_gas/execsumm.php (last visited Oct. 10, 2007); Curtis, *supra* note 59, at 802-05.

71. 16 U.S.C. §§ 1131-36 (2000 & Supp. 2005).

72. See Josh Eagle, *Regional Ocean Governance: The Perils of Multiple-Use and the Promise of Agency Diversity*, 16 DUKE ENVTL. L. & POL'Y F. 143, 168 (2006). (“While Congress has designated nearly twenty percent of all public lands as uniform-use wilderness, available only to non-motorized recreation use, it has designated almost none as uniform-use ‘resource extraction areas.’”) One example of such “resource-extraction area” designation is “[t]he nations’ only National Petroleum Reserve, located on the North Slope of Alaska, [] a 23 million acre tract of land originally set aside as Naval Petroleum Reserve, Number 4, by President Warren Harding in 1923. Exec. Order No. 3797-A (Feb. 27, 1923). Congress later enacted the reserve into law. 42 U.S.C. § 6502 (2000).” *Id.* at 168 n.132.

73. Extractive industries, such as the oil and gas industry, spend significant amounts of money in the effort to influence both Congress and agencies. The oil and gas industry has contributed more than \$200 million to congressional and senate campaigns over the past nine election cycles. See Opensecrets.org, Industry Total: Oil & Gas, <http://www.opensecrets.org/industries/indus.asp?Ind=E01> (last visited Oct. 10, 2007). No comparable figures are available for administrative lobbying. However, one would assume that these industries spend orders of magnitude more than environmental groups. Financial resources give concentrated groups an advantage in administrative processes. See, e.g., JOHN E. CHUBB, INTEREST GROUPS AND THE BUREAUCRACY 264 (1983) (“Notwithstanding the many changes in the structure and political environment of the bureaucracy,

As I have argued elsewhere, based on theories advanced by Heather Gerken and others, guaranteeing wins for groups that would likely lose in the administrative, multiple-use process might provide benefits that extend beyond the groups and areas that Congress has actually protected.⁷⁴ Victories have an inspiring effect on the conservation cause, an effect that translates to interest-group strengthening where groups can use these success stories to attract more members and more funding.⁷⁵ Interest groups can use these funds not only to lobby Congress for more protected areas, but can also devote them to lobbying for more conservation in administrative processes.⁷⁶ Thus, the establishment of protected areas can have conservation benefits for all areas of public lands, including areas that have not yet been zoned.⁷⁷

C. Mechanisms of Zoning

In order to achieve these four goals—preemption of user conflict, minimization of externalities, prospective certainty, and group strengthening—municipal and public property zoning incorporate two critical mechanisms. First, zoning's success is predicated on the utilization of uniform-use zones.⁷⁸ Second, zoning cannot function without zones and zone rules existing in a stable form for a meaningful period of time.⁷⁹ In the foregoing discussion of zoning's purposes, it may have become obvious that those purposes could only be achieved through the use of these two mechanisms. A more complete explanation of the connection between means and ends is critical to understanding the ultimate argument: agencies are not well-suited to crafting the fundamental tools of zoning.

the energy agencies cooperated most with interest groups that had the expert personnel and the financial resources to contribute to these slow and technical policymaking processes.”); Scott R. Furlong, *Political Influence on the Bureaucracy: The Bureaucracy Speaks*, 8 J. PUB. ADMIN. RES. & THEORY 39 (1998); Scott R. Furlong, *Interest Group Influence on Rule Making*, 29 ADMIN. & SOC'Y 213 (1997); MICHAEL D. REAGAN, *REGULATION: THE POLITICS OF POLICY* (1987); BARRY M. MITNICK, *THE POLITICAL ECONOMY OF REGULATION* (1980).

74. See Eagle, *supra* note 72, at 172-74.

75. See *id.* at 171-72.

76. See *id.* at 172.

77. See *id.* at 175-76. In addition, the presence of a conservation area could improve conservation on nearby multiple-use areas, if the agency managing the conservation area lobbies or negotiates with the agency or agencies managing those multiple-use lands. See J.R. DeShazo & Jody Freeman, *Public Agencies as Lobbyists*, 105 COLUM. L. REV. 2217, 2303 (2005) (showing “how FERC, an agency that had historically ignored a suite of environmental mandates, was brought to heel to a significant extent by lateral federal fish and wildlife agencies and state agencies willing to intervene in FERC's licensing process”).

78. See discussion *infra* Part II.C.1.

79. See discussion *infra* Part II.C.2.

1. “Uniformity of Use within the Division”

According to one court, zoning is defined as the “territorial division in keeping with the character of the lands . . . and their peculiar suitability for particular uses, and the uniformity of use within the division.”⁸⁰ In other words, zoning simply would not be zoning unless it divided an area into uniform-use zones.⁸¹ A more helpful explanation would connect zoning mechanisms with the effects that zoning is intended to achieve. In other words, how are uniform-use zones necessary to achieving the positive (efficiency) and normative (political) goals stated above?

First, the idea of uniform-use zones is inseparable from the idea that benefits arise from the act of physically separating discordant uses.⁸² A pollution-emitting factory would have less impact on property owners whose property is further away than it would on its close-by neighbors.⁸³ A uniform zone increases the distance between potential plaintiffs and defendants, by surrounding both with a buffer of “no possible impact,” the distance from the plaintiff’s property to the edge of the zone plus the distance from the defendant’s property to the edge of the zone. Like any system for use conflict resolution, this one is not perfect. In the absence of some further form of buffer between zones, conflicts would still arise

80. YOKLEY, *supra* note 4, § 2-1 (citing *Katobimar Realty Co. v. Webster*, 118 A.2d 824, 829 (1955)).

81. The division of a larger jurisdiction into a set of smaller areas in which uses are restricted is assumed by courts and commentators to be integral to the definition and concept of zoning. *See, e.g., Mansfield & Swett, Inc. v. Town of West Orange*, 198 A. 225, 228 (N.J. 1938) (“Zoning is a separation of the municipality into districts and the regulation of buildings and structures in the districts so created, in accordance with . . . the nature and extent of their use It is the dedication of the districts delimited to particular uses designed to subserve the general welfare.”); *Family Golf of Nashville, Inc. v. Metropolitan Gov’t of Nashville & Davidson County*, 964 S.W.2d 254, 258 (Tenn. Ct. App. 1997) (“Zoning . . . involves the territorial division of land into districts according to the character of the land and buildings, their suitability for particular uses, and the uniformity of these uses.”); YOKLEY, *supra* note 4, at 1-2 to 1-4, 2-1 to 2-6; 1 KENNETH H. YOUNG, ANDERSON’S AMERICAN LAW OF ZONING § 1.13, at 19 (4th ed. 1996).

Historically, zones were not always uniform in nature. “Zoning ordinances were originally cumulative. They permitted ‘higher’ less intensive uses in the ‘lower’ zones that permitted more intensive uses. Most modern zoning ordinances are not cumulative. Each zoning district is exclusive and allows only the uses permitted in that zone.” MANDELKER, *supra* note 2, § 1.04.

82. *See* MANDELKER, *supra* note 2, § 1.04 (discussing the original need for zoning by noting that “[I]and use nuisance cases usually arose when a commercial or industrial use planned to locate in a residential neighborhood, where it would be detrimental to residential land uses. Courts recognized the importance of established residential areas by prohibiting the location of these invading uses in residential neighborhoods.”)

83. Unless, perhaps, if the pollution in question were toxic at any level of exposure.

between landowners whose land was located at the fringes of zones.⁸⁴ Similarly, if the defendant's use has long-range effects, such as high-level air pollution, activities carried out in the center of a zone and consistent with zone rules still could have effects on landowners in other zones.⁸⁵ However, the uniform zone will arguably result in fewer unresolved conflicts and, thus, less inefficiency than occurred in the pre-zoning environment.

Uniform zones are also critical to achieving the collateral benefits of investor certainty.⁸⁶ Zoning creates certainty through the use of rules that presumptively allow defined use or uses to occur within the bounds of each type of zone. Zone administrators have little or no discretion to prevent a rule-permitted use from going forward; it is at least presumptively allowed.⁸⁷ This type of certainty does not exist in non-uniform "zones." In non-uniform or multiple-use areas, all activities might be permitted or disallowed, depending upon their effect on other activities.⁸⁸ Indeed, the notion of certainty conflicts with the central

84. Plaintiffs could, despite the presence of zoning laws, try to use nuisance law to correct this problem. Zoning neither eliminates the nuisance cause of action, nor does it insulate defendants from suit. See Goetz & Wofford, *supra* note 37.

85. For example, emissions from Los Angeles can travel as far as the Grand Canyon. S.V. Hering et al., *Characterization of the Regional Haze in the Southwestern United States*, 15 *ATMOS. ENV.* 1999 (1981).

86. See POSNER, *supra* note 31, at 66.

87. "[Z]oning ordinances, being in derogation of common law, and operating to deprive an owner of property of a use that would otherwise be lawful, are to be strictly construed in favor of the property owner." YOKLEY, *supra* note 4, at 1-6.

88. For example, one of the early Federal multiple-use statutes, the Multiple-Use Sustained-Yield Act of 1960, defined multiple-use as:

The management of all the various renewable surface resources of the national forests so that they are utilized in the combination that will best meet the needs of the American people; making the most judicious use of the land for some or all of these resources or related services over areas large enough to provide sufficient latitude for periodic adjustments in use to conform to changing needs and conditions; that some land will be used for less than all of the resources; and harmonious and coordinated management of the various resources, each with the other, without impairment of the productivity of the land, with consideration being given to the relative values of the various resources, and not necessarily the combination of uses that will give the greatest dollar return or the greatest unit output.

16 U.S.C. § 531 (2006).

As Martin describes the multiple-use decision-making process under the Act:

Application of the multiple-use formula thus means that the effect of a decision on all forest resources and the people's utilization of them must be considered. Hence, the consequences of all recognized alternatives for functional decisions are carefully evaluated initially to reduce and eventually to resolve conflict in most cases. Whenever a timber cutting is proposed in a national forest, for example, the effect on recreation, scenic values, soil erosion, water management, and wildlife management must be ascertained; and the decision to cut in a certain area must balance all considerations so as to maximize benefits and uses.

Philip L. Martin, *Conflict Resolution through the Multiple-Use Concept in Forest Service Decision-Making*, 9 *NAT. RESOURCES J.* 228, 230 (1969).

purposes of multiple-use management: flexibility and the preservation of options.⁸⁹

Finally, uniformity is also necessary to achieving the normative weak-group benefits described by Steele and Gerken and discussed above.⁹⁰ The creation of a uniform zone that benefits a particular interest group can, insofar as it represents a victory, serve as something around which members of the group can rally. In allocating an area wholly to one particular use (and group), the zoning body is making a statement that the group's values are important and worth protecting.⁹¹ In creating "Yellowstone National Park," for example, Congress made a strong statement about the importance of preserving the unique wildlife and scenery of that place, and about the importance of recreation to the well-being of Americans.⁹² Congress' action promoted conservation, encouraged preservation groups, and served as the beginning of a new era in public land management.⁹³ These effects would not have been felt had Congress instead created something called "the Yellowstone National Multiple-Use Area."

It is worth pointing out that while uniformity is crucial to all of these results, structuring zone rules as presumptions rather than absolutes would likely enhance both the efficiency and group strengthening functions of zoning. First, provisions such as variances can lead to greater efficiency by allowing socially desirable, but inconsistent, uses to occur within the otherwise uniform zone.⁹⁴ For example, the character of a zone, particularly

89. The idea is that multiple-use management can take into account the fact that resource values change over time. Managers can give preference to the highest-valued use of a place during any given planning period.

90. Steele, *supra* note 53; Gerken, *supra* note 58; Eagle, *supra* note 72, at 152-53.

91. See, e.g., Peek-A-Boo Lounge of Bradenton, Inc. v. Manatee County, 337 F.3d 1251, 1257 (11th Cir. 2003) ("Without stable neighborhoods . . . large sections of a modern city quickly can deteriorate into an urban jungle with tragic consequences to social, environmental, and economic values.").

92. See ALFRED RUNTE, NATIONAL PARKS: THE AMERICAN EXPERIENCE 33-47 (3d ed. 1987).

93. Eagle, *supra* note 72, at 171-72. As for the long-term impact of the creation of Yellowstone, Levitt points out that it was the first national park created anywhere in the world, and that today: the International Union for the Conservation of Nature indicates that there are on the globe . . . some four billion square kilometers of land designated as national parks (as distinguished, for example, from national forests and other types of protected lands). That represents a land mass larger than the one covered by all of the fifteen current member nations of the European Union, including Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden, and the United Kingdom.

James N. Levitt, *Networks and Nature in the American Experience*, FOREST HIST. TODAY 8 (Fall 2002) (citation omitted).

94. A variance is defined as "[a]n administrative or quasi-judicial act permitting minor deviations

along its boundaries, can change over time. When the residential neighborhood was formed, it may not have been efficient to allow a gas station within the neighborhood. The negative costs of congestion and fumes may at that time have outweighed the cost savings to residents that would arise from a shorter drive to fill up. It could be that, since then, the number of residents has increased, the character of nearby areas has changed, or the technological control of gas station emissions has improved. All of these changes might mean that it is now inefficient to prevent the inconsistent use. The presence of a variance provision within the uniform-use rule would allow this inefficiency to be eliminated.⁹⁵

Just as important, the inclusion of a variance provision may help enhance the collateral benefits of group strengthening and community building.⁹⁶ As some have noted, uniform zones represent a form of collective “property rights,” whereby subsets of citizens are politically empowered to make decisions about the future of their neighborhoods.⁹⁷ Hearings on variance applications provide an opportunity for neighborhood

from land use regulations and avoiding undue hardship for the property owner without violating the overall scheme of land use regulation.” YOKLEY, *supra* note 4, § 20-1-2. There are two kinds of variance—the use variance and the nonuse variance:

As the name indicates, a use variance is one which permits a use other than one of those prescribed by the zoning ordinance in the particular district; it permits a use which the ordinance prohibits. A nonuse variance authorizes deviations from restrictions which relate to a permitted use, rather than limitations on the use itself, that is, restrictions on the bulk of buildings, or relating to their height, size, extent of lot coverage, or minimum habitable area therein, or on the placement of buildings and structures on the lot with respect to required yards.

A. RATHKOPF, 3 THE LAW OF ZONING AND PLANNING § 38.01 (1979).

Use variances, where permitted by law, can be seen as a way of making zoning more efficient. Some jurisdictions do not permit the issuance of a use variance on the ground that it represents an unconstitutional delegation of legislative zoning power. *See, e.g., Matthew v. Smith*, 707 S.W.2d 411 (Mo. 1986)). The idea behind this is that zone boundaries are not always perfectly matched with the character of the zoning district. To the extent a zone has inadvertently captured land that is better suited for another purpose, or to the extent that circumstances change, variance provisions can allow zoning administrators to permit that other use. As the New Hampshire Supreme Court has explained, variances ought to be granted when:

(1) a zoning restriction as applied to [one property] interferes with their reasonable use of the property, considering the unique setting of the property in its environment; (2) no fair and substantial relationship exists between the general purposes of the zoning ordinance and the specific restriction on the property; and (3) the variance would not injure the public or private rights of others.

Simplex Technologies, Inc. v. Town of Newington, 766 A.2d 713, 717 (N.H. 2001). These factors are premised on the idea that continuing to prevent the proposed inconsistent use is not justified by the nuisance-prevention, efficiency-oriented purposes of zoning. It should be noted that many jurisdictions permit variances for inconsistent uses.

95. Of course, it may also have been that the proposed inconsistent use would always have been efficient, but that the land in question was mistakenly included within the residential zone boundary.

96. Steele, *supra* note 53, at 717-32.

97. FISCHER, *supra* note 46, at 21, 36-37. These are not true property rights because, as noted by Fischel, “no law allows the community to sell this property right in the way one might sell his house.” *Id.* at 36.

residents to exercise “the power of the presumption,” at the same time interacting with other neighbors and developing a shared vision for their communities.⁹⁸

2. Durability

In order for zoning to produce the benefits it promises, users must perceive zones and zone rules as fairly durable over time.⁹⁹ Stability, or at least perceived stability, is critical to the production of several key benefits of zoning.¹⁰⁰ Most obviously, the benefit of certainty, which allows users to make rational investment decisions regarding the purchase of land and equipment, would decrease in direct proportion to the perceived instability of zone rules.¹⁰¹

Durability is also an essential element in the political transition from an un-zoned to zoned environment.¹⁰² Inherent in the division of lands into uniform-use zones is the fact that some or all interest groups will end up losing the ability to pursue their preferred activities in some part of the jurisdiction. Whereas, prior to zoning, all land in the jurisdiction might have been available for high-density development, this will not be true once the zoning plan has been put into place. To those who “lose” something in the transition, zoning offers something in return: a guarantee that in some parts of the jurisdiction, the restricted activity will be presumptively allowed to occur.¹⁰³

98. See *id.* Steele documents significant participation in variance hearings in Evanston, Illinois. Steele, *supra* note 53, at 721. More interestingly, he shows that most of the outcomes, where more than one-third of variance proceedings were conditionally or partially granted, “indicate[] that a compromise had been negotiated between the applicant and the community.” *Id.* at 724.

99. See *supra* note 46.

100. See *supra* note 46.

101. See *supra* note 46.

102. See Kevin Stokes, *New Zealand Seafood Industry Proposes Huge Classes—Cynicism or Pragmatism?*, MPA NEWS, Apr. 2006, available at <http://depts.washington.edu/mpanews/MPA73.htm> (noting New Zealand fisherman gave up some rights in exchange for having greater certainty).

103. In 2006, the New Zealand Seafood Industry Council proposed the creation of a large number of limited-fishing areas within that country’s waters. Press Release, NZ Seafood Industry Council, *Massive Closures to Protect Bio-diversity Proposal by NZ Seafood Industry* (Feb. 14, 2006) available at <http://www.seafood.co.nz/n375,44.html>. In explaining why the industry would do this, Stokes suggests that the industry’s desire for certainty played a role:

The industry proposal would give up a significant part of the development right inherent in its quota. Potentially, this is a huge amount and the decision to give it up was not taken lightly. What the industry will gain in return, if the proposals are carried through, is certainty. Deepwater fishing and international market development require a large

Of course, like all laws, zoning rules will never be completely stable.¹⁰⁴ Barring some form of constitutional zoning, legislatures will always have the option of altering zone boundaries and zone rules. It is perhaps better, then, to argue that what is important to zoning's success is not immutability, but instead the construction of the zoning framework in a way that makes it relatively difficult to alter, at least from the perspective of user groups.¹⁰⁵

III. HYPOTHESES REGARDING AGENCIES

Over the years, various scholars have argued that Congress should not delegate certain responsibilities to administrative agencies.¹⁰⁶ These arguments fall into three categories. The first kind of argument—the legal argument—is that “excessive” delegation is unconstitutional because Article I, Section I of the Constitution contains an exclusive grant of legislative authority to Congress, and Congress may not delegate this legislative power to agencies in the Executive Branch.¹⁰⁷ The second type of nondelegation

amount of capital investment. By squarely facing the near-certainty that MPAs would have been put in place anyway, with or without industry consent, the deepwater quota owners are trying to create a clearer picture of the future. The industry is also intending to avoid a significant amount of money and effort being spent arguing about protection areas and closures. Costs of this type are crippling for business. In a nutshell, in giving up huge potential, the industry is trying to secure a more certain future and to reduce large upfront costs.

Stokes, *supra* note 102, at 7.

Similarly, in 2001, several large timber companies agreed to forego the opportunity to log large areas within British Columbia's Great Bear Rainforest in exchange for guaranteed rights to use other areas. R.A. Clapp, *Wilderness Ethics and Political Ecology: Remapping the Great Bear Rainforest*, 23 POL. GEOGRAPHY 839 (2004). Such trade-offs would not be possible if zoning banned one of the uses from the entirety of the jurisdiction. *See id.*

104. *See* Steele, *supra* note 53, at 717-32.

105. *See supra* note 46.

106. *See, e.g.*, JOHN HART ELY, DEMOCRACY AND DISTRUST 132 (1980) (“[Delegation] is wrong . . . because it is undemocratic, in the quite obvious sense that by refusing to legislate, our legislators are escaping the sort of accountability that is crucial to the intelligible functioning of a democratic republic.”); THEODORE J. LOWI, THE END OF LIBERALISM: IDEOLOGY, POLICY, AND THE CRISIS OF PUBLIC AUTHORITY 144 (1969) (“[M]odern law has become a series of instructions to administrators rather than a series of commands to citizens.”); MARTIN H. REDISH, THE CONSTITUTION AS POLITICAL STRUCTURE 154 (1995) (noting that the enforceable nondelegation doctrine ensures that “legislation evinces a sufficient political commitment to enable the voters to judge their representatives”); DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY 3 (1993) (“When the lawmakers we elect have others make the law, the people lose.”). *But see* Dan M. Kahan, *Democracy Schmocracy*, 20 CARDOZO L. REV. 795, 795 (arguing delegation is not anti-democratic); Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J. L. ECON. & ORG. 81 (1985) (claiming delegation does not diminish accountability nor decrease social welfare); Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1723 (2002) (opining that delegation is not a concern; it never actually occurs because “[a] statutory grant of authority to the executive isn't a *transfer* of legislative power, but an *exercise* of legislative power”) (emphasis in original).

107. *See* SCHOENBROD, *supra* note 106, at 155-64; *see also* U.S. CONST. art. I, § 1.

argument—the democratic argument—is based on the fact that while congresspersons are elected, bureaucrats are not. The argument is that certain decisions are too important to be left to unelected officials who are not directly accountable to voters.¹⁰⁸ A third nondelegation argument—the practical argument—is based on the idea that agencies lack the capacity to carry out delegated assignments that Congress could have carried out itself.¹⁰⁹ By failing to fully exercise its powers in writing a given law, Congress is dooming that law to failure.¹¹⁰

In examining the problems with delegated zoning, this article will not focus on the first two arguments, both of which frame the question of whether Congress (or state legislatures) should delegate as one of right or wrong.¹¹¹ Instead, this article will view the problem through the lens of the third argument, which looks at delegation as a policy question: if Congress were to decide that zoning would improve management of public property, would it be wise to delegate zoning responsibilities to an agency?

More specifically: what characteristics of agencies make them likely to avoid the creation of uniform-use zones? What characteristics of agencies make them unwilling or unable to create durable zones? Finally, what characteristics of agencies make it unlikely that they will act to remedy pre-zoning inequities in resource allocation?

At first blush, it might seem that an agency would be well-suited to zoning the ocean.¹¹² If zoning is considered to be an information-intensive, process-heavy activity, then an agency could be better equipped than Congress to lead the way.¹¹³ Agencies carry large scientific staffs and are well-versed in formal public process owing to their experience in complying

108. See ELY, *supra* note 106, at 131 (“The point is not that such ‘faceless bureaucrats’ necessarily do a bad job as our effective legislators. It is rather that they are neither elected nor reelected, and are controlled only spasmodically by officials who are.”).

109. SCHOENBROD, *supra* note 106, at 12 (arguing that delegation “undercuts the government’s capacity to resolve disputes through compromise by allowing the only officials with authoritative power to impose compromises to instead claim to be all things to all interests”).

110. *Id.* at 49-57.

111. For purposes of convenience, I am hereinafter dropping the “(or state legislatures)” parenthetical after “Congress.” The argument I make regarding delegation of zoning applies equally to Congress and state legislatures.

112. This argument has been made implicitly by Congress in passing earlier delegated zoning statutes. It is made explicitly by the Pew Oceans Commission. See PEW OCEANS COMMISSION, *supra* note 13, at 34.

113. SCHOENBROD, *supra* note 106, at 119-21 (exploring the question of agency expertise). For a historical account of the “scientific management” approach to allocating natural resources, see Robert B. Keiter, *Public Lands and Law Reform: Putting Theory, Policy, and Practice in Perspective*, 2005 UTAH L. REV. 1127, 1159-65 (2005).

with statutes such as the Administrative Procedure Act¹¹⁴ and the National Environmental Policy Act.¹¹⁵ But, as Glen Robinson has written, we should avoid “confus[ing] research with choice, information with judgment.”¹¹⁶

While zoning an area does require information about the physical features of the property, prior human use of certain areas, and projected growth,¹¹⁷ it is ultimately a heavily political process.¹¹⁸ In the end, zoning requires very difficult decisions about who will be able to do what, where, and for how long. These decisions have enormous economic implications and may significantly alter longstanding use entitlements.¹¹⁹ In this section, I describe three features of administrative agencies, each of which leads to predictions that agencies are not likely to carry out zoning mandates either quickly or effectively.

114. 5 U.S.C. § 553(b) (2006).

115. 42 U.S.C. §§ 4331-75 (2006).

116. GLEN O. ROBINSON, *AMERICAN BUREAUCRACY: PUBLIC CHOICE AND PUBLIC LAW* 74 (1991); see also William T. Mayton, *The Possibilities of Collective Choice: Arrow's Theorem, Article 1, and the Delegation of Legislative Power to Administrative Agencies*, 1986 DUKE L.J. 948, 962 n.51 (1986) (“The customary justification for committing social policy to experts involves a concept of lawmaking according to clean scientific truths, divined by experts, as would lift it out of the infirm muck of politics. This idea of scientifically determined social policy is, however, flawed. Insofar as basic choices of social policy are concerned, there is usually no objectively determinable scientific truth sufficient to guide and bolster the expert planner. Science might, for example, be able to relate the health of workers to certain types and quantities of carcinogens. But the larger question—which levels of carcinogens best serves the interest of these workers as well as the interest of the rest of society—involves trade-offs with aggregated personal preferences about safety, risk acceptance, wages, productivity, and inflation.”).

117. Like most states, Oregon requires that cities undertake planning exercises prior to drafting zoning ordinances. Under Oregon law, the planning process must result in a comprehensive plan that consists of:

a generalized, coordinated land use map and policy statement of the governing body of a local government that interrelates all functional and natural systems and activities relating to the use of lands, including but not limited to sewer and water systems, transportation systems, educational facilities, recreational facilities, and natural resources and air and water quality management programs. “Comprehensive” means all-inclusive, both in terms of the geographic area covered and functional and natural activities and systems occurring in the area covered by the plan. “General nature” means a summary of policies and proposals in broad categories and does not necessarily indicate specific locations of any area, activity or use. A plan is “coordinated” when the needs of all levels of governments, semipublic and private agencies and the citizens of Oregon have been considered and accommodated as much as possible. “Land” includes water, both surface and subsurface, and the air.

OR. REV. STAT. ANN. § 197.015(6) (West Supp. 2007).

118. FISCHER, *supra* note 46, at 32 (“The establishment of zoning . . . is clearly the function of the local governing body. . . . It is important to emphasize this point, because it clearly puts zoning . . . in the local political arena. Some theories of zoning seem to suppose that it is established by an independent authority whose goal is the efficient use of land Zoning is an eminently political process.”).

119. Reductions in longstanding entitlements (real or perceived) are likely to be highly controversial among users. See Daniel Kahnemann et al., *Experimental Tests of the Endowment Effect and the Coase Theorem*, 98 J. POL. ECON. 1325 (1990).

A. Lack of Political Capacity and Limits on the Usefulness of Expertise

To the extent that successful zoning requires the establishment of uniform-use zones, it will result in losses for some members of society. Areas where all individuals could previously pursue any resource or land use become, after zoning, areas where all individuals can pursue only a limited range of activities. Even where these losses are offset by gains, such as enhanced “rights” to pursue activities in other places, users are likely to fix their attention on the loss side of the equation.¹²⁰ This is particularly true where zoning rules prohibit activities that individuals had previously pursued in that same area.¹²¹

In simple terms, zoning has dramatic impacts on citizens’ lives. In the municipal context, zoning an area as “residential only” might reduce the value of a piece of real property by millions of dollars.¹²² In the public property context, the effects of zoning may not be as easily measured in financial terms, but may be equally significant.¹²³ First, Americans have a reasonable expectation that they will be able to use “their” lands. Incursions on this expectation, although somewhat common, are always controversial.¹²⁴ Zoning, with its spatially defined prohibitions and its indefinite duration, would certainly heighten this controversy.¹²⁵ Second, like municipal zoning, public property zoning can have financial impacts on individuals. A marine reserve in which fishing is prohibited translates, at least in the short-term, into direct reductions in fishing income.¹²⁶ Third, not

120. See Barton H. Thompson, Jr., *Tragically Difficult: The Obstacles to Governing the Commons*, 30 ENVTL. L. 241, 256-58 (2000).

121. Kahnemann et al., *supra* note 119.

122. As noted above, the New York City zoning ordinance of 1916 affected property worth over 8 billion dollars. See *supra* note 31. In *Village of Euclid*, the village’s zoning ordinance reduced the value of the plaintiff’s property by more than \$500,000 in 1922. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 379-84 (1926).

123. Dave Owen, *The Disappointing History of the National Marine Sanctuaries Act*, 11 N.Y.U. ENVTL. L.J. 711, 748-49 (2003) (stating that “[s]etting aside land or water for protection is extremely difficult politically” and noting some historic examples).

124. For an example of the flavor of emotions involved in limiting access to public property, visit the websites of the Property Rights Congress, <http://www.freedom.org/prc/prcmission.html>, the California Off Road Vehicle Association, <http://www.corva.org>, and the United Anglers of Southern California, <http://www.unitedanglers.com/page.php?5>.

125. Zoning maps, in particular, seem to provoke particularly strong responses from user groups. See BROCK BERNSTEIN ET AL., LESSONS LEARNED FROM RECENT MARINE PROTECTED AREA DESIGNATIONS IN THE UNITED STATES 21-22 (2004). Perhaps this is because zone boundaries on a map, unlike most types of regulation, can be visually perceived. See *id.*

126. The new set of marine reserves created off California’s Central Coast will cost commercial fishermen in the area, as a group, between seven and fourteen percent of their annual income.

only does dividing public property into uniform-use zones decrease some individuals' income, it affects a wealth transfer from one set of users to another. While fishermen lose income from the creation of marine reserves, conservationists, divers, and scientists gain.¹²⁷ It is not hard to imagine that group-to-group transfers would be more controversial than simple losses, even where the net effect on the losing group is the same in financial terms.¹²⁸

There are two ways to think about the relationship between accountability and controversy. One view would be that agency bureaucrats would be more likely to make controversial decisions than more accountable, elected government officials. Although agency bureaucrats could be fired or sanctioned, or the budgets of their agencies curtailed, bureaucrats would face no direct and immediate consequences from the public as a result of their decision.¹²⁹ On the other hand, bureaucrats might be less likely to make controversial decisions because they lack the confidence that accompanies a voter mandate.¹³⁰ Bureaucrats might be more interested in remaining "below the radar" and avoiding attention from the legislature or the chief executive.¹³¹

Support for the latter view as the more likely description of bureaucratic incentives comes from a variety of sources. David Schoenbrod argues that "[w]hen agencies are delegated issues too hot for Congress to handle, they often have even less political capacity to make the necessary choices."¹³² In support of this argument, Schoenbrod cites to earlier studies of

JAMES WILEN & JOSHUA ABBOTT, ESTIMATES OF THE MAXIMUM POTENTIAL ECONOMIC IMPACTS OF MARINE RESERVE NETWORKS IN THE CENTRAL CALIFORNIA COAST (2006), available at http://www.dfg.ca.gov/mlpa/pdfs/isor632_att7.pdf.

127. Although there is science that indicates fishermen may eventually benefit from the "spillover" benefits of marine reserves, most fishermen do not yet appear to be convinced. See, e.g., California Fisheries Coalition, <http://www.cafisheriescoalition.org/> (last visited Oct. 16, 2007) ("Respected marine scientists have found that new MPAs, proposed for adoption, provide little additional conservation value. However, certain alternatives have devastating costs to thousands of hard working fishermen, small fish processing businesses, recreational fishing businesses, restaurant workers, and local coastal communities.").

128. It is easy to imagine, for example, that taxpayers might be angrier about their tax dollars going to a government activity they do not like, than they would be about simply paying the taxes in the first place.

129. Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165, 166 (1984) (describing all of the "bad things" that Congress and the President might do to rein in out-of-line bureaucrats).

130. As John Leshy, law professor and former solicitor for the Secretary of the Interior, puts it: "Congress is more directly accountable, and better able to resolve the tension between local and national interests, than unelected officials in the executive branch." John D. Leshy, *Is the Multiple Use/Sustained Yield Management Philosophy Still Applicable Today*, in MULTIPLE USE AND SUSTAINED YIELD: CHANGING PHILOSOPHIES FOR FEDERAL LAND MANAGEMENT? 107, 117 (U.S. G.P.O. ed., 1992).

131. See McCubbins & Schwartz, *supra* note 129, at 167.

132. SCHOENBROD, *supra* note 106, at 101.

administrative behavior, including those of Louis L. Jaffe and William T. Mayton.¹³³

Without objective and scientific measures of the “public interest” to bolster them, without an anchor in the Constitution, and without ratification of their choices by means of the ballot box, agency officials can and will be set upon by individual congressmen or congressional committees, by the White House, by the courts, and by interest groups. Subject to these pressures, agencies twist and turn, and indeterminate and fluctuating policy is often the result.¹³⁴

Recalling that property zoning can be characterized as affecting wealth transfers between interest groups, agencies’ lack of political capacity is likely to be particularly problematic. As Mayton writes, “[i]n weighing . . . primary choices among conflicting personal preferences, ‘technical experts have no special claim to wisdom,’ and they are not ‘institutionally capable of making the basic value choices.’”¹³⁵

B. *Incentives of Agency Officials*

As many have noted, agency officials have their own incentives.¹³⁶ Agencies do not simply function as implementation machines, accepting legislative mandates and applying them as best they can in the political cauldron of pressure from Congress, the President, and various interest groups.¹³⁷ Rather, agency officials have incentives unrelated to the

133. Louis L. Jaffe, *The Illusion of the Ideal Administration*, 86 HARV. L. REV. 1183, 1190 (1973) (stating that “[a]n agency . . . may have very little political leverage and be incapable of resolving power conflicts”).

134. Mayton, *supra* note 116, at 962 (citation omitted).

135. *Id.* at 962 n.59 (citation omitted) (quoting S. BREYER & R. STEWART, ADMINISTRATIVE LAW AND REGULATORY POLICY 128 (1985) (“[T]echnical experts have no special claim to wisdom”)); *see also* Regulatory Reform Act, S. REP. NO. 97-284, at 59 (1981) (noting that technical experts are not “institutionally capable of making the basic value choices”).

136. *See, e.g.*, GORDON TULLOCK, THE POLITICS OF BUREAUCRACY 29-30 (1965); Terry M. Moe, *The New Economics of Organization*, 28 AM. J. POL. SCI. 739, 764 (1984); William A. Niskanen, *Nonmarket Decision Making: The Peculiar Economics of Bureaucracy*, 58 AM. ECON. REV. 293, 293-94 (1968).

137. This is the approach taken in earlier studies. *See, e.g.*, MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS (1971); MARVER BERSTEIN, REGULATING BUSINESS BY INDEPENDENT COMMISSION (1955). For a concise history of the development of bureaucratic studies, *see* Kenneth J. Meier & George A. Krause, *The Scientific Study of the Bureaucracy: An Overview*, in POLITICS, POLICY, AND ORGANIZATIONS 1 (Kenneth J. Meier & George A. Krause eds., 2003).

substance of the issues they have been charged to resolve. According to the literature, officials are motivated to maximize their personal utility functions, which would include variables such as “salary, perquisites of the office, public reputation, power, patronage, ease of managing the bureau, and ease of making changes.”¹³⁸ Attainment of these objectives is not shaped in the same way it would be in a private organization. Instead, it is dictated by the political setting of the agency, its “contextual goals,” and its “political constraints.”¹³⁹ Although the following observations concern individual incentives, it is reasonable to assume that these incentives will affect the final decisions of agencies as institutions.¹⁴⁰

1. Conservation of Discretion

Officials may have a strong incentive to conserve their “discretionary space,” or the number of decision-making opportunities available to them.¹⁴¹ Discretion not only gives officials a form of power distinct from the simple power to execute the orders of a principal.¹⁴² It can also provide a justification for more staffing and a higher budget¹⁴³ and can increase officials’ standing with respect to their superiors, their peers, outside groups, and their subordinates.¹⁴⁴ Officials have available to them several means of conserving discretion, including opposing changes that would narrow statutory mandates delegating authority,¹⁴⁵ postponing decisions that would

138. Niskanen, *supra* note 136, at 293-94.

139. JAMES Q. WILSON, *BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT* 113-36 (1989).

140. This assumption is supported by literature on managers’ incentives in large corporations. *See, e.g.,* R. Joseph Monsen, Jr. & Anthony Downs, *A Theory of Large Managerial Firms*, 73 *J. POL. ECON.* 221 (1965). The incentives of individual officials would matter under two scenarios. In the first, an agency decision is the composite of many individual officials’ decisions, and the joint decision-making process is not characterized by some form of emergent incentive, disjunctive with those of the various officials. *See id.* at 234-35. In the second, the final agency decision is made by its top official, who—as an individual—possesses individual incentives. *See id.* at 231-34.

141. Jerry Mashaw coined the phrase, “the law of conservation of administrative discretion,” in his paper to explain the futility of Congress’ attempt to limit agency discretion. Mashaw, *supra* note 106, at 97. Mashaw’s argument is that “[e]limination of discretion at one choice point merely causes the discretion that had been exercised there to migrate elsewhere in the system.” *Id.*

142. WILSON, *supra* note 139, at 205 (“The short tenure and small rewards of much public service mean that for many political executives the chance to influence policy is a major incentive for taking a government job.”).

143. The assumption here is that processing complex decisions requires more resources than executing specific, obligatory actions. According to Niskanen, officials would prefer the former simply because it satisfies the official’s desire for more resources. Niskanen, *supra* note 136, at 293-94. Wilson, on the other hand, argues that not all bureaucrats are motivated by a “desire to maximize their agency’s size.” WILSON, *supra* note 139, at 181. He also notes, though, that “[a]ll else being equal, big budgets are better than small.” *Id.* at 182.

144. It is easy to imagine that a person would prefer to be a “policy-maker” than a “bureaucrat.”

145. Agency officials might accomplish this by lobbying Congress or testifying at oversight

limit future discretion,¹⁴⁶ and interpreting statutes in a way that would enhance, rather than limit, future options.¹⁴⁷

The desire to conserve discretion is closely tied to two other incentives discussed below—namely, officials’ preference for process and their aversion to risk—both of which militate away from taking final, definitive action.

2. Process Before Results

“[Government] managers have a strong incentive to worry more about constraints than tasks, which means to worry more about processes than outcomes. Outcomes often are uncertain, delayed, and controversial; procedures are known, immediate, and defined by law or rule.”¹⁴⁸ Focusing on processes and avoiding outcomes benefits agency officials in several ways. Tying back to the point above, process conserves discretion by delaying the final decisions that might eliminate options.¹⁴⁹ Second, it matches up with external evaluation metrics: “[i]t is hard to hold managers accountable for attaining a goal, easy to hold them accountable for conforming to the rules.”¹⁵⁰ Along the same lines, it insulates agency action from external criticism.¹⁵¹ Beyond illustrating the agency’s rule compliance and “progress,” process allows an agency to avoid making decisions that could offend either their principals or powerful constituents.¹⁵²

hearings.

146. For example, these results can be achieved by splitting the decision into a set of smaller decisions (assessing pollutants sequentially rather than concurrently) or by making temporarily effective decisions (such as proposed rules or temporary regulations). See William Pedersen, *The Future of Federal Solid Waste Regulation*, 16 COLUM. J. ENVTL. L. 109 (1991); Madeleine McGuckin, *Towards an Understanding of the Principles and Application of the Temporary Regulations Under Internal Revenue Code Section 752*, 7 AKRON TAX J. 133, 133 (1991) (discussing the elaborate set of temporary rules enacted by the IRS in response to a congressional directive).

147. See discussion *infra* Part V.A-B for examples.

148. WILSON, *supra* note 139, at 131.

149. See *supra* notes 141-47 and accompanying text.

150. See *supra* notes 141-47 and accompanying text.

151. See *supra* note 131 and accompanying text.

152. Not acting could offend powerful constituents, but only when they are unhappy with the status quo. See Angel Manuel Moreno, *Presidential Coordination of the Independent Regulatory Process*, 8 ADMIN. L.J. 361, 510 (1994) (“[T]here would be opposition from some . . . members of Congress, especially those fearing adverse reactions from constituents or regulated industries satisfied with the status quo.”). In the case of most environmental law, including public property zoning, statutes are meant to introduce new regulations on concentrated interests. Thus, those interests would prefer “paralysis by analysis.” See Robert F. Durant, *The Democratic Deficit in*

3. Risk Aversion

Avoiding controversial decisions is consistent with another observation—that “the existence of many contextual goals [such as fairness] . . . tends to make managers more risk averse.”¹⁵³ According to Wilson:

Police administrators rarely lose their jobs because the crime rate has gone up or win promotions because it has gone down. They can easily lose their jobs if somebody persuasively argues that the police department has abused a citizen, beaten a prisoner, or failed to answer a call for service.¹⁵⁴

Put differently, agencies have an incentive not to attract undue attention by making politically controversial decisions. Among other effects, such decisions may attract the unwanted attention of the legislature.¹⁵⁵ McCubbins and Schwartz explain that, where agencies have discretion, Congress prefers to monitor agency action within this discretionary space by “fire-alarm” rather than by “police-patrol.”¹⁵⁶ In other words, Congress prefers to save its oversight of agencies for occasions where agencies make decisions that raise the ire of the public or interest groups, rather than to conduct regular reviews of agency performance.¹⁵⁷ If this is true, then it would clearly create the incentive for agency officials to avoid making controversial decisions.

4. Autonomy

One way to avoid the fire alarm is to maintain agency autonomy, and in particular, what Philip Selznick calls “external autonomy.”¹⁵⁸ The argument goes as follows: “[A]ssuring the necessary flow of resources” to the agency “requires obtaining not only capital (appropriations) and labor (personnel) but in addition political support.”¹⁵⁹ James Wilson explains that “[p]olitical support is at its highest when the agency’s goals are popular, its tasks simple, its rivals nonexistent, and the constraints minimal.”¹⁶⁰ He gives several pieces of advice to the agency official seeking to minimize rivals and

America, 110 POL. SCI. Q. 25, 34 (1995).

153. WILSON, *supra* note 139, at 132.

154. *Id.*

155. *See supra* note 131 and accompanying text.

156. McCubbins & Schwartz, *supra* note 129, at 167-68.

157. *See supra* note 131 and accompanying text.

158. PHILIP SELZNICK, LEADERSHIP IN ADMINISTRATION 121, 121-22 (1957).

159. WILSON, *supra* note 139, at 181.

160. *Id.*

constraints.¹⁶¹ Among these are: “avoid taking on tasks that differ significantly from those that are at the heart of the organization’s (or [agency’s]) mission,” and “avoid tasks that will produce divided or hostile constituencies.”¹⁶²

For a public property management agency that has traditionally focused on balancing the multiple possible uses of natural resources, the task of rationing those resources out on spatial and exclusive terms could certainly “differ significantly” from the task “at the heart of the organization’s (or [agency’s]) mission.”¹⁶³ Moreover, the establishment of uniform-use zones could create new rivalries. For example, were the multiple-use agency to create the administrative equivalent of a national park within its boundaries, an agency such as the National Park Service, with years of experience managing such places, could make the case that it would be a more efficient manager of the newly created “park.”¹⁶⁴

As noted above, and as illustrated by the case studies in Part V, uniform-use zoning is also very likely to produce divided and hostile constituencies.¹⁶⁵ In addition to pitting user groups against one another in a higher-stakes battle,¹⁶⁶ zoning may create divisions among user groups.¹⁶⁷ For example, some ranchers would benefit from the creation of a designated grazing area near their property; they would, in fact, be better off than they were before the zoning process.¹⁶⁸ Other ranchers, who after zoning would have no practical access to grazing lands, would likely be very unhappy.

161. *Id.* at 188-92.

162. *Id.* at 190-91.

163. *See id.*

164. For excellent histories of exactly such kinds of competition between the Park Service and Forest Service, see Todd Kunioka and Lawrence S. Rosenberg, *The Politics of Bureaucratic Competition: The Case of Natural Resource Policy*, 12 J. POL’Y ANAL. & MGMT. 700 (1993) and David Gerard, *The Origins of the Federal Wilderness System*, in *POLITICAL ENVIRONMENTALISM: GOING BEHIND THE GREEN CURTAIN* (Terry L. Anderson ed., 2000).

165. *See infra* notes 195-286 and accompanying text.

166. The battle is for higher stakes, because under zoning, the allocations are for longer temporal periods.

167. *See supra* notes 63-64 and accompanying text.

168. They would be better off because grazing would become a priority use of those lands. Even though the land may already be used primarily for grazing, a legal priority would provide greater certainty that ranchers would be permitted to use those lands in the future.

C. *Influence of Concentrated Groups*

Recall that one function of zoning is to address allocative inequities in the pre-zoning environment.¹⁶⁹ In the case of municipal zoning, the inequities are related to differentials in market power between various groups of land owners, as well as the transaction costs associated with remedying conflicting land uses.¹⁷⁰ In the case of public property, inequities in the pre-zoning environment are a product of the concentrated-diffuse dynamic and agency processes.¹⁷¹ In short, concentrated groups both in theory and in practice are shown to succeed in these processes at a greater rate than the diffuse public or less well-organized groups.¹⁷²

Of course, these same concentrated groups also have disproportionate influence over legislators, to whom they may make campaign contributions in addition to lobbying visits.¹⁷³ There are good reasons to believe, however, that concentrated group influence on agency decisions is relatively greater than it is on legislation.¹⁷⁴ Glen Robinson explains:

In the abstract, delegation of legislative power is not biased toward any particular political interest group; however, it seems plausible that broad delegations favor concentrated groups relative to those more diffusely organized. The logic of this assumption is straightforward. Obtaining legislation is an occasional thing. It may require a strong political effort, but for a limited period of time. By contrast, influencing agency legislation is a sustained, continuing thing in which well-organized, concentrated, and well-financed interest groups have a comparative advantage over looser political coalitions that may be strong for a time but whose energies dissipate over the long run.¹⁷⁵

The net result of this, according to Stewart, is that agencies “unduly favor organized interests, especially the interests of regulated or client business firms and other organized groups at the expense of diffuse,

169. See *supra* note 70 and accompanying text.

170. Juliana Maantay, *Health, Law and Everyday Life*, 30 J.L. MED. & ETHICS 572, 578 (2002) (“Perhaps the main reason that zoning is often a promoter of inequity rather than a protector of the public will is the inequity of the underlying system of market forces that is relied upon in many places, and drives zoning in many places . . .”).

171. See generally Michael Blumm, *Public Choice Theory and the Public Lands: Why “Multiple Use” Failed*, 18 HARV. ENVTL. L. REV. 405, 406-08 (1994) (describing how powerful groups have dominated administrative processes allocating resources of the public lands).

172. See generally PHILIP SELZNICK, *TVA AND THE GRASS ROOTS: A STUDY IN THE SOCIOLOGY OF FORMAL ORGANIZATION* 155 (1949); SCHOENBROD, *supra* note 106, at 54-55.

173. See SELZNICK, *supra* note 172, at 155; see also SCHOENBROD, *supra* note 106, at 54-55.

174. ROBINSON, *supra* note 116, at 78; see also *supra* note 73 and accompanying text.

175. ROBINSON, *supra* note 116, at 78.

comparatively unorganized interests such as consumers, environmentalists, and the poor.”¹⁷⁶

Whether one accepts this argument, one thing seems certain: all agency processes, including delegated zoning, will reflect concentrated-diffuse dynamics in the same way. In other words, there is no apparent reason to believe that a concentrated-diffuse dynamic would affect an administrative zoning process differently than it would affect the pre-zoning multiple-use allocation process. If the purpose of zoning is to change the pre-zoning allocation of resources, delegating that task to the same institution that allocated resources in the pre-zoning environment makes little sense.

IV. THE EFFECTS OF DELEGATION: PREDICTIONS AS TO HOW AGENCIES WILL (OR WON'T) ZONE

Based on these three observations—lack of political capacity, the incentives of officials, and responsiveness to concentrated groups—it is possible to make some predictions about what might happen under delegated zoning.

A. Delay

Perhaps the easiest prediction is that it will take the agency a long time—as long as it can take without being rebuked by the legislature—to complete the zoning plan.¹⁷⁷ Each of the observations described above, if true, would contribute to delays in the process.

First, because zoning requires the creation of uniform-use zones,¹⁷⁸ and because rules for uniform zones will prevent certain groups from using them in the future, one can expect strong opposition among user groups, particularly those groups who stand to suffer a decrease in their pre-zoning allocation. The biggest potential losers from implementation of public property zoning will be those concentrated groups who thrived under the

176. SCHOENBROD, *supra* note 106, at 112 (quoting Richard Stewart, *The Reformation of American Administrative Law*, HARV. L. REV. 1667, 1684-68 (1974)); see also Peter H. Aranson et al., *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1, 6 (1982) (“Delegation facilitates the collective provision of private goods.”).

177. If the delegating statute contains a deadline, then it might be possible for a citizen to sue the agency to compel action. However, agencies have numerous defenses to such suits, including lack of budget available to perform the duty. See, e.g., *Biodiversity Legal Found. v. Babbitt*, 146 F.3d 1249 (10th Cir. 1998) (refusing to issue injunction compelling Fish and Wildlife Service to act on missed statutory deadline where agency claimed inadequate funding).

178. See discussion *supra* Part II.C (discussing the need for uniformity).

background administrative process, multiple-use scheme. Lacking political capacity, agencies will struggle and avoid making the necessarily difficult decisions.¹⁷⁹

Second, the incentives of agency officials militate toward a strategy of delay.¹⁸⁰ Zoning involves a direct reduction in agency discretion.¹⁸¹ In creating uniform-use zones, agencies lose most of their future power to make resource allocation decisions within the zones.¹⁸² Officials' preference for process over action supports delay.¹⁸³ Risk aversion would certainly slow the process down as agency officials avoided offending particular groups.¹⁸⁴ The very nature of zoning, in creating uniform-use zones, will likely offend the excluded groups, even if they are promised "their own" zone in return.¹⁸⁵ It is worth emphasizing that concentrated groups, in this context, prefer the status quo. Keeping powerful groups happy keeps the fire alarm silent. Wilson's autonomy guidelines will also encourage delay, as officials seek to avoid straying from the familiar multiple-use mandate and the prospect of "hostile constituencies."¹⁸⁶

Finally, agencies' responsiveness to concentrated groups will also contribute to the likelihood of delay.¹⁸⁷ If one assumes that the purpose of zoning is to address inequities in pre-zoning resource allocation and that concentrated groups fared well in the pre-zoning environment, then it is clear that concentrated groups will oppose the finalization of the zoning plan. Assuming that these groups have some or significant influence over the agency, they will be motivated to use that influence to slow the process. After all, they are benefiting from the status quo.

Delay is undesirable for several reasons. First, assuming the legislature intended for the zoning plan to be implemented, delay represents a thwarting of legislative intent. Second, delay may have significant associated costs.

179. See discussion *supra* Part III.A (discussing the lack of political capacity of agency officials).

180. See discussion *supra* Part III.B.2 (discussing the incentive for officials to focus on processes rather than outcomes).

181. See discussion *supra* Part II.C (discussing the need for uniformity and durability, both of which reduce agency discretion).

182. A multiple-use statute, such as the FLPMA, endows agency managers with a substantial amount of discretionary power—that is, the power to decide among a wide range of potential uses for an area within each given unit of time. See *supra* note 88. A uniform-use statute would eliminate or significantly reduce this discretionary power. Depending on the terms of the statute, agencies might retain limited power to grant variances or special exceptions.

183. See discussion *supra* Part III.B.2 (discussing the incentive for officials to focus on processes rather than outcomes).

184. See discussion *supra* Part III.B.3 (discussing the incentive for agency officials to be risk averse).

185. See *supra* notes 101-03 and accompanying text.

186. See discussion *supra* Part III.B.4 (discussing the incentive for agency officials to maintain their autonomy).

187. See discussion *supra* Part III.C.

Because the zoning plan was intended to fix a problem, perhaps poor environmental quality, then delaying that fix will entail costs.¹⁸⁸ Furthermore, process is not cheap; the longer the process, the more money must be spent on facilitation and other process tasks. Third, delay may make the eventual implementation of a zoning plan more difficult: in the meantime, user groups will continue to invest in a manner consistent with expectations in the pre-zoning environment. This strengthens their sense of entitlement, and their arguments of entitlement, to the status quo.

B. Multiple-Use “Zoning”

In addition to delaying, an agency charged with zoning is likely to avoid, as much as possible, the creation of uniform-use zones. Instead, it will try to shape the “zones,” by rule, as much like multiple-use areas as possible. This prediction also follows from all three of the observations described above.

If agencies lack the political capacity to exclude powerful user groups from areas whose resources they wish to use, a “lower capacity” option is to create “zones” that allow continued use by all groups. While these areas might be called “zones,” the fact that they are not true uniform-use zones will prevent achievement of zoning goals. By definition, a multiple-use area does not attempt to physically separate incompatible uses, at least not on a long-term basis.¹⁸⁹

“Multiple-use zones” will not only generate less controversy and unwanted attention, but they will also preserve the agencies’ options regarding future allocation decisions.¹⁹⁰ As in the pre-zoning environment, decisions about resource use in multiple-use areas will require significant

188. For the costs of delay in one case study of delegation, see DAVID SCHOENBROD, *SAVING OUR ENVIRONMENT FROM WASHINGTON: HOW CONGRESS GRABS POWER, SHIRKS RESPONSIBILITY, AND SHORTCHANGES THE PEOPLE* 29-38 (2005). See also STUART SHAPIRO, AEI-BROOKINGS JOINT CENTER FOR REGULATORY STUDIES, *ASSESSING THE BENEFITS AND COSTS OF REGULATORY REFORMS: WHAT QUESTIONS NEED TO BE ASKED* (2007), available at <http://www.aei-brookings.org/authorpdfs/redirect-safely.php?fname=/pdfiles/RA07-01.pdf>.

189. In the course of multiple-use management, it may be necessary for an agency to separate uses over the short-term—for example, allocate some land to timber harvest and some land to recreation—simply to avoid direct user conflict.

190. See *supra* notes 120-35 (discussing the controversy of creating uniform-use zones). Interestingly, Michael Mortimer argues that broad delegations limit agency authority by allowing inter-constituent battles to paralyze the agency. Michael J. Mortimer, *The Delegation of Law-Making Authority to the United States Forest Service: Implications in the Struggle for National Forest Management*, 54 ADMIN. L. REV. 907, 910 (2002).

study and public process.¹⁹¹ The decision to create such areas is certainly risk averse, as it represents, in an easily explained way, the “fairest” solution to the allocation problem: all parties will have a bite at each apple. Multiple-use is also familiar to the agency; sticking with it helps the agency maintain the autonomy it might desire.¹⁹²

The creation of multiple-use zones, in lieu of uniform-use zones, will benefit concentrated groups. Because multiple-use zones are simply smaller versions of the entire multiple-use area from which they were carved, the results of agency allocation processes are likely to be quite similar to pre-zoning results.

C. Failure to Remediate Pre-Zoning Allocation Problems

Again, assuming that the zoning agency overcomes delay (which continues the imposition of pre-zoning inequities), and supposing that it finds some capacity to create some uniform-use zones, it is likely that the number of uniform-use zones aimed at benefiting weak interests, such as marine conservation, will be small. Creating a large number of such zones would be politically difficult, would engender controversy, would limit discretion, and would certainly offend powerful, concentrated groups.¹⁹³ One would expect that the final zoning plan would loosely reflect the same power disparities that zoning was intended to remediate: most of the valuable resources would be allocated, now spatially, to concentrated resource extraction groups.¹⁹⁴ Weak groups would receive not only a small percentage in spatial terms, but areas of little or no resource value.

V. THE CASE STUDIES

In order to test these predictions, this section examines four case studies—examples of legislation in which Congress and one state legislature have delegated public property zoning responsibilities to agencies. Rather than detail the entire histories of the various programs, this section is organized into brief descriptions of the authority delegating zoning power, followed by evidence drawn from the agency implementation experience that appears to support the predictions made in Part IV above.¹⁹⁵

191. See *supra* note 88 and accompanying text.

192. In an earlier paper, I recommend that, after zoning, each zone be managed by a separate, narrowly focused agency. This possibility would clearly represent a threat to the zoning agency's autonomy and jurisdiction. Eagle, *supra* note 72, at 166-76.

193. See *supra* notes 120-35 and accompanying text.

194. See Blumm, *supra* note 171, at 422-29.

195. For complete histories of the National Marine Sanctuary Act, see William J. Chandler & Hannah Gillelan, *The History and Evolution of the National Marine Sanctuaries Act*, 34 E.L.R. 10,505 (2004); Owen, *supra* note 123. Regarding the Marine Life Protection Act, see David Bunn,

A. *The National Marine Sanctuaries Act*

In 1972, in response to rising concern about the harmful effects of industrial activities, particularly petroleum development and ocean dumping, on the condition of the marine environment, Congress passed Title III of the Marine Protection, Research, and Sanctuaries Act, known as the National Marine Sanctuaries Act (“NMSA”).¹⁹⁶

The statute gave the National Oceanic and Atmospheric Administration (“NOAA”)¹⁹⁷ a clear mandate to create zones out of its broader ocean jurisdiction.¹⁹⁸ According to Chandler and Gillelan, the Act gave the Secretary of Commerce broad discretionary authority to preserve ocean places on a case-by-case basis if the Secretary determined sanctuary designations were “necessary for the purpose of preserving or restoring” marine areas for their “conservation, recreational, ecological, or esthetic values.”¹⁹⁹

Regional Management in a Statewide Marine Protected Area Process: The Marine Life Protection Act Working Groups, in CALIFORNIA AND THE WORLD OCEAN '02 (Orville T. Magoon et al. eds., 2005); James Mize, *Lessons in State Implementation of Marine Reserves: California's Marine Life Protection Act Initiative*, 36 E.L.R. 10,376; Christopher M. Weible, *An Advocacy Coalition Framework Approach to Stakeholder Analysis: Understanding the Political Context of California Marine Protected Area Policy*, 17 J. PUB. ADMIN. RES. & THEORY 95 (2006); Christopher Weible et al., *A Comparison of Collaborative and Top-Down Approach to the Use of Science in Policy: Establishing Marine Protected Areas in California*, 32 POL. STUD. J. 187 (2004). For a non-academic history of the Magnuson-Stevens Fishery Conservation and Management Act's Essential Fish Habitat provisions, see MARINE FISH CONSERVATION NETWORK, RAY OF HOPE: SUCCESSES AND SHORTCOMINGS IN PROTECTING ESSENTIAL FISH HABITAT (2006). I could find no complete histories of the Bureau of Land Management's Area of Critical Environmental Concern program, but I am indebted to the BLM for providing me with statistical information.

196. Marine Protection, Research, and Sanctuaries Act of 1972, Pub. L. No. 92-532, tit. III, 86 Stat. 1052 (1972) (hereinafter National Marine Sanctuaries Act). For purposes of this case study, I am analyzing the events in the first six years after its passage—that is, between 1972 and 1978. Beginning in 1978, Congress amended the Act seven times, eliminating some, but not all of the ambiguities found in the original statutes. For purposes of this paper, the events of the 1972-78 period are the most relevant because they illustrate NOAA's response to a mandate that could have been interpreted as a zoning mandate.

197. NOAA is an agency within the cabinet-level United States Department of Commerce. See generally United States Department of Commerce, National Oceanic and Atmospheric Administration, www.noaa.gov (last visited Mar. 5, 2008).

198. At the time, the full extent of NOAA's ocean jurisdiction had not been established by law. The United States had made some unilateral ocean claims, but the Law of the Sea conventions had not been concluded. Robert B. Krueger & Myron H. Nordquist, *The Evolution of the 200-Mile Exclusive Economic Zone: State Practice in the Pacific Basin*, 19 VA. J. INT'L L. 321, 323-24 (1979). In 1976, Congress passed a statute claiming full authority over fisheries within 200 nautical miles of U.S. coasts and charging NOAA, and eight regional fishery management councils, with managing those fisheries. 16 U.S.C. § 1811 (2006). See *infra* note 281.

199. Chandler & Gillelan, *supra* note 195, at 10,523.

Although the original Act was clear in its mandate to create national marine sanctuaries in order to promote these four listed purposes, it was vague in many other ways.²⁰⁰ It contained no timeline for designation or goals as to the number of sanctuaries that NOAA was to create.²⁰¹ While the Act specified a set of acceptable functions, or priority uses, for sanctuary zones, it did not provide any guidance as to the kinds of places that NOAA ought to designate.²⁰² It did not, for example, call for the agency to protect a representative set of ocean ecosystems.²⁰³

Finally, and most importantly, the Act did not exactly specify that designated sanctuaries had to be created as uniform-use zones, in furtherance of the objectives of the Act. On the one hand, there was language in the original Act indicating that Congress anticipated some degree of multiple uses in the sanctuaries. For example, in Section 302(f), the law provided that, “[a]fter [designation], the Secretary . . . shall issue necessary and reasonable regulations to control any activities [permitted by other Federal agencies] within the sanctuary.”²⁰⁴ It is clear, on the other hand, that the Act did not require or empower NOAA to act as a multiple-use manager of each sanctuary.²⁰⁵ Instead, the Act seemed to envision limited-purpose sanctuaries in which NOAA had discretionary power to allow activities that had been permitted by other agencies, but only if such activities were consistent with the primary purpose of the relevant sanctuary: “[N]o permit, license, or other authorization issued pursuant to any other authority shall be valid unless the Secretary shall certify that the permitted activity is consistent with the purposes of this title and can be carried out within the regulations promulgated under this section.”²⁰⁶

200. Owen, *supra* note 123, at 718-21.

201. According to Chandler and Gillelan, “[t]he Secretary was directed to make the first designations within two years and periodically thereafter . . . ,” but I have not been able to find a source for this assertion. Chandler & Gillelan, *supra* note 195, at 10,523.

202. These functions, or priority uses, can be found at Section 302(a) of the original bill: “preserving or restoring . . . areas for their conservation, recreational, ecological, or esthetic values.” Marine Protection, Research, and Sanctuaries Act of 1972, Pub. L. No. 92-532, tit. III, 86 Stat. 1052, § 302(a) (1972).

203. Compare this to President Clinton’s Executive Order on Marine Protected Areas, which calls for the development of a “comprehensive national system of MPAs representing diverse U.S. marine ecosystems.” Exec. Order. No. 13,158, 65 Fed. Reg. 34,909, Sec. 1(b) (May 26, 2000).

204. Marine Protection, Research, and Sanctuaries Act of 1972, Pub. L. No. 92-532, tit. III, 86 Stat. 1052 (1972).

205. In other words, it did not intend for NOAA to actually run the permitting systems for, say, oil and gas. These responsibilities were to be left in the agencies with prior responsibility, such as the Department of the Interior’s minerals management system. The National Marine Sanctuaries Act gave NOAA only the power to approve or disapprove activities that had been permitted by other agencies. Marine Protection, Research, and Sanctuaries Act of 1972, Pub. L. No. 92-532, tit. III, 86 Stat. 1052, § 302(f) (1972).

206. *Id.*

NOAA's efforts to interpret the statute in the years immediately following passage of the Act provide some evidence of the agency's desire to avoid designating uniform or strictly-limited zones. For example, in writing the first set of overarching regulations that were to guide the sanctuary program, the agency pushed the idea that multiple uses of sanctuaries should not only be permitted, but "maximized."²⁰⁷ The establishment of multiple-use maximization as a goal of the sanctuary program all but ensured that the sanctuaries would never function as uniform-use zones. The reason for this is that the key question in assessing whether a proposed use could be allowed in a purpose-built sanctuary was whether the use would be "consistent with" that purpose.²⁰⁸ A general rule calling for *maximizing* multiple uses, as opposed to *encouraging* or *permitting* multiple uses, relieves individuals proposing uses from the obligation of proving that the proposed use is not consistent with the primary purpose of the sanctuary. In other words, where it is not clear that the proposed use is inconsistent, it will be allowed unless there is conclusive proof to the contrary.

The point is not that NOAA's interpretation was unreasonable or entirely inconsistent with the language of the Act.²⁰⁹ Rather, the important observation is that the agency used its discretionary power to implement the statute as a multiple-use statute rather than a uniform-use statute. Although

207. See Chandler & Gillelan, *supra* note 195. As NOAA wrote in the regulations:

The question of multiple use will need to be examined on a case-by-case basis. The legislative history of the Title clearly indicates that *multiple use of each area should be maximized consistent with the primary purpose*. Additionally, the statute clearly indicates, as a safeguard that "no permit, license, or other authorization issued pursuant to any other authority shall be valid unless the Secretary (Administrator) shall certify that the permitted activity is consistent with the purposes of this title and can be carried out within the regulations promulgated."

39 Fed. Reg. 23,255 (1974) (*emphasis added*); see Chandler & Gillelan, *supra* note 195, at 10,528-29.

208. Minus the maximization angle, this would be similar to the compatibility standard used in the National Wildlife Refuge Improvement Act of 1997, which allows a "compatible use" in a refuge if it meets the following definition: "a wildlife-dependent recreational use or any other use of a refuge that, in the sound professional judgment of the Director, will not materially interfere with or detract from the fulfillment of the mission of the System or the purposes of the refuge." 16 U.S.C. §§ 668dd(d)(1)(A), 668ee(1).

209. The regulation would probably have been upheld under a later-decided United States Supreme Court case. The case held:

If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.

Chevron v. NRDC, 467 U.S. 837, 843-44 (1984).

the plain language of the Act, combined with a dictionary definition of the word “sanctuary,”²¹⁰ would have easily allowed NOAA to shape the program toward establishing zones meant to “preserv[e] or restor[e] such areas for their conservation, recreational, ecological, or esthetic values,” the agency chose not to do this.²¹¹

In addition to inventing the concept of multiple-use maximization in the 1974 regulations, NOAA also used the regulation-writing process to otherwise limit the extent of its potential zoning power under the Act. While the statute itself provided no numerical limit on the amount of ocean area that could be designated as sanctuary, NOAA interpreted the statute to require the minimum amount necessary: “It is not expected . . . that large areas of the oceans and coastal waters will be designated as marine sanctuaries, and all activity prohibited or drastically reduced. It is expected that sanctuaries will be only large enough to permit accomplishment of the purposes specified in the Act.”²¹²

The combination of multiple-use maximization and sanctuary-size minimization found in the 1974 regulations clearly indicates the agency’s unwillingness to take on the difficult political chore of limiting or prohibiting resource use. NOAA’s “controversy aversion” is consistent with many of the predictions made above in Part IV, namely that agencies lack the political capacity to make difficult decisions associated with zoning and that agencies will tend away from uniform-use zoning decisions that both limit their future discretion and sound “fire alarms” with powerful constituencies and in Congress.²¹³

Furthermore, the history of the NMSA supports the prediction that agencies will delay in their implementation of zoning plans. Even after interpreting the NMSA in a way that might minimize the controversy associated with sanctuary designation, NOAA created sanctuaries at a glacial pace. The first sanctuary, designated in 1975, was the Monitor Marine Sanctuary, an area one mile in diameter surrounding the wreck of the civil war submarine.²¹⁴ The second, Key Largo National Marine Sanctuary, designated in the same year, was larger—covering about seventy-five square

210. See, e.g., AMERICAN HERITAGE COLLEGE DICTIONARY 1207 (3d. ed. 1992) (“A reserved area in which birds and other animals, especially wild animals, are protected from molestation.”).

211. See Marine Protection, Research, and Sanctuaries Act of 1972, Pub. L. No. 92-532, § 302(a), 86 Stat. 1052, 1061 (1972).

212. 39 Fed. Reg. 23,254-57 (June 27, 1974) (to be codified at 15 C.F.R. 922).

213. Owen alludes to these issues when he writes, “[t]he potential problems [with the NMSA], in hindsight, seem obvious. A relatively small agency like NOAA has little leverage when dealing with potentially irate opponents to sanctuary designations.” Owen, *supra* note 123, at 750. For insight into the thought processes of NOAA sanctuary officials during this period, see John Epting, *National Marine Sanctuary Program: Balancing Resource Protection with Multiple Use*, 18 HOUS. L. REV. 1037 (1981) (clearly struggling to identify the purpose of the sanctuary program).

214. Chandler & Gillelan, *supra* note 195, at 10529.

nautical miles.²¹⁵ NOAA designated no other sanctuaries until 1980, and fifteen years after the Act's passage, it had only designated six—covering about one-tenth of one percent of the area under the agency's jurisdiction.²¹⁶

B. Areas of Critical Environmental Concern

In 1976, Congress passed the Federal Land Policy and Management Act (“FLPMA”), intending to establish a management system for lands under the dominion of the Bureau of Land Management (“BLM”).²¹⁷ The centerpiece of the Act was a long-range planning mandate, under which the BLM was to prepare “land use plans” for all of the 258 million acres²¹⁸ of federal land under its jurisdiction.²¹⁹

Although the Act generally calls for multiple-use management of BLM lands,²²⁰ it also provided that, within the multiple-use landscape, certain areas should be designated and protected as “areas of critical environmental concern” (“ACECs”).²²¹ Section 1702(c)(3) mandates that, in developing and revising land use plans under the Act, the BLM is to “give priority” to the establishment of ACECs.²²² The Act defines ACECs as:

[areas] where special management attention is required (when such areas are developed or used or where no development is required) to protect and prevent irreparable damage to important historic, cultural, or scenic values, fish and wildlife resources or other natural systems or processes, or to protect life and safety from natural hazards.²²³

Like the NMSA, the ACEC provisions do not mandate uniform-use zoning, but they could easily be interpreted as encouraging or allowing it.

215. *Id.*

216. The epilogue to the story is that—disappointed with the slow pace of NOAA designations—Congress eventually took over the process, designating five sanctuaries by specific legislation. See Owen, *supra* note 123, at 729-38. These included the three largest national marine sanctuaries: Florida Keys, Monterey Bay, and Olympic Coast. See *id.* at 722-23.

217. Fed. Land Pol. & Mgt. Act, Pub. L. No. 94-579, 90 Stat. 2743 (1976).

218. U.S. Department of the Interior, Bureau of Land Management, About the BLM, http://www.blm.gov/wo/st/en/info/About_BLM.html (last visited April 5, 2008).

219. See Pub. L. No. 94-579, § 202, 90 Stat. 2743, 2747-50 (codified as amended at 43 U.S.C. § 1712 (2006)).

220. See 43 U.S.C. § 1712(c)(1) (2006).

221. § 1712(c)(1)-(3).

222. § 1712(c)(3).

223. § 1702(a).

The fact that Congress created ACECs as a category of lands distinct from the bulk of lands to be managed under the multiple-use FLPMA indicates that ACECs are distinct from run-of-the-mill multiple-use lands. Second, the very name, “areas of critical environmental concern,” indicates that Congress viewed certain places as both particularly valuable as historic sites, wildlife habitats, or natural systems, and particularly sensitive to development. Uniform-use zoning would seem to be a particularly useful tool where these two conditions exist. Third, the FLPMA provides explicit authority to BLM to establish uniform-use zones. Although it serves as a limit on such decisions, Section 1712(e)(1) of the Act provides that BLM may make management decisions (such as the establishment of an ACEC) that “exclude[] (that is total[ly] eliminat[e]) one or more of the principal or major uses” of a particular area.²²⁴

In its land-use planning regulations, rather than explain how it intended to make the establishment of ACECs a priority, BLM established rules that appear to constitute a presumption against establishment.²²⁵ According to the regulations, areas shall be considered eligible for designation, but not necessarily require designation, if four criteria are met: “relevance,” “importance,” “criticalness,” and “protectability.”²²⁶ BLM’s definitions of these criteria, specifically the last, would make it nearly impossible to justify any proposed designation as necessary, and more importantly, would make it extremely easy to justify any proposed designation as unnecessary. “Protectability,” according to the agency, meant that “[t]he value, resources, system or process shall be capable of being protected from decisive adverse change with the special management attention that can feasibly be applied.”²²⁷ In other words, if resources in the area were adversely affected by activities outside of BLM’s control, then BLM was under no obligation to attempt to give those resources special protection.

The addition of the “protectability” requirement, not referenced in the statute, would in theory create significant obstacles to the creation of ACECs for “fish and wildlife resources or other natural systems or processes”²²⁸ For example, this criterion would prevent designation of a wildlife habitat if the wildlife in question migrated beyond the boundaries of BLM land. Because the wildlife resource might be subjected to offsite activities

224. § 1712(e)(1). The section provides that, “[s]uch decisions . . . shall remain subject to reconsideration, modification, and termination through revision by the Secretary[.]” *Id.* Furthermore, to the extent such decisions affect a tract of more than 100,000 acres (for two or more years), the Secretary must make a report to the House and Senate. § 1712(e)(2). Congress may pass a concurrent resolution within ninety days disallowing the Secretary’s use-banning decision. *Id.*

225. See 43 C.F.R. § 1600 (2003).

226. § 1601.5-4.

227. § 1601.5-4(4).

228. 43 U.S.C. § 1702(a) (2006).

causing decisive adverse change, the protection of its habitat through an ACEC would be impermissible.²²⁹

Owing perhaps to the agency's regulatory interpretations, it did little in terms of implementing the ACEC program during the first ten years after passage of the FLPMA. According to a 1990 General Accounting Office ("GAO") report,²³⁰ whose authors reviewed fourteen BLM land use plans:

[T]he treatment of ACECs in the resource management-planning process varied considerably For example, in some plans, the Bureau's field offices had identified ACECs as a planning issue and had documented the process of identifying and designating ACECs. Other field offices, however, had not identified ACECs as a planning issue and had handled the ACEC process informally, with little or no documentation of what areas were considered for designation or how final decisions were made.²³¹

As of the date of the report, BLM had designated about 300 ACECs, covering about 6.5 million acres, or about 2.5 percent of all BLM lands.²³² As of 2005, the BLM had designated 901 ACECs covering about 13 million acres, or about five percent of all BLM lands. It is difficult to determine the extent to which BLM has limited or excluded resource extraction activities in these areas. To date, the agency has not produced a comprehensive report. However, a random sample of 144 ACECs revealed some interesting observations. First, 52 of the ACECs were less than 1,000 acres in size and 111 were smaller than 10,000 acres. Only three were larger than 100,000 acres. Second, there is an inverse relationship between the size of the ACEC and the amount of regulatory protection it receives: the larger the area, the less likely it is that mining, logging, hydrocarbon, or grazing activities are prohibited. Finally, in none of the areas sampled were all four of the major

229. Because of the deference given to agency decisions under *Chevron*, it is more accurate to say that a citizen could not challenge BLM's failure to designate an ACEC for wildlife unless it could show that the BLM arbitrarily made a finding of no "protectability." *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.* 467 U.S. 837, 843-44 (1984); *see also supra* note 210.

230. GENERAL ACCOUNTING OFFICE, REPORT TO THE CHAIRMAN, SUBCOMMITTEE ON NATIONAL PARKS AND PUBLIC LANDS, COMMITTEE ON INTERIOR AND INSULAR AFFAIRS, HOUSE OF REPRESENTATIONS, PUBLIC LANDS: LIMITED PROGRESS IN RESOURCE MANAGEMENT PLANNING (1990).

231. *Id.* at 27.

232. The numbers and statistics specified in this paragraph are based upon data that I received directly from the BLM.

extractive uses prohibited. The nine ACECs in which BLM had prohibited three of the four extractive uses were each less than 620 acres in size.

These observations appear to support the predictions made in Part IV, above. In implementing what could have potentially functioned as a public property zoning program, the BLM has tended toward the creation of small, multiple-use zones rather than large, uniform-use zones. This approach has allowed the agency to avoid controversy, to preserve discretion, and to continue to provide access to resources to powerful, concentrated interests such as the petroleum, mining, timber, and grazing industries.

C. *Essential Fish Habitat*

Similar to the way in which Congress statutorily embedded ACECs within the broader multiple-use context of the FLPMA, it has given similar responsibilities to NOAA and the Regional Fishery Management Councils within the broader multiple-use context of the Magnuson-Stevens Fishery Conservation and Management Act (“MSFCMA”).²³³

Finding that “[o]ne of the greatest long-term threats to the viability of commercial and recreational fisheries (or [species]) is the continuing . . . loss of marine, estuarine, and other aquatic habitats[.]”²³⁴ Congress, in 1996, added the Essential Fish Habitat (“EFH”) provisions to the MSFCMA in a large set of amendments meant to improve fisheries conservation known as the Sustainable Fisheries Act (“SFA”).²³⁵

Unlike the sanctuary program, which as noted exists outside of the federal fishery management program,²³⁶ Congress integrated the EFH provisions into the MSFCMA. Section 1853(a)(7) of the Act requires

233. 16 U.S.C. §§ 1801-83 (2000). Although NOAA is nominally the agency in charge of fisheries management in federal waters, the Magnuson-Stevens Act gives significant power to eight Regional Fishery Management Councils. JOSH EAGLE ET AL., *TAKING STOCK OF THE REGIONAL FISHERY MANAGEMENT COUNCILS* 32-33 (Island Press 2003). The councils are responsible for all major decisions regarding these fisheries, including the designation of Essential Fish Habitat discussed in this section of the Article. *Id.* Although Congress charged NOAA in the statute with overseeing council decisions, the agency rarely overturns council decisions in practice. *Id.* at 32. Moreover, the councils are disproportionately staffed with representatives of commercial and recreational fisheries. *Id.* at 24. Thus, predictions that the councils would make decisions favoring concentrated interests (such as commercial and recreational fishing industries) are not particularly bold.

234. 16 U.S.C. § 1801(a)(9).

235. Sustainable Fisheries Act, Pub. L. No. 104-297, 110 Stat. 3559 (1996) (codified as amended at 16 U.S.C. § 1801 et seq.).

236. In the 1984 amendments to the National Marine Sanctuaries Act, Congress required that the MSFCMA’s regional councils be provided an opportunity to draft fishing rules for the sanctuaries. Chandler & Gillelan, *supra* note 195, at 10543. According to the current NMSA, those regulations “shall be accepted and issued as proposed regulations by the Secretary unless the Secretary finds that the Council’s action fails to fulfill the purposes and policies of this chapter (or [title]) and the goals and objectives of the proposed designation.” 16 U.S.C. § 1434(a)(5)(2000).

federal fishery management agencies to “describe and identify essential fish habitat for the fishery based on the guidelines established by the Secretary . . . [and] minimize to the extent practicable adverse effects on such habitat caused by fishing”²³⁷ The Act defines “essential fish habitat” as “those waters and substrate necessary to fish for spawning, breeding, feeding or growth to maturity.”²³⁸

The EFH provisions call for the creation of special kinds of marine conservation zones.²³⁹ Once it has identified an area as essential, the councils must write rules allowing within the area only those kinds of fishing deemed compatible with use of the area as fish habitat—that is, unless banning incompatible fishing techniques would be impracticable.²⁴⁰ On the one hand, the provisions are mandatory and concrete: the statute requires the identification of EFH and the prohibition of at least some amount of incompatible fishing within EFH areas.²⁴¹ On the other hand, there is ample room for the application of agency discretion. For example, drawing the physical boundaries of EFH, defining “adverse” impacts, and determinations of what is and is not “practicable,” all require significant administrative judgment.²⁴²

In a 2006 report entitled *Ray of Hope: Successes and Shortcomings in Protecting Essential Fish Habitat*,²⁴³ the marine conservation group, Marine Fish Conservation Network,²⁴⁴ documented actions of each of the eight Regional Fishery Management Councils in implementing the EFH provisions after 1996.²⁴⁵ According to the report, the councils were initially slow to act: “[b]y 1999, three years after passage of the SFA, only two of 38 existing management plans included specific regulatory actions to increase habitat protection—and those actions affected only small areas.”²⁴⁶ Not

237. 16 U.S.C. § 1853(a)(7) (2000).

238. § 1802(10).

239. § 1801(b).

240. § 1853(b).

241. See § 1853(a)(7).

242. § 1853(b). Again, these determinations would be protected by *Chevron*, and the “arbitrary and capricious” standard of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (2000); see *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.* 467 U.S. 837, 843-44 (1984).

243. MARINE FISH CONSERVATION NETWORK, *supra* note 195.

244. The Marine Fish Conservation Network is “a coalition of over 190 national and regional environmental organizations, commercial and recreational fishing groups, aquariums, and marine science groups dedicated to conserving marine fish and to promoting their long-term sustainability.” Marine Fish Conservation Network, About Us—Who We Are, <http://www.conservefish.org/site/aboutus/whoware/> (last visited Oct. 15, 2007).

245. *Id.*

246. MARINE FISH CONSERVATION NETWORK, *supra* note 195, at 5.

only had the councils failed to regulate habitat during this period, most had not even performed the kind of “comprehensive assessment of fishing gear impacts on habitat” that would be needed in order “to examine possible measures to reduce those impacts.”²⁴⁷ Instead, “[t]hese councils claimed that there was no scientific evidence of negative impacts and that existing council management provisions were sufficient” to protect habitat.²⁴⁸

In the hope of forcing the councils to comply with what they believed Congress had intended, a number of marine conservation groups filed a lawsuit in 1999, charging that five of the councils had violated the MSFCMA and the National Environmental Policy Act (NEPA).²⁴⁹ The court found that the councils had violated the NEPA by failing to consider relevant scientific information regarding the impacts of fishing gear on habitat.²⁵⁰

The councils eventually prepared more complete Environmental Impact Statements that assessed those impacts.²⁵¹ The MFCN report concludes, however, that while “[a]ll councils have described and identified EFH for their managed fisheries,” the councils “continue to falter . . . in providing actual protection for these important areas from the adverse impacts of fishing.”²⁵²

Instead of taking meaningful steps to protect sensitive areas from the harmful impacts of certain kinds of fishing gear, the councils “hid[e] behind scientific uncertainty,”²⁵³ using uncertainty to delay the imposition of protective rules, “maintain[] that existing management measures are sufficient,”²⁵⁴ “prohibit[] [harmful fishing] gear where it currently is not a threat,”²⁵⁵ and “provid[e] some protection for the most vulnerable habitat types, but ignor[e] other important areas.”²⁵⁶

As would be predicted, the councils have generally avoided creating uniform-use EFH zones. From the outset, the program has been implemented quite slowly. Where councils have created such zones, they have tended to allow most types of fishing to continue within EFH areas. In

247. *Id.*

248. *Id.*

249. *Am. Oceans Campaign v. Daley*, 183 F. Supp. 2d 1, 9 (D.D.C. 2000).

250. *Id.* at 20.

251. MARINE FISH CONSERVATION NETWORK, *supra* note 195, at 6.

252. *Id.*

253. *Id.* at 1.

254. *Id.* at 1-2.

255. *Id.* at 2.

256. *Id.* For region-specific discussions of delays and problems in Council and NMFS implementation of the EFH provisions, see Roger Fleming et al., *Twenty-Eight Years and Counting: Can the Magnuson-Stevens Act Deliver on its Conservation Promise?*, 28 VT. L. REV. 579 (2004); Peter Van Tuyn, *Courage without Conviction: Cause for Chaos in U.S. Marine Fisheries Management*, 28 VT. L. REV. 663 (2004).

other words, the councils have shied away from uniform-use conservation areas, have tended to preserve future options, have tried to avoid offending concentrated interests (commercial fishermen), and have failed to reallocate significant portions of the sea within their jurisdictions to weak interest groups such as conservation or recreational fishing.

D. California's Marine Life Protection Act

The Marine Life Protection Act, passed in 1999, provides perhaps the most robust example of delegated zoning.²⁵⁷ Unlike the National Marine Sanctuary Act, the ACEC provisions of the FLPMA, or the EFH provisions of the MSFCMA, the Marine Life Protection Act (“MLPA”) actually mandates, among other things, the creation of uniform-use conservation zones—known as “marine life reserves”—within California waters.²⁵⁸ Among the findings it lists in the MLPA, the California Legislature includes the finding that:

[m]arine life reserves are an essential element of a [marine protected area system] because they protect habitat and ecosystems, conserve biological diversity, provide a sanctuary for fish and other sea life, enhance recreational and educational opportunities, provide a reference point against which scientists can measure changes elsewhere in the marine environment, and may help rebuild depleted fisheries.²⁵⁹

The Act defines a “marine life reserve” as:

a marine protected area [MPA] in which all extractive activities, including the taking of marine species, and, at the discretion of the commission and within the authority of the commission, other activities that upset the natural ecological functions of the area, are prohibited. While, to the extent feasible, the area shall be open to the public for managed enjoyment and study, the area shall be maintained to the extent practicable in an undisturbed and unpolluted state.²⁶⁰

257. CAL. FISH & GAME CODE §§ 2850-63 (West 2007).

258. §§ 2853(c)(1), 2852(d).

259. § 2851(f).

260. § 2852(d).

Overall, the Act sets out a process for “reexamin[ing] and redesign[ing] California’s MPA system to increase its coherence and its effectiveness at protecting the state’s marine life, habitat, and ecosystems.”²⁶¹ The objective of this process is a “Master Plan,” essentially a map that identifies the resources within California’s marine waters and lays out several alternative configurations of existing and proposed new MPAs (including marine life reserves).²⁶² Once the Plan has been completed, it is to be presented to the California Fish and Game Commission,²⁶³ vested by the legislature with the power to approve a final Marine Life Protection Program.²⁶⁴

Under the terms of the original Act, a “master plan team” was to prepare the Master Plan “on or before July 1, 2001,” at which point the California Department of Fish and Game (“DFG”) was to hold a series of workshops where the department would present the Master Plan to the public for discussion of the proposed alternatives.²⁶⁵ The purpose of these workshops was to allow the team to incorporate “information and views provided by people who live in the area and other interested parties” into the development of a preferred alternative.²⁶⁶ Following these workshops, the Department was, “on or before January 1, 2002,” “to submit a draft of the [M]aster [P]lan” containing this preferred alternative to the commission.²⁶⁷

261. § 2853(a).

262. § 2855.

263. The California Fish and Game Commission is:

composed of up to five members, appointed by the Governor and confirmed by the Senate. The Commissioners are not full-time State employees, but individuals involved in private enterprise with expertise in various wildlife-related fields. They have a staff of eight employees, which handle day-to-day administrative activities. The Commission meets at least eleven times each year to publicly discuss various proposed regulations, permits, licenses, management policies and other subjects within its areas of responsibility. It also holds a variety of special meetings to obtain public input on items of a more localized nature, requests for use permits on certain streams or establishment of new ecological reserves.

Between 1870 and 1940, individual Commissioners served at the pleasure of the Governor. In 1940 the people provided for a Fish and Game Commission in the State Constitution (Article 4, Section 20). The Legislature delegated to the Commission a variety of powers, some general in nature and some very specific. A major responsibility is the formulation of general policies for the conduct of the [California] Department [of Fish and Game], and the Director is responsible for administering the Department's activities in accordance with these policies.

State of California, Fish and Game Commissions, <http://www.fgc.ca.gov/> (last visited Oct. 15, 2007).

264. CAL. FISH & GAME CODE § 2859(d).

265. 1999 Cal. Stat. 1999, ch. 1015 (A.B. 993). The deadline was changed by the California Legislature in 2001. Other statutory language remained the same. 2001 Cal. Legis. Serv. 4897 (West).

266. CAL. FISH & GAME CODE § 2857(a) (West 2007).

267. *See id.*

Between January and April, the Department of Fish and Game was to hold at least three public meetings on the proposed Master Plan and the alternatives therein.²⁶⁸ Finally, on or before July 1, 2002, the Fish and Game Commission was to hold several public hearings, then “adopt a final master plan and a Marine Life Protection Program based on the plan and . . . implement the program, to the extent funds are available.”²⁶⁹

The first efforts to implement the MLPA provide ample evidence of the controversial nature of uniform-use zoning decisions. As recounted by Weible:

[d]uring the summer of 2001, the DFG organized ten public meetings to present the science-based proposal in a traditional public hearing format. Most of the fishing interests and local government officials reacted with outrage. They were upset about the proposed size and locations of the proposed MPAs and indignant for not being consulted by the DFG. In response to political pressure from the fishing community, the California DFG abandoned the master plan team process six months after the public meetings.²⁷⁰

Weible is not understating the controversy that surrounded implementation of the MLPA. In a recent newspaper article describing ongoing issues with the MLPA, Brian Baird, California’s assistant secretary for ocean and coastal policy at the California Resources Agency, said that “on the scale of political volatility . . . [the MLPA is] thermonuclear.”²⁷¹

Following the Plan team’s initial failure, the California Legislature extended the deadline for DFG’s submission of the Master Plan to the Fish and Game Commission, moving it back to April 1, 2003.²⁷² In the summer of 2002, the Department and Master Plan team began another effort toward implementation of the Act.²⁷³ In late 2002, the legislature again extended the Plan submission deadline, this time until 2005.²⁷⁴

268. *Id.*

269. *Id.*

270. Weible, *supra* note 195, at 102.

271. Terry Rodgers, *Troubled Waters: Plan to Increase California’s Marine Protected Areas Worries Fishing Industry*, SAN DIEGO UNION-TRIBUNE (CA), Sept. 17, 2006, at A1.

272. 2001 Cal. Legis. Serv. 4897 (West).

273. Weible, *supra* note 195, at 102-03.

274. 2002 Cal. Stat., ch. 559 § 2 (A.B. 892).

While implementation struggled against political opposition in the administrative process, the MLPA ran into budget problems.²⁷⁵ “In early 2004, the Schwarzenegger Administration announced an ‘indefinite postponement’ on the implementation of the MLPA until funding could be found to support administration, staffing, and necessary scientific analyses supporting the designation process.”²⁷⁶

By all accounts dead in the water, the MLPA was ultimately revived when the Resources Legacy Fund Foundation, a private foundation,²⁷⁷ offered to provide California with about 4 million dollars toward the cost of a third effort at implementing the Act.²⁷⁸ In its third iteration, the Master Plan team was replaced by a “Blue Ribbon Task Force” that focused on drafting proposed MPA systems for the central one-third of California’s coast.²⁷⁹ In April of 2007, the Fish and Game Commission approved one of these proposed systems, designating eighty-five square miles (or eight percent of the total area under evaluation) of the Central Coast as uniform-use marine life reserves and another ten percent as mixed-use marine protected areas.²⁸⁰ The remainder of the area continues to be “zoned” for multiple uses.

As noted, the MLPA represented a direct legislative mandate to create some number of uniform-use zones. As such, the statute did not allow the Department of Fish and Game the option of “regulating away” its zoning responsibilities.²⁸¹ Furthermore, the Act contained fixed deadlines for

275. Mize, *supra* note 195, at 10,385.

276. *Id.*

277. See generally Resources Legacy Fund Foundation, <http://www.resourceslegacyfund.org/riff.html> (last visited Mar. 5, 2008).

278. Mize, *supra* note 195. In a Memorandum of Understanding between the California Department of Fish and Game, the Resources Legacy Fund, and the California Resources Agency, each party agreed to a mutual interest in preserving the resources in California’s oceans through a third effort to implement the California Marine Life Protection Act. The Memorandum set up a cooperative effort between these parties with a primary purpose of enlisting the Foundation’s aid in preparing a Master Plan Framework for the Act through a transparent and accountable process. The Memorandum set up a Blue Ribbon Task Force to create the Framework and laid the groundwork for possible future cooperation between the parties. In the Memorandum, each party also made unique commitments. The Agency agreed to provide the Task Force with the physical space, management manpower, and the possibility of future funding. The Department agreed to provide public data, to provide scientific personnel, and to independently review drafts of the Master Plan. The Foundation, in contrast, agreed to provide funding for the project and to work to obtain other investors. For a copy of the Memorandum of Understanding, see Memorandum of Understanding among the Cal. Resources Agency, the Cal. Dep’t of Fish & Game, & the Resources Legacy Fund Found. for the Cal. Marine Life Prot. Act Initiative (Aug. 27, 2004), available at <http://www.dfg.ca.gov/mlpa/pdfs/mou.pdf>.

279. Mize, *supra* note 195, at 10,385-86.

280. See State of Cal., Dep’t of Fish & Game, <http://www.dfg.ca.gov/MRD/mlpa/ccmpas.asp> (last visited April 5, 2008).

281. Some authors have suggested that the MLPA did not require, but merely allowed, the creation of marine life reserves. In their study, Bernstein et al. attribute implementation problems in

implementation, putting some limits (albeit apparently avoidable ones) on the agency's ability to delay implementation.

The fact that the Act eventually resulted in the creation of a number of uniform-use zones is evidence that delegated zoning can achieve some results. However, the MLPA story does raise interesting questions about the efficiency of delegated zoning. Partial implementation of the Act took eight years. Although DFG's current goal is to finalize the final two-thirds of its Marine Life Protection Program by 2011,²⁸² it is reasonable to wonder whether this will occur, given that the first third took eight years and that one of the two future "thirds" involves the even more hotly contested waters off Southern California.²⁸³ Would it be more efficient for the legislature to take on the role of adopting a plan prepared in an administrative process? Given the amount of controversy generated by the MLPA process, perhaps legislators would be better suited to withstand the "thermonuclear" heat of that decision.

It is also worth wondering whether a direct zoning model would have designated more than eight percent of the Central Coast as uniform-use zones. Although the 2001 recommendations of the original Master Plan team are no longer available on the Department of Fish and Game website, newspaper coverage from the time indicates that the team recommended that fifteen percent of California waters be designated as marine life reserves.²⁸⁴ According to the leader of a recreational fishing group, this fifteen percent covered about "70 [percent] of the fishable waters" of the state.²⁸⁵ While this may be an exaggeration, the results of the MLPA could well have been

the years following passage of the statute to the Department of Fish and Game's unwillingness to "take control of the message regarding the specific goals of the MLPA and the network of MPAs." NATIONAL FISHERIES CONSERVATION CENTER, LESSONS LEARNED FROM THE RECENT MARINE PROTECTED AREA DESIGNATIONS IN THE UNITED STATES 22-23 (2004). If this interpretation of history (and the statute) is correct, DFG's approach to the MLPA would not be all that different from the efforts of NOAA and BLM in interpreting sanctuary and ACEC mandates.

282. *Id.* The process of implementing the MLPA in the northern third of California waters is currently underway. Press Release, State of California: Resources Agency, Secretary for Resources Mike Chrisman Announces Order for Remaining MLPA Study Regions (Dec. 6, 2007), available at http://www.resources.ca.gov/press_documents/2007.pdf.

283. Rodgers, *supra* note 271. It is also reasonable to wonder whether any results would have been obtained through the MLPA in the absence of the unusual circumstance of a private foundation willing to inject millions of dollars into a government process.

284. Ryck Lydecker, *Anglers De-Bone No-Take Zone*, BOAT U.S. MAGAZINE, July 1, 2002, at 18, available at http://findarticles.com/p/articles/mi_m0BQK/is_4_7/ai_89513882.

285. *Id.*

different had the legislation contained a provision requiring legislative approval of the initial Master Plan team's recommendations.²⁸⁶

VI. LEGISLATURES CAN ZONE

There are several practical arguments that are likely to be raised in favor of delegated zoning and against direct zoning. First, it might be argued that agencies are in the best position to gather and process the information needed to draft an optimal zoning plan. While it is true that agencies are well-equipped for gathering and processing information, decisions about where to draw zone lines, though properly informed by science and economics, are neither scientific nor economic decisions. They are ultimately political decisions about how resources should be allocated among user groups (and between current and future generations).

A second argument is that legislatures are ill-suited to the zoning chore because of their lack of information-collecting capabilities. Legislatures do have some capacity to collect information through hearings and mandated reports. More importantly, framing the choices as "agency does all" or "legislature does all" unnecessarily constrains the options and fails to take into account the unique capacities of the two institutions. In this section, I provide examples of how direct zoning has occurred in private and public property contexts, illustrating how legislative bodies have crafted efficient systems for gathering information and making zoning decisions.

A. *The Municipal Experience*

As noted in the introduction to this Article, municipal zoning decisions must be approved by elected officials.²⁸⁷ In making these decisions, city and county councils make use of permanent or temporary advisory bodies, generally known as planning commissions, whose task it is to perform studies and prepare the plans upon which council members then vote.²⁸⁸ This system, uniformly used throughout the United States,²⁸⁹ has proven capable of implementing zoning plans in short periods of time.

The ability of this system to complete the zoning chore quickly, even in the context of complexity and controversy, is apparent in its application to the zoning of large cities such as New York City, Los Angeles, and Chicago.²⁹⁰ In New York City, for example, the Commission on Building

286. See discussion *infra* at VI.C (regarding the Great Barrier Reef in Australia). Zoning legislation for the reef contained a provision requiring legislative review of the zoning plan.

287. YOKLEY, *supra* note 4, at 16-3 to 16-8.

288. *Id.*

289. *Id.*

290. New York, N.Y., New York City Zoning Resolution (1961); Los Angeles, Ca., Municipal

Districts was created in June of 1914; the New York City Board of Estimate²⁹¹ approved the zoning plan drafted by the Commission on July 25, 1916.²⁹² At that time, the population of New York City was about 5 million people,²⁹³ the city covered more than 300 square miles,²⁹⁴ and the combined value of the private real estate holdings within city limits was estimated to be more than 8 billion dollars.²⁹⁵

Similarly, New York's first "elaborate" revision of its original zoning ordinance took just slightly more than two years to complete.²⁹⁶ Under procedures created by a reformed city charter, a planning commission began its work at the beginning of January 1938, and by April 1940 had "adopted a long series of detailed amendments."²⁹⁷ Under the provisions of the city charter, these amendments were to become law "unless disapproved within 30 days by a [three-fourths] vote of the Board of Estimate"²⁹⁸ Although many of the proposed amendments were noncontroversial, several of the commission's recommendations aroused substantial opposition from affected members of the public, eliciting "[c]ries of 'confiscation,' 'radicalism,' [and] 'disregard of property rights.'"²⁹⁹ Notwithstanding the protests, "most of the changes adopted by the planning commission were permitted to stand untouched."³⁰⁰

Code ch. 1 (Planning and Zoning Code) (1936); Chicago, Ill., Chicago Zoning Ordinance (2004).

291. The New York City Board of Estimate no longer exists. Created in the late nineteenth century, its members included eight elected officials: the mayor of New York City, the presidents of the five boroughs, the city comptroller, and the president of the Board of Aldermen. In 1989, the United States Supreme Court found that the board's composition contravened the Equal Protection Clause's guarantee of "one-person, one-vote." *Bd. of Estimate v. Morris*, 489 U.S. 688, 703 (1989).

292. *City Fixes Limit on Tall Buildings*, N.Y. TIMES, July 26, 1916, at 1.

293. CITY OF NEW YORK, NEW YORK CITY ZONING HANDBOOK (1990).

294. NYC.gov, New York City, Department of City Planning, New York City Land Use, <http://www.nyc.gov/html/dcp/html/landusefacts/landusefactshome.shtml> (last visited Mar. 5, 2008).

295. Charles S. Ascher, *New York City Revises its Zoning Ordinance*, 16 J. LAND & PUB. UTIL. ECON. 345, 345 (1940).

296. *Id.* at 347.

297. *Id.*

298. *Id.* This type of mechanism, sometimes referred to as "automatic government" or "government by commission," "provides [legislative bodies] a way to address politically charged issues and yet avoid blame from constituents for unpopular outcomes." Natalie Hanlon, *Military Base Closings: A Study of Government by Commission*, 62 U. COLO. L. REV. 331, 331 (1991). It is similar not only to the mechanism used by Congress in the Base Closure and Realignment Act of 1988, Pub. L. No. 100-526, 102 Stat. 2623 (codified at 10 U.S.C. § 2687 note (1988)), but also to that used by the Parliament of Australia in the zoning provisions of the Great Barrier Reef Marine Park Act 1977, discussed *infra* at Part VI.C.

299. Ascher, *supra* note 295, at 347.

300. *Id.* at 348. The board did vote to modify several of the more controversial amendments, including new restrictions on billboards and filling stations. *Id.*

B. *The Public Property Experience*

Of more than 700 million acres of federal public land, a significant percentage has been zoned for uniform use directly by Congress or the President.³⁰¹ These areas include national parks, national monuments, wilderness areas, and national wildlife refuges.³⁰²

Congress is not inexperienced in collecting the information necessary to determine whether an area is suitable for designation and what the boundaries of the area ought to be. Prior to the designation of Yellowstone National Park, for example, the House Committee on the Public Lands commissioned the eminent geologist Ferdinand Hayden to prepare “a detailed summary of Yellowstone’s qualifications for park status”³⁰³ and “to suggest suitable boundaries for the park”³⁰⁴

The Wilderness Act of 1964 also provides an example of how Congress has harnessed the staff and expertise of federal agencies for the purposes of gathering information necessary to the zoning enterprise.³⁰⁵ Sections 1132(b) and (c) of the Act required the Secretary of Agriculture and the Secretary of the Interior to inventory lands under their respective jurisdictions and to make recommendations to the President and Congress within ten years regarding the wilderness suitability of particular places within those jurisdictions.³⁰⁶ The Act permits the two agencies to make additional recommendations for designation in the reports they are required to annually file with the President and Congress.³⁰⁷ Furthermore, the Act required the agencies to solicit public input on each recommended wilderness designation through “a public hearing or hearings at a location or locations convenient to the area affected.”³⁰⁸

C. *The Great Barrier Reef*

The Great Barrier Reef (“GBR”) Marine Park in Australia is not only home to 133,000 square miles of coral reefs, “mangrove estuaries, seagrass

301. See *supra* note 63.

302. See *supra* note 63.

303. RUNTE, *supra* note 92, at 45.

304. *Id.* at 46. For other examples, see *Hearing on Canyonlands, Glen Canyon, Capitol Reef and Arches National Park*, 92d Cong. 1040 (1971); *Hearing before the Subcommittee on National Parks and Recreation on H.R. 12034 and similar H.R. 12335 to establish the Big Thicket National Park in Texas*, 92d Cong. 1023 (1972). These hearings included testimony from a wide variety of experts and interest groups. See also RUNTE, *supra* note 92 (discussing the creation and establishment of several of the United States’ national parks); JOHN ISE, *OUR NATIONAL PARK POLICY: A CRITICAL HISTORY* (1961) (discussing the history and policy of United States national parks).

305. 16 U.S.C. §§ 1131-36 (2006).

306. § 1132(b), (c).

307. § 1136.

308. § 1132(d)(1)(B).

beds, algal[,] . . . sponge gardens, sandy or muddy bottom communities, continental slopes and deep ocean troughs.”³⁰⁹ The Park is also the site of one of the world’s largest ocean zoning regimes.³¹⁰

In designing the procedural mechanisms for zoning the reef, the Parliament of Australia delegated responsibility for researching, designing, and enforcing the zoning plan to an agency, the Great Barrier Reef Marine Park Authority, but retained power to approve or disapprove the plan.³¹¹ In the Great Barrier Reef Marine Park Act, the Parliament mandated that: “[a]s soon as practicable after an area has been declared to be a part of the Marine Park, the Authority shall prepare a zoning plan in respect of that area.”³¹² In Section 32(7) of the Act, the Parliament set out the broad objectives of the zoning plan:

- (a) the conservation of the Great Barrier Reef;
- (b) the regulation of the use of the Marine Park so as to protect the Great Barrier Reef while allowing the reasonable use of the Great Barrier Reef Region;
- (c) the regulation of activities that exploit the resources of the Great Barrier Reef Region so as to minimize the effect of those activities on the Great Barrier Reef;
- (d) the reservation of some areas of the Great Barrier Reef for its appreciation and enjoyment by the public; and
- (e) the preservation of some areas of the Great Barrier Reef in its natural state undisturbed by man except for the purposes of scientific research.³¹³

309. Jon C. Day, *Zoning: Lessons from the Great Barrier Reef Marine Park*, 45 OCEAN & COASTAL MGT. 139, 140 (2002).

310. The zoning regime covers an area “bigger than the United Kingdom, Holland and Switzerland combined and almost the size of California.” *Id.* at 139.

311. Great Barrier Reef Marine Park Act 1975, § 33, available at [http://www.comlaw.gov.au/ComLaw/Legislation/ActCompilation1.nsf/0/AA27A8C98CD88ABACA25730E002199AC/\\$file/Gr%20BarrierRfMarPk1975WD02.pdf](http://www.comlaw.gov.au/ComLaw/Legislation/ActCompilation1.nsf/0/AA27A8C98CD88ABACA25730E002199AC/$file/Gr%20BarrierRfMarPk1975WD02.pdf). Somewhat similar to the New York City ordinance discussed above, the statute requires that the Great Barrier Reef Zoning Authority present the zoning plan to the Parliament of Australia, which then has the opportunity to reject it. *Id.*

312. *Id.* § 32(1).

313. *Id.* § 32(7).

The Act further required that, both before and after preparing the zoning plan, the Authority consult with the public.³¹⁴

Once the Authority has finalized the plan, it must submit the plan to the Minister for the Environment and Water Resources (a member of parliament appointed by the Prime Minister) for his or her approval.³¹⁵ At this point, the Minister may accept the zoning plan or refer it back to the Authority with suggestions.³¹⁶ If the Minister accepts the plan, he or she must “cause it to be laid before both Houses of the Parliament as soon as practicable and not later than 15 sitting days after the day on which it was accepted.”³¹⁷

If neither House of Parliament passes a resolution disallowing the plan “within 15 sitting days after the plan has been laid before that House,” the plan is deemed allowed and the Minister may notice a date for its entry into force as law.³¹⁸ There is no requirement for a positive vote by Parliament, and apparently no opportunity for Parliament to make changes to the proposed zoning plan. It may only reject it or accept it (by non-action) as submitted by the Minister.

The most recent comprehensive rezoning process for the Great Barrier Reef Marine Park took somewhere between two to five years from research to implementation.³¹⁹ For purposes of comparison, the GBR rezoning endeavor covered a geographic area that is approximately 44 times larger than the area of California waters covered by the MLPA, and about 180 times larger than the area of California waters covered by “phase one” of MLPA implementation.³²⁰ The GBR rezoning plan reconfigured the seven types of zones; the five types of uniform-use conservation zones, combined, cover more than thirty-six percent of the total Park area.³²¹

314. *Id.* § 32(2).

315. *Id.* § 32(10).

316. *Id.* § 32(11).

317. *Id.* § 33(1).

318. *Id.* § 33(2), (5).

319. According to the Great Barrier Reef Marine Park Authority, research for the rezoning plan began in 1998. However, the agency did not give formal notice that it intended to prepare a draft rezoning plan until the summer of 2002. The agency submitted the rezoning plan to the Parliament on December 3, 2003. *See* Australian Government, Great Barrier Reef Marine Park Authority, The Great Barrier Reef: Representative Areas Program, available at http://www.gbrmpa.gov.au/_data/assets/pdf_file/0016/10681/Rap_poster.pdf.

320. The first estimate is based on the fact that the California coastline is about 1100 miles long and that the state’s jurisdictional waters extend out to three miles. Cal. Coastal Comm’n, the Cal. Coastal Trail, <http://www.coastal.ca.gov/access/ctrail-access.html> (last visited Oct. 17, 2007). The second estimate is based on the distance between Pigeon Point and Point Conception, the northern and southern limits of the Central Coast as covered by the first phase of the MLPA process. *See* State of California, Department of Fish & Game, Cent. Cal. Marine Protected Areas, <http://www.dfg.ca.gov/MRD/mlpa/images/ccmpas041907.jpg> (last visited Oct. 16, 2007).

321. Australian Government, Department of Environment & Heritage, Review of the Great Barrier Reef Marine Park Act 1975, 57-58 (2006), available at <http://www.environment.gov.au/coasts/publications/pubs/gbr-marine-park-act.pdf>.

The efficiency of the GBR zoning process cannot be attributed to a lack of controversy. As in California, several concentrated resource extraction groups strongly opposed the creation of uniform-use conservation zones. A government review of the GBR process found that:

[a] group of stakeholders with strongly held views expressed great dissatisfaction with the rezoning process and questioned the science behind it. This group considered that the Authority lacked accountability and was not only biased but had actively worked against them. The stakeholders expressing such considerable dissatisfaction did so largely in relation to the treatment of recreational and commercial fishing interests and the impacts on associated land-based businesses such as boatyards, bait and tackle suppliers and land-based fish processing and marketing enterprises.³²²

VII. CONCLUSION

The idea that the legislature may reserve a role for itself in approving tentative administrative decisions is not a new one.³²³ Neither is the idea that direct zoning of public lands is likely to result in very different results than multiple-use management.³²⁴

322. *Id.* at 59.

323. As James Landis wrote in 1938, "It is possible by a simple device to have the administrative as the technical agent in the initiation of rules of conduct, yet at the same time to have the legislative share in the responsibility for their adoption." JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* 76 (Yale University Press 1966) (1938). In fact, some state administrative procedure acts mandate legislative review of agency regulations. See Jim Rossi, *Institutional Design and the Lingering Legacy of Antifederalist Separation of Powers Ideals in the States*, 52 *VAND. L. REV.* 1167, 1201-04 (1999).

324. See, e.g., Curtis, *supra* note 59, at 787, 805 ("The present 'multiple use' system should be replaced with one incorporating a 'limited use' concept, in which Congress would determine single or dominant purposes for all federally-owned tracts of land The present administrative structures of the Bureau of Land Management and the Forest Service do not respond adequately to the full range of user interests."); NELSON, *supra* note 56, at 370 ("Congressional mandates for 'multiple-use' management have amounted in effect to a Congressional blessing for a system of interest-group negotiation and accommodation."); Stephen C. Trombulak, *An Integrative Model of Landscape-scale Conservation in the Twenty-first Century*, in *RECONSTRUCTING CONSERVATION* (Ben A. Minteer & Robert E. Manning eds., 2003) (arguing that a uniform-use approach is preferable to the multiple-use approach). But see William L. Reavley, *An Environmental Approach to the PLLRC Report Concerning Grazing*, 6 *LAND & WATER L. REV.* 69 (1971) (arguing that uniform-use management would be detrimental to the interests of conservation groups).

For an interesting paper that, in important ways, foreshadows the marine reserve movement

While it may be true that agencies are capable of zoning, a convincing case can be made that zoning is not a good fit with agencies' incentives or institutional capacities. Any future effort to zone state or federal seas will require some legislative involvement. After all, the law must be passed, whether it delegates the zoning chore or not. If state and federal legislatures wish to see their zoning objectives realized, they would be well-advised to consider an alternative to delegated zoning.³²⁵

The *ad hoc* direct zoning model that Congress has used in creating parks and wilderness areas may not fit perfectly with the idea of comprehensive ocean zoning.³²⁶ However, as the examples of municipal zoning and the Great Barrier Reef plan show, other models are available. Importantly, these models do not require any greater investment of legislative time and effort than the delegated zoning models of the MLPA, ACECs, or National Marine Sanctuaries.³²⁷ They simply require a wrinkle in the initial legislation and a willingness to take responsibility for the difficult political decisions inherent in any zoning enterprise.³²⁸

and its rationales, see Carl E. Bock et al., *Proposal for a System of Federal Livestock Enclosures on Public Rangelands in the Western United States*, 7 CONSERVATION BIOLOGY 731 (1993).

325. The "other" elected officials—that is, the President and Governors—could also play an important role in implementing ocean zoning. See John A. Lesly, *Shaping the Modern West: The Role of the Executive Branch*, 72 U. COLO. L. REV. 287 (2001); See also Proclamation No. 8031, 71 Fed. Reg. 36,443 (June 15, 2006) (creating the Northwestern Hawaiian Islands Marine National Monument in 2006 and renaming the Papahānaumokuākea Marine National Monument on March 2nd, 2007); Papahānaumokuākea Marine National Monument, Marine National Monument Established, <http://www.hawaiiireef.noaa.gov/management/welcome.html> (last visited Mar. 5, 2008).

326. Some ocean zoning proposals emphasize the importance of comprehensive planning as critical to success. See, e.g., Crowder et al., *supra* note 13. Comprehensive planning is meant to be an integral part of municipal zoning. "[Z]oning without planning lacks coherence and discipline in the pursuit of goals of public welfare which the whole municipal regulatory process is supposed to serve." Charles M. Haar, *In Accordance With a Comprehensive Plan*, 68 HARV. L. REV. 1154, 1154 (1955).

327. Insofar as it relieves the legislature from the responsibility of overseeing agency decisions, direct zoning may, in fact, conserve legislative time.

328. If legislatures wish to shelter themselves from some of the controversy associated with zoning public property, they might utilize a dichotomous choice voting mechanism similar to that used in the Great Barrier Reef Marine Park Act and in the base closure legislation. See *supra* note 298.