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

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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

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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. 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. 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. 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. C.f., 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 . . . .”

By contrast, legislatures and executives have used two distinct institutional approaches in zoning public lands and seas. 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, legislation and Presidential proclamations. In other cases, however, they have opted to make use of a

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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).


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 Sanctuaries\(^10\) 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
Gray Davis signed the Marine Life Protection Act ("MLPA"), 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." 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. In the MLPA, the California Legislature delegated
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

840
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, an emphasis on multiple-use “zones” that do not provide the benefits of uniform-use zones, 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, the Federal Land Policy and Management Act, the Magnuson-Stevens Fishery Conservation and Management Act, and California’s Marine Life Protection Act. 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
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. Cities in the United States began to implement zoning in the second decade of the twentieth century. In Village of Euclid v. Ambler Realty Co., 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. Today, about ninety percent of American municipalities with more than 10,000 residents have adopted zoning ordinances.

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.


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).

As explained over the years, zoning is a response to market failure. The critical assumption, which remains contested, is that pre-zoning conflict resolution systems could not efficiently resolve conflicts among landowners. 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. While this system


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.\textsuperscript{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).\textsuperscript{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.\textsuperscript{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,\textsuperscript{42} juries are fickle,\textsuperscript{43} and the relative likelihood of crippling injunctive or affordable damages remedies (if a nuisance is established) is difficult to predict.\textsuperscript{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.\textsuperscript{45} By establishing

\begin{itemize}
\item \textsuperscript{39} See Posner, \textit{supra} note 31, at 60-62.
\item \textsuperscript{40} 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).
\item \textsuperscript{41} See supra note 38; see also Singer, \textit{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").
\item \textsuperscript{42} 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).
\item \textsuperscript{43} 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. 1917); 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 Quesn Light Co., 126 A. 345 (Pa. 1924); Madison v. Ducktown Sulphur, Copper & Iron Co., 83 S.W. 658 (Tenn. 1904).
\item \textsuperscript{44} 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, \textit{Zoning: A Reply to the Critics}, 10 J. LAND USE & ENVTL. L. 45, 47-48 (1994). Karkkainen points out that "[t]he 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.\textsuperscript{46}

Beyond aiming at these welfare-enhancing effects, zoning can be used in an attempt to achieve normative goals.\textsuperscript{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.\textsuperscript{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.\textsuperscript{49} In the zoning process, by contrast, residents would have greater power to prevent construction of this gas station.\textsuperscript{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

\textsuperscript{46} See, e.g., Christophe Defeuilley, \textit{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.”). \textit{But see} WILLIAM A. FISCHEL, \textit{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.”).

\textsuperscript{47} See FISCHEL, \textit{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”).

\textsuperscript{48} See Sidney Willhelm \& Gideon Sjoberg, \textit{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); \textit{see also} FISCHEL, \textit{supra} note 46, at 36-37.

\textsuperscript{49} POSNER, \textit{supra} note 31, at 61.

\textsuperscript{50} FISCHEL, \textit{supra} note 46, at 55-56.
city council to rezone her property. Under either of these options, the developer would face a steep uphill climb, and residents would have the advantage. 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.

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) ("Zoning has evolved into a mechanism that conserves and protects existing residential communities by moderating the pace of development and change."); see also FISCHEL, 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:

[Although 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," 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. 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.

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. 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.

54. Fischel, 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. 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. Second, in the municipal setting, the pre-zoning conflict resolution mechanism is nuisance law. In the public property setting, the background mechanism is administrative process. Within un-zoned areas of public property, also known as multiple-use areas, 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).

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).

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).

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.

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).

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).


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.\(^4\)

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.\(^5\)

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.\(^6\)

Zoning the public land in question, by designating this area \textit{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.\(^7\) Although investment decisions do not concern purchases of land, they can still be significant.\(^8\)

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


\(^7\) \textit{PUBLIC LAND LAW REVIEW COMMISSION}, supra note 59, at 51.

contingent on the vagaries of the administrative decision-making process.\textsuperscript{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.\textsuperscript{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,\textsuperscript{71} Congress has zoned very little of the public lands to benefit commercial interests such as timber, mining, grazing, or oil and gas development.\textsuperscript{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.\textsuperscript{73}

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\textsuperscript{69} For an exploration of the boundaries of these vagaries, see Anderson, supra note 68.

\textsuperscript{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 HORKWITT 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.


\textsuperscript{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.

\textsuperscript{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. 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. 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. Thus, the establishment of protected areas can have conservation benefits for all areas of public lands, including areas that have not yet been zoned.

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. Second, zoning cannot function without zones and zone rules existing in a stable form for a meaningful period of time. 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.
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." In other words, zoning simply would not be zoning unless it divided an area into uniform-use zones. 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. A pollution-emitting factory would have less impact on property owners whose property is further away than it would on its close-by neighbors. 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 "[l]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. 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. 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. 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. 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. 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.


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.

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.”).
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. Fischel, 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.

856
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.


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. 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.

III. HYPOTHESES REGARDING AGENCIES

Over the years, various scholars have argued that Congress should not delegate certain responsibilities to administrative agencies. 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. 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.

106. See supra note 46.

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. 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. By failing to fully exercise its powers in writing a given law, Congress is dooming that law to failure.

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. 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. 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. 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.

with statutes such as the Administrative Procedure Act\textsuperscript{114} and the National Environmental Policy Act.\textsuperscript{115} But, as Glen Robinson has written, we should avoid "confus[ing] research with choice, information with judgment."\textsuperscript{116}

While zoning an area does require information about the physical features of the property, prior human use of certain areas, and projected growth,\textsuperscript{117} it is ultimately a heavily political process.\textsuperscript{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.\textsuperscript{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.

\textsuperscript{114} 5 U.S.C. § 553(b) (2006).
\textsuperscript{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 I, 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.").
\textsuperscript{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.

\textsuperscript{118} FISCHEL, 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.").
\textsuperscript{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. This is particularly true where zoning rules prohibit activities that individuals had previously pursued in that same area.

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. In the public property context, the effects of zoning may not be as easily measured in financial terms, but may be equally significant. 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. Zoning, with its spatially defined prohibitions and its indefinite duration, would certainly heighten this controversy. 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. 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).
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. 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.

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. On the other hand, bureaucrats might be less likely to make controversial decisions because they lack the confidence that accompanies a voter mandate. Bureaucrats might be more interested in remaining “below the radar” and avoiding attention from the legislature or the chief executive.

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.” In support of this argument, Schoenbrod cites to earlier studies of...
administrative behavior, including those of Louis L. Jaffe and William T. Mayton.\textsuperscript{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.\textsuperscript{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.'"\textsuperscript{135}

\textbf{B. Incentives of Agency Officials}

As many have noted, agency officials have their own incentives.\textsuperscript{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.\textsuperscript{137} Rather, agency officials have incentives unrelated to the

\begin{itemize}
  \item \textsuperscript{133} Louis L. Jaffe, \textit{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").
  \item \textsuperscript{134} Mayton, supra note 116, at 962 (citation omitted).
  \item \textsuperscript{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").
\end{itemize}
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."\textsuperscript{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."\textsuperscript{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.\textsuperscript{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.\textsuperscript{141}
Discretion not only gives officials a form of power distinct from the simple
power to execute the orders of a principal.\textsuperscript{142} It can also provide a
justification for more staffing and a higher budget\textsuperscript{143} and can increase
officials' standing with respect to their superiors, their peers, outside groups,
and their subordinates.\textsuperscript{144} Officials have available to them several means of
conserving discretion, including opposing changes that would narrow
statutory mandates delegating authority,\textsuperscript{145} postponing decisions that would

\textsuperscript{138} Niskanen, \textit{supra} note 136, at 293-94.

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

\textsuperscript{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 \textit{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 \textit{id.} at 231-34.

\textsuperscript{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, \textit{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." \textit{Id.}

\textsuperscript{142} WILSON, \textit{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.").

\textsuperscript{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, \textit{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, \textit{supra} note 139, at 181. He also notes, though, that "[a]ll
else being equal, big budgets are better than small." \textit{Id.} at 182.

\textsuperscript{144} It is easy to imagine that a person would prefer to be a "policy-maker" than a "bureaucrat."

\textsuperscript{145} Agency officials might accomplish this by lobbying Congress or testifying at oversight

864
limit future discretion, and interpreting statutes in a way that would enhance, rather than limit, future options.

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." 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. 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." Along the same lines, it insulates agency action from external criticism. 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.

hearing.

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.” 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.

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. 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.” 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. 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.” 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.” 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.” He gives several pieces of advice to the agency official seeking to minimize rivals and

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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.
159. Wilson, supra note 139, at 181.
160. Id.
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."

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." 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."

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. In addition to pitting user groups against one another in a higher-stakes battle, zoning may create divisions among user groups. 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. Other ranchers, who after zoning would have no practical access to grazing lands, would likely be very unhappy.
C. Influence of Concentrated Groups

Recall that one function of zoning is to address allocative inequities in the pre-zoning environment. 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. In the case of public property, inequities in the pre-zoning environment are a product of the concentrated-diffuse dynamic and agency processes. 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.

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

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,

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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 . . . .").
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


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.\textsuperscript{179}

Second, the incentives of agency officials militate toward a strategy of
delay.\textsuperscript{180} Zoning involves a direct reduction in agency discretion.\textsuperscript{181} In
creating uniform-use zones, agencies lose most of their future power to
make resource allocation decisions within the zones.\textsuperscript{182} Officials’ preference
for process over action supports delay.\textsuperscript{183} Risk aversion would certainly
slow the process down as agency officials avoided offending particular
groups.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{186}

Finally, agencies’ responsiveness to concentrated groups will also
contribute to the likelihood of delay.\textsuperscript{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.
Because the zoning plan was intended to fix a problem, perhaps poor environmental quality, then delaying that fix will entail costs. 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.

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


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.

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 Gillean, 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").

The statute gave the National Oceanic and Atmospheric Administration ("NOAA") a clear mandate to create zones out of its broader ocean jurisdiction. 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.”


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.


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. It contained no timeline for designation or goals as to the number of sanctuaries that NOAA was to create. 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. It did not, for example, call for the agency to protect a representative set of ocean ecosystems.

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.” 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. 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.”

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).
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," 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. 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."

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.

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. The second, Key Largo National Marine Sanctuary, designated in the same year, was larger—covering about seventy-five square

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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.").


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.

876
nautical miles.\textsuperscript{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.\textsuperscript{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").\textsuperscript{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 acres\textsuperscript{218} of federal land under its jurisdiction.\textsuperscript{219}

Although the Act generally calls for multiple-use management of BLM lands,\textsuperscript{220} it also provided that, within the multiple-use landscape, certain areas should be designated and protected as "areas of critical environmental concern" ("ACECs").\textsuperscript{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.\textsuperscript{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.\textsuperscript{223}

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

\textsuperscript{215} Id.
\textsuperscript{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, \textit{supra} note 123, at 729-38. These included the three largest national marine sanctuaries: Florida Keys, Monterey Bay, and Olympic Coast. See \textit{id}. at 722-23.
\textsuperscript{221} § 1712(c)(1)-(3).
\textsuperscript{222} § 1712(c)(3).
\textsuperscript{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.


226. § 1601.5-4.

227. § 1601.5-4(4).

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

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, 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.

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. 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").

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[,]" 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").

Unlike the sanctuary program, which as noted exists outside of the federal fishery management program, 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.


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 . . . ." The Act defines "essential fish habitat" as "those waters and substrate necessary to fish for spawning, breeding, feeding or growth to maturity." 

The EFH provisions call for the creation of special kinds of marine conservation zones. 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. 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. 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.

In a 2006 report entitled Ray of Hope: Successes and Shortcomings in Protecting Essential Fish Habitat, the marine conservation group, Marine Fish Conservation Network, documented actions of each of the eight Regional Fishery Management Councils in implementing the EFH provisions after 1996. According to the report, the councils were initially slow to act: "by 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."

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238. § 1802(10).
239. § 1801(b).
240. § 1853(b).
241. See § 1853(a)(7).
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 Conversation Network, About Us—Who We Are, http://www.conservefish.org/site/aboutus/whoweare/ (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.”\textsuperscript{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.\textsuperscript{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).\textsuperscript{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.\textsuperscript{250}

The councils eventually prepared more complete Environmental Impact Statements that assessed those impacts.\textsuperscript{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.”\textsuperscript{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,”\textsuperscript{253} using uncertainty to delay the imposition of protective rules, “maintain[ ] that existing management measures are sufficient,”\textsuperscript{254} “prohibit[ ] [harmful fishing] gear where it currently is not a threat,”\textsuperscript{255} and “provid[e] some protection for the most vulnerable habitat types, but ignor[e] other important areas.”\textsuperscript{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

\textsuperscript{247} Id.
\textsuperscript{248} Id.
\textsuperscript{250} Id. at 20.
\textsuperscript{251} MARINE FISH CONSERVATION NETWORK, supra note 195, at 6.
\textsuperscript{252} Id.
\textsuperscript{253} Id. at 1.
\textsuperscript{254} Id. at 1-2.
\textsuperscript{255} Id. at 2.
\textsuperscript{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. 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. 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.

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.

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 "reexamining and redesigning California's MPA system to increase its coherence and its effectiveness at protecting the state's marine life, habitat, and ecosystems.\textsuperscript{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).\textsuperscript{262} Once the Plan has been completed, it is to be presented to the California Fish and Game Commission,\textsuperscript{263} vested by the legislature with the power to approve a final Marine Life Protection Program.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{267}

\textsuperscript{261} § 2853(a).
\textsuperscript{262} § 2855.
\textsuperscript{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.

\textsuperscript{264} CAL. FISH & GAME CODE § 2859(d).
\textsuperscript{266} CAL. FISH & GAME CODE § 2857(a) (West 2007).
\textsuperscript{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. 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."  

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.  

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.”

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. In the summer of 2002, the Department and Master Plan team began another effort toward implementation of the Act. In late 2002, the legislature again extended the Plan submission deadline, this time until 2005.

268. Id.
269. Id.
270. Weible, supra note 195, at 102.
273. Weible, supra note 195, at 102-03.
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

276. Id.
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.
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

886
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, 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. 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. According to the leader of a recreational fishing group, this fifteen percent covered about “70 [percent] of the fishable waters” of the state. While this may be an exaggeration, the results of the MLPA could well have been
different had the legislation contained a provision requiring legislative approval of the initial Master Plan team’s recommendations.\textsuperscript{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.\textsuperscript{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.\textsuperscript{288} This system, uniformly used throughout the United States,\textsuperscript{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.\textsuperscript{290} In New York City, for example, the Commission on Building

\textsuperscript{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.
\textsuperscript{287} YOKLEY, supra note 4, at 16-3 to 16-8.
\textsuperscript{288} Id.
\textsuperscript{289} Id.
\textsuperscript{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 Estimate approved the zoning plan drafted by the Commission on July 25, 1916. At that time, the population of New York City was about 5 million people, the city covered more than 300 square miles, and the combined value of the private real estate holdings within city limits was estimated to be more than 8 billion dollars.

Similarly, New York's first "elaborate" revision of its original zoning ordinance took just slightly more than two years to complete. 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." 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 . . . ." 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.'" Notwithstanding the protests, "most of the changes adopted by the planning commission were permitted to stand untouched."

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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).
293. CITY OF NEW YORK, NEW YORK CITY ZONING HANDBOOK (1990).
296. Id. at 347.
297. Id.
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. These areas include national parks, national monuments, wilderness areas, and national wildlife refuges.

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” and “to suggest suitable boundaries for the park . . . .”

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. 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. 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. 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.”

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).
306. § 1132(b), (c).
307. § 1136.
308. § 1132(d)(1)(B).
The Great Barrier Reef Marine Park Act, 1975, § 33, available at http://www.comlaw.gov.au/ComLaw/Legislation/ActCompilation1.nsf/AA27A8C98CD88ABACA25730E002199AC/$file/GrtBarrierRfMarPk1975WD02.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. § 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

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314. Id. § 32(2).
315. Id. § 32(10).
316. Id. § 32(11).
317. Id. § 33(1).
318. Id. § 33(2), (5).
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).

892
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.\(^{324}\)

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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.

893
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.\textsuperscript{325}

The \textit{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{328}

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\textsuperscript{326} Some ocean zoning proposals emphasize the importance of comprehensive planning as critical to success. \textit{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, \textit{In Accordance With a Comprehensive Plan}, 68 HARV. L. REV. 1154, 1154 (1955).

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

\textsuperscript{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. \textit{See supra} note 298.