

# TAMING ADVERSARIAL LEGALISM: THE PORT OF OAKLAND'S DREDGING SAGA REVISITED

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During the past generation, a bookshelf's-worth of criticism has been leveled at the extent to which law has become the primary instrument for framing and resolving—indeed, for discussing—America's policy problems. The nation, it is repeatedly said, suffers from a glut of lawyers and excessive rights-consciousness.<sup>1</sup> “Our current American rights talk” is held to be distinctive in “its prodigality . . . , its legalistic character, its exaggerated absoluteness, its hyperindividual-

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1. See, e.g., LAWRENCE M. FRIEDMAN, *THE REPUBLIC OF CHOICE: LAW, AUTHORITY AND CULTURE* (1990) (discussing evolution of concept of individual rights in Western legal culture); MICHAEL KAMMEN, *A MACHINE THAT WOULD GO OF ITSELF: THE CONSTITUTION AND AMERICAN CULTURE* (1983) (arguing that complex and sometimes conflicting interpretations decrease public's understanding of Constitution); JETHRO K. LIEBERMAN, *THE LITIGIOUS SOCIETY* (1981) (discussing courts' role in setting public policy); PETER H. SCHUCK, *SUING GOVERNMENT* (1983) (concerning civil remedies for torts committed by public officials); Lawrence M. Friedman, *Litigation and Its Discontents*, 40 *MERCER L. REV.* 973 (1989) (examining whether litigation has become excessive); Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) about Our Allegedly Contentious and Litigious Society*, 31 *UCLA L. REV.* 4 (1983) (providing empirical analysis of levels of litigation).

ism, its insularity, and its silence with respect to personal, civic, and collective responsibilities.”<sup>2</sup>

Much of this discussion is rhetorical and not empirical in character, expressed in terms that have more to do with ideology than law or policy. However, in a series of influential, widely-cited articles, Robert Kagan, a political scientist and lawyer, has used an elaborately developed case study—the twenty-five year struggle of the Port of Oakland, California, to deepen its harbor—to illustrate the more general argument that “adversarial legalism” leads to misguided policy choices.<sup>3</sup>

Kagan’s Port of Oakland narrative shows how costs mushroomed as one set of disputes was resolved, only to be replaced by new disputes; litigants, interest groups, and public agencies repeatedly took the Port to court; and impatient shipping companies fled to other, more accommodating ports, dramatically reducing Oakland’s share of the market. At the end of Kagan’s tale, part tragedy and part farce, the Port’s problems seemed no closer to being resolved than at the outset.

This account of institutional failure is proffered as an empirical stepping stone to broader claims about the pitfalls of the fragmented American system of decision making generally, and especially, the over-reliance on courts to resolve multi-faceted disputes. Policy making is perceived as hampered by fractured government, public agencies with narrow missions, weak central authority, too little trust of expertise, and too easy access to the judicial system.

Drawing on the Oakland case study, as well as European practice, Kagan argues for a less open and more tightly controlled model of decision making.<sup>4</sup> He favors establishing a powerful quasi-governmental agency, which would be authorized in the event of failed negotiations to issue decisions that command near-total deference by the courts.<sup>5</sup>

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2. MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE at x (1991) (comparing discussion of rights in United States to discussion in other liberal democracies).

3. See Robert A. Kagan, *Adversarial Legalism and American Government*, 10 J. POL’Y ANALYSIS & MGMT. 369 (1991) [hereinafter Kagan, *Adversarial Legalism*]; Robert A. Kagan, *The Dredging Dilemma: Economic Development and Environmental Protection in Oakland Harbor*, 19 COASTAL MGMT. 313 (1991); Robert A. Kagan, *Dredging Oakland Harbor: Implications for Ocean Governance*, 23 OCEAN & COASTAL MGMT. 49, 55-63 (1994). See generally Robert A. Kagan, *Should Europe Worry about Adversarial Legalism?*, 17 OXFORD J. LEGAL STUD. 165 (1997) (discussing roots and consequences of adversarial legal systems in United States and Europe).

4. See Kagan, *Adversarial Legalism*, *supra* note 3, at 387-89.

5. See *id.*

Kagan's rendering of the Port of Oakland story is a cautionary tale. But it is also an incomplete tale. Stalemate ultimately gave way to agreement as Oakland's policy makers, guided by new legal rules and by astute political actors, snatched opportunity from the jaws of paralysis. In 1995, four years after Kagan's narrative ends, a clamshell dredge excavated the first bucketful of mud from the Harbor.<sup>6</sup> The dredging of the Port to a depth of forty-two feet, deep enough for modern container ships, was finally taking place.<sup>7</sup> The Port of Oakland's story has been transformed—and so have its legal and policy implications. The agreement to deepen the Port has become the model for managing environmentally and politically sensitive dredging projects in other locales, as well as the predicate for new federal legislation.<sup>8</sup>

The reverberations of this accomplishment reach beyond a single case. They suggest that an unwieldy system of decision making that includes multiple points of access to judicial intervention is susceptible to modification over time. They also indicate that the threat of recourse to the courts is not always a barrier to good outcomes; indeed, the possibility of a lawsuit can induce negotiations that yield widely accepted and substantively sensible results.

This article revisits the Oakland dredging saga and extracts new lessons for the design of legal and political systems of decision making. Part I updates the Port of Oakland narrative. Part II examines recent procedural changes for issuing dredging permits at both the federal and local levels. Although these changes do not fundamentally alter the adversarial nature of the system, they nonetheless represent real policy learning. Part III moves beyond the environmental issue to rethinking more broadly the supposed vices of adversarial legalism and the necessity of systemic reform. The article concludes that, while policy failures can result from over-reliance on legal rights, the lesson is not to reject rights-based concerns in favor of administrative autonomy. A more promising strategy draws on an array of competing policy frames, a "policy pentacle" that includes bureaucratization, professionalization, politicization, and privatization, as well as legalization. The healthy tension among these norms and forms of decision

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6. See Rick DeVecchio, *Oakland Looks Forward, Back in Ceremonies*, S.F. CHRON., May 13, 1995, at A15 [hereinafter DeVecchio, *Oakland Looks Forward*]. A preliminary round of dredging that removed a small percentage of the project total took place in 1992. See *Projects Hinge on Spoil Sites*, ENGINEERING NEWS-REC., Sept. 21, 1992, at 24, 24; *infra* notes 71-72 and accompanying text.

7. See DeVecchio, *Oakland Looks Forward*, *supra* note 6, at A15.

8. For discussion of new federal legislation predicated on the agreement to deepen the Port, see *infra* Part II.C.2.

making—the pull and tug of law, policy, and politics—has the potential to produce outcomes that are both better on their merits and more likely to gain wide acceptance.

## I

### BREAKING THE “MUDLOCK”

#### A. *Becoming Mired*

In 1972, at a time when a new generation of huge, swift, and fuel-efficient cargo ships was still on the drawing boards, the Port of Oakland first realized that it had to deepen its harbor, to forty-two feet, in order to compete for the lucrative business these ships would generate. That year, the Port began its efforts to deepen its channel.<sup>9</sup> The project would be stymied for twenty-four years.<sup>10</sup> But, for the first fifteen of those years, a lack of federal dollars and political infighting in Washington, not environmentalism or hyper-legalism, represented the primary roadblocks.

The federal government, which has constitutional jurisdiction over navigable waters, pays most of the cost of dredging navigational channels.<sup>11</sup> Because harbors are big-ticket items, mother’s milk to politicians, Congress has insisted on approving each new dredging project.<sup>12</sup> The queue has invariably been long, the political dealing has been fierce, and muscle rather than merit has been decisive in determining which projects get funded.

Things began to change in the mid-1970s, when the growing deficit surfaced as an issue on the national political agenda and concern mounted over pork barrel spending. Presidents Carter and Reagan put all dredging appropriations on hold for nearly a decade while the Office of Management and Budget (“OMB”) drafted rules designed to curb runaway federal spending.<sup>13</sup> OMB imposed stricter cost controls and demanded bigger local contributions; it also required the Army Corps of Engineers (the “Corps”), the lead federal agency in dredging projects, to prepare rigorous and time-devouring cost-benefit analyses.<sup>14</sup> In Oakland’s case, the Corps completed the cost-benefit analy-

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9. See Kagan, *Adversarial Legalism*, *supra* note 3, at 370.

10. See *id.* at 369-71, 379-84.

11. See *id.* at 379.

12. See *id.*

13. See *id.*

14. See *id.*

sis, as well as an Environmental Impact Statement (“EIS”), in 1984.<sup>15</sup> Three more years passed before Congress finally authorized funding.<sup>16</sup>

Once Congress funded the Oakland project, environmental disputes took center stage. A cast of hundreds, drawn from federal, state, and local government bureaus, as well as the private sector, weighed in. The result was a saga that Kafka could appreciate.

Citing potential harm to water quality and fisheries, California’s Water Resources Control Board and its Department of Fish and Game questioned the Army Corps of Engineers’ plan to dispose of the sediments dredged from the Harbor by dumping them in San Francisco Bay, near Alcatraz Island.<sup>17</sup> While the Corps disputed these claims in a supplemental EIS, the threat of legal challenge from the state agencies, and the delays such a challenge would inflict, prompted the Corps to abandon its plan.<sup>18</sup> Instead, it proposed to use a dumping site fifteen miles offshore,<sup>19</sup> a solution that doubled the estimated cost of the dredging to \$39 million.<sup>20</sup> This plan might well have mollified the state agencies, but the Environmental Protection Agency (“EPA”) stepped in, disputing the Corps’ conclusion that this dredging would have no significant environmental impact.<sup>21</sup> Without EPA approval, the Corps could not proceed.

In March 1988, the EPA and the Corps agreed on yet another disposal site—this one located thirty miles out to sea off the coast of San Mateo County, to the south of Oakland.<sup>22</sup> That revision, which added still more millions to the projected dredging costs, was supposed to appease local fishing interests; nonetheless, a fishermen’s association, fearing damage to fishing areas, filed suit in federal court to halt the dredging.<sup>23</sup> The fishermen lost that case, although not until a temporary restraining order was issued, then dissolved, by the Ninth Circuit Court of Appeals.<sup>24</sup> Dredging finally began, only to be halted within days, this time by an order from a San Mateo County trial court judge.<sup>25</sup> For two years, the case remained bottled up in state courts. The Port of Oakland, fearful of losing business, rented expensive hy-

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15. *See id.* at 381.

16. *See id.*

17. *See id.*

18. *See id.*

19. *See id.*

20. *See id.*

21. *See id.* at 381-82.

22. *See id.* at 382.

23. *See id.*

24. *See id.* at 383.

25. *See id.*

draulic dredging equipment;<sup>26</sup> but, as the equipment sat idle in the Harbor, shippers were forced to consider other possible ports of call.

Stymied in their attempts to dispose of the sediments at sea, Port officials tried still another tack. They developed a plan to use some 440,000 cubic yards of the dredged material, enough to deepen the channel to thirty-eight feet, to strengthen levees in the Sacramento River delta.<sup>27</sup> However, a downstream water district filed suit, claiming that the Port's environmental analysis had failed to address adequately the possibility that contaminants in the dredged sediment would migrate into its waterways.<sup>28</sup>

During this seemingly interminable process, the Port of Oakland's market share dropped from 37% of all containers shipped on the West Coast in 1972 to 14% two decades later.<sup>29</sup> The estimated cost of deepening the channel, \$20 million when Congress initially approved funding for the venture in 1987, had ballooned six-fold to \$120 million.<sup>30</sup> The straightforward project originally envisioned by Port officials had evolved into a plan of stunning complexity and uncertain prospects.

No resolution was in sight when Kagan published the first of his articles on adversarial legalism in 1991. While the Port won its legal battle with the water district soon after, the prospect of still more lawsuits, combined with the high cost of environmental monitoring associated with this latest plan, convinced Port officials that the levee option was unfeasible.<sup>31</sup> Twenty years into the venture, the dredging of the Port of Oakland seemed on the verge of being written off, and with it the commercial viability of the Port itself. It required an altered political and legal climate to rewrite this scenario.

### B. *Windows of Opportunity*

In the conventional model of policy analysis, problems come first. Solutions emerge only after various alternatives are devised and

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26. *See id.*

27. *See id.*

28. *See id.* at 383-84.

29. To be sure, not all of the loss in Oakland's market share is attributable to the silting of the channel. Oakland was a pioneer in providing facilities for the first generation of containerized cargo ships; once the other West Coast ports followed suit and invested in the necessary infrastructure, Oakland's market share naturally began to decrease. *See generally Oakland in \$31m Dredging Fiasco*, INT'L FREIGHTING WEEKLY, Mar. 11, 1991, available in LEXIS, News Library, Transp. File.

30. *See* Interview with James McGrath, Environmental Department Manager, Port of Oakland (March 1997).

31. *See Kagan, Adversarial Legalism*, *supra* note 3, at 384.

tradeoffs constructed.<sup>32</sup> But, in the real world, decisions often precede reasoning, calling to mind the Red Queen's *diktat* in *Alice in Wonderland*: "Sentence first—verdict afterwards."<sup>33</sup> Even when solutions are carefully planned before their implementation, plans are frequently altered or scrapped when unforeseen obstacles arise.<sup>34</sup> Problems, policies, and politics are jumbled until, for reasons mainly outside the control of policy actors, a window of opportunity opens. "A problem is recognized," John Kingdon writes in *Agendas, Alternatives and Public Policies*, "a solution is developed and available in the policy community, a political change makes it the right time for policy change, and potential constraints are not severe."<sup>35</sup> If an astute policy hand is present—someone who recognizes the "policy running room" these altered circumstances create—then the opportunity can be seized.<sup>36</sup>

Potential solutions to the Port of Oakland's conundrum existed all along. The window of opportunity would not be opened, however, until the Port, the Corps, and the EPA, driven to audaciousness by failure, came up with new potential solutions: an approved ocean disposal site, an on-land location for disposing of the most contaminated sediment, and an environmentally beneficial use of clean sediments to restore more than three hundred acres of tidal wetlands. Changes in the *zeitgeist* also contributed to resolving the dredging problem—a struggling California economy; an environmental community newly eager to demonstrate that economic growth and environmental responsibility could coexist; a bitter struggle over water policy in California's Central Valley; and a newly elected president, a master at making good use of political running room, who needed to solidify his political base in California in the aftermath of widespread military

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32. See EUGENE BARDACH, *THE EIGHT-STEP PATH OF POLICY ANALYSIS: A HANDBOOK FOR PRACTICE* 4 (1996).

33. LEWIS CARROLL, *ALICE'S ADVENTURES IN WONDERLAND* 96 (Donald J. Gray ed., W.W. Norton 2d ed. 1992) (1865).

34. Sometimes this scramble yields results better than what were originally anticipated. See ALBERT O. HIRSCHMAN, *DEVELOPMENT PROJECTS OBSERVED* 27 (1967) (describing this phenomenon as the "Hiding Hand").

35. JOHN W. KINGDON, *AGENDAS, ALTERNATIVES AND PUBLIC POLICIES* 88 (HarperCollins College Publishers 2d ed. 1995) (1984).

36. For instance, the emergence of AIDS as a public health crisis increased the influence of the hemophiliac and gay rights movements. See David L. Kirp & Ronald Bayer, *The Second Decade of AIDS: The End of Exceptionalism?*, in *AIDS IN THE INDUSTRIALIZED DEMOCRACIES: PASSIONS, POLITICS, AND POLICIES* 366, 375, 382 (David L. Kirp & Ronald Bayer eds., 1992); David L. Kirp, *AIDS, Hemophilia, and the Emergence of a Social Movement*, in *BLOOD FEUDS* (Ronald Bayer & E. Feldman eds., forthcoming 1999).

base closures. Only when politics and policy thinking were transformed could the problem be resolved.

### C. Politics

#### 1. Rethinking Environmental Absolutism

Economic circumstance often shapes political perception.<sup>37</sup> Certainly this has been true for environmentalism in California, where shifting attitudes toward environmental concerns contributed to settling the Port of Oakland's problem.

During the 1980s, California's economy grew rapidly, fueled by increases in federal spending on military technology and the booming computer industry. Amid such prosperity, protests from business leaders that they were being suffocated by environmental regulation could be dismissed as disingenuous. But by the early 1990s the national economy had slowed. California was hit especially hard because of its heavy dependence on military spending. Although southern California suffered most because of the concentration of aerospace firms there, the more economically diverse San Francisco Bay Area also felt the effects of military downsizing when the federal Base Realignment and Closure Commission designated several Bay Area military installations for closure.<sup>38</sup>

As layoffs and salary freezes became commonplace in the state, and as the citizenry came increasingly to question the economic burdens imposed by substantively and procedurally complex environmental requirements, complaints from business leaders found a more receptive audience. In 1990, California voters soundly rejected a ballot proposition, popularly known as "Big Green," which would have further strengthened California's already stringent environmental rules.<sup>39</sup> In 1995, Republican Governor Pete Wilson, emboldened by his reading of the political tea leaves, proposed to eliminate the Bay Conservation and Development Commission ("BCDC"), a regulatory

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37. See, e.g., DAVID VOGEL, *FLUCTUATING FORTUNES: THE POLITICAL POWER OF BUSINESS IN AMERICA* 228-30 (1989) (discussing changing views of American middle-class regarding government regulations during periods of high inflation and economic stagnation).

38. The Base Realignment and Closure Commission's recommendations led to the closures of five major Bay Area installations: the Presidio, Hunters Point Naval Shipyard, and Treasure Island Naval Station, all in San Francisco; the Mare Island Naval Shipyard; and Alameda Naval Air Station, located directly across the Oakland Estuary from the Port of Oakland. See GOVERNOR'S OFFICE OF PLANNING AND RESEARCH, STATE OF CAL., *CURRENT STATUS OF REUSE EFFORTS* 3 (Sept. 1998).

39. See Elliot Diring, *Big Green Loses—Forest Initiatives Being Turned Down*, S.F. CHRON., Nov. 7, 1990, at A4.



agency with the power to veto development projects in and around San Francisco Bay, because, in his view, the Commission presented an unnecessary obstacle for business.<sup>40</sup> A Republican-dominated Congress, sensitive to complaints from landowners that development restrictions to save “birds and bunnies” were unreasonable, began to reconsider the Endangered Species Act.<sup>41</sup>

In this changing political climate, environmental groups and regulatory agencies realized they had to show that economic growth and environmental protection could coexist. The Port of Oakland deepening project gave them a chance to do exactly that.

## 2. *Irrigation and Harbors*

At first blush, the perennial battle over cheap water for California agribusiness appears unrelated to the Port of Oakland’s woes. But politics has a way of forging unlikely linkages.

While California’s San Joaquin Valley contains some of the world’s most fertile soil, the Valley is also extremely dry, with annual rainfall of a foot or less, and almost no rain from April to November. In the 1930s, in order to tap the Valley’s vast agricultural potential, the federal Bureau of Reclamation began construction on the Central Valley Project, which moved massive amounts of water from the Sacramento River in the northern part of the state to the San Joaquin Valley farther south.<sup>42</sup> When the state completed a project of similar magnitude in the 1960s, California’s water diversion network represented the two biggest irrigation projects on earth.<sup>43</sup>

The costs of constructing and operating the Central Valley Project were supposed to be paid for by the farmers who benefited from it, but growers used their political influence to keep the price of federally regulated water artificially low.<sup>44</sup> With inexpensive water available, growers had little incentive to use water efficiently. As agricultural acreage expanded and demand increased, the Bureau of

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40. See Kenneth J. Garcia, *Wilson Budget Calls for Eliminating Bay Commission*, S.F. CHRON., Jan. 11, 1995, at A20.

41. See H.R. 2275, 104th Cong. (1995) (proposing drastic revisions to Endangered Species Act); S. 768, 104th Cong. (1995) (same). For a discussion of Congress’s concerns regarding the Act, see Randy Lee Loftis, *Endangered Species Act Under Siege*, DALLAS MORNING NEWS, July 2, 1995, at A1 (discussing Senate Bill 768 and House bill to be introduced).

42. See CRANE S. MILLER & RICHARD S. HYSLOP, CALIFORNIA: THE GEOGRAPHY OF DIVERSITY 100-02, 186 (1983).

43. See MARC REISNER, CADILLAC DESERT 10 (1986) (classifying Central Valley Project as “the most mind-boggling public works project on five continents” and California Water Project as “nearly as large”).

44. See BILL BRADLEY, TIME PRESENT, TIME PAST 108 (1996).

Reclamation diverted more and more water to the Valley.<sup>45</sup> These dams and canals meant reduced water flows into San Francisco Bay, damaging the estuary.<sup>46</sup>

Environmentalists, who for years had agitated for change in federal water policy, redoubled their efforts with the California drought of 1987-1992. In the last days of the 1992 congressional session, Representative George Miller (D-CA) and Senator Bill Bradley (D-NJ) shepherded through Congress a measure (the "Miller-Bradley bill") that reduced the federal water subsidy and established a market for the sale of water rights, both of which were expected to reduce demand for water by agricultural users.<sup>47</sup>

California Governor Pete Wilson and Senator John Seymour (R-CA), Republican lawmakers with strong ties to agriculture, urged President Bush to veto the bill. But Bush found himself being pulled in opposite directions. On the one hand, fellow Republicans pressured him to continue water subsidies; on the other hand, he was locked in a tight presidential campaign, and he feared damaging editorials, especially in the key electoral state of California, if he opted to continue subsidizing corporate farmers. The support of the Port of Oakland and its powerful business allies for water policy reform not only helped persuade President Bush to sign the bill into law,<sup>48</sup> it also helped the Port to cultivate new allies in the environmental community.

### 3. *All (Presidential) Politics Is Local*

Because California, the state with the most electoral votes, is often a swing state in presidential elections, its seemingly parochial concerns regularly take on national significance. For Bill Clinton, California was the springboard to the White House in 1992, and winning the state was critical to his reelection strategy. So often did he visit California—twenty-six times during his first three-and-a-half years in the White House<sup>49</sup>—that wags proposed shifting the White House to the Golden State.

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45. *See id.* at 108-09.

46. *See* James McGrath & Jody Zaitlin, *Getting on With It: Deepening the Port of Oakland to 42 Feet 7* (1995) (unpublished manuscript, on file with the *New York University Journal of Legislation and Public Policy*).

47. *See* H.R. 429, 102d Cong. (1991) (enacted); *see generally* BRADLEY, *supra* note 44, at 101-16.

48. *See* Reclamation Projects Authorization and Adjustment Act of 1992, Pub. L. No. 102-175, 106 Stat. 4600 (codified as amended at 16 U.S.C. §§ 4601-31 to 4601-34, 43 U.S.C. §§ 390h to 390h-15 (1994)) (signed by President Bush Oct. 30, 1992).

49. *See* Marc Sandalow, *Red Carpet for California Delegates: State Considered Crucial for Re-election of Clinton*, S.F. CHRON., Aug. 27, 1996, at A7.

Clinton appreciated how badly California had been hurt by reduced military spending, but could not interfere with the decision-making process of the apolitical Base Realignment and Closure Commission. He needed to demonstrate his commitment to rejuvenating California's economy in a way that would neither jeopardize the base closure process nor alienate his environmentalist constituency. The Port of Oakland dredging project admirably served his purposes.

#### *D. Policy*

During the lengthy standoff, many possible solutions for the Port's sediment disposal woes were proposed. Yet some entity—a regulatory agency, an environmental organization, a fishermen's group—was always unhappy enough with the proposal to challenge it in court. Still, even as the Port's opponents kept trying to stop the dredging, the parties never entirely gave up on the search for a resolution.

##### *1. Putting the Port's Mud to Good Use*

During the initial years of the Port of Oakland controversy, the mud to be dredged from the Harbor was considered an unmitigated bad. That changed when a potential use was found for some of that mud—the restoration of coastal wetlands.

In 1990, the California State Coastal Conservancy, working with an environmental group called the Sonoma Land Trust, began to study the possibility of returning a large hay ranch on the northern shore of San Francisco Bay to its previous state as a tidal wetland.<sup>50</sup> The Sonoma Baylands project was intended to restore habitat for a number of bird and fish species, among them the endangered salt marsh harvest mouse and California clapper rail.<sup>51</sup>

As design work progressed, however, engineers found that the hay field had subsided.<sup>52</sup> As much as seven-and-a-half feet of new mud would have to accumulate before a marsh habitat could form.<sup>53</sup> The Coastal Conservancy could either wait as long as half a century for sediment to collect naturally or accelerate the process by introducing some 2.8 million cubic yards of mud.<sup>54</sup> Oakland had mud to

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50. See Laurel Marcus, *A Marriage Made in Mud*, CAL. COAST & OCEAN, Autumn 1994, at 6, 6.

51. See *id.*

52. See *id.* at 9.

53. See *id.*

54. See *id.*

spare, and the Coastal Conservancy began discussions with Port officials to see if they might be interested in the venture.<sup>55</sup>

## 2. *A New Ocean Dumping Site*

The Pacific Ocean is a very big place. For all the difficulties that Bay Area ports were experiencing in carrying out dredging, all the concerns that government agencies, business organizations, and environmental groups brought to the table, surely there must be sites in the ocean suitable for the dumping of harmless, nontoxic mud. So the Army Corps of Engineers reasoned when, in 1990, it launched its Long Term Management Strategy, a \$16.8 million study designed to develop alternatives for the disposal of dredged material.<sup>56</sup>

The EPA, which participated in this study, had stymied earlier efforts to dredge the Port of Oakland.<sup>57</sup> But subsequent EPA research identified an ocean disposal site fifty miles off the coast and outside the Gulf of Farallones National Marine Sanctuary, where the military had once disposed of chemical weapons and radioactive waste.<sup>58</sup> While environmental groups insisted on safeguards to protect marine life,<sup>59</sup> no group went to court to prevent the site from being used.

Pinpointing this particular site was a critical component in the Oakland dredging project. The site was to receive approximately three million cubic yards of the material dredged from Oakland Harbor.<sup>60</sup> Because it could hold up to 400 million cubic yards of material, it also provided an important piece of the long-term dredging picture.<sup>61</sup> This long-term capacity was crucial because, even before the deepening of the Harbor began, shipping companies announced yet another generation of cargo ships that would require even deeper channels.<sup>62</sup>

## 3. *Environmental Racism: The Claim Not Pursued*

The Sonoma Baylands and the ocean disposal sites together provided a way to dispose of most of the Port's sediments. But some 1.3

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55. *See id.*

56. *See Harbor Improvements Set*, ENGINEERING NEWS-REC., Aug. 8, 1994, at 20, 20.

57. *See supra* note 21 and accompanying text.

58. *See Harbor Improvements Set*, *supra* note 56, at 20; *see also* Steve Rubenstein, *EPA Dredges Up a New Place to Dump Mud*, S.F. CHRON., July 20, 1994, at A18.

59. *See* Rubenstein, *supra* note 58, at A18.

60. *See Harbor Improvements Set*, *supra* note 56, at 20.

61. *See* Rubenstein, *supra* note 58, at A18.

62. *See* Richard Knee, *Oakland Dredging OK'd*, AM. SHIPPER, Aug. 1992, at 81, 81.

million cubic yards were too toxic to satisfy standards for aquatic disposal; for this sediment, the Port had to find a disposal site on land.<sup>63</sup> After exploring a number of locations, Port officials settled on the Galbraith Golf Course, a municipal course situated atop a former garbage dump on Port-owned land near Oakland's airport.<sup>64</sup>

As had happened so often in the past, the Port's choice of a destination for its toxic sediments elicited protest. This time, however, the complaints were voiced not by environmental groups but by residents living nearby, who feared adverse health effects from the toxic silt. They charged the Port with environmental racism, claiming the Port was dumping its problem in the vicinity of a poor and mainly minority neighborhood.<sup>65</sup> The Port countered with studies concluding that use of the site would pose no significant risks to residents. Unlike the environmentalists or the fishermen, the neighbors never mobilized to bring their case to court.

### *E. Politics and Policy Come Together: Let's Make a Deal*

#### *1. Behind the Scenes*

Although the Port's situation looked dismal in 1991, when Kagan's first Oakland case study was published, behind-the-scenes developments, as well as shifts in political and economic circumstances, ultimately generated a solution to Oakland's dredging problem.

The regular meetings of the Army Corps of Engineers' Long Term Management Strategy group, while failing to produce immediate results, kept the players talking. The EPA initiated the studies that eventually led to the designation of a suitable ocean disposal site.<sup>66</sup> The Coastal Conservancy began to line up support for its wetland restoration project in the dredging community, among environmental groups, and in Washington; this prompted the Conservancy to embrace the Port of Oakland's objectives.<sup>67</sup> Legislation reforming the nation's half-century-old water policy was wending its way through Congress,<sup>68</sup> and the politics of deal making also won the Port new allies.<sup>69</sup> As California's economy sank deeper into a recession, the

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63. See Richard Knee, *Possible Snag to Oakland Dredging*, AM. SHIPPER, May 1994, at 95, 95.

64. See Rick DelVecchio, *Port of Oakland Wins OK to Bury Golf Links in Mud*, S.F. CHRON., Nov. 17, 1993, at D3 [hereinafter DelVecchio, *Bury Golf Links*].

65. See Interview with James McGrath, *supra* note 30.

66. See *supra* notes 57-58 and accompanying text.

67. See Marcus, *supra* note 50, at 13, 15.

68. See *supra* note 47 and accompanying text.

69. See Marcus, *supra* note 50, at 10, 12.

groups that stood to benefit financially from dredging—Bay Area ports, the business community, and organized labor—formed the Bay Dredging Action Coalition (“BDAC”) to lobby with a single voice for the Port’s plans.<sup>70</sup>

The first real breakthrough came in 1992, when the Port and the Corps won approval from the BCDC, one of the state-created agencies with permit authority over dredging, to deepen its channels from thirty-five to thirty-eight feet and dump the displaced mud at a site near Alcatraz Island.<sup>71</sup> The benefits were largely symbolic: this phase of the dredging would remove only 562,000 cubic yards of silt, and even with channels thirty-eight feet deep, fully-loaded container ships would still need to wait until high tide to call on Oakland.<sup>72</sup> Nonetheless, this approval was important. It marked not only the first authorization to deepen the Port since officials had begun to seek permits twenty years earlier, but also the first attempt to deepen the Harbor that was not halted by litigation.

Why did the environmental groups, which had fought earlier dredging plans, stay out of court this time? Ongoing political bargaining provided a straightforward answer. These groups wanted the Port’s support for water policy reform and the Sonoma Baylands project. To obtain this support, they were willing to swallow their objections to the Alcatraz site.<sup>73</sup> Bargaining was taking place in the shadow of the law,<sup>74</sup> as adversarial legalism gave way to an uneasy peace.

## 2. *The New Environmental Climate in Washington*

Federal legislation to rewrite water policy, which was working its way through Congress in 1992, was a priority issue for environmental groups, which regarded water diversions to the Central Valley as a major cause of the decline of the San Francisco Bay and other nearby fisheries.<sup>75</sup> The Port of Oakland agreed; indeed, Port officials had claimed for years that decreased fresh water flows into the Bay, attributable to the Central Valley Project, were much more harmful to the ecosystem than dredging.<sup>76</sup>

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70. *See id.* at 13.

71. *See* Knee, *supra* note 62, at 81.

72. *See id.*

73. *See* Marcus, *supra* note 50, at 10.

74. *See generally* Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 *YALE L.J.* 950 (1979) (discussing impact of legal system on negotiations and bargaining outside judicial proceedings).

75. *See* McGrath & Zaitlin, *supra* note 46, at 7.

76. *See id.*

The advent of the Miller-Bradley bill<sup>77</sup> afforded the Port an opportunity to win bargaining points with environmental groups by promoting a healthier San Francisco Bay, without undercutting its own objectives. Consequently, the Port and its allies in the Bay Dredging Action Coalition supported the measure,<sup>78</sup> and this backing was critical in pushing President Bush to sign the bill.<sup>79</sup>

Meanwhile, Congress removed a significant obstacle to the Sonoma Baylands project, thus filling in another piece of the Oakland dredging puzzle. Prior to 1992, the Army Corps of Engineers had opposed the reuse of sediments in wetland restoration.<sup>80</sup> While the Corps cited as its rationale the lack of explicit congressional authorization, legal niceties were not its real motivation.<sup>81</sup> The agency simply was not interested in wetland creation. "Corps policy did not favor wetland creation as an option for disposal of dredged mud," Laurel Marcus of the Coastal Conservancy pointed out.<sup>82</sup> "Bound by a tradition of aquatic disposal and a national policy to implement the cheapest alternative, the Corps adamantly opposed the idea."<sup>83</sup>

To change the Corps' mindset and secure the Sonoma wetlands project, the Coastal Conservancy spent the better part of a year pulling together a coalition of supporters.<sup>84</sup> After getting help from key environmental groups, including the Sierra Club and the Save San Francisco Bay Association, the Conservancy won cautious backing from the Port of Oakland and broadened its base by garnering the endorsement of BDAC.<sup>85</sup>

Support led to more support, as these endorsements were instrumental in convincing the Bay Area's congressional delegation to back the Sonoma Baylands project.<sup>86</sup> Finally, in the Water Resources Development Act of 1992, Congress provided a special \$15 million allocation, 75 percent of the total cost of the wetlands project.<sup>87</sup> Although

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77. H.R. 429, 102d Cong. (1991) (enacted).

78. See McGrath & Zaitlin, *supra* note 46, at 7.

79. See *id.*

80. See Marcus, *supra* note 50, at 13.

81. See *id.*

82. *Id.*

83. *Id.*

84. See *id.* at 11, 13, 15.

85. See Marcus, *supra* note 50, at 10. Both the U.S. Fish and Wildlife Service and the Audubon Society feared that the Sonoma Baylands project would destroy seasonal wetlands in the course of restoring tidal wetlands. Yet, while neither group endorsed the project, they opted not to block it. See Interview with Brian Ross, Regional Dredging Coordinator, Environmental Protection Agency (June 26, 1998).

86. See Interview with James McGrath, *supra* note 30.

87. See Water Resources Development Act of 1992, Pub. L. No. 102-580, § 106, 106 Stat. 4797, 4814-15.

the Corps could not actually construct the wetlands until it completed an Environmental Impact Statement ("EIS") and the Port of Oakland found a home for the remaining four million cubic yards of its sediment, Port officials read the legislation as a hopeful sign. Threatening to drop the project rather than pay the remaining 25% of the cost,<sup>88</sup> the Port successfully lobbied Sacramento for a state budget supplement to cover the non-federal share of the tab.<sup>89</sup>

But was this a case of too little, too late? That was the fear when, in June 1993, the Port's biggest tenant, American President Lines ("APL"), announced plans for a major new terminal at the Port of Los Angeles.<sup>90</sup> The company, citing Oakland's dredging difficulties, rejected the Port's proposal to provide comparable facilities. "Our review of each port's proposals," APL's president explained, "underscored the need for greater certainty about how the Bay Area will maintain adequate channel depths for commercial ships."<sup>91</sup> Soon thereafter, the EPA added to the Port's woes. The agency was worried that it had insufficient data to designate an ocean site for dredged material disposal, and informed the Port that it would require an additional round of sediment testing.<sup>92</sup> That requirement, complained Port officials, was costly, time-consuming, and unnecessary.

Enter President Clinton. The newly elected president had been lobbied by Oakland Congressman Ronald Dellums (D-CA) to help end the dredging impasse.<sup>93</sup> Dellums undoubtedly used American President Lines' departure from Oakland to demonstrate that the Port's capacity to expand, which would soften the economic and political shock of the military base closures, was precluded by its shallow channels.<sup>94</sup> National politicians are often loathe to intervene in such local issues, but President Clinton decided to take the risk. In an August 1993 speech at the Alameda Naval Air Station, one of the local military bases designated for closure, Clinton addressed the channel

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88. See Interview with Brian Ross, *supra* note 85.

89. See Interview with James McGrath, *supra* note 30.

90. *Oakland to Remain a Major Port-of-Call, Headquarters Location, Says Top APL Executive*, PR NEWSWIRE, June 30, 1993, available in LEXIS, News Library, Wires File.

91. *Id.*

92. See Allen R. Wastler, *Oakland Port Faces More Dredging Problems*, J. COM., July 6, 1993, at 1B, available in LEXIS, News Library, MajPap File. The EPA's caution undoubtedly stemmed in part from threats of lawsuits against the agency by environmental groups opposing the designation of an ocean disposal site in Southern California. See Kagan, *Adversarial Legalism*, *supra* note 3, at 384.

93. See Laura Evenson & Kevin Fagan, *Port Officials Hail Clinton Deal*, S.F. CHRON., Aug. 14, 1993, at B5.

94. See *id.*



deepening project.<sup>95</sup> “I have directed the Army Corps of Engineers, the EPA and all other concerned agencies to get on with it, and to act as quickly as possible to resolve the issues so that we can dredge the channels and bring more opportunity to the people who live here.”<sup>96</sup>

That speech provided the catalyst needed to bring the dredging project to fruition, and the remaining hurdles were quickly cleared. In March 1994, the Army Corps of Engineers released a preliminary EIS, which concluded that the preferred alternative—splitting clean sediments between an ocean disposal site and Sonoma Baylands, and depositing and capping contaminated sediments at the Galbraith Golf Course—would not damage the environment.<sup>97</sup> Shortly thereafter, the Port won approval to construct the Galbraith disposal site.<sup>98</sup> In July 1994, the EPA, which had withdrawn its demand for additional testing after the President’s directive, designated the proposed offshore site as a long-term ocean repository for dredged material.<sup>99</sup> Ten months later, after all the design documents had been prepared and the contracts put out to bid, dredging began at last.<sup>100</sup>

## II

### LEARNING FROM MUDLOCK

The Port of Oakland story, which had looked so hopeless just a few years earlier, took a positive turn—and not just for Oakland. A similar approach to conflict resolution—more precisely, conflict diminution—led to agreement on a hotly contested dredging project at the Port of New York and New Jersey.<sup>101</sup> As well, recent federal legislation on dredging policy takes its cue from Oakland.<sup>102</sup> These developments suggest a strategy for settling not only mudlock, but also an array of economically important and ideologically laden disputes. This strategy relies not on a race to the courthouse, but rather on conversation among the stakeholders, carried out in the penumbra of the law.<sup>103</sup>

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95. See Joseph Bonney, *Clinton OKs Navy Land for Oakland*, AM. SHIPPER, Oct. 1993, at 75, 75 (reporting on President Clinton’s approval of land lease to expand Oakland’s port).

96. *Id.*

97. See Elaine Herscher, *Oakland Dredging Project Clears Hurdle*, S.F. CHRON., Mar. 15, 1994, at A18.

98. See DeIVecchio, *Bury Golf Links*, *supra* note 64, at D3.

99. See Rubenstein, *supra* note 58, at A18.

100. See DeIVecchio, *Oakland Looks Forward*, *supra* note 6, at A15.

101. See *infra* notes 121-29 and accompanying text.

102. For a discussion of the Water Resources Development Act of 1996 (WRDA ‘96), Pub. L. No. 104-303, 110 Stat. 3658, see *infra* notes 136-43.

103. See Mnookin & Kornhauser, *supra* note 74, at 950.

### A. *Changing Minds—and Mind-sets*

The emergence of environmental protection as a national concern over the past three decades underlies the dredging gridlock at the Port of Oakland. Even though ports are public entities, they are supposed to operate as businesses. They seek to minimize costs and move freight as rapidly as possible, competing against one another while attending to the bottom line. Historically, ports and shipping companies discharged tons of petroleum, chemicals, and toxins in coastal and Great Lakes waters. However, beginning with the passage of environmental legislation in the 1970s, ports found themselves contending with a host of new regulations.<sup>104</sup> Nowhere has the scrutiny been more minute than at the Port of Oakland, which is situated in what may well be the nation's most environmentally conscious community.

Organizations do learn. In *Making Bureaucracies Think*, a study of the impact of the National Environmental Policy Act ("NEPA") on decision making by the U.S. Forest Service and the Army Corps of Engineers, Serge Taylor concluded that, even though the requirements of NEPA are essentially procedural (the law mandates evaluation of environmental impact and public involvement but does not require mitigation), the very act of following the NEPA procedures made both the Forest Service and the Corps more environmentally conscious.<sup>105</sup> Taylor attributes this change both to the agencies' desire to stay out of court and to a shift in their organizational cultures.<sup>106</sup> Environmental analysts hired by the Forest Service and the Corps made a difference beyond the boundaries of their job descriptions. Not only did they write environmental statements, they also influenced the design of projects.<sup>107</sup>

Port authorities have gone through a similar shift in organizational culture. Like the Army Corps of Engineers and the U.S. Forest Service, port authorities established environmental offices staffed by scientists and planners. Events such as Oakland's well publicized dredging difficulties, coupled with the obligation to prepare EISs that flag environmental problems, led them to appreciate that they had to take environmentalism seriously. They began allocating the resources

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104. See, e.g., National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852 (1970) (codified as amended at 42 U.S.C. §§ 4321, 4331-4335, 4341-4347 (1994)).

105. See SERGE TAYLOR, *MAKING BUREAUCRACIES THINK: THE ENVIRONMENTAL IMPACT STATEMENT STRATEGY OF ADMINISTRATIVE REFORM* 234-48 (1984).

106. See *id.*

107. See *id.*

needed to dispose safely of dredged sediment and to protect the marine ecological balance.<sup>108</sup>

At the least, port authorities have learned to make gestures of accommodation to environmentalism. The Port of Oakland's home page on the Internet notes:

In previous years there was less sensitivity to the need for environmental protection for waterways and the surrounding wetlands and marshes. Today we know that the maritime industry and the natural environment can coexist, bringing economic vitality to a region as well as the pleasures that come from walking along the water's edge and enjoying the natural wetlands.<sup>109</sup>

That is good public relations. But the change in ports' behavior has been more than cosmetic. Surveys conducted by the American Association of Port Authorities show that environmental regulation, dredging, and disposal of dredged material have become the ports' biggest concerns.<sup>110</sup> "I think [dredging] will remain at the top or near the top in coming years," observes Association President Erik Stromberg.<sup>111</sup> Budgetary allocations, often the best measure of an organization's true priorities,<sup>112</sup> support the contention of Lillian Liburdi, Director of the Port of New York and New Jersey, that dredging is her organization's "number one issue."<sup>113</sup> In 1996, the Port of New York and New Jersey more than tripled its dredging budget, to \$130 million.<sup>114</sup> At the Port of Oakland, between 20 and 50 percent of the total cost of a development project is attributable to addressing environmental concerns.<sup>115</sup>

Despite spending so much on environmental issues, port officials have not metamorphosed into fish-huggers, and their top priority remains maximizing market share while minimizing costs. Port authorities continue to complain that too much is being asked of them and to press for less stringent environmental regulation.<sup>116</sup> But they recog-

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108. See Rose Horowitz, *Ports Face Financing Challenge in Era of High-Cost Environmental Compliance*, TRAFFIC WORLD, Oct. 3, 1994, at 24, 24-26.

109. *Gulls and Terns* (visited Mar. 7, 1999) <<http://www.portoakland.com/shoreline/birds.html>>.

110. See Horowitz, *supra* note 108, at 24.

111. See *id.*

112. See AARON WILDAVSKY, BUDGETING: A COMPARATIVE THEORY OF BUDGETARY PROCESSES 4 (1975).

113. Horowitz, *supra* note 108, at 24.

114. See *Port of N.Y. Triples Dredging Budget*, TRAFFIC WORLD, May 27, 1996, at 40, 40.

115. See Horowitz, *supra* note 108, at 26.

116. See *id.* at 24-26.

nize that, whatever marginal changes they may secure, environmentalism has become a permanent cost of doing business.

### B. *The Port of Oakland as a National Model*

The resolution of mudlock at the Port of Oakland shows that, despite the decentralization of authority that characterizes American policy making, opposing interests can be brought together to devise solutions that promote the public interest. While delays caused by the frequent exercise of the “heckler’s veto” in the early days of the Port of Oakland’s dredging efforts demonstrate the power a few dissidents can wield, unanimity is not required to reach a resolution.<sup>117</sup> Instead, effective policy making requires that the parties to a dispute be willing to convert rights-based claims—which admit of no compromise, and which necessarily yield losers as well as winners—into chips for political bargaining.<sup>118</sup>

In 1990, the Army Corps of Engineers assembled key players in the Oakland controversy, creating a groundwork for political bargaining. Recruiting federal and state agencies in addition to business and environmental interests, the Corps worked with these players to shape a comprehensive Long Term Management Strategy (“LTMS”) for disposing of dredged material from the San Francisco Bay.<sup>119</sup> Although the group members could not reach an agreement without a push from President Clinton, the Clinton administration recognized the LTMS model as a viable one, and subsequently opted to replicate the team

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117. Substantial agreement was achieved in Oakland, but the stakeholders never reached complete consensus. Both the U.S. Fish and Wildlife Service and the Audubon Society opposed the Sonoma Baylands project because it destroyed fifty-six acres of seasonal wetlands in order to create 322 acres of tidal wetlands. To accommodate these concerns, the borders of the restoration project were slightly altered to save a few acres of seasonal wetlands. While both organizations continued to object, neither tried to halt the project by going to court. See Interview with Brian Ross, *supra* note 85.

118. See, e.g., GLENDON, *supra* note 2, at 111 (discussing how members of Poletown community used the vocabulary of rights to bargain with policy makers); see also EUGENE KENNEDY & SARA C. CHARLES, *AUTHORITY: THE MOST MISUNDERSTOOD IDEA IN AMERICA* 222-23 (1997) (discussing the ill effects of “thinking like a lawyer” on communication and relationships).

119. See *Executive Summary, Long Term Management Strategy for Dredged Material Placement in the San Francisco Bay Region, Draft Policy Environmental Impact Statement/Programmatic Environmental Impact Report*, April 19, 1996 (on file with the *New York University Journal of Legislation and Public Policy*); see also *Long-Term Management Strategy (LTMS) for the Placement of Dredged Material in the San Francisco Bay Region, Final Policy Environmental Impact Statement/Programmatic Environmental Impact Report* (last modified October 13, 1998) <<http://www.spn.usace.army.mil/ltnms>>.

approach to solving dredging problems. The National Dredging Policy adopted by President Clinton calls for similar teams nationwide.<sup>120</sup>

Oakland's ability to make a deal, helped along by some White House arm-twisting, was followed by a similarly successful resolution of mudlock at the Port of New York and New Jersey. In July 1996, Vice President Albert Gore announced a plan to resume dredging of the Port of New York and New Jersey, which had been halted for three years when tests showed that the dredged sediment contained toxic material.<sup>121</sup> Capitalizing on the symbolic importance of the event, Gore announced the plan at a White House ceremony attended by executives of the longshoremen's union, the New York Shipping Association, and environmental groups.<sup>122</sup> Calling it "President Clinton's plan"—the President's prestige again put to political use—Gore asserted that "[t]oday's announcement is good for the environment, good for business, and good for the region's future."<sup>123</sup>

The agreement calls for closing a site six miles off the New Jersey shore that had served as the main repository of contaminated waste dredged from the Port.<sup>124</sup> That offshore site would be covered by clean dredged material, a measure advocated by environmental, tourism, and fishing interests that view continued dumping as a threat to New Jersey's beaches and marine ecological balance.<sup>125</sup> As in Oakland, technological developments played a key part in speeding a resolution: new technologies can decontaminate the sediment, which can then be used for road construction.<sup>126</sup>

The progress made by the Port of New York and New Jersey provides another example of compromise between environmentalists, labor, and business. Once again, this system of political give-and-take demonstrates that adversarial legalism can be tamed by bargaining in the context of legal and political realities. Environmental groups pledged, in the short term, not to sue to halt the dumping of dredged material, and so permitted the harbor dredging to resume in return for

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120. See National Dredging Team, *Local Planning Groups & Development of Dredged Material Management Plans 2* (June 1997).

121. See Thomas J. Lueck, *Harbor Plan Is Detailed: 2 Governors Cry Politics*, N.Y. TIMES, July 25, 1996, at B1 (describing Vice President Gore's speech on Port of New York and New Jersey dredging plan).

122. See *id.*

123. *Dumping to End Off New Jersey Shore*, UPI, July 24, 1996, available in LEXIS, News Library, Wires File.

124. See Lueck, *supra* note 121, at B1.

125. See *White House Plans to Close N.J. Mud Dump Site*, Reuters, July 24, 1996, available in LEXIS, News Library, Wires File.

126. See *id.*

a commitment to close the dump site a year later.<sup>127</sup> “This, for the first time ever, says no more dumping off the Jersey shore,” Beth Millemann, director of Coast Alliance, pointed out.<sup>128</sup> “Dumping will be gone just like the covered wagon. No state has ever done that before.”<sup>129</sup>

### C. *The New National Regime*

#### 1. *The Bully Pulpit*

For the Clinton administration, eager to show that economics and environmentalism were not inevitably at odds, the dredging issue offered a natural focus of attention. As the administration was drawn into the Port of Oakland’s problems, dredging became an opportunity to address environmental regulation nationally.

A June 1994 meeting convened by the National Research Council’s Transportation Research Board made the linkage between economics and environmentalism: the session was titled “Environmental Regulatory Process: Does It Work?: Dredging U.S. Ports.”<sup>130</sup> Reflecting the administration’s embrace of reinventing government, Keith Laughlin of the White House Office on Environmental Policy expressed the administration’s commitment to “‘reinventing’ environmental protection to ensure maximum protection of public health and the environment while minimizing economic and social costs . . . to sort out what works from what does not, and—when necessary—to develop new approaches to environmental protection . . . .”<sup>131</sup>

Soon afterwards, an Interagency Working Group on the Dredging Process, comprised of representatives of six agencies from five different cabinet-level departments, each with some responsibility for dredging, made the transition from defining problems to making policy.<sup>132</sup> The Working Group, convened by Transportation Secretary

127. See Lueck, *supra* note 121, at B1.

128. Adam Piore, *Gore Announces Deal to End Dredging Crisis*, BERGEN REC., July 25, 1996, at A3.

129. *Id.*

130. See Transportation Research Circular #427, *Environmental Regulatory Process: Does it Work?: Dredging U.S. Ports* (June 1994) <<http://www.bts.gov/ntl/DOCS/DUP.html>>.

131. See *id.* at 48.

132. Members included the Army Corps of Engineers, National Oceanographic and Atmospheric Administration, National Marine Fisheries Service, Office of Ocean and Coastal Resource Management, U.S. Fish & Wildlife Service, Maritime Administration, and the Environmental Protection Agency. See INTERAGENCY WORKING GROUP ON THE DREDGING PROCESS, *The Dredging Process in the United States: An Action Plan for Improvement* § 3.0 (last modified July 15, 1997) <<http://www.epa.gov/owow/oceans/ndt/report.html>>.

Federico Peña, met with stakeholders around the country; the group's report, released in December 1994, shows the impact of that local knowledge.<sup>133</sup> The report focuses on improving the decision-making process: strengthening planning, communication, and coordination during the dredging approval process, and reducing uncertainties about the technical feasibility of ocean dumping.<sup>134</sup>

Barely half a year later, President Clinton ordered federal agencies to begin implementing the report's recommendations. This entailed revising the Water Resources Development Act, establishing national, regional, and local dredging teams, developing guidance on dredged material management plans for local teams, and undertaking research designed to reduce scientific uncertainty about ocean disposal.<sup>135</sup>

## 2. *Amending the Water Resources Development Act*

The Water Resources Development Act of 1996 ("WRDA '96"),<sup>136</sup> which passed Congress with bipartisan support, authorizes the Army Corps of Engineers to carry out environmental restoration projects.<sup>137</sup> Previously, the Corps could pay for only an oceanic disposal of dredged material, unless Congress specifically authorized an alternative disposal method.<sup>138</sup> The new law leaves the method of disposal in the stakeholders' hands.<sup>139</sup> Federal funds may be used for upland as well as ocean disposal, including beneficial reuse projects such as the Sonoma wetlands restoration effort.<sup>140</sup>

WRDA '96 also ends the requirement that the federal government underwrite only those projects that impose the "least cost" necessary to dredge. Formerly, the law had obliged the Corps to focus on minimizing cost in order to maximize net monetary benefit, in the nar-

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133. Stakeholders included federal, state, and local governments, port and shipping interests, environmental groups, commercial fishing interests, recreational boaters, maritime labor unions, local businesses, and the general public. *See id.* § 3.0.

134. *See id.* § 5.0.

135. *See generally* National Dredging Team, *supra* note 120 (explaining national dredging policy and plans to institute dredging).

136. Pub. L. No. 104-303, 110 Stat. 3658 (1996).

137. *See id.* at 3678-79.

138. *See* David Barnes, *House Panel Approves Port, River Dredging Bill*, *TRAFFIC WORLD*, June 17, 1996, at 13, 13.

139. *See* 110 Stat. at 3680.

140. *See id.* To keep the federal government's financial responsibility from ballooning, the new legislation decreases the proportion of dredged material management costs that the federal government will shoulder, from 75 to 65 percent.

row sense of money spent and revenue generated.<sup>141</sup> WRDA '96 expands the benefit-cost perspective, authorizing the Corps to consider the overall costs and benefits associated with a project.<sup>142</sup> This change enables the Corps to contribute to beneficial reuse projects such as the Sonoma Baylands.<sup>143</sup>

### 3. *Taking Advantage of Federalism*

In crafting a national dredging policy, the Clinton Administration built on the Long Term Management Strategy used in the Port of Oakland controversy by mandating a similar mechanism nationwide. A three-tiered approach, with national, regional, and local teams, is intended to encourage negotiation rather than litigation.<sup>144</sup>

The National Dredging Team ("NDT"), a federal interagency group, was formed in 1995.<sup>145</sup> Co-chaired by officials from the EPA and the Corps, the NDT includes representatives from all the federal agencies that participated in the earlier Interagency Working Group on dredging.<sup>146</sup> The NDT oversees the creation of Regional Dredging Teams, which include the same federal agencies as the NDT as well as state regulatory agencies.<sup>147</sup> The composition of Local Planning Groups ("LPG") is broader still, including all potential stakeholders involved in the management of dredged materials.<sup>148</sup>

Because the LPGs are structured to have broad support, they are responsible for formulating dredging plans that can be smoothly implemented.<sup>149</sup> The underlying belief is that by providing a forum for government agencies and concerned interest groups to exchange ideas and opinions, dissenters have less incentive to obstruct, even if con-

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141. See Water Resources Development Act of 1992, Pub. L. No. 102-580, 106 Stat. 4797, 4826-27 (codified as amended at 33 U.S.C. § 2326 (1994)).

142. See 110 Stat. at 3680.

143. The Port of Oakland's dredging plan actually failed the "least cost" test, since the environmental restoration component boosted the cost of the project without increasing the purely economic benefits of dredging. Although the environmental benefits of the restoration are considerable, the Corps was legally prevented from taking these into account under the law prior to WRDA '96. Instead, a special appropriation was required to support the Sonoma Baylands project, and one was provided under the Energy and Water Development Appropriations Act, Pub. L. No. 103-126 tit. I, 107 Stat. 1312, 1314 (1993) (allocating \$4,000,000 for Sonoma Baylands Wetland Demonstration Project).

144. See National Dredging Team, *supra* note 120, at 6.

145. See *id.* at app. B.

146. See *supra* note 132 for the list of participating federal agencies.

147. See National Dredging Team, *supra* note 120, at app. B.

148. See *id.* at 9.

149. See *id.* at 8-10.



sensus remains elusive.<sup>150</sup> The hope is that, over time, the parties at the table will come to know and trust one another.<sup>151</sup> The cases of the Oakland and New York/New Jersey ports support this theory, as do other policy case studies far removed from the realm of dredging.<sup>152</sup>

In addition to building consensus, the three-tiered approach to problem solving draws on the strengths of a federal system. Operating from Washington, the NDT is well positioned to distribute information about creative problem solving nationwide, while decentralized local teams can capitalize on the experience of community-based organizations and street level bureaucrats.<sup>153</sup>

Recent policy initiatives in California illustrate how the new structure can be used to encourage bureaucratic innovation. The EPA's San Francisco regional office is testing a streamlined process for issuing permits.<sup>154</sup> The aim is not to reduce the number of regulations that must be satisfied or to alter their content (requiring reform at the national level), but to achieve greater procedural rationality.<sup>155</sup> Under the new system, reviews are to be conducted in a coordinated rather than a sequential manner, with all agencies reviewing dredging proposals at once.<sup>156</sup> If the reform works, a port authority should never again find itself concluding an agreement with one agency only to have its proposal rejected by another, in a seemingly endless cycle.<sup>157</sup>

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150. *See id.*

151. *See* DAVID L. KIRP, *JUST SCHOOLS: THE IDEA OF RACIAL EQUALITY IN AMERICAN EDUCATION* 52-64 (1982) (examining the quest for desegregation of American schools through analysis of five Bay Area communities).

152. *See* RICHARD F. ELMORE & MILBREY W. McLAUGHLIN, *STEADY WORK: POLICY, PRACTICE, AND THE REFORM OF AMERICAN EDUCATION* 10-11 (1988) (explaining that successful school reforms must involve policy makers, administrators, and teachers); *see also* Robert B. Reich, *Public Administration and Public Deliberation: An Interpretive Essay*, 94 *YALE L.J.* 1617, 1631-32 (1985) (advocating use of public deliberation in public administration); *cf.* Robert B. Reich, *Policy Making in a Democracy*, in *THE POWER OF PUBLIC IDEAS* 123, 147-53 (Robert B. Reich ed., 1990) [hereinafter Reich, *Policy Making in a Democracy*] (presenting examples of public disputes involving pollution, advertising, and educational reform).

153. A June 1997 report from the National Dredging Team includes proven disposal methods and minimum federal requirements—information needed by newly formed local groups as they set about devising harbor-specific dredged material management plans. LPGs are counseled to learn about planning groups that already function in order not to duplicate effort. *See* National Dredging Team, *supra* note 120, at 6.

154. *See* Interview with Brian Ross, *supra* note 85.

155. *See id.*

156. *See id.*

157. In another venture aimed at speeding up decision making by reducing duplication, the EPA and the Army Corps of Engineers, in conjunction with the Regional Water Quality Control Board, the Bay Conservation and Development Commission, and the State Lands Commission, have established a Dredged Material Management

## III

## WHY INCREMENTALISM WORKS

Although the mudlock that paralyzed the Port of Oakland was eventually broken, no one applauds the fact that it took nearly twenty-five years. Secretary of Transportation Federico Peña identified the problem just weeks before the dredging in Oakland began in 1995. The process was the problem, according to Peña, who observed that dredging projects are “submerged in conflicting missions and mandates among a number of federal agencies and a pyramid of federal rules and regulations, plus state and local government laws, which make it a miracle every time a port dredging project is brought to fruition.”<sup>158</sup>

A. *Is Radical Surgery Needed?*

To avoid repetition of the pitfalls that characterized the Oakland project, Robert Kagan argues in his series of articles on adversarial legalism that radical institutional surgery is required. Kagan proposes adopting a hierarchical process that is less procedurally cumbersome. To set the intellectual groundwork for reform, Kagan develops the notion of “*administratively final, multi-factor balancing*,” which would rewrite the rules of federalism, centralizing power in regional super-agencies launched by Washington at the expense of state and local agencies.<sup>159</sup>

1. *The Return of Robert Moses*

These super-agencies would possess legal authority not seen since the heyday of Robert Moses.<sup>160</sup> In reviewing a particular port expansion proposal, the super-agency would meet with interested parties.<sup>161</sup> Although it would seek consensus for its preferred plan, it would have the power to act unilaterally if negotiations failed.<sup>162</sup> Its decision would command nearly total deference from other branches of government, and could be overturned in court only if shown to be

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Office in San Francisco. This office provides a venue where test results for proposed ocean dumping sites can be interpreted jointly. *See id.*

158. Leigh Stoner, *Dredge Crisis in U.S. Ports Urgently Needs Political Fix*, INSIDE DOT & TRANSP. WEEK, Apr. 21, 1995, available in LEXIS, Transp. Library, Arcnews File.

159. *See* Kagan, *Adversarial Legalism*, *supra* note 3, at 387.

160. *See generally* ROBERT A. CARO, *THE POWER BROKER: ROBERT MOSES AND THE FALL OF NEW YORK* (1974) (chronicling rise of Robert Moses in New York City government).

161. *See* Kagan, *Adversarial Legalism*, *supra* note 3, at 387.

162. *See id.*

“substantively arbitrary or the product of unfair influence.”<sup>163</sup> The threat of an externally imposed ruling, Kagan contends, would spur “serious efforts by participating interests to reach a negotiated accommodation.”<sup>164</sup>

Such a decision-making process would align the United States with the practice in Western Europe, where controversies pitting development against environmental interests “usually are resolved in political and administrative forums, not in courts, and outcomes rarely are shaped by the manipulative use of legal procedures and standards.”<sup>165</sup> Administratively, final decision making would work a counter-revolution in American public law, reviving an era when public law actions were rarities and standing to bring a lawsuit was hard to secure. Administrative agencies were granted sweeping discretion, no “sunshine laws” mandated public deliberation,<sup>166</sup> expert judgment was rarely challenged, and courts operated as the deferential—indeed, the “least dangerous”—branch of government.<sup>167</sup>

## 2. *Is Government by Experts Feasible—or Wise?*

Underlying these specific changes is an attempt to restore confidence in public decision making by “reconstitut[ing] governmental authority.”<sup>168</sup> While making democracy work is vitally important, Kagan’s strategy for doing so is both politically unfeasible and problematic on its merits.

American distrust of government by bureaucracy, expressed by the citizenry and business leaders, has deep roots.<sup>169</sup> It is hard to envi-

163. *Id.*

164. *Id.*

165. *Id.* at 391; *see also* DAVID L. KIRP, *DOING GOOD BY DOING LITTLE: RACE AND SCHOOLING IN BRITAIN* 119 (1979) (comparing Britain’s non-confrontational style of decision making with United States’ more adversarial approach).

166. *See generally* Christopher W. Deering, *Closing the Door on the Public’s Right to Know: Alabama’s Open Meetings Law After Dunn v. Alabama State University Board of Trustees*, 28 CUMB. L. REV. 361, 364-68 (1998) (providing historical background of sunshine laws).

167. *See generally* ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (1962) (propounding theory of “passive virtues” of deferential, non-activist judiciary).

168. Kagan, *Adversarial Legalism*, *supra* note 3, at 398.

169. *See* SEYMOUR MARTIN LIPSET, *AMERICAN EXCEPTIONALISM: A DOUBLE-EDGED SWORD* 39-46, 281-87 (1996) (discussing American libertarian tradition, voter frustration, media distortion, and heavy reliance upon state as sources of American distrust of political leaders and institutions); *see also* JOHN P. DWYER & PETER S. MENELL, *PROPERTY LAW AND POLICY: A COMPARATIVE INSTITUTIONAL PERSPECTIVE* 1008 (1998) (referring to historical distrust of government bureaucracy); HENRY FORD & SAMUEL CROWTHER, *MY LIFE AND WORK* 91-96 (1922), *reprinted in* GIANT ENTER-

sion popular support for new super-regulatory agencies of the sort that have worked well in the very different political and cultural atmosphere of Western Europe. Indeed, the depth and pervasiveness of hostility toward Washington makes it difficult to conceive how such an idea—which shifts power away from state houses, port authorities, and interest groups to central government—could ever win approval.<sup>170</sup>

Changes in dredging policy since *Adversarial Legalism* appeared suggest that major surgery is not only politically implausible but unnecessary. Through careful modifications in the present legal regime, public decision making can be significantly improved and the habit of legalizing all disputes can be broken.<sup>171</sup> In recent years, both environmental activists and commercial interests, acting in the context of larger political and economic shifts, have come to recognize the virtues of bargaining.<sup>172</sup> Federal judges have been less willing to substitute their wisdom for that of administrative agencies.<sup>173</sup> At the same time, technology has broadened the array of feasible solutions for disposing of sediment.<sup>174</sup>

Simultaneously placing water conservation, wetlands preservation, and harbor dredging on the table encouraged political horse trading. A president, recognizing the policy and political gains that he could secure, deployed the power of his office to help resolve two long-standing dredging disputes at the Port of Oakland and the Port of New York and New Jersey. Conventional political wisdom counsels presidents to avoid direct intervention in such controversial local issues, because the political terrain is complex and unfamiliar and the risk of misstep is high. These cases, however, show that the sparing and pointed use of presidential leadership can be highly effective.

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PRISE 141-44 (Alfred D. Chandler, Jr. ed.) (1964) (criticizing bureaucratic corporate structure).

170. See E.J. DIONNE, JR., *WHY AMERICANS HATE POLITICS* 10-11, 283, 331-32, 344-45, 349-50, 355 (1991) (describing Americans' present dissatisfaction with federal government and discussing causes of their antipathy toward politics).

171. See Robert D. Behn, *Management by Groping Along*, 7 *J. POL'Y ANALYSIS & MGMT.*, 641, 652-53 (1988) (arguing managers will achieve policy goals only through experimentation).

172. See *supra* Part II.B.

173. See *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-45, 864-66 (1984) (explaining when and why courts should defer to administrative agencies in questions of statutory interpretation and policy).

174. See, e.g., *Biosafe Awarded Contract by U.S. Department of Energy To Demonstrate Dredged Spoils Remediation Technology*, *BUS. WIRE*, Sept. 26, 1995, available in *LEXIS*, News Library, Wires File; see *supra* note 126 and accompanying text.

They redefined decision making without setting a precedent for presidential intervention in every future dispute.

Bureaucratic behavior has been subsequently recast to invite greater coordination among agencies, experimentation with new modes of decision making (such as the procedural streamlining among San Francisco-based agencies), and consultation with interested parties.<sup>175</sup> Despite the history of litigiousness in dredging controversies, most interest groups would rather see policy made in the conference room than the courtroom.<sup>176</sup> Since the experiences of Oakland and New York/New Jersey, dredging disputes have largely been kept out of the courts. As discussions yield new agreements, they also show parties how to resolve future disputes without having to depend on judges, thus creating a different kind of precedent.

Dredging would benefit from relatively modest changes in how policy gets made. The multiplicity of agencies, both state and federal, with authority to deny dredging permits dramatically slows decision making. There are too many points at which the various federal, state, and local agencies must agree (the Oakland dredging project, for instance, required fourteen separate permits or formal approvals).<sup>177</sup>

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175. See Interview with Brian Ross, *supra* note 85; see also National Dredging Team, *supra* note 120, at 6.

176. See GLENDON, *supra* note 2, at 175 (noting that the legal profession turns to litigation only when negotiations have failed).

177. According to the Port of Oakland, before dredging could proceed, the Army Corps of Engineers had to obtain the following permits and approvals: Section 401 (Clean Water Act) certification from the Regional Water Quality Control Board for dredging; Section 401 (Clean Water Act) permit to allow barge overflow at the dredge site; EPA concurrence with ocean disposal; and consistency determination concurrence from the California Coastal Commission for ocean disposal, and from the Bay Conservation and Development Commission ("BCDC"), for dredging and some pipeline facilities work at Sonoma Baylands and the Galbraith site. See *Final Supplemental Environmental Impact Report/Environmental Impact Statement, Oakland Harbor Deep Draft Navigation Improvements*, at 2-82 (June 1994) (on file with the *New York University Journal of Legislation and Public Policy*).

Permits and approvals that had to be obtained by the Port itself included: Section 10 (River and Harbor Act) permit from the U.S. Army Corps of Engineers for dredging of berthing areas; Section 10/404 (Clean Water Act) permit from the Corps for filling portions of the Galbraith site and digging a drainage channel; Section 103 (Marine Protection, Research, and Sanctuaries Act) permit from the Corps for ocean dumping of some of the material to be dredged from the berthing areas; State Lands Commission permit for dredging of certain lands in the inner harbor; stream bed alteration agreement from the California Department of Fish and Game for the alteration of the drainage channel through the Galbraith site; a new lease with the City of Oakland to allow disposal at the Galbraith site; airspace review by the Federal Aviation Administration for the Galbraith site; Alameda County Airport Land Use Commission informal project review for use of the Galbraith site; from the Regional Water Quality Control Board, waste discharge permit and National Pollutant Discharge Elimination System permit for disposal at the Galbraith site, and waste discharge permit for the

The effect of these multiple “clearance points,” as Aaron Wildavsky and Jeffrey Pressman show in *Implementation: How Great Expectations in Washington Are Dashed in Oakland*, is to make it hard to accomplish anything.<sup>178</sup>

This pathology of multiplicity is a central theme of *Adversarial Legalism*, but something less than a super-agency is required to correct the problem. Decision making would be effectively simplified if a single non-federal entity (such as the Bay Conservation Development Commission) had exclusive authority to grant environmental permits for dredging, while specialized agencies (such as the Department of Fish and Game) retained a formal advisory role. It also makes sense, as Kagan points out, to end piecemeal congressional funding.<sup>179</sup> Although this method of funding appreciably retards policy development, it would be difficult to change because it allows members of Congress to claim political credit each time a project is approved. At the least, the Army Corps of Engineers should be authorized to carry out maintenance dredging and pay for developing shipping channels when such efforts enhance the environment, without having to obtain project-specific congressional approval.

### 3. *Expertise and Participation*

If the more centralized, less open model advocated in *Adversarial Legalism* were adopted, disputes like the Port of Oakland dredging issue would undoubtedly be settled more quickly, with fewer resources consumed in the process. But the price—the real possibility of worse decisions, the impoverishment of public deliberation, and loss of legitimacy—is too high.

Kagan’s preference for centralized decision making over the messier forms of participatory politics is premised on the belief that better decisions will result. Unquestionably, expertise deserves an important role in a domain like dredging, where scientific knowledge

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drying yard at the Ninth Avenue terminal, if needed; and miscellaneous construction easements for the Galbraith site. *See id.* at 2-82 to 2-83.

Permits and approvals that had to be obtained by the dredging contractor included a permit from the Bay Area Quality Management District for the dredge, if the dredge were to be tied up to a dock or pier or if the dredge offloaded dredged materials directly onto land. A permit may also be required for operating the pumps on the dredged material pipeline. *See id.* at 2-83.

178. *See* JEFFREY L. PRESSMAN & AARON WILDAVSKY, *IMPLEMENTATION: HOW GREAT EXPECTATIONS IN WASHINGTON ARE DASHED IN OAKLAND* 102-10 (2d ed. 1979) (arguing that, in context of efforts to increase employment opportunities in Oakland, programs are less likely to succeed where multiple decisions are required).

179. *See* Kagan, *Adversarial Legalism*, *supra* note 3, at 379.

sets the technical parameters for the safe disposal of dredged material. But faith in “comprehensive rationality” ignores the blind spots that characteristically accompany professionally dominated modes of decision making.<sup>180</sup>

Narrowing the range of voices involved in policy formation and implementation can lead to the systematic exclusion of valuable information and the premature dismissal of certain lines of inquiry. Standard operating procedures, conventional wisdom, and prevailing paradigms will dominate the discussion, leading to information gaps and promoting potentially poor outcomes. As Charles Lindblom and Edward Woodhouse argue:

When potentially relevant participation is undermined or shut out by systematic biases differentially empowering certain social groups or ideas, less intelligence can be brought influentially to bear . . . . Great diversity [of ideas] will help prevent careless, grossly simplistic, premature agreement on policies that do not offer much prospect of ameliorating the problem.<sup>181</sup>

Whether the topic is harbor dredging or school reform,<sup>182</sup> community development<sup>183</sup> or AIDS,<sup>184</sup> participation embodies a powerful form of learning. An effort by the EPA to enlist the citizens of Tacoma, Washington in discussions of whether to shut down a copper smelting plant exemplifies such learning.<sup>185</sup> The community meetings raised serious questions about the EPA’s own scientific research, pointing out the limitations of expertise.<sup>186</sup> Those meetings also proved valuable by demonstrating that, contrary to the notion of fixed preferences postulated by neoclassical economics, people’s prefer-

180. See Colin S. Diver, *Statutory Interpretation in the Administrative State*, 133 U. PA. L. REV. 549, 574-82 (1985) (discussing respective competence of courts and administrative agencies to interpret statutes).

181. CHARLES E. LINDBLOM & EDWARD J. WOODHOUSE, *THE POLICY-MAKING PROCESS* 141, 147-48 (3d ed. 1993).

182. See, e.g., THOMAS B. TIMAR & DAVID L. KIRP, *MANAGING EDUCATIONAL EXCELLENCE* 131-32 (1988) (discussing need for greater local involvement in education reforms).

183. See, e.g., Judith E. Innes, *Group Processes in the Social Construction of Growth Management*, 58 J. AM. PLAN. ASS’N 440 (1992) (discussing success of consensual groups of experts, citizens, and high level officials in implementing growth management in Florida, Vermont, and New Jersey).

184. See e.g., DAVID L. KIRP, *LEARNING BY HEART: AIDS AND SCHOOLCHILDREN IN AMERICA’S COMMUNITIES* 282 (1989) (discussing how open forums on AIDS led community members to change their minds about allowing children with AIDS to attend school).

185. See Reich, *Policy Making in a Democracy*, *supra* note 152, at 147-50.

186. See *id.*

ences can change when they are involved in dialogue. As Robert Reich writes:

Individual preferences . . . are influenced by both the process and the substance of policy making. Communications move in both directions, from citizen to policy maker and from policy maker to citizen, and then horizontally among citizens. The acts of seeking to discover what people want and then responding to such findings inevitably shape people's subsequent desires.<sup>187</sup>

More conventional approaches to policy making, whether relying on interest group intermediaries or calculating net benefit maximization to specify public goals, "leav[e] out some of the most important aspects of democratic governance, which involve public deliberation over public issues and the ensuing discovery of public ideas."<sup>188</sup>

Introducing multiple voices into the process typically causes delay in reaching decisions, as Kagan repeatedly points out.<sup>189</sup> Kagan equates delay with cost, but delay is not necessarily a bad thing. In the Port of Oakland case, for instance, the initial professional judgment to dump hundreds of tons of toxic materials into San Francisco Bay would have done great environmental damage. The search for additional options, begun only when those outside the government and Port effectively compelled it, must be reckoned a benefit even though it made dredging more expensive. As this example suggests, Kagan has lost sight of the fact that, while participatory democracy can be costly and inefficient from the standpoint of process alone, the overall results may surpass those achieved by relying mainly on bureaucratic expertise.

Designing processes of decision making poses deeper questions about how to develop trust in government. In this critical enterprise, Kagan has little use for politicians or participatory politics. His treatment of politicians adopts the assumption of public choice theorists that elected officials are consumed by self-interest—their desire to be reelected—and inattentive to the public's concerns.<sup>190</sup> This model posits that political leadership on contested issues is rare because it is risky. But President Clinton's role in the Port of Oakland case indicates that leadership and electability are not necessarily at odds and that there can be political rewards for taking risks in developing pol-

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187. *Id.* at 138.

188. *Id.*

189. See Kagan, *Adversarial Legalism*, *supra* note 3, at 384, 389.

190. See, e.g., JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT* 334 (1962) (analyzing theoretical underpinnings of the notion that behavior of politicians is driven by election concerns).



icy.<sup>191</sup> Leadership not only helps to resolve particular problems; it also has the potential to reinvent government, consequently boosting public support.

Kagan treats participation as an impediment to expert decision making, a persistent heckler's veto whose impact needs to be contained. The dredging super-agency he describes limits outside involvement, with discussions between administrators and the interested parties occurring only in private.<sup>192</sup> To be sure, privacy can invite greater candor and less posturing by the participants. But preferring secret rather than open government also means less visible decision making and greater discretion for officials to decide whose voices really count.<sup>193</sup> Decisions generated in such a political vacuum are inherently less stable than outcomes that emerge from public conversation. Those who have been excluded are more likely to lodge challenges in whichever venue is available to them, be it a court of law or the court of public opinion. *The Rebirth of Urban Democracy*, an empirical investigation of neighborhood policy making in five cities, concludes that giving citizens substantial authority over decisions that affect the quality of life in their communities, while hardly utopian in its consequences, produces better decisions and greater consensus about those decisions.<sup>194</sup> "A large proportion of administrators . . . overwhelmingly felt that the benefits [of participation] outweighed the costs."<sup>195</sup>

## B. *The Policy Pentacle*

### 1. *Policy Frameworks*

For all domains of public policy, dredging included, the strategies of policy design can be grouped under one of five broad frameworks: creation of a regime of legal rights; reliance on professional expertise; utilization of bureaucratic norms of consistency and internal accounta-

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191. This is a lesson President Clinton could have used to his political advantage on other issues, such as gays in the military, health care reform, and welfare reform.

192. See Kagan, *Adversarial Legalism*, *supra* note 3, at 387.

193. Cf. NEW INSIGHTS ON GOVERNANCE: THEORY AND PRACTICE at xii (Kenneth W. Thompson ed., 1995) ("The 'public choice' approach sees venality in the system with bureaucrats taking over and guiding choices to serve their own personal advancement.").

194. See JEFFREY M. BERRY ET AL., *THE REBIRTH OF URBAN DEMOCRACY* 213 (1993).

195. *Id.*; see also SIDNEY VERBA ET AL., *VOICE AND EQUALITY: CIVIC VOLUNTARISM IN AMERICAN POLITICS* 283-84 (1995) (arguing that political participation provides significant benefits that outweigh costs). See generally MATTHEW CRENSON, *NEIGHBORHOOD POLITICS* (1983) (comparing neighborhood political participation in several Baltimore communities and consequent benefits).

bility; allowing the political system to settle matters (producing either ideological clashes or the give-and-take of interested parties); or leaving matters to the market (subject to varying degrees of regulation).<sup>196</sup>

Each of these frameworks tends over time to slip in and out of favor. At present, market solutions are increasingly preferred in education,<sup>197</sup> with much attention paid to charter schools and vouchers, as well as in health care, where competition between health maintenance organizations is supposed to control skyrocketing costs. A generation earlier, rights were substituted for markets in safeguarding the environment,<sup>198</sup> and they supplanted professional discretion in defining opportunities for disabled children.<sup>199</sup>

Each framework has both a distinctive potential and pathology. Markets treat the consumer as sovereign, which often exacerbates differences between individuals. Politics gives voice to the majority while rejecting the claims of the minority. The idea of rights honors individual autonomy but denigrates expertise or politics. Bureaucracy produces uniformity but is unresponsive to differences among individuals. Professionals draw on expertise while ignoring the polity.

In contemporary policy making, few significant issues are defined in terms of a single framework. Instead, several frames are used to fashion a complex and mixed regime. Conflict and strain among the frameworks is the norm, because these frameworks embody different values and have distinct, built-in constituencies. Professionals regard expertise as a superior mode of problem solving because it avoids what is regarded as petty partisanship, while politicians disparage claims of expertise as masking political judgments. Administrators claim that bureaucratic standards produce the fairest outcomes because they are uniform, while lawyers assert that rights offer better protection because they trump other kinds of claims.

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196. See generally David L. Kirp, *Professionalism as a Policy Choice: British Special Education in Comparative Perspective*, 34 *WORLD POL.* 137 (1982) (outlining five strategic frameworks of policy design).

197. See, e.g., JOHN E. CHUBB & TERRY M. MOE, *POLITICS, MARKETS, AND AMERICA'S SCHOOLS* (1990) (advocating that aspects of free market system, such as consumer choice, be applied to public school reform); PAUL T. HILL ET AL., *REINVENTING PUBLIC EDUCATION: HOW CONTRACTING CAN TRANSFORM AMERICA'S SCHOOLS* (1997) (proposing governance of public education based on contracting and family choice).

198. See, e.g., DWYER & MENELL, *supra* note 169, at 486-502 (discussing creation of markets in allocation of water rights).

199. See, e.g., David Neal & David L. Kirp, *The Allure of Legalization Reconsidered: The Case of Special Education*, 48 *LAW & CONTEMP. PROBS.* 63, 71-72 (1985) (discussing development of Individualized Education Program and its effect on decision making process in special education).

The balance struck among these frameworks is critical. It determines what goods or services will be provided by whom and on what terms, as well as how varied those goods or services will be and who will benefit most. Defining a policy problem primarily in terms of rights, for instance, creates a different client class with a different stake than does treating the issue as one mainly fit for professional discretion or the ministerial responsibility of a bureau or the price-setting mechanisms of the marketplace. In short, choices among policy frameworks embody judgments about how to allocate power in the universe of decision.

For some issues, a particular framework is likely to dominate. For instance, when the issue has to do with primary individual needs—the requisites of survival, the basic tools of participation in society—rights are naturally implicated. When choices are to be made among non-essential goods, the market plays the central role. When reliable expertise exists, professionals have an especially strong claim to authority.

Maintaining a tension among frameworks means inviting competing conceptions of the good into the house of policy. This is wise, since a single framework can offer only an incomplete way to conceptualize a problem. Trouble predictably arises when one approach dominates to the effective exclusion of others. Consider, for example, what characteristically transpires when one of the frameworks captures the policy process, as when professionals deny clients a say in decisions about their lives or when bureaucratic rules undermine the sensible exercise of administrative discretion. Drawing on multiple frameworks has the desirable effect of overcoming these built-in blind spots.

## 2. *Harbor Dredging and the Policy Pentacle*

The history of harbor dredging shows the policy pentacle in operation. Until the 1970s, port construction was managed by inventive bureaucrats and masters of politics.<sup>200</sup> Ports expanded to meet growing market demand, but often at considerable cost to the environment. The rights-focused environmentalism that held sway during the 1970s and 1980s represents a predictable reaction to these market excesses. The form of that environmentalism fit the predilections of the times.

Meanwhile, scientific expertise had begun to fall into disrepute. With Agent Orange, Bhopal, and Chernobyl in contemporary memory—and, closer to home, asbestos, Love Canal, and the Dalkon

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200. See CARO, *supra* note 160, at 616-17.

Shield intrauterine device—there existed a broadly held and hard-to-erase worry about a possible “Big Lie” of modern science.<sup>201</sup>

Concurrently, rights-based concerns began to play a significant role. The citizenry, enjoying the prosperity of post-war economic growth, came increasingly to acknowledge the importance of addressing social injustice. Litigation became a tool to assert new rights. “Scarcely any political question arises in the United States,” Alexis de Tocqueville wrote in *Democracy in America*, “that is not resolved, sooner or later, into a judicial question.”<sup>202</sup> Like so many of Tocqueville’s observations, this one became truer over time. Beginning in the 1960s, law was aggressively used to promote civil rights for minorities, as well as to place neglected social concerns on the public agenda. In reappraising the structure of environmental policy, then, it seemed only logical to substitute a rights-driven regime for one based on market dominance.<sup>203</sup>

But a policy dominated by the idea of rights brings its own problems. It is hostile to the bureaucrats and professionals who must manage public life when the lawyers depart. A rights-based orientation treats expertise as something determined by an adversarial system, rather than by the profession itself, even as it dismisses political give-and-take as wrongheaded, even immoral.

Rights “trump” politics, it is said, as they trump markets.<sup>204</sup> But politicians, like lawyers, can make good use of interest group pressures; certainly President Clinton was able to do so in the dredging case. Participatory politics, embodied in wide-ranging discussions among the array of stakeholders, also had the effect of checking rights. Scientific expertise, used mainly for advocacy purposes during the spate of 1980s litigation, subsequently contributed to rethinking the policy issues and so helped pave the way to resolution. As well, economic realities cannot be cast aside by the invocation of rights, since what looks principled in times of economic prosperity can appear obstructionist in less happy days.

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201. See, e.g., DOROTHY NELKIN & LAURENCE TANCREDI, *DANGEROUS DIAGNOSTICS: THE SOCIAL POWER OF BIOLOGICAL INFORMATION* (1989) (exploring rise of genetic essentialism and necessary public distrust that should accompany dangerous fallacies of genetic testing).

202. 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 280 (Phillips Bradley ed., Knopf 1945) (1835).

203. See DWYER & MENELL, *supra* note 169, at 486-502 (discussing creation of markets in allocation of water rights).

204. See RONALD DWORIN, *LAW’S EMPIRE* 381-82 (1986) (discussing how rights trump collective strategies).

The harbor dredging agreements not only represent a solution to particular problems; also, and more vitally, they have re-balanced the policy pentacle. Concerning harbor dredging, rights now function less as absolutes and more as standards against which to frame negotiation. Markets influence but do not dictate decisions. Expertise contributes knowledge that expands the range of options available to policy makers.

This balance will surely shift as the result of some future, un-specifiable shift in circumstance. For now, though, a productive tension among the frameworks of decision holds sway.

## V

### MUDLOCK IN OAKLAND REDUX

The Army Corps of Engineers has completed the deepening of the channels in the Port of Oakland to forty-two feet. Already, Port planners are working with the Corps to determine the feasibility of dredging as deep as fifty feet in order to handle the next generation of container ships.<sup>205</sup>

That undertaking presents a new array of problems. Oakland's harbor channels are narrow, and deepening them further will threaten the stability of the banks.<sup>206</sup> The Port and the Corps will have to relocate a large sewer pipe, at great expense.<sup>207</sup> The projected increase in shipping and cargo handling will also generate more truck traffic, which brings more congestion and air pollution.<sup>208</sup>

Sediment disposal remains on the list of Oakland's problems, but it is not the Port's primary concern. Deepening the Harbor to forty-two feet removed a layer of mud, some of it contaminated with toxins. What remains is sand (which does not retain contamination the way finer-grained mud does) that can be used in construction. The Port Authority envisions using much of this sand to raise the elevation of nearby land that has subsided and to restore shoreline habitat.<sup>209</sup> What cannot be used nearby can be shipped to the ocean disposal site, which has substantial capacity to handle sediment, although Port officials worry that the cost of such a venture might prove prohibitive.

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205. *See Port of Oakland Gets Okay to Dredge Harbor to -50 Feet* (last modified Oct. 16, 1998) <<http://www.portoakland.com/50foot.html>>.

206. *See U.S. Army Corps of Engineers, San Francisco District & Port of Oakland, Oakland Harbor Navigation Improvement (-50 Foot) Project*, § S.2 (May 1998) <<http://www.50ftdredge.com/EIS>>.

207. *See id.*

208. *See id.*

209. *See id.* § 3.3.2.

Once a policy has been implemented, “[t]he coalition resisting change is defeated, and the coalition that was built and nurtured to establish the new policy can be transferred to other fights.”<sup>210</sup> That is what has happened in Oakland. There, Port officials are discussing their plans for further dredging with other members of the Long Term Management Study; none of the environmental groups or agencies has voiced insurmountable objections.<sup>211</sup> Where Oakland goes, will other harbors—and other public agencies generally—be able to follow?

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210. KINGDON, *supra* note 35, at 202.

211. Although the Port’s dredging coalition of businesses, environmental groups, and agencies has held together thus far, a new group—one that was not included in earlier negotiations—has emerged to challenge the Port’s expansion plans. On October 7, 1997, West Oakland Neighbors filed suit asking a federal court to withhold federal money from the Port project until planners examine all possible measures to reduce air emissions from the expected increase in vehicular traffic. *See* Rick DelVecchio, *West Oakland Group Sues to Block Port Project*, S.F. CHRON., Oct. 7, 1997, at A19. The group also threatened to file a second lawsuit under the Civil Rights Act of 1964, charging environmental racism. *See id.* The same allegation was made against the Port by minority residents who lived in the vicinity of the Galbraith golf course although it never resulted in litigation. For further discussion, see *supra* Part I.D.3.

The court challenge illustrates the inherent fragility of negotiated solutions: those excluded from the bargaining table resort to other means of influencing outcomes. Under Kagan’s proposed model, the issues raised by West Oakland Neighbors could be ignored if the super-agency determined they were spurious, and the project could move forward quickly. The Port of Oakland’s recent successes in negotiating solutions to complex policy problems suggest that the Port is likely to broaden its coalition and negotiate a solution. The process will take time, and neither side will get exactly what it wants, but the outcome—a re-balancing of the policy pentacle—will be more stable and will better represent the variety of interests involved.