Policy Entrepreneurship, Public Choice, and Symbolic Reform Analysis of Section 198, The Brownfields Tax Incentive: Carrot or Stick or Just Never Mind?

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POLICY ENTREPRENEURSHIP, PUBLIC CHOICE, AND SYMBOLIC REFORM ANALYSIS OF SECTION 198, THE BROWNFIELDS TAX INCENTIVE: CARROT OR STICK OR JUST NEVER MIND?

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I. INTRODUCTION

A. Brownfield Remediation and Section 198

A "brownfield" site is abandoned or underutilized urban property which private sources will not redevelop due to the reality or just the perception of hazardous waste (including asbestos containing materials) and fear of attendant liability for environmental remediation or cleanup. Such liability might arise under state law, or prior to 2001 amendments under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), which extends "Superfund" liability to all persons in the chain of title, including a subsequent non-polluting purchaser; and state liability often is imposed for lesser contamination. In any event, if a purchaser is legally or even just economically compelled (e.g., as a condition to financing) to disturb a brownfield contamination site, such activities trigger extensive Environmental Protection Agency ("EPA") and Occupational Safety and Health Administration ("OSHA") regulations governing removal of hazardous waste, renovation or demolition of buildings containing asbestos-containing materials, resultant debris disposal, and the working conditions for such activities, respectively. The cleanup costs of contaminated brownfield sites may

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1 See infra text accompanying note 66.
2 See infra text accompanying notes 68 and 82.
3 See infra text accompanying notes 88-92.
exceed the fair market value of the remediated site.\textsuperscript{4} Moreover, if the new owner purchased contaminated property anticipating cleaning it up (and thus rationally would have reduced its purchase price), the cleanup costs are treated as a contingent part of the purchase price and capitalized when incurred or paid.\textsuperscript{5} The end result has been that developers have often declined to buy sites in brownfields and municipalities often end up owning abandoned brownfield sites through delinquent property tax foreclosures.\textsuperscript{6}

Section 198, as enacted in 1997,\textsuperscript{7} provided until December 31, 2000 an ordinary deduction for otherwise capitalizable remediation costs (including remediation costs anticipated at the time of purchase). The Senate Finance Committee later noted that the 1997 provision had applied to a "relatively narrow class of sites."\textsuperscript{8} Around 200 targeted brownfields (with less than Superfund contamination) were covered, containing 15,000 "qualified contaminated sites" (essentially target poverty areas mostly in some large cities and in a few rural areas—probably less than five percent of all brownfield sites).\textsuperscript{9} The Treasury Department estimated in 1999 that making this provision permanent would leverage, over the following ten years, $7 billion in private investment and return 18,000 brownfields to productive use\textsuperscript{10}—at that time actually only twenty to thirty sites had used Section 198 nationwide.\textsuperscript{11} Amendments to Section 198 in 2000\textsuperscript{12} eliminated the geographic restrictions, expanding it to cover contaminated areas lying in suburban and rural areas, and extended the already once extended expiration date\textsuperscript{13} until December 31, 2003.

B. Why Section 198 Was Thought Necessary

Initially the Internal Revenue Service ("Service") denied any deduction for environmental cleanup in general, thus requiring a taxpayer

\begin{footnotes}
\item[4] See infra note 354 and accompanying text.
\item[5] See infra text accompanying notes 422-26.
\item[6] See infra note 334.
\item[9] See infra note 315.
\item[10] See infra note 270.
\item[11] See id.
\item[13] See infra note 283.
\end{footnotes}
to capitalize brownfield remediation costs and add to its basis in the non-depreciable land.\textsuperscript{14} Gradually, the Service shifted to allowing a taxpayer to currently deduct in many, but not all, cases the cost of cleaning up contamination which the taxpayer had created.\textsuperscript{15} Under one view the contaminator’s cleanup costs should be treated as deferred maintenance expenses; that is, the cleanup could have taken place each year, in which case the cost would have been deductible in those years, but the taxpayer chose to remove several prior years’ contamination in one year.\textsuperscript{16} Under another view a current deduction for soil remediation costs is appropriate because no depreciation would be available if the remediation costs were added to the basis of the non-depreciable land.\textsuperscript{17} In contrast, a purchaser could not deduct the cost of remediating toxic waste existing at the time of purchase.\textsuperscript{18} Section 198 puts a purchaser so remediating in almost\textsuperscript{19} as good, and sometimes a better\textsuperscript{20} tax position as that of a remediating

\textsuperscript{14} See infra note 387 and accompanying text.
\textsuperscript{15} See infra note 388.
\textsuperscript{16} See infra note 368. If measurement of taxable income consistently followed the matching principle, a taxpayer using an accrual basis method of tax accounting would be allowed to accrue its cleanup costs each year, as the contamination occurs. Instead Section 461(h) requires deferral of the expense until the work is accomplished.
\textsuperscript{17} John Lee et al., Capitalizing and Depreciating Cyclical Aircraft Maintenance Costs: More-Trouble-Than-It’s-Worth?, 17 VA. TAX REV. 161, 198 n.145 (1997); see also U.S. Freightways Corp. v. Comm’r, 270 F.3d 1137, 1146 (7th Cir. 2001) (arguing that a current deduction is allowed where the administrative burden of capitalization outweighs the gain in precision for the taxing authorities gained by achieving a more perfect match of expenses with future income);

Where the burden on both taxpayers and Service to account for each item of property separately is great, and the likelihood of distortion of income is nil or minimal, the Code is not so rigid and so impracticable that it demands that nevertheless all items be accounted for individually, no matter what the trouble or the onus.

\textsuperscript{18} See infra notes 443-44 and accompanying text.
\textsuperscript{19} Such a purchaser must “convert” upon a sale any gain (otherwise taxable usually as a capital gain under Section 1231) equivalent to the Section 198 deduction into ordinary income, i.e., “recapture” the Section 198 deduction. See infra note 343 and accompanying text. In contrast, a contaminator deducting remediation costs under Section 162 does not. See infra note 347 and accompanying text. For industry criticism of this rule as explaining in part the scant use of Section 198, see infra note 353 and accompanying text.
\textsuperscript{20} The purchaser can deduct under Section 198 remediation costs incurred in connection with a general plan of rehabilitation, or adaptation to a different use, of the contaminated property; whereas the contaminator can not under conventional wisdom. See infra note 29
taxpayer who had contaminated the property.

The current deduction for the clean-up cost for a taxpayer with taxable income means that the after-tax cost of the clean-up is \( (1-T)(C) \), where \( T \) is the taxpayer's marginal tax rate and \( C \) is the cost of the clean-up. Current deductibility of the cleanup costs may create situations in which it is more economical for the owner to decontaminate the property and put it back into use, rather than moving to a new location. Many brownfield owners, however, have no taxable income. For instance, many, if not most brownfield sites have been long abandoned, with the former owners forfeiting their titles to local governments\(^2\) who are unaffected by the federal tax consequences of any cleanup costs. For many other brownfields owned by private enterprise, the owners have no interest in redeveloping the property or have net operating losses\(^2\)\(^2\) and thus can not presently utilize a current deduction. With the advent of Section 198, the new owners may deduct the cleanup costs of pre-purchase contamination and if the price of the property is discounted by the total cost of the future cleanup, the contaminated property could be more appealing than similar property without the contaminants.\(^2\)\(^3\) For example, if the cost of the contamination cleanup is $800 and the value of the property after the cleanup is estimated to be only $600, in the absence of tax benefits, the property will remain idle. However, if the costs can be deducted by a taxpayer in the thirty-five percent marginal bracket,\(^2\)\(^4\) the after-tax cost is less than the value of the property, \( (1-.35)(800) = 520 \). Thus, otherwise idle property would be returned to productive use.\(^2\)\(^5\)

\(^{21}\) See infra note 334 and accompanying text.

\(^{22}\) Section 172 provides that a business "net operating loss" may be carried back for the two most recent tax years and forward for the next 20 tax years, offsetting business income in those tax years in that order.

\(^{23}\) This assumes that the remediation costs do not exceed the value of the property once remediated plus tax savings. For example, a new owner who paid $200 for contaminated property, which would be worth $1,000 without the contaminants, should be willing to pay as much as $1,231 to remove the contaminants, assuming the marginal tax rate is .35. The $1,231 deductible expenditure would have an after-tax cost of \( (1-.35)(1,231) = 800 \), which would equal the increase in the value of the land (from $200 to $1000). The company's before tax investment of $200 + $1,231 = $1,431 would be partially matched by the federal government's .35($1,231) = 431 tax expenditure. This is likely not to be the case. See infra note 354 and accompanying text.

\(^{24}\) The current top corporate income tax rate is 35%, I.R.C. § 11(b)(1)(D) (1986); the top individual rate is scheduled to be 35% in 2006 and thereafter, I.R.C. § 1(D)(2).

\(^{25}\) The deduction is a deferral of tax, rather than a permanent forgiveness of tax, since the expenditures for remediation increase the value of the property but do not increase its basis.
Accordingly, resources should flow to brownfields, all other things being equal.  

Under current Service policy, a property owner is allowed to deduct toxic waste cleanup costs, provided the taxpayer created the contamination, so that it might appear that Section 198 was intended merely to provide tax parity between the contaminator and a purchaser. The authorities, however, fashion two exceptions to the general rule that the contaminator may deduct remediation costs by requiring capitalization of such cleanup costs: (1) occurring in a “general plan of rehabilitation;” and (2) occurring in the conversion of the property to a new and different use. Section 198 eliminates these incongruities only as to a purchaser, creating economic inefficiency. A non-transparent motivation might have been an inclination to punish the contaminator. Moreover, in many situations where environmental cleanup will be needed—e.g, release of friable asbestos within a building upon remodeling or otherwise or an abandoned service station—the remediation costs may not be currently deducted either by the owner under conventional wisdom as to the tax common law, nor by a purchaser under Section 198.

Brownfields compete with many other potential locations, especially “greenfields”—industrial and commercial locations outside of urban areas. Thus, brownfields remediation tax expenditure proponents deliberately promoted a tax provision “tilting the playing field in favor of brownfields.” In actuality, however, greenfields usually continued to have an economic advantage over urban brownfields due to heavy costs of remediation; Section 198 really tilted the playing field in favor of large

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26 For non-tax factors that might drive the business decision, see infra notes 81 and 353 and accompanying text. Additionally other things usually are not equal—the cost of cleanup often exceeds the fair market value of the remediated site plus tax savings of a Section 198 deduction. See infra note 354.

27 See supra note 15.

28 See infra note 434.

29 See infra note 380 and accompanying text.

30 Economic inefficiency results from a taxpayer modifying her normal business operations to insure qualifying for preferential tax treatment. See Joseph A. Snoe, Tax Simplification and Fairness: Four Proposals for Fundamental Tax Reform, 60 ALB. L. REV. 61, 66 (1996). Such modification often lies at the heart of tax planning or structuring a transaction to obtain the best tax result.

31 See infra notes 71 and 86.

32 See infra note 434.

33 See infra note 96.

34 See infra note 111.

35 See infra note 113.
city brownfields over brownfields in suburbs and small towns. After brownfields had enjoyed a three-year window of opportunity, Congress broadened Section 198 to create parity between brownfields in all cities and in the suburbs, small towns, and rural areas.

This Article shows in Part IV that the case law doctrinal backdrop against which Section 198 was enacted, as well as subsequent judicial developments, is seriously flawed conceptually. It suggests some rather simple doctrinal adjustments that would complement, if not render unnecessary in many cases, the Section 198 deduction.

C. Public Choice and Policy Entrepreneurship and Section 198

"Public Choice" theory holds that legislators obtain ballot votes and other contributions in exchange for legislative votes to: (a) provide asymmetrical (tax) benefits to a special interest or "pressure" group; (b) impose disproportionate (tax) burdens on competitors of such pressure group; or (c) retain a (tax) preference for a pressure group or a (tax) burden for its target.36 Another explanation of motivation of legislators is "policy entrepreneurship." A tax policy entrepreneur in promoting a policy idea invests personal resources in mobilizing latent public support by linking her idea with broader themes resonating with values already widely shared by the public or media during a window of political opportunity to obtain enactment of that idea.37 Both theories can apply as is the case with Section 198.

Part III of this Article shows that the origin of Section 198 was the tax policy entrepreneurship of tax incentives to increase voluntary brownfield remediation, begun in 1993 by Democratic Chicago Mayor Richard Daley, and then continued in 1996 and 1997 by the national Democratic Administration—Vice President Al Gore and ultimately President Bill Clinton.38 (other policy entrepreneurship federal brownfield remediation incentives are beyond the scope of this Article39). It traces through the news media in 1993-97, the growth of public, i.e., media, awareness of the problems that brownfields create,40 the linkage of a brownfields tax incentive with alleviation of those problems,41 and the

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36 See infra note 100.
37 See infra note 101.
38 See infra notes 119 and 148-50 and accompanying text.
39 See infra notes 83-85 and 147 and accompanying text.
40 See infra notes 159, 173, and 185 and accompanying text.
41 See infra notes 203 and 212-15 and accompanying text.
Clinton Administration's creation of a window of political opportunity, largely by "log rolling," in the Taxpayer Relief Act of 1997 to obtain enactment of Section 198.42

At the same time, "Public Choice" insights illuminate the motivations of the policy entrepreneurs who pushed the original, and of those who pushed the current, revised Section 198. For the national policy, entrepreneurs of the 1997 version of Section 198 aimed it primarily at targeted (high poverty) urban brownfields as part of a successful strategy of gaining the support of large cities and minorities for Clinton and Gore in the 1996 and 2000 presidential elections.43 In the 2000 version, in turn, other policy entrepreneurs44 were able after the November presidential election to expand Section 198 to cover brownfields everywhere in order to encompass Republican constituencies as well.

"Public Choice" analysis also is helpful in determining who would be the better actor in resolving the taxation of brownfield cleanups outside of Section 198.45 Sadly the existing Section 198 and the case law both vary from the ideal in many aspects. Broadened, Section 198 still does not reach (a) common indoor asbestos release, as in remodeling by a purchaser; and (b) petroleum and petroleum products contamination (abandoned gas stations), which account for close to half of all brownfield sites;46 nor (c) is it permanent.47 Moreover, in the common business circumstances of remodeling or adapting buildings or other property with asbestos products to a new use, the Section 162 authorities do not permit the existing owner to currently deduct remediation costs for contamination it had caused.48 This Article asserts that they are conceptually wrong; where such remediation adds no value (as by substituting an inferior insulation for asbestos), a current deduction should be allowed under Section 162 based upon the "reverse" rule of tax parity, or under Section 165 as a realized economic loss.49 Uncertainty exists as to the current deductibility by such an owner of the costs of remediating asbestos being released indoors in the unlikely event such remediation is carried out in

42 See infra notes 252-55 and 269 and accompanying text
43 See infra note 119 and accompanying text.
44 See infra notes 284 and 286 and accompanying text.
45 See infra notes 129-41 and accompanying text
46 See infra note 75.
47 See infra note 295 and accompanying text.
48 See infra notes 434 and 436 and accompanying text.
49 See infra notes 447-63, 472-73, 495, and 507-09 and accompanying text.
the absence of remodeling.\textsuperscript{50} Moreover, by failing to expressly consider the competing environmental policies,\textsuperscript{51} the Service too often appears to have conceded specific environmental deduction issues in an ad hoc, unprincipled fashion.\textsuperscript{52} This Article suggests relatively simple doctrinal "clarifications," producing a current deduction in many of the above cases that could be implemented by the courts, or more likely by Treasury and the Service through regulations.

D. Symbolic Reform

Political science literature utilizes "symbolism" to mean demonizing "political enemies" in political discourse, which tends to deflect those seeking substantive reform.\textsuperscript{53} The story of Section 198 well illustrates this notion, as the Clinton Administration depicted the Republican Congressional opposition after 1994 as "enemies of the environment"\textsuperscript{54} and the Clinton-Gore Administration as the "friend of the cities"\textsuperscript{55} and of the environment\textsuperscript{56} by opposing urban sprawl—the mantra was cleanup brownfields instead of developing greenfields.\textsuperscript{57} The Administration linked its brownfields tax incentive with the problem of brownfields against this backdrop.\textsuperscript{58} At the same time, the Section 198 brownfields tax incentive itself was mostly symbolic in another sense: it was deliberately restricted in a number of ways to limit its cost and to aid only inner cities.\textsuperscript{59} Other, probably less intentional features resulted in Section 198 being hardly used at all, notwithstanding the Administration’s rhetoric as to its significance.\textsuperscript{60} The net result was sound bites on
brownfields by President Clinton campaigning on a list of accomplishments or goals with little practical effect or cost—"a little something for everyone but not a lot of any one thing to anyone."61 However, by the 2000 presidential election campaign, both Republican and Democratic candidates proposed positive environmental initiatives, or better sound bites.62

Sadly, the Clinton-Gore Administration's pushing of Section 198 as its major brownfields incentive might have served to retard more meaningful reform of brownfield cleanups, as through changes to CERCLA limiting liability of innocent purchasers, or authorization of EPA grants for brownfield study and remediation (including mild contamination by petroleum or petroleum products and land scarred by mining).63 Such reform was ultimately enacted in 2001 under the Bush Administration and probably will be much more effective than Section 198 in encouraging remediation of land contaminated by hazardous or toxic waste. The core elements of that reform, however, were, in effect, codification, and more adequate funding for existing EPA brownfield incentives to cede brownfield cleanups to state voluntary remediation with release from any future liability; for study; and for some cleanup grants.64 Statutory relief from CERCLA liability for an innocent purchaser of a brownfield (wherever located) and specifically including abandoned gas stations and mine-scarred lands was a good thing.65


In 35 states, voluntary programs are cleaning up thousands of brownfield sites faster and more effectively, and with less litigation, than under the federal Superfund program. A case in point is Texas, where, under Governor Bush, the number of brownfield sites restored to productive use climbed from zero to 451, not only improving the environment but restoring more than $200 million in property value to local tax rolls, most of it in poor communities. We will replicate Governor Bush's success on the national level.

GOP Platform, supra.

63 See infra notes 74-75 and accompanying text
64 Local EPA offices apparently still dragged their heels in releasing remediating owners from liability. See infra notes 83-84.
65 See infra note 75.
II. REMEDIATION OF BROWNFIELD SITES

The literature defines a brownfield site as any site where any use, expansion of current usage, or redevelopment is prevented by real or often just suspected environmental contamination. This broad definition of brownfields includes urban, suburban and rural (greenfields), and industrial and non-industrial sites. Since this definition would include "Superfund" sites, where CERCLA and the Superfund Amendment and Reauthorization Act of 1986 establish retroactive, strict, and joint and several liability for those found to be "potentially responsible parties" for heavily contaminating property, which includes past or present "owners."

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67 Superfund refers to the fund created by corporate environmental tax and special levies on chemical feedstocks and crude oil to finance the cleanup of hazardous substances at sites where no financially viable responsible party could be found and to expedite the cleanup of sites where costs would ultimately be recovered from responsible parties. Such taxes and levies had been funneling—prior to expiration of the act—about $4 million per day into the Superfund Trust Fund; the Superfund also was authorized to receive appropriations of $44 million per year from general revenues. The total revenue for the Superfund was intended to be $1.6 billion over five years. David Brazell & Geraldine Gerardi, Issues in Financing the Superfund: Tax Policy and the Social Agenda, 47 NAT’L TAX J. 677 (1994); Glenn Hess, Administration Superfund Moves Seen as Major Setbacks by CMA, CHEM. MKT. REP., Feb. 23, 1998, at 1. This tax expired in 1995, a hostage to the Republican majority’s goal of repealing joint and several retroactive liability upon present and past owners and actual contaminants. John T. McQuiston, Planned U.S. Cuts Imperil Sludge Cleanup, N.Y. TIMES, Sept. 7, 1995, at B10; Gary Lee, GOP Proposal Would Repeal Key Superfund Component: Cleanup of Older Hazardous Waste Sites Is at Issue, WASH. POST, July 8, 1995, at A2. Congress still has not been able to agree on such liability issue to which corporate Superfund taxes has remained a hostage, so that the Federal government has been spending about $1.54 billion a year to operate the Superfund program. Eric Pianin, Superfund Cleanup Effort Shows Results, Study Shows, WASH. POST, July 10, 2001, at A19.
"operators," "transporters," or generators of contamination. Litigating such "retroactive" liability has resulted in enormous transaction costs and delayed cleanup. Section 198 and the 2002 brownfield amendments to CERCLA carefully exclude Superfund sites, but the fear that parties with no direct role in the extreme contamination of property—e.g., current property owners or lenders—might be liable for the entire cost of the cleanup, reportedly led to developers avoiding brownfield sites.

68 42 U.S.C. §§ 9601-75.
69 Jerry Zremski, GOP Superfund Plan Causes Concern: Could Delay Area Cleanup Efforts, BUFF. NEWS, Aug. 14, 1995, at C1 (reporting that more than 25% of Superfund spending has gone to legal fees); Jim Nichols, Revisionists Retreat: Republicans Back Off Touted Reform of Environmental Law in Light of Polls Showing Support for Protection of Resources, PLAIN DEALER, Oct. 22, 1995, at 1B (stating that 1/3 to legal fees and related costs); see also Don Hopey, A Super Threat: Superfund Program to Clean up Contaminated Sites May be Cut, PITT. POST-GAZETTE, Nov. 13, 1995, at A6. The political rhetoric is that as much as 50% of all the money spent for Superfund goes for attorney fees and regulatory costs. 147 CONG. REC. H10,899 (daily ed. Dec. 19, 2001) (remarks of Rep. Paul E. Gillmor, R-Oh., chief sponsor of Small Business Liability Relief and Brownfields Revitalization Act, H.R. 2869, 107th Cong. (2001) (enacted)).
71 Several witnesses testified before our committee that fear of liability kept them from cleaning up brownfields, and when people are afraid to use a brownfield because of the expense, because of the aggravation involved, they go out and acquire green spaces or virgin land for development instead of safely cleaning up and developing a brownfield.
The "polluter pays" principle, fundamental to Superfund's success in deterring the creation of new contaminated sites, has caused public and private investors to shy away from buying and cleaning up land which may be contaminated. Fear of that liability drives investors toward undeveloped 'greenfields.' The result can be a diminished supply of pristine land and economic decline in industrial and urban centers. Both are detrimental to communities.

Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) or Superfund, Section 104; Announcement of Competition for Final Five Brownfield Economic Redevelopment Initiative Pilots, 59 Fed. Reg. 60,012 (Nov. 21, 1994); Jim Nichols, Companies Getting Green Light to Oversee Own "Brownfields," PLAIN DEALER, June 27, 1996, at 4B ("Fear of state environmental-enforcement litigation has largely chased away developers and financiers from brownfields . . . . The unintended consequence of laws meant to punish polluters has been to encourage even greater development in unused suburban 'greenfields.'"(emphasis added));
CERCLA does provide an “innocent landowner defense” under which a non-governmental entity that intentionally acquires a Superfund site may escape CERCLA liability if: (1) it can establish that the hazardous substances were placed at the site before its acquisition; and (2) it exercised due diligence to detect contamination of the property before the purchase.\(^7\) Today due diligence would, however, usually disclose such substantial contamination, but the costs and uncertainty of such endeavors themselves may have retarded redevelopment of brownfields.\(^7\)

Again note that Section 198 specifically applies to sites with less contamination than Superfund sites.

More significantly, on January 11, 2002, Congress enacted H.R. 2869, the “Small Business Liability Relief and Brownfields Revitalization Act,”\(^7\) which, among other provisions, protects innocent landowners and prospective purchasers or developers of brownfields from Superfund liability.\(^7\) While this Act enjoyed widespread bipartisan support and

Throughout Maryland there are numerous abandoned buildings and industrial warehouses no company will touch under present law. Instead of recycling these ‘brownfields,’ companies opt for plants in the ‘greenfields’ of suburbia, gobbling up former farmland. This is an irrational policy. Government should be encouraging firms to locate in existing industrial sites that already have costly infrastructure. We don’t need more sprawl . . . . We should give property owners rewards—not punitive disincentives—to complete costly clean-ups. If the remediation passes state muster, the reward is a liability waiver needed to get bank loans and avoid future lawsuits.


\(^7\) 42 U.S.C. §§ 9601(A)-(C), 9607.

\(^7\) *See infra* note 180.


\(^7\) *Id.* § 222(a)-(b) (adding 42 U.S.C. §§ 9601(40) and 9607(r)); *id.* § 223 (amending 42 U.S.C. § 9601(35)); Chet Bridger, *Brownfields Looking Attractive*, BUFF. NEWS, Jan. 19, 2002, at E1; Lew Sichelman, *“Brownfields” Bill Allots More Money for Cleanups: President Urges Nation To Recycle Polluted Sites*, BOSTON GLOBE, Jan. 19, 2002, at Z400 (“The bill gives states and localities up to $250 million a year for five years to clean up polluted industrial sites, known as ‘brownfields.’ It also shields potential developers from liability for the cost of cleaning up toxic wastes that existed at a site prior to the purchase of the property.”); Eric Pianin, *“Brownfields” Cleanup Beefed Up: Bush Signs Bill Offering $200 Million a Year for Reclamation*, WASH. POST, Jan. 12, 2002, at A3;

For the first time, the measure permits the government to use
President Bush’s approval it was held hostage for some time to extraneous political issues.

brownfield funds to clean up petroleum waste sites. The EPA estimates that there are as many as 300,000 abandoned gas stations, but the Superfund legislation forbade the use of funds for petroleum cleanup. The House added a provision that would exempt from liability under the Superfund law small businesses contributing less than 110 gallons or 200 pounds of hazardous waste to a contaminated site. That provision sweetened the deal for many Republicans and helped assure passage.


For all its success, this bill also marks a failure. Separate brownfields legislation is needed because Congress has failed in its efforts to revamp as well as reauthorize the broader federal Superfund program. Brownfields grants and loans have been made since 1993 under Superfund, but the long-standing impasse over Superfund is not likely to be broken this year. With much broader support, the separate brownfields measure—which links development needs to environmental concerns—was easier to craft. Debates centered primarily on how much liability protection to extend to developers, and how to define the role of the EPA.


In 1995, foreshadowing the 2002 CERCLA amendments, the EPA removed 25,000 brownfields from its then Superfund list of 38,000 sites as the U.S. Conference of Mayors and Congress urged. Such removal probably did more than anything else over the rest of the decade to encourage remediation of brownfields. Prior to such de-listing, while the

Brownfields have become one of the hottest issues among urban planners as a means for stimulating job growth, stores and housing in business districts and neighborhoods in cities nationwide. More than 31 states have adopted or are considering voluntary cleanup regulations for brownfields, including Pennsylvania and Virginia . . . . Part of the push for brownfields legislation at state and federal levels stems from the effort to curtail the Environmental Protection Agency’s oversight of the cleanup of properties whose contamination levels are less threatening than those for other large sites on the Superfund list. Last January, the agency removed 24,000 smaller properties from its Superfund list, EPA administrator Carol M. Browner said. “By what’s happened, a helluva lot more sites are getting cleaned up than before,” she said. “We removed the stigma so that development would be likely to occur.” The EPA recently started a two-year program offering state and local governments $200,000 grants to help develop programs that would define site assessment, environmental cleanup regulations and redevelopment of brownfield properties.


Twenty-five states, including New York, New Jersey and Connecticut, have adopted laws or regulations that ease the threat of liability and adjust pollution treatment standards. And the Environmental Protection Agency has taken a series of administrative measures, including removing thousands of less-polluted properties from its list of possible Superfund sites, in an effort to spur commercial development.


Sabrina Eaton, *Superfund to “De-list” Sites to Spur Urban Development*, PLAIN DEALER, Jan. 26, 1995, at 1B; Editorial, *Eased EPA Rules Will Help Cities*, ST. LOUIS POST-DISPATCH, Feb. 11, 1995, at 14B (“EPA not only will remove 25,000 sites from its Superfund inventory but will award 50 ‘brownfield’ grants of $200,000 each to help cities cover the costs of some cleanups. In addition, the EPA will soon begin relieving developers of liability problems if they acquire land that later turns out to be polluted.”);


vast majority of brownfields never would have been subject to an EPA Superfund investigation, the perception of potential Superfund liability discouraged selling, purchasing, or lending as to brownfields.  

Where the contamination is less than Superfund status so that CERCLA liability does not attach, but still poses a risk to the public or the environment, most states impose liability on the owner and other responsible persons under analogous state environmental laws. Again foreshadowing the 2002 amendments to CERCLA excepting cleanup liability for innocent purchasers of brownfields, over the last half of the 1990's most states, in cooperation with the EPA, have provided for limitation of liability of those who cleanup brownfields to specified standards for specific future uses. Despite a slow start, state voluntary

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81 T.J. Becker, Clean-Up Costs, Red Tape Tie Up Recycling Sites, CHI. TRIB., Jan. 15, 1995, at C1 (“Although there’s a perception that contamination equals ‘crushing liability,’ not all sites are of Superfund status, said Henry Henderson, Chicago’s environmental commissioner at a recent forum on brownfields. Brownfields are properties idle or abandoned due to real or suspected environmental contamination.”); see generally Hearings on Reclamation and Reuse of Abandoned Industrial Sites Before the Subcomm. on Tech., Env’t and Aviation of the House Comm. on Science, Space, and Tech., 103d Cong. 26-27 (1994) (statement of Charles Bartsch, Senior Policy Analyst, Economic Development, Northeast-Midwest Institute); Lee, supra note 76 (“[D]evelopers say cleaning up such sites often isn’t worth the expense, especially considering the threat of lawsuits and tough oversight by federal regulators.”).

82 Andrea Lee Rimer, Environmental Liability and the Brownfields Phenomenon: An Analysis of Federal Options for Redevelopment, 10 TUL. ENVTL. L.J. 63, 67 (1996) (forty-five states have laws similar to CERCLA); Christine Kolodij Carver, Note, Brownfield Blues, 22 SETON HALL LEGIS. J. 241, 242 n.7 (1997) (“Generally, the type and extent of contamination at a site determines whether federal or state remediation law governs.”).


84 Ohio Cleanup Program Shows Only 10 Successes Since 1989, COLUMBUS DISPATCH, Feb. 25, 2001, at A2 (discussing how only ten Superfund sites have been cleaned completely by state program; some of the money from the state tax of $1 per ton of solid waste—generating $14 million per year—“whittled away for . . . a voluntary clean up effort,” which in turn resulted in only fifty-seven state covenants not to sue since 1996 “due to [the] federal government’s refusal to grant property owners immunity from law suits.”); Randall Edwards, EPA Plan Easing Pollution Cleanup Hits Snag, COLUMBUS DISPATCH, Aug. 27, 1996, at B1 (“Since the program began in September 1994, only four
cleanup programs may have picked up steam recently, as has EPA oversees-cleanup of Superfund sites.

EPA has promulgated hazardous air pollutant standards for "friable" asbestos, usually indoors (e.g., completely dried out insulation in a forty-year old building or piece of machinery or asbestos containing roofing and flooring materials when torn off or abraded), which is inhaleable and linked to many adverse health conditions. Such standards usually are not exceeded unless friable asbestos is stirred up by remodeling or demolition, in which case the removal of asbestos sites have been issued covenants not to sue, largely because the interim rules don’t permit properties with contaminated groundwater to get involved.

147 CONG. REC. S3898 (daily ed. Apr. 25, 2001) (remarks of Sen. Voinovich, R-Oh.) (stating that seventy-eight sites have been cleaned up under Ohio’s voluntary program in past five years). Perhaps Senator Voinovich is not limiting this number to sites that have been issued covenants not to sue. See supra note 84.

Eric Pianin, Superfund Cleanup Effort Shows Results, Study Reports, WASH. POST, July 10, 2001, at A19 (“As of late last year, according to the [GAO] study, about 57 percent of the more than 1,280 toxic waste dumps on the EPA’s national priority list—other than polluted federal or military property—had been designated ‘construction complete’ or free of any immediate threats to humans.”); GENERAL ACCOUNTING OFFICE (“GAO”), HAZARDOUS WASTE, EPA HAS REMOVED SOME BARRIERS TO CLEANUPS 16-7 (GAO/RCED-00-224 Aug. 2000); see also GAO, SUPERFUND: INFORMATION ON THE STATUS OF SITES (GAO/RCED-98-241 Aug., 1998);

That result [not re-enacting the Superfund tax as the Bush administration has proposed] would turn back the clock on the substantial progress made during the past decade. In its early days, the Superfund program was inefficient and slow. In fact, after the first 12 years of its existence, only 155 sites had been cleaned up.

During the Clinton administration, the EPA carried out an aggressive set of reforms that helped reduce litigation delays over how cleanups would be conducted. The administration also introduced a more flexible process for reaching agreements with the polluters. With these reforms, 602 cleanups were completed in eight years—with an average of 85 sites being cleaned each year in the administration’s final four years.


40 C.F.R. § 61.141 (rev’d ed. 2001). Asbestos is friable when it can be crumbled by hand when dry. Otherwise non-friable asbestos may become airborne as by grinding or polishing asbestos floor tiles or running over an asbestos-coated steel beam with a bulldozer.

88 AWARENESS TRAINING FOR ASBESTOS AND LEAD § 1.2 (1996).

89 Id. These include asbestosis (blockage of the lungs by thickened tissue), mesothelioma, and various cancers (lung, larynx, and digestive system).

90 Hearing on Impact of Tax Law on Land Use Before the Subcomm. on Oversight of the House Comm. on Ways and Means, 94th Cong. 79, 81 (1996) [hereinafter MacEwen
containing materials and disposal of resulting debris is subject to EPA regulations. OSHA also regulates occupational exposure to asbestos in the construction industry in such circumstances. EPA estimates that approximately 733,000 non-residential buildings, or one in five in the United States, contain friable asbestos products. Also it estimates that asbestos-containing flooring products are present in over 3.6 million buildings.

Indoor releases of asbestos and other hazardous substances are not covered by CERCLA. Since Section 198's definition of hazardous substances is defined by reference to CERCLA, indoor asbestos removal is not eligible for Section 198 treatment. This was an intentional limitation, probably to limit revenue losses and possibly to tilt the

Statement] (prepared statement of Bruce W. MacEwen, representing National Realty Committee) ("The other issues regarding cleanup and demolition costs are issues that have been in the forefront now for the last few years with the advent of the asbestos problem.").


42 U.S.C. § 9604(a)(3); see supra note 90 and infra note 97.

Section 198(d) . . . includes expenditures associated with substances for which a removal or remedial action would not be permitted under CERCLA §104(a)(3). CERCLA §104(a)(3) generally provides that a removal or remedial action cannot be taken to address products that are part of the building structure and result in exposure within residential buildings or business or community structures (e.g., interior lead-based paint contamination or asbestos which results in indoor exposure).

EPA, Brownfields Tax Incentive, Frequently Asked Questions (Q&A 12), at http://www.epa.gov/brownfields/html-doc/taxfaq.htm (last visited Mar. 12, 2002). This CERCLA limitation may have been due to a reluctance “to give the thousands of asbestos victims a cause of action under CERCLA.” Kimberly A. Marsh, Environmental Quality: Hazardous Waste, 21 ENVTL. L. 1141, 1153 (1991) (reporting the Ninth Circuit’s interpretation of this provision in 3550 Stevens Creek Assocs. v. Barclays Bank, 915 F.2d 1355 (9th Cir. 1990)).

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playing field more towards urban brownfields.\textsuperscript{98}

III. SECTION 198 AND BROWNFIELD REMEDIATION

LEGISLATION ENACTED IN 1997, JCS-23-97, at 136 (Comm. Print 1997) ("Hazardous substances generally are defined by reference to sections 101(14) and 102 of CERCLA, subject to additional limitations applicable to asbestos and other similar substances within buildings . . . "). In the context of Section 198, such exclusion draws one more distinction between urban and suburban contamination in that contamination in the former probably is more likely to involve release outside of buildings as from prior manufacturing operations and in the latter more from release inside buildings from friable asbestos. In 1999 the EPA Chief of Staff urged Congress to expand Section 198 to include remediation of such inside releases:

We have heard from the States and others that to make . . . [section 198] more broadly available we ought to look at changing the definition of what is a hazardous substance, to include petroleum, asbestos, and lead paint. And we are working with our colleagues at Treasury to see if that is indeed workable. They [i.e., the States and others] certainly make some good arguments as to how that would help them clean up brownfields quicker.

Hearings on the Impact of Tax Law on Land Use, Conservation, and Preservation Before the Subcomm. on Oversight of the House Comm. on Ways and Means, 106th Cong. 29, 31 (1999) [hereinafter 1999 Hearings on Impact of Tax Law on Land Use] (statement of D. Reid Wilson, Chief of Staff, EPA). Rep. Paul E. Kanjorski, D-Pa., hoped that the term "brownfields" would be extended to "former mine-scarred lands." Id. at 11, 12. Rep. Jerry Weller, R-III., apparently understood that Section 198 applied to cleanups of abandoned gas stations. Id. at 48. That was questionable since CERCLA, and hence Section 198 did not apply to petroleum contamination. See supra note 75. The recent Small Business Liability Relief and Brownfields Revitalization Act of 2002 does, however, amend CERCLA to provide liability relief as to contamination for innocent purchasers of brownfields covering relatively low risk petroleum contamination and mine-scarred land in 42 U.S.C. §§ 9601(39)(D)(II) and (III). See Pub. L. No. 107-118, § 211(a) (2002). No relief was explicitly provided for indoor asbestos or lead paint releases, although a parallel bill, introduced by Reps. Weller, Johnson and William Coyne, D-Pa., to expand Section 198 would have. H.R. 2264 Would Expand Expensing of Brownfields Remediation, 2001 TNT 135-32 (July 13, 2001) (would amend Section 198 definition of "hazardous substances" by a cross reference to Section 302(a) of the Emergency Planning and Community Right-to-Know Act of 1986 and add: (D) any asbestos (whether friable or non-friable), oil (as defined in Section 1001(23) of the Oil Pollution Act of 1990), pesticide (as defined in Section 2(u) of the Federal Insecticide, Fungicide, and Rodenticide Act), radon, and lead-based paint (as defined in Lead: Requirements for Disclosure of Known Lead-Based Paint and/or Lead-Based Paint Hazards in Housing (61 Fed. Reg. 9062)); see also Johnson Bill, H.R. 4200, Would Encourage Cleaning Up Contaminated Sites, 96 TNT 198-48 (Oct. 9, 1996) [hereinafter Johnson Bill] ("[Q]ualified contaminated site" turned on containing any "hazardous substance," which in addition to CERCLA and Emergency Planning and Community Right-to-Know Act cross references included "(D) asbestos (whether friable or nonfriable), (E) radon, (F) lead paint, and (G) any petroleum product.").

\textsuperscript{98} See infra note 113.
A. Public Choice, Policy Entrepreneurship, and Symbolic Reform

1. Introduction

"Public Choice" theory is a currently fashionable explanation of (tax) legislation.99 "Public Choice" theory holds that legislators obtain ballot votes and other contributions in exchange for legislative votes to (a) provide asymmetrical (tax) benefits to a special interest or "pressure" group; (b) impose disproportionate (tax) burdens on competitors of such pressure group; or (c) retain a (tax) preference for a pressure group or a (tax) burden for its target.100

Another, often more accurate, explanation of motivation of legislators is "policy entrepreneurship." A tax policy entrepreneur, in promoting a policy idea, invests personal resources in mobilizing latent public support by linking her idea with broader themes resonating with values already widely shared by the public or media during a window of political opportunity to obtain enactment of that idea.101 Some view "Public Choice" as failing to account for policy entrepreneurship or ideology;102 others see it as encompassing policy entrepreneurship.103

"Symbolic Reform" describes certain types of legislation rather than the motivation or activities of the politicians promoting it. The classic idea is that by demonizing one's political opponents the impetus in the populace for true reform can be deflected.104 The Clinton Administration certainly did so demonize the Republican controlled

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99 A widely cited definition of "Public Choice" theory is "the economic study of nonmarket decision making, or simply the application of economics to political science." DENNIS C. MUELLER, PUBLIC CHOICE II 1 (1989). The central thesis is that political behavior is purposive, e.g., most members of Congress first and foremost want to be re-elected and act accordingly. Morris P. Fiorina, When Stakes are High, Rationality Kicks In, N.Y. TIMES, Feb. 26, 2000, at B11.


103 Id.

104 See infra note 297 and accompanying text.
Congress as to its position on the environment, thereby painting itself as a "friend of the environment." Section 198 constitutes even more symbolic reform in that it was hardly ever used due to a number of design defects. Some of these defects were driven by "Public Choice" considerations and others by a desire to keep revenue costs low in order to promote a lot of "boutique" incentives. Such incentives provide a little something, but not much, for as many constituent interest groups as possible within the confines of pay-go budget legislation rules. Such rules dictate that any new tax incentive or expenditure be offset by a

105 See infra notes 225-26 and 236 and accompanying text.

106 Although the Clinton White House has enjoyed a reputation as a friend of the environment, it has never really earned that standing. When confronted by a difficult environmental issue, it has repeatedly undercut its own agency heads—Bruce Babbitt at the Department of Interior, Carol Browner at the Environmental Protection Agency, among others—rather than offend the special-interest groups that dump so much money into campaign coffers. President Clinton hasn't suffered politically for those decisions in part because he has used Vice President Al Gore—"Senator Treehugger," as he used to be known—to give him cover. The strident anti-environmental rhetoric of his Republican opponents has also made the president seem downright progressive in comparison.

Editorial, EPA Needs White House, ATLANTA J. & CONST., June 22, 1997, at B6; see also Editorial, The Better Friend, L.A. TIMES, Oct. 1, 2000, at M4 ("Just about every political candidate declares himself, in some way, a friend of the environment. Gore has been a better friend than Bush and has the record to show it.").

107 See supra notes 60-61 and accompanying text.

108 Section 198 was primarily targeted to the inner cities to tilt the playing field in their favor compared to the suburbs. See infra note 113 and accompanying text.

109 See infra note 267 and accompanying text.

110 See supra note 61 and accompanying text.

111 "Tax expenditure theory essentially provides that the legal effect of certain tax benefits should be analyzed as if the government had provided the recipient of the tax benefit an equivalent grant of money." David A. Brennen, Tax Expenditures, Social Justice, and Civil Rights: Expanding the Scope of Civil Rights Laws to Apply to Tax-Exempt Charities, 2001 BYU L. REV. 167, 208-09; "Tax expenditures" are defined under the Congressional Budget and Impoundment Control Act of 1974 ("the Budget Act") as "revenue losses attributable to provisions of the Federal tax laws which allow a special exclusion, exemption, or deduction from gross income or which provide a special credit, a preferential rate of tax, or a deferral of tax liability." Thus, tax expenditures include any reductions in income tax liabilities that result from special tax provisions or regulations that provide tax benefits to particular taxpayers . . . . The legislative history of the Budget Act indicates that tax expenditures are to be defined with
new revenue raiser or spending cuts. This Section first considers the “Public Choice” or interest group aspects of the enactment of Section 198, then recounts its paradigm Policy Entrepreneurship story, and concludes that Section 198 also constitutes a paradigm Symbolic Reform.

2. Public Choice

Brownfields remediation tax expenditure proponents deliberately promoted a tax provision “tilting the playing field in favor of brownfields.” For instance, proponents of a brownfield tax incentive, such as mayors, wanted brownfield incentives to be targeted to them and to be denied to suburban communities to which they had lost population.

112 See infra note 132.
113 Letter from Norman B. Rice, on behalf of U.S. Conference of Mayors, to Secretary of the Treasury Robert Rubin (Oct. 18, 1995), in 95 TNT 212-57 (Oct. 30, 1995) [hereinafter Rice Letter] (requesting remediation tax credit and targeted tax cuts only); Secretary of the Treasury Robert Rubin, Remarks to the John F. Kennedy School of Government, Harvard University (Dec. 12, 1996) (noting that in his meeting with the mayors, the brownfields tax incentive was number one on their list; the incentive would “resurrect 30,000 brownfield sites around the country”).
114 Rice Letter, supra note 113 (favoring targeted tax cuts, i.e., limited to cities);
Although Seif [head of Department of Environmental Protection] credits the law for “breaking the logjam” on cleaning up abandoned industrial sites, others have criticized it, saying its brownfield focus is weak. “The problem is, the bill didn’t limit cleanup concessions to brownfields,” Woodwell [Pennsylvania Environmental Council western office director] said. “Businesses can develop “greenfields” and have the same cleanup opportunities. So instead of tilting the playing field in favor of brownfields, it gave everyone the same opportunity.

and allegedly jobs for the past two decades or so.115 Clearly cities lost population to the suburbs, but the cities lost largely high pay, low skill manufacturing jobs while the suburbs largely gained information and service jobs often requiring greater skills.116 In actuality, greenfields usually continued to have an economic advantage over urban brownfields;117 Section 198 merely tilted the playing field in favor of large city brownfields over brownfields in suburbs and small towns.

After earlier, policy-based opposition,118 the Clinton-Gore Administration became in 1996 a policy entrepreneur of an urban-targeted brownfields cleanup tax incentive as part of a successful strategy of gaining the support of large cities and minorities for Clinton and Gore in the 1996 and 2000 Presidential elections.119 Section 198 was part of a brownfields or on uncontaminated land, known as 'greenfields.' They wanted funds to go only to brownfields). This desire to hurt other special interests as well as helping one’s own interest is consistent with “Public Choice” thinking. See also Shaviro, supra note 102, at 71 (Under the “Public Choice” model of rent seeking “politicians do not merely certify the high bidder in the ‘legislative auction’, ‘but work to raise the bidding by both promising benefit and threatening harm.’). Professor Shaviro correctly reasons that factors other than merely rent seeking motivates members of Congress, such as ideology and policy entrepreneurship in order to be known as a player.  

115 See infra note 165.
116 See infra notes 200 and 330-32 and accompanying text.
117 “According to case studies . . . total site preparation costs per acre for long-time industrial sites in inner city areas can be quadruple those of a site of the same size in a new pristine development.” 1999 Hearings on Impact of Tax Law on Land Use, supra note 97, at 63 (statement of Charles Bartsch, Senior Policy Analyst, Economic Development, Northeast-Midwest Institute). The cost of the brownfield must be very cheap and the cost of the greenfield very expensive for the total cost of the brownfield acreage plus site preparation (less the Section 198 tax savings) to be less than the total cost of identical greenfield acreage plus site preparation.
118 See infra notes 183-84 and accompanying text.
119 Abby Goodnough, Democrats Say Urban Votes Clinched Victory, N.Y. TIMES, Nov. 9, 1996, at 1-28; David Firestone, The 1996 Elections: The Region—The Voters; Fear of G.O.P. Cuts Emerges In Clinton’s Northeast Sweep, N.Y. TIMES, Nov. 7, 1996, at A1 (reporting that Clinton carried New York City by over 75%); Martin F. Nolan, Their Places in History: Election ’96 - Assessing the Results, BOSTON GLOBE, Nov. 7, 1996, at A31 (reporting that Clinton carried Boston by 75%); Alan Bernstein, Decline in Turnout Paid Off for GOP, HOUS. CHRON., Nov. 10, 1996, at 25 (reporting that blacks supported Clinton almost exclusively and “[l]ower middle-class Anglos favored Clinton, 52 percent to 40 percent, in the key urban precincts”); Rafael Lorente, Broward Played A Major Role In Giving Florida To Clinton, SUN-SENTINEL (Fort Lauderdale, FL), Nov. 10, 1996, at A6 (reporting that Clinton got more votes than his challengers in every city in the county except four); Scott Gold & Nicole Sterghos, Despite Clinton’s Performance, It Was a Bad Day for Democrats, SUN-SENTINEL (Fort Lauderdale, FL), Nov. 10, 1996, at A6 (reporting that Clinton carried every city in Palm Beach County with a Democratic
package targeting, in addition to selected poverty areas in inner cities, such areas in selected rural areas and Indian reservations; apparently so proponents could claim that the benefits were not limited to cities, to affect log rolling, and to serve the logy of support for the downtrodden. Gore was also able to weave the brownfields tax incentive into his version of “smart growth.”

Similarly the desire to extend Section 198 by Republicans and others to brownfields in all areas of the nation, which was achieved in

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Senator Carol Mosely-Braun, D-III., in introducing her 1997 brownfields tax incentive proposal (but not her identical 1996 proposal) stated that this was “not just a big-city solution. This is something that will affect the cities, the suburbs, and the rural areas as well in providing an incentive to reclaim these environmentally challenged areas of our country.” 143 CONG. REC. S8556 (daily ed. Jan. 30, 1997).

“Smart growth” is roughly defined as the redirection of growth from new suburban and exurban developments to already established urban and inner suburban communities. Now Vice President Al Gore, long a purveyor of ‘green’ policy, hopes that he can capitalize on people’s frustrations with suburban sprawl in his 2000 bid for the White House. Gore calls his program “Livable Communities,” a package of initiatives that would preserve green space, reduce traffic congestion, protect water quality and clean up abandoned industrial sites (known as “brownfields”).


By advance billing, President Clinton’s address to the U.S. Conference of Mayors, meeting in San Francisco in late June, was to encompass the first comprehensive urban agenda of his 4 1/2-old administration. Simultaneously, a “State of the Cities” report, prepared by the Department of Housing and Urban Development, was called by Vice President Gore “the most significant report on the condition of urban America in a generation” . . . . Echoing traditional liberal rhetoric, the cities report preaches to the suburbs that they should care about inner
2000, is explainable in terms of interest groups politics. 124

"Public Choice" analysis also would suggest that the structure of "extenders," i.e., bills extending sunset dates of tax provisions, offers greater opportunities for rent seeking by legislators 125 and thus encourages enactment of provisions like Section 198 with sunsets that are often reset. 126 Interest groups however may understandably discount highly the benefits from such provisions. It is more likely that the sunsets are more driven by a desire to promote as many boutique tax policy ideas as possible against a background of minimum revenue costs. 127 Perhaps both stories played a role in Section 198's sunsets, in that both President Clinton and President Bush advocated making Section 198 permanent, 128 but were unable to persuade Congress.

"Public Choice" also offers insight into who is the best actor for

cities. But it miraculously misses the wave of research showing that older working-class suburbs are starting the same slippery slide as inner cities, experiencing job loss, crime and declining property values.


124 See infra notes 254 and 294-95 and accompanying text.


126 Conventional wisdom holds that revenue (or spending reduction) offsets to new revenue losses or "tax expenditures" requirements under paygo requirements are the main reason for extenders. Heidi Glenn, Expiring Provisions Never Die, They Just Become "Extenders," 73 TAX NOTES 1009, 1010 (1996) (stating that in some cases Congress wants to test such a "temporary" provision). Such an offset requirement provides Congress an opportunity to reevaluate tax expenditures. Elizabeth Garrett, Harnessing Politics: The Dynamics of Offset Requirements in the Tax Legislative Process, 65 U. CHI. L. REV. 501, 506, 510 (1998). But the periodic extension—with some such temporary provisions being made permanent and others expiring. See id. at 562 (providing examples of these categories); see Glenn supra—undoubtedly offers opportunities for rent extraction. The Administration's 1997 proposal based the millennial sunset on a policy of wait-and-see if the budget agreement did produce a "dividend" by 2000. STAFF OF J. COMM. ON TAXATION, 104TH CONG., DESCRIPTION OF REVENUE PROVISIONS CONTAINED IN THE PRESIDENT'S FISCAL YEAR 1997 BUDGET PROPOSAL (RELEASED ON MARCH 19, 1996), JCS-2-96, at 50 (Comm. Print 1996).

127 See infra notes 267 and 304-05 and accompanying text.

128 For President Clinton, see infra note 271 and accompanying text; for President Bush, see Mason, supra note 111.
resolving the tax treatment of toxic or hazardous waste remediation.\textsuperscript{129} This Article concludes that judicial resolution most likely would take too long and is by-and-large going down the wrong road by employing an archaic “restoration” doctrine,\textsuperscript{130} unresponsive to the modern basis for capitalizing, viz., significant future benefit requires capitalization unless “the administrative and record keeping costs associated with capitalization . . . [out]weigh . . . the potential distortion of income”\textsuperscript{131} from not capitalizing such future benefit cost. Congressional resolution, although ideal, appears politically unlikely. Congress finds it difficult to overturn bad tax answers reached in the judicial process due to “paygo” considerations—i.e., Congress must increase taxes or cut spending to pay for even a remedial tax cut or correction.\textsuperscript{132} Even with the millennial advent of budget “surpluses,” partisan deadlock prevailed between the goal of cutting taxes and of new spending programs, reflecting in part pent up demand from paygo during the preceding deficit era. Only with a budget surplus, Republican control of Congress, and imminent Republican control of the White House was the ideal legislative resolution of taxation of toxic and hazardous waste cleanup costs even a step closer to enactment in late 2000. Broadened, Section 198 still does not reach very common

\textsuperscript{129} See Lee et al., supra note 100, at 666-81.

\textsuperscript{130} See infra notes 397-99 and accompanying text.

\textsuperscript{131} Advance Notice of Proposed Rulemaking, Guidance Regarding Deduction and Capitalization of Expenditures, 67 Fed. Reg. 3461 (Jan. 24, 2002). In a 124-page response to the Service’s request in Notice 96-7, 1996-1 C.B. 359, for comments on the application of Sections 162 and 263 in light of \textit{INDOPCO}, Professor Lee and his students advocated just such an advance notice as a discussion draft with citations to judicial support for the proposed rules. Lee et al., supra note 100, at 664-65. They also recommended, with case law and congressional support, a balancing of the burdens and benefits of capitalization standard (adopted by the advance notice) supporting safe harbor “rough justice” rules most of which it proposes or for which it seeks additional comments. \textit{See also} John Lee et al., \textit{Restating Capitalization Standards and Rules: The Case for Rough Justice Regulations (Part Two)}, 23 \textit{Ohio N.U. L. Rev.} 1483, 1521-33 (1997) [hereinafter Lee et al., \textit{Rough Justice II}] (e.g., relatively short life; de minimis rule, regular and recurring, 12-month rule, and safe harbor amortization periods); \textit{ supra} note 17 and authorities cited therein. \textit{Compare} 67 Fed. Reg. at 3462, 3464, \textit{with} Lee et al., \textit{ supra} note 100, at 648.


indoor asbestos release, as in remodeling, or abandoned filling stations (accounting for almost fifty percent of brownfields), nor the existing owner's cost of remediation of contamination it had caused in common business circumstances of remodeling or adapting the property to a new use.

Consequently, formal regulation by the Service and Treasury of the taxation of brownfield and other toxic waste cleanup costs not currently covered by Section 198 is probably the most efficient avenue for achieving uniform and equitable tax treatment of such costs. Unfortunately the Service's track record to date as to capitalization in general over the past decade, and in particular, with respect to toxic and hazardous waste remediation costs, has been short-sighted and misguided, as well as hugely inefficient. The Service unfortunately chose to regulate such taxation by audit, litigation, and incrementally oblique, if not opaque, published and private rulings after its victory in *INDOPCO, Inc. v. Commissioner.* As former Commissioner, Chief Counsel, and Assistant Secretary for Tax Policy Fred Goldberg, Jr., points out, prior to the 1997 Congressionally-mandated reorganization of the Service, revenue agents were rewarded for raising issues and litigators were rewarded for winning cases without regard to whether the result was good tax policy and/or good tax administration. As Goldberg illustrates this process with the "INDOPCO fiasco." (Moreover, by failing to expressly consider the competing environmental policies, the Service too often appears to have conceded specific environmental deduction issues in an ad hoc, unprincipled fashion.) "Hope springs eternal," however. Treasury and IRS's Advance Notice of Proposed Rulemaking, "Guidance Regarding Deduction and Capitalization of Expenditures," in its general

134 503 U.S. 79, 87-88 (1992) ("[The Code] endeavors to match expenses with the revenues of the taxable period to which [the expenses] are properly attributable, thereby resulting in a more accurate calculation of net income for tax purposes;" outside transaction costs of the target corporation for investment bankers, attorneys, accountants, printers, etc., capitalized due to future benefits forecast by the board of the target corporation recommending the corporate transaction.); see Lee et al., supra note 100, at 648-50.
135 Fred T. Goldberg, supra note 133.
136 Id. at 185-86.
137 See supra note 51 and accompanying text.
139 "Hope springs eternal in the human breast. Man never Is, but always To be blest." ALEXANDER POPE, AN ESSAY ON MAN [1733-34] Epistle I, 1.95.
"rough justice" approach, offers substantial grounds for hope that the subsequent project of "repairs and maintenance" will resolve this area.\(^1\)

3. Policy Entrepreneurship

a. Introduction

The story of the brownfield remediation tax deduction under Section 198 illustrates "policy entrepreneurship," the political science concept of a politician's investment of personal resources in promoting a particular policy with the anticipated "return" often depending on the enactment of legislation.\(^1\)\(^4\)\(^{142}\) A tax policy entrepreneur, in promoting a tax policy, mobilizes latent public support by linking it with broader themes resonating with values already widely held by the public or at least opinion leaders and the media.\(^1\)\(^4\)\(^{143}\) Legislation results under this, originally political science, model of a "garbage can" theory of governance, first designed to explain the "organized anarchy" of universities (where the participants do not clearly know or define their goals and participation in decisions is fluid and unpredictable),\(^1\)\(^4\)\(^{144}\) when the policy entrepreneur so connects a proposed policy with a perceived problem in a window of political opportunity.\(^1\)\(^4\)\(^{145}\) Policy entrepreneurs adopt policy proposals in order to promote their own interests, gain favors and obligations for future bargaining ("Public Choice" notion) or just because they personally favor those particular policies as a matter of ideology or otherwise.\(^1\)\(^4\)\(^{146}\)

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\(^{141}\) Id. at 3462.

\(^{142}\) J. KINGDON, AGENDAS, ALTERNATIVES, AND PUBLIC POLICY 88-94, 122-23 (2d ed. 1995) (Policy entrepreneurs are willing "to invest their resources—time, energy, reputation, and sometimes money—in the hope of a future return. That return might come to them in the form of policies of which they approve, satisfaction from participation, or even personal aggrandizement in the form of job security or career promotion."); Shaviro, supra note 102, at 92.

\(^{143}\) Shapiro, supra note 101, at 724 n.17.


\(^{145}\) Kingdon borrows from the "garbage can" model, supra text accompanying note 144, with "streams" consisting of "problem recognition," "policy proposals," and "politics." KINGDON, supra note 142, at 92. He suggests that the enactment of a law requires the convergence of all three streams, together with an "entrepreneur" to guide the law's passage through Congress. Id. See also Vincent Di Lorenzo, Legislative Chaos: An Exploratory Study, 12 YALE L. & POL'Y REV. 425, 433 (1994).

\(^{146}\) Sheldon D. Pollack, Tax Reform: The 1980's in Perspective, 46 TAX L. REV. 489,
Four major federal policy ideas to encourage brownfields redevelopment have been considered in the second half of the 1990's: (1) limiting environmental liability for purchasers and lenders where remediation is undertaken; (2) considering the future use of the contaminated property, e.g., lower cleanup standards for industrial or perhaps commercial use than for residential or recreational use; (3) voluntary cleanup programs; and (4) a focus of this Article, use of tax incentives such as providing a current deduction for otherwise capitalizable cleanup costs.\(^1\)

The origin of Section 198 is the tax policy entrepreneurship of tax incentives to increase voluntary brownfield remediation, beginning in 1993 by Democratic Chicago Mayor Richard Daley,\(^1\) and then in 1996 and 1997 by the national Democratic Administration—Vice President Al Gore and ultimately President Bill Clinton\(^1\)—against the backdrop of the 1995 attempts of the Republican-controlled Congress to rollback federal environmental regulation.\(^1\) (Other policy entrepreneurship federal brownfield remediation incentives are beyond the scope of this Article.\(^1\))

After enactment of Section 198 in 1997, its near-term fate was inextricably

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\(^{147}\) Rimer, supra note 82, at 71; Douglas A. McWilliams, Environmental Justice and Industrial Redevelopment: Economics and Equality in Urban Revitalization, 21 ECOLOGY L.Q. 705, 726 (1994).

Since 1988, almost forty states have developed voluntary cleanup programs ("VCPs") through statutory and regulatory reforms intended to speed up the cleanup of brownfields sites. No two states have identical programs and most differ widely in terms of the cleanup process and its requirements, but the VCP process, broadly speaking, is similar in most states . . . . Following an investigation to determine the level of contamination, the developer remediates the site to meet "generic" or site-specific cleanup standards, or concludes the process if remediation is not necessary. At the end of the process, the developer receives liability protection from the state but none from the federal government, except in those states with whom the EPA has agreed to refrain from pursuing enforcement actions.

Eisen, Brownfields Policies, supra note 66, at 193-94 (footnotes omitted). See infra notes 172, 178, 181-82, 199, and 208 and accompanying text for newspaper treatment of this policy idea and legislation embodying it in various states. See supra notes 74-75 for 2002 amendments to CERCLA eliminating CERCLA liability for innocent purchasers of brownfield sites.

\(^{148}\) See infra notes 162-65.

\(^{149}\) See infra notes 213-15 and 230.

\(^{150}\) See infra notes 220-26 and accompanying text.

\(^{151}\) See supra notes 83 and 147 and accompanying text.
interwoven with then Vice President Gore’s “Smart Growth”\textsuperscript{152} policy entrepreneurship, which included the notion that cleaning up brownfield sites is vital to growth in the \textit{urban} economy\textsuperscript{153} and at the same time helps preserve undeveloped property or “greenfields.”\textsuperscript{154} In contrast, Senate Finance Committee Chair William Roth, Jr., R-Del., \textsuperscript{155} and other Republicans\textsuperscript{156} repeatedly manifested a commitment to broader availability of Section 198 by eliminating the targeted aspect and extending it to any site state-certified as contaminated. This view eventually prevailed in 2000\textsuperscript{157} (after Governor George W. Bush had been elected President) with Republican control of Congress and imminent control of the White House for the first time since 1954.\textsuperscript{158}

b. Recognition of Brownfields Problem: 1993-95

Brownfields are the chemically scorched areas of many manufacturing cities that scare off developers and leave many residents in the vicinity without jobs or hope. Brownfields once held the mills, factories and other heavy industry that made this and many other Northeast Ohio towns viable and important.

Now, these poisoned sites are nothing more than vacant wastelands. Acre after acre of contaminated land represents a threat to the environment, an impediment to job creation and an attraction to vandals. Brownfields have grown like a cancer, slowly weakening and eventually destroying many cities. Brownfields kill inner-city jobs


\textsuperscript{153} See \textit{infra} notes 160 and 190 and accompanying text.

\textsuperscript{154} Others explicitly linked cleaning up brownfields with preserving greenfields. See \textit{infra} notes 170 and 180 and accompanying texts.

\textsuperscript{155} \textit{U.S. Finance Committee Chair William V. Roth’s Bill Would Provide Incentives for Distressed Areas}, 2000 TNT 214-16 (Nov. 3, 2000).

\textsuperscript{156} 1999 \textit{Hearings on Impact of Tax Law on Land Use}, \textit{supra} note 97 (statements of Reps. Nancy L. Johnson, R-Conn., and Jerry Weller, R-Ill.).


and it is the lack of those jobs that are a primary cause of our societal ills.\textsuperscript{159}

Democratic Chicago Mayor Richard Daley first proposed in 1993,\textsuperscript{160} and subsequently as President of the United States Conference of Mayors pursued,\textsuperscript{161} the granting to businesses a tax credit (spread over five years) for twenty-five percent of the cost of cleaning up abandoned contaminated industrial land in a small number of large and medium sized cities. Representative Mel Reynolds, D-Ill., introduced H.R. 2340, the


Inflexible state and federal environmental laws . . . virtually ensure that brownfields remain vacant and uncleaned. The laws, though well-intentioned, have slowly strangled and impoverished our cities. The laws rigidly demand that any purchaser be responsible for large-scale or even total cleanup of the contaminated land. Such cleansing can cost millions of dollars before the first shovel of dirt is turned for new construction. Worse yet, what you find underground may be difficult and costly to dispose of safely.

\textit{Id.; see also} Tom Barnes, \textit{Stringent U.S. Industrial Waste Cleanup Laws Hit}, \textit{PITT. POST \- GAZETTE}, Dec. 10, 1994, at C1 ("Old manufacturing and mill sites, often contaminated with some form of hazardous materials, are called 'brownfields.' Brownfields usually are within older communities and are much harder to develop than 'virgin greenfield' territory in the country."). For discussion of the impact of CERCLA on creating brownfields, see infra notes 173 and 180.

\textsuperscript{160} \textit{Hearings on Miscellaneous Revenue Issues Before the Subcomm. on Select Revenue Measures of the House Comm. on Ways & Means (Part 1)}, 103d Cong. 830 (1993) (statement of Mayor Richard Daley) [hereinafter 1993 House Hearings (Part 1)]; Letter from Henry L. Henderson, Commissioner, Chicago Department of Environment, \textit{Revise Superfund}, \textit{CHI. TRIB.}, March 5, 1994, at 18 ("Testifying last summer before Congress, Mayor Daley asked for tax incentives which could help induce private firms to form partnerships with our cities, bringing desolate industrial sites back into productive use."); Julia A. Solo, Comment, \textit{Urban Decay and the Role of Superfund: Legal Barriers to Redevelopment and Prospects for Change}, 43 \textit{BUFF. L. REV.} 285, 322-23 (1995) (discussing factors that should be taken into account in determining whether tax incentive should be granted, e.g., "state of the art waste disposal and emission controls, maintaining full operation of the plant, industry, or business for a certain number of years, and guaranteeing the continued employment of a minimum number of individuals from the local community").

Environmental Remediation Tax Credit Act of 1993, which he and Mayor Daley had developed. Mayor Daley testified in 1993 Hearings on Miscellaneous Revenue Issues that brownfield site problems "include asbestos filled rubble, underground storage tanks, and hazardous waste" which are too expensive for the localities or the Federal Superfund to cleanup and private companies will not clean them up either when they can get cleaner ex-urban sites. Thus, brownfield sites must be made economically attractive to the private sector since the potential large costs in cleaning them up discourages purchase and redevelopment. Mayor Daley also linked cleaning up brownfield sites with preventing further "unsightly inefficient sprawl, increasing automobile traffic and, of course, more pollution." The window of political opportunity had not yet opened in 1993 and the policy entrepreneurship at the federal level was at best lukewarm. For instance, Representative Reynolds' testimony on his bill

162 Reynolds Bill, H.R. 2340, Would Provide Credit For Waste Cleanup, 93 TNT 128-33 (June 17, 1993); 1993 House Hearings (Part 1), supra note 160, at 834 (prepared statement of Mayor Richard Daley).
164 Id. at 834 (prepared statement of Mayor Richard Daley).
165 Id. at 831. This was a slam at greenfields; We have lost thousands of jobs because of policies that discourage development of urban industrial areas . . . . Rather than helping to clean up and redevelop former industrial sites, said Daley, the present federal policy encourages investment to move to pristine farmland outside the city. "We want Chicago to be on a level playing field with the suburbs," he said.

William Smith, Speed Up Efforts To Clean Industrial Sites, Daley Urges, CHI. SUN-TIMES, July 22, 1994, at 42. Suburban areas, too, had contaminated sites. Basil Talbott, Plan Includes $2 Billion To Clean Polluted Sites, CHI. SUN-TIMES, Feb. 6, 1996, at S15 ("Suburbs suffer some of the same problems, said Arlington Heights Mayor Arlene Mulder. Rulings by the Environmental Protection Agency have caused gas stations to close, leaving land empty because 'no one is going to buy an EPA nightmare that costs so much to clean,' Mulder said."). Proponents actually wanted a playing field tilted towards cities as to cleanup of contaminated sites. See supra note 114 and infra note 199 and accompanying text.

166 Smith, supra note 165 (Mayor Richard Daley "pushed for a bill in Congress that would offer tax credits to companies that cleanup the sites. The legislation, sponsored by U.S. Rep. Mel Reynolds (D-Ill.), was introduced last year, but has languished in the House Ways and Means Committee."); Spielman, supra note 161 ("Daley's proposals for state and federal tax incentives to help clean abandoned industrial sites have stalled in Washington and Springfield. On Thursday, he lowered his sights to the Cook County Board, where his brother John is Finance Committee chairman.").
was perfunctory.\textsuperscript{167} Although House Ways and Committee Chair Dan Rostenkowski, D-Ill., popped into the subcommittee hearing to introduce Mayor Daley and spoke favorably about the bill,\textsuperscript{168} he acknowledged that “the cost question is always a problem” particularly when “[w]e are here talking about cutbacks in federal spending.”\textsuperscript{169} The political reality was that Congress had already passed President Clinton’s major 1993 tax act,\textsuperscript{170} the Clinton Administration opposed a brownfield tax subsidy, and Chair Rostenkowski was in the political fight of his career due to the House Post Office and other corruption scandals and lost his seat in Congress the following November.\textsuperscript{171} In short there was not yet sufficient

\textsuperscript{167} 1993 House Hearings (Part 1), supra note 160, at 838 (statement of Rep. Mel Reynolds, D.-Ill.). “This is a very important piece of legislation as far as helping the cities and cleaning up some sites around our city. As the mayor points out, what are we going to do with sites if we don’t find some way of cleaning them up? I want to urge my colleagues to be in support of this.” \textit{Id.} at 848. “I just wanted to make one point, Mr. Chairman. That was, as far as sites around the city, there are lots of sites like that. On the south side of Chicago in my district we have several that have just gone on, and on, and on, and we must do something to revitalize these sites.” \textit{Id.} at 848. In contrast, Rep. Reynolds testified at length shortly thereafter in the same hearing about a proposal to have Somalia declared a combat zone so that members of the armed forces serving there would obtain tax benefits. \textit{Id.} at 857.

\textsuperscript{168} Basil Talbott, \textit{Daley Pitches Bill—With Rosty’s Help}, CHI. SUN-TIMES, July 14, 1993, at 54 (“Mayor Daley’s newest pet project, a proposed environmental tax break for industry, got a strong start in Congress Tuesday with the help of Rep. Dan Rostenkowski (D-Ill.).”). When Ways and Means Chair Dan Rostenkowski, D-Ill., introduced Mayor Richard Daley to the Subcommittee, Rep. Andy Jacobs, Jr., D-Ind., the presiding subcommittee member, remarked that “I am sure you know you are very honored to have our leader alongside you. You may have help somewhere along the line.” \textit{1993 House Hearings (Part 1), supra} note 160, at 829. Rostenkowski in his early years in Congress had been very close to Mayor Daley’s father, also Mayor of Chicago. Tom McNamee, \textit{The Making of “Mr. Chairman;” Politician’s Son Learned Lessons in Chicago Clout}, CHI. SUN-TIMES, June 2, 1994, at 20. The fact that Subcommittee Chair Charles B. Rangel, D-N.Y., was not presiding was probably indicative that the political window was not yet even cracked, much less opened.

\textsuperscript{169} \textit{1993 House Hearings (Part 1), supra} note 160, at 829-30.


political momentum for a brownfield tax subsidy; indeed, there wasn’t even sufficient recognition of the problem.

There were no magazine articles and relatively few newspaper articles in 1993 on brownfield remediation. The newspaper articles mostly appeared in papers in cities with numerous brownfields such as Buffalo, Cleveland, and Pittsburgh. The seventeen brownfield news articles published in 1993 mostly dealt with (a) new state guidelines or statutory proposals for the cleanup of brownfields to make redevelopment of those areas easier and the background thesis that inflexible federal and state environmental laws “have slowly strangled and impoverished our cities,” (b) state enterprise zones and other tax incentives, (c) EPA or state study grants, (d) the environmental problems of particular local brownfield sites, and (e) cleanup of brownfields as an alternative to developing “green fields, i.e., “untouched farm or woodland spaces.”


175 Michael K. McIntyre, Cleanup Program Gets Trial Run in Cleveland, PLAIN DEALER, Nov. 9, 1993, at B1; Editorial, Bright Hopes for Brownfields?, PLAIN DEALER, Nov. 12, 1993, at B6.


177 Clarke Thomas, Brownfields: The Logical Reuse of Our Old Industrial Sites, PITT. POST-GAZETTE, Nov. 3, 1993, at B3 (stating that environmentalists and business and industry have found a common cause— “reuse of old industrial sites rather than carving out plant sites in untouched farm or woodland spaces”); Editorial, The Best Choice for
The same patterns\textsuperscript{178} continued in 1994 with more than twice as many brownfield news articles (37). Thus “problem recognition”\textsuperscript{179} was growing but had not yet reached a critical mass. Again a recurring theme was to blame brownfields on EPA standards.\textsuperscript{180} Additionally, a large portion of

*Note from Plain Dealer, Oct. 17, 1993,* at C2 (“In the past four years, Cleveland has lost an estimated 36,000 jobs, many of which will never return. Thousands more are regularly being lured away by suburbs offering tax incentives. Brownfield sites discourage construction and inner cities in general have suffered significantly from cutbacks in federal spending.”); To some, the problem of vacant space in our older factory cities and suburbs is environmental “redlining.” Builders, lenders, corporations and insurers systematically reject urban sites where even the slightest hint of industrial contamination exists. Others call it the “brownfields” problem - that instead of recycling sites where the Industrial Revolution in America was born, much of our national wealth was generated and our history written, developers keep heading out for exurban “greenfields.”


\textsuperscript{178} In 1994 brownfield articles focused on topics familiar from 1993 such as (a) enterprise zones and other tax incentives, see Tom Barnes, *Tax Credit Seen as Key to Downtown Restoration*, PITT. POST-GAZETTE, Sept. 9, 1994, at B7, (b) EPA grants, (see Tom Barnes, *City Loses Bid for Big U.S. Grant, But it Wins $3 Million to Share With River Towns*, PITT. POST-GAZETTE, Dec. 22, 1994, at A1; Paul Souhrada, *$1.5 Million Will Launch Site Cleanup*, COLUMBUS DISPATCH, Oct. 12, 1994, at B3 (discussing grant to start a voluntary environmental cleanup program); Harry Stainer, *Superfund to the Rescue: EPA to Consider Plight of Cities in Setting Cleanup Rules*, PLAIN DEALER, Mar. 6, 1994, at B9, (c) local brownfields, see Casey Bukro, *City, Businesses Wrestle with Contaminated Industrial Sites*, CHI. TRIB., Dec. 20, 1994, at 2 (“The Internal Revenue Service turned down a proposal to set aside $50,000 a year for 10 years in pretax dollars to help pay for the cleanup. The IRS wanted Blacklidge to pay for the cleanup from savings, or after-tax dollars.”); Editorial, . . . *Example; Westinghouse; Airport Is Encountering “Brownfield” Disease*, BUFF. NEWS, July 6, 1994, at 2, and (d) greenfields with a new twist, Thomas Bier, *Clean Land is Going Fast*, PLAIN DEALER, Jan. 5, 1994, at B7 (“[F]uture of Cuyahoga County depends squarely on future real estate development. The hooker is this: The county is running out of greenfields on which development, particularly residential, can most easily occur.”).  

\textsuperscript{179} See supra note 145 and accompanying text.

the 1995 articles report on the legislative development and then enactment of an Ohio statute providing for voluntary, largely owner-monitored compliance with lowered standards for remediation of non-Superfund sites varying according to the intended use and limitation of liability or similar proposals in other states.

In 1993 the Clinton Treasury Department opposed the Daley brownfield cleanup costs tax incentive proposal as "complex and difficult to administer . . . . In addition, the proposal would have significant revenue cost, and would not be the most efficient means of providing subsidies to finance cleanup costs." It repeated these criticisms verbatim in 1995, but without adding any data to support this position.

By 1995 the problem of brownfield redevelopment began receiving contributes to the brownfields problem through (1) purchaser liability; (2) lender liability; (3) overlapping jurisdiction over hazardous waste sites by EPA and state environmental agencies; (4) CERCLA settlement provisions; (5) uncertain cleanup standards; and (6) costs of extensive testing and investigation to meet the "all appropriate inquiry" rule for innocent purchaser exception, see supra note 72; Vogel, supra note 83, at 92-94.


1993 House Hearings (Part I), supra note 160, at 302, 341 (prepared statement of Leslie B. Samuels, Assistant Secretary (Tax Policy) Department of the Treasury))

Hearings on Miscellaneous Tax Reforms Before the House Committee on Ways and Means, 104th Cong., 233, 238 (1995) (prepared statement of Leslie B. Samuels, Assistant Secretary (Tax Policy) Department of the Treasury).
broader recognition in the media—"one of the hottest topics right now in state and local development circles."\(^\text{185}\) The number of brownfield articles (89) again doubled from the preceding year. General stories on brownfields began to appear in newspapers other than in the industrial Midwest and Great Lakes areas,\(^\text{186}\) and, more significantly, reporting on brownfield remediation in general or local sites appeared in national newspapers such as the *New York Times*,\(^\text{187}\) the *Wall Street Journal*,\(^\text{188}\) and the *Washington Post*.\(^\text{189}\)

In 1995 the Conference of Mayors (of which Mayor Daley was then President) told President Clinton’s Secretary of the Treasury Robert Rubin that their top federal tax priority was a tax incentive to put environmentally contaminated areas in their inner city back in use.\(^\text{190}\)

\(^{185}\) Vindu P. Goel, *Cities Focus on Developing Abandoned Industrial Sites*, *Plain Dealer*, Aug. 13, 1995, at H13; see also Evans, supra note 78 ("Brownfields have become one of the hottest issues among urban planners as a means for stimulating job growth, stores and housing in business districts and neighborhoods in cities nationwide. More than 31 states have adopted or are considering voluntary cleanup regulations for brownfields, including Pennsylvania and Virginia.").


\(^{190}\) Rice Letter, supra note 113; President Clinton, in his policy entrepreneurship of a brownfields remediation tax incentive, came to agree:

Let me also say that our cities are full of what we call brownfields—urban toxic waste sites. We have proved that they can be cleaned up and turned into homes for safe businesses that create jobs in areas that thought they would never get any new jobs again. The most important thing that I am working on with the mayors of America today is cleaning up these brownfields so we can create jobs in the city. Again, I tell you, good environmental policy is good for the economy. It creates jobs. It creates a future for America and we have to be prepared to do it.

the same time, the mayors wanted brownfield incentives to be targeted to them and to be denied to suburban communities to which they had lost population and allegedly jobs for the past two decades or so.\footnote{191} Clearly cities lost population to the suburbs, but the cities lost largely high pay, low skill manufacturing jobs while the suburbs largely gained information and service jobs often requiring greater skills.\footnote{192} News articles in 1995 largely dealt with brownfield topics familiar from the two previous years: (a) Superfund liability;\footnote{193} (b) greenfields;\footnote{194}

\footnote{191}{Rice Letter, supra note 113 (favoring \textit{targeted} tax cuts, i.e., limited to cities). Although Seif [head of Department of Environmental Protection] credits the law for “breaking the logjam” on cleaning up abandoned industrial sites, others have criticized it, saying its brownfield focus is weak. “The problem is, the bill didn’t limit cleanup concessions to brownfields,” Woodwell [Pennsylvania Environmental Council western office director] said. “Businesses can develop ‘greenfields’ and have the same cleanup opportunities. So instead of tilting the playing field in favor of brownfields, it gave everyone the same opportunity.” \textit{Cf.} Don Hopey, \textit{supra} note 114; Tom Daykin, \textit{supra} note 114 (State Senator Peggy Rosenzweig and Rep. Scott Walker “said state law now requires the Commerce Department to offer the same incentives to businesses whether they develop on brownfields or on uncontaminated land, known as ‘greenfields.’” They wanted funds to go only to brownfields.). In fact, they tilted the playing field more usually in favor of urban brownfields as compared with suburban brownfields. “According to case studies . . . total site preparation costs per acre for long-time industrial sites in inner city areas can be quadruple those of a site of the same size in a new pristine development.” 1999 \textit{Hearings on Impact of Tax Law on Land Use}, supra note 97, at 63 (statement of Charles Bartsch, Senior Policy Analyst, Economic Development, Northeast-Midwest Institute). Accordingly, the cost of the brownfield must be very cheap and the cost of the greenfield very expensive for the total cost of the brownfield acreage plus site preparation (less the Section 198 tax savings) to be less than the total cost of identical greenfield acreage plus site preparation. For example, in the case of a company in the .35 marginal tax bracket, a greenfield that can be purchased for $200 and that requires $100 in cleanup costs has an after-tax cost of $200 + (1 - .35)($100) = $265. If the company’s alternative is to purchase a brownfield requiring $400 in cleanup costs, four times the greenfield cleanup costs, the most the company would be willing to pay for the brownfield is $5. That is, the $5 initial investment plus the after-tax cost of the cleanup (1 - .35)($400) = $260, equals the $265 after-tax cost of the greenfield. Given the .35 marginal tax rate and the 4:1 cleanup ratio, mathematically, the original cost of the brownfield must be equal to the original cost of the Greenfield reduced by the 1.95 multiplied by the greenfield cleanup cost ($200 - 1.95($100) = $5 = maximum price of the brownfield). It should be apparent that in some situations the brownfield will not be competitive with the greenfield.} \footnote{192}{See \textit{infra} note 200 and accompanying text.} \footnote{193}{Fred Webber, \textit{Time to Fix the Superfund Law}, J. Com., Dec. 11, 1995 at A12.} \footnote{194}{Jerry Zremski, \textit{Congress Weighs Salvaging Industrial Sites: Development May Be Spurred by Easing Laws on Hazardous Waste Cleanup}, \textit{Buff. News}, July 11, 1995, at B7.}
(c) EPA grants and state credits;\(^{195}\) and (d) voluntary remediation with release from liability\(^{196}\) issues. In addition, the EPA's de-listing of 25,000 brownfields from the 38,000 listed on the Superfund list received repeated coverage throughout 1995.\(^{197}\) The newspapers reported the proposal or enactment of brownfield tax credits in a number of states\(^{198}\) and even more had instituted programs of voluntary remediation of brownfields with the carrot of limitation of state environmental liability.\(^{199}\) Occasionally journalists reported, however, that the voluntary remediation efforts were not always producing results due to factors other than potential toxic waste cleanup liability retarding redevelopment.\(^{200}\) With the benefit of

\(^{195}\) Korlin, \textit{supra} note 186.

\(^{196}\) \textit{Id.}


\(^{199}\) Eisen, \textit{Brownfields Policies, supra} note 66, at 193; Rimer, \textit{supra} note 82, at 88.


No longer are place and distance such vital factors. The new economy is driven by technological changes that allow people with means to live and work largely where they want, experts say. New suburbs are the No. 1 choice . . . . Jobs have been leaving cities in massive numbers and are not being replaced. About 70 percent of new jobs, most requiring extensive technical training, were being created outside cities . . . . Business and residential developers seek large plots of cheap land. Those are markets that most older cities, with all their problems, cannot
hindsight, the most significant news development in 1995 for the viability of enactment of a tax deduction for environmental remediation was President Clinton's launching a counterattack against the Republican-controlled Congress on environmental issues. 201 “Problem recognition,” the first stage in the garbage can model of organizational choice, 202 was well on its way.

c. Linkage of Cleanup Tax Incentive with Recognition of Brownfields Problem: 1996

The great increase in news stories in 1996 over 1995 (from 89 to 132) manifests attainment of the second stage in the model, here linking a remediation tax incentive with the now widely recognized problem of brownfields—“the hottest topic in urban environmental policy.” 203 These stories reported a flurry of EPA grants to study brownfields in a number of cities and the new “empowerment zones” for which special brownfield provisions were available, 204 as well as loans, etc. by other agencies for

serve or compete against. As a result, the United States is decentralizing faster than any other society in history, experts say. One telling statistic: 15 of the largest 25 U.S. cities have lost 4 million people since 1965, while the total population has risen by 60 million.


201 Carl M. Cannon & Timothy B. Wheeler, *Clinton to Attack EPA Cuts*, BALT. SUN, Aug. 8, 1995, at B1 (“under the guise of cutting the federal budget, Republicans on Capitol Hill are weakening environmental laws at the behest of corporate contributors and polluters”). This approach struck a cord in localities with Superfund sites. The following front page headline says it all. Coleman Warner, *Cuts Imperil Dump Cleanup*, TIMES-PICAYUNE, Aug. 6, 1995, at A1 (“Prospects for a federally financed cleanup of a 9th Ward neighborhood built atop a contaminated dump look increasingly bleak as Congress moves ahead with plans for deep budget cuts to the U.S. Environmental Protection Agency.”).

202 See supra note 144 and accompanying text.

203 Scott Allen, *Waste Sites Now Paying Dividends*, BOSTON GLOBE, Nov. 16, 1996, at A1 (“[T]oday, these so-called ‘brownfields’ are the hottest topic in urban environmental policy. Everyone from President Clinton to Gov. William F. Weld wants to offer tax breaks, modest grants or reduced liability for cleanups to developers willing to build on former industrial and commercial land—rather than a pollution-free site.”).

204 Karen Merk, *Neighborhoods Rebuild: Money, Ideas Forge New Life in Old Areas,*
brownfield remediation.\textsuperscript{205} This publicity blitz provoked Republican outrage.\textsuperscript{206} Also stories appeared on the by now familiar Superfund


\textsuperscript{205} Gary Lee, Breathing New Life Into "Brownfield": Incentives Lure Firms To Contaminated Sites, WASH. POST, Mar. 11, 1996, at A4 ("Environmental Protection Agency has awarded $200,000 grants to forty cities (including Cleveland) to encourage the redevelopment of brownfields, and plans to give ten more by the end of the year."); Mike Vogel, The Brownfield Problem, BUFF. NEWS, Oct. 6, 1996, at H1 ("HUD-EPA 'memorandum of understanding,' . . . is only part of the picture. Increasingly, 'brownfields' are drawing interest and funding: EPA launched its Brownfields Initiative earlier this year, giving Buffalo and 18 other cities $200,000 grants for regional pilot projects."); Charles Seabrook, City Gets Seed Money to Tackle "Brownfields," ATLANTA J. & CONST., Dec. 17, 1996, at D3 ("EPA awarded Atlanta a $100,000 grant through its national Brownfield Economic Redevelopment Initiative to do a pilot assessment of several city brownfield sites."); Coleman Warner, Redevelopment Hoped For Idle Industrial Sites, TIMES-PICAYUNE, Nov. 18, 1996, at B1; Evans, supra note 204; Elsa Brenner, Environmental Bill: The Pros and Cons, N.Y. TIMES, Oct. 20, 1996, at 13-WC-1; Jacquelyn Heard, Loan To Aid Industrial Cleanup, CHI. TRIB., Oct, 18, 1996, at N2 (Some suggested the announcement of a $10 million HUD loan to cleanup contaminated and abandoned industrial sites "was part of the Clinton administration's strategy to woo local voters with the presidential election less than three weeks away."); Daniel P. Jones, Grant Targets Deserted Industrial Properties, HARTFORD COURANT, Oct. 3, 1996, at A3; Pat Kossan, A Stinking Mess and a Runaround; the Pollution of Brownfields, ARIZ. REPUBLIC, Mar. 30, 1996, at A1 (Phoenix applying for EPA grant). See generally GAO, EPA'S CONTINUING PROGRAMS AND PROJECT GRANTS (GAO/01/860R June 29, 2001); GAO, ENVIRONMENTAL PROTECTION: INFORMATION ON EPA PROJECT GRANTS AND USE OF WAIVER AUTHORITY (GAO/01/359 Mar. 2001). The "Brownfields Economic Redevelopment Pilot" encourages the safe and appropriate cleanup and revitalization of abandoned commercial facilities where redevelopment is inhibited by real or perceived environmental contamination. EPA's Brownfields Pilots (to be funded at $200,000 each over two years) will test redevelopment models, direct special efforts toward removing regulatory barriers without sacrificing protectiveness, and facilitate coordinated efforts at the federal, state, and local levels. EPA will develop a coordinated federal strategy to help initiate a significant national effort to clean up and redevelop brownfields.

59 Fed. Reg. 60,012 (Nov. 21, 1994).

\textsuperscript{206} House GOP leaders denounced the Environmental Protection Agency's top official yesterday for holding a costly "extravaganza" in Pittsburgh this week to showcase the Clinton administration's toxic waste initiatives, rather than spending its money for site cleanup or coming to Capitol Hill to work out compromises for stalled Superfund program legislation.
problems\textsuperscript{207} and state voluntary remediation laws.\textsuperscript{208} Again some reported that existing brownfields programs often were ineffective.\textsuperscript{209} The familiar anti-greenfield development stories were repeated, but sometimes with a new aspect of retarding or reverse urban sprawl.\textsuperscript{210} Indeed, the smart growth philosophy of Maryland’s Democratic Governor Glendening began to appear.\textsuperscript{211}


\textsuperscript{207} The Candidates, \textit{Pitt. Post-Gazette}, Oct. 13, 1996, at A20 ("Campaigning on a pledge to accelerate the sluggish pace of cleanup of toxic waste sites and contaminated urban ‘brownfields,’ . . . [Clinton] is pledging that two-thirds of the 1,387 toxic sites on the Superfund national priorities list will be cleaned up by 2000."). In fact substantial progress was made in the ensuing years. See Pianin supra note 74 ("about 57 percent of the more than 1,280 toxic waste dumps on the EPA's national priority list—other than polluted federal or military property—had been designated ‘construction complete’. . . .")


\textsuperscript{209} Randall Edwards, \textit{EPA Plan Easing Pollution Cleanup Hits Snag,} \textit{Columbus Dispatch}, Aug. 27, 1996, at B1 ("Since the program began in September 1994, only four sites have been issued covenants not to sue, largely because the interim rules don’t permit properties with contaminated groundwater to get involved.").


The clearest examples of such linkage, however, were stories specifically treating a brownfield remediation tax deduction, e.g., Mayor Daley and other mayors pushing brownfield remediation tax deduction; one story reported that Mayor Daley in urging quick action on a brownfield tax incentive called “President Clinton ‘a friend’ to cities.”

Swift action on tax incentives to clean up “brownfield” industrial sites on Mayor Daley’s wish list for Illinois congressional delegation; he called “President Clinton ‘a friend to cities’” . . . . The mayor said he was particularly optimistic about getting bipartisan support in Congress for his “brownfield” initiative because industrial decay and contamination affect Republican constituencies as well. “Hastert asked me about it,” Daley said. “They (Republicans) like this initiative because it goes all over the state, say, along the Illinois River and a lot of towns.”

Michael Kilian, CTA Tax Credit Tops Daley Wish List, CHI. TRIB., Mar. 28, 1996, at N6; Lobbying for federal help to clean up polluted industrial sites paid off for Mayor Daley when President Clinton put $2 billion to begin the job in his proposed 1997 budget released Monday. Treasury Secretary Robert Rubin said Clinton wants to spend “roughly $2 billion” over seven years in incentives to companies “to resuscitate industrial sites in economically distressed areas, both rural and urban, known as brownfields.” . . . . After initiating the idea of a tax credit four years ago, Daley failed to get legislation through Congress. He has since raised the issue with Clinton, Vice President Al Gore and Senate Majority Leader Bob Dole (R-Kan.).

Basil Talbott, Plan Includes $2 Billion To Clean Polluted Sites, CHI. SUN-TIMES, Feb. 6, 1996, at 16; Lima Gets $200,000 Redevelopment Grant, COLUMBUS DISPATCH, June 16, 1996, at D10 (Vice President Gore announced that 20 communities were awarded nearly $3 million in brownfield cleanup grants; “President Clinton has proposed expanding the program to provide tax breaks for companies that clean up and develop brownfields—sites contaminated by previous industrial use.”); President Clinton signed off on the idea earlier this year, including $2 billion in his seven-year balanced budget plan to allow businesses that acquire sites in specific areas to deduct environmental cleanup costs. Moseley-Braun will introduce the legislation this month. Although congressional Republicans haven’t agreed to the proposal, Moseley-Braun predicted it would pass. “I’m getting bipartisan support for it, so we’re optimistic,” Moseley-Braun said after participating in a forum on the issue that also was attended by U.S. Rep. Bobby Rush (D-Illinois).

Gillis, supra note 161; President Clinton’s appellation as “friend of cities” was widely reported. Joe Frolik, Crime Tops Clinton’s Message To Mayors, PLAIN DEALER, June 23, 1996, at A1 (“Toledo Mayor Carty S. Finkbeiner said Clinton had proven himself to be a great friend of cities without spending the kind of federal money dispensed during the Great Society years.”); Terence Samuel, Proposal Provides Cities with Anti-Poverty Boost, Funds for Creating Jobs, ST. LOUIS POST-DISPATCH, Feb. 3, 1998, at A4 (“Thomas Cochran, executive director of the U.S. Conference of Mayors, said: ‘President Clinton and HUD Secretary Andrew Cuomo have proven that they are friends of
Especially significant for linkage of a tax incentive policy with the problem of brownfields cleanups was President Clinton's 1996 inclusion of a brownfield remediation deduction for innocent purchasers in his proposed budget for 1997, its inclusion as a plank in his 1996 Presidential Campaign and the subsequent stories of his speeches on it in cities across the country.

In the context of policy entrepreneurship several factors coalesced in 1996 to firmly establish this second stage of linking the policy idea of tax incentive with the problem of brownfield remediation. Vice President Al Gore, well-known for his long concern with environmental issues, and Mayor Daley had become close personal friends and political allies in the mid-1990s. Cleaning up brownfields then became a signature policy entrepreneurship for Gore, who had become a policy entrepreneur America's cities and that they understand that healthy city economies are essential to continue healthy national economies.”); Katharine Q. Seelye, President Goes Forth, To Mixed Reception, N.Y. TIMES, Aug. 28, 1998, at A14 (“[Y]ou, through your policies, Mr. President, have been a true friend of Worcester.”); Ron Taylor & Jingle Davis, Clinton Finds Admiration Aplenty in Atlanta, ATLANTA J. & CONST., Mar. 10, 2001, at A3 (“[Mayor Bill] Campbell said, ‘I am always delighted to have President Clinton come to Atlanta. He’s been a good friend of mine and a great friend of the city of Atlanta.’”).

In his State of the Union address in January, President Clinton mentioned the renewal of brownfields as a key plank in his environmental agenda. Today, in a major speech on the environment that Clinton is to deliver in New Jersey, he will outline a program to give tax incentives to companies that locate on brownfield sites, administration officials said.

Lee, supra note 205. See Clinton Proposes Tax Incentives, CHI. TRIB., Mar. 11, 1996, at C1; Gillis, supra note 159; Melinda Wilson, Tax Breaks Proposed for Removing Toxins, DET. NEWS METRO, Apr. 4, 1996 (reporting on similar provision introduced by Sen. Spencer Abraham, R-Mich.).

See 1996 Democratic Platform, infra note 241; George Weeks, Despite All the Planks, Both Parties Must Hammer Harder for a Cleaner Tomorrow, DET. NEWS, Aug. 30, 1996, at A11.

Tim Poor, Clinton Announces Plan For Clean Environment, ST. LOUIS POST-DISPATCH, Aug. 29, 1996, at A14; Charlie Cain & Phil Linsata, Last Two Michigan Stops Feature Environment Cleanup Plan, DET. NEWS, Aug. 29, 1996, at A4; Martha T. Moore, Clinton Proposes $1.9 B for Toxic Waste Programs, USA TODAY, Aug. 29, 1996, at A4 (“spend $300 million to promote the revitalization of “brownfields,” mildly contaminated industrial or commercial facilities in urban areas”).

Carl M. Cannon, The Old-Timers, 31 NAT'L L. 1386 (1999) (“In his 1992 book, EARTH IN THE BALANCE, Gore characterized the pollution caused by automobiles as 'a mortal threat to the security of every nation, that is more deadly than that of any military enemy we are ever again likely to confront.'”); Margaret Kriz, A Few Hints of Green, 31 NAT'L J. 2289 (1999).

of "smart growth," adopting the idea from democratic Governor Glendening of Maryland.

Most significantly, "Clinton, who ceded most environmental efforts to Vice President Al Gore during his first two years in office, approached environmentalism with new enthusiasm after the Republican takeover of Congress [in 1994], when polls showed voters overwhelmingly opposed GOP efforts to loosen environmental protections." In classic "garbage can" fashion, President Clinton's tactics in response seemed with hindsight brilliant but sprang in part from inadvertence. In a garbage can world the able politician has a guiding

218 Cosmo Macero Jr., Bill Targets Contaminated Sites, BOSTON HERALD, Oct. 15, 1997, at 27 ("The move to get polluted sites developed as part of a larger environmental policy stems from federal legislation championed by Vice President Al Gore that will set aside $2 billion for brownfields projects."); James M. Odato, 18-Acre Tomato Greenhouse Takes Shape In City, BUFF. NEWS, Aug. 2, 1997, at B9 (Gore using erection of giant green house for growing tomatoes from property once used as a parking lot for steelworkers' cars as the 1997 example of brownfield development); Phil Fairbanks, Off Main Street, BUFF. NEWS, July 27, 1997, at C1 ("Vice President Gore has adopted as a new mantra on the importance of brownfield development "If we clean it up, they will come," from a telephone conversation with mayor of Buffalo."); see Dalrymple, supra note 121.

219 See supra note 211.

220 Amy Bayer, Day of the Environment: Clinton Targets Toxics on Final Leg of Journey, S.D. UNION-TRIB., Aug. 29, 1996, at A3;

[T]he Administration's record is best defined by how it performed in a colossal collision with Congress midway through its first four years. When Republicans won control in 1994, they aggressively pressed forward with an antiregulatory agenda that environmentalists saw as threatening to dismantle a whole generation of rules that not only preserved open spaces and wilderness areas, but also put protection of the public's health and safety above other considerations, including economic ones. An intense battle over how to reshape environmental regulations ensued, with the Administration presenting its own, moderate ideas but essentially playing a defensive game and labeling the Republicans as tools of industrial special interests. The fight made every issue, including cleaning up toxic wastes or chopping down ancient forests, a matter of pitched partisan politics.


221 In retrospect, Clinton had scored a major victory by standing firm. But what seemed brilliant tactics had sprung—as so often is the case in politics—in part from inadvertence. Morris himself had wanted to make a budget deal; the back channel was not just a ruse. Morris's liberal foes, Stephanopoulos and Ickes, had been terrified that the president would fold. Clinton himself had no master plan; he had played the whole thing day by day. . . . Only after the game was over
strategy but adjusts it quickly to unfolding events. Here Clinton followed political consultant Dick Morris' "triangulation" concept:

Clinton should move right, Morris said. But he needn't become a pseudo-Republican. The trick was to co-opt the Republicans on issues that were truly popular, like balancing the budget and reforming welfare. Meanwhile, let the Republicans tear themselves apart over abortion, and paint them as extremists on education and the environment. It was like a triangle, he said. The Republicans and the traditional Democrats would be strung out down at the bottom, while you, the president, would float above them at the apex.\(^{222}\)

The Republican-controlled Congress had reduced the EPA budget by over twenty percent in 1995 and refused to renew the chemical and feedstock tax, which funded the Superfund.\(^ {223}\)

did they realize that it had helped to bamboozle the other side. "You couldn't have bought a better disinformation campaign if you tried. It was stunning. You know, Clinton's a genius," said Stephanopoulos laughing. Two months after the press declared Clinton the winner in the budget battle, Leon Panetta, too, was still marveling at the president's good fortune. "I could tell this was all Machiavellian," he said and burst into laughter. "Let's face it," Stephanopoulos said. "Gingrich saved our butt." His hot rhetoric allowed the White House to paint him and his unruly freshmen followers ('the Shites') as extremists.

Evan Thomas et al., Back From the Dead; How Clinton Survived the Republican Revolution 41-2 (1997).

\(^{222}\) Id. at 12.

\(^{223}\) Nancy Mathis & Greg McDonald, GOP Rejects Clinton Offers: Dole, Gingrich Request Budget Meeting Instead, Hous. Chron., Dec. 19, 1995, at A1 ("Clinton said Republican cuts of 21 percent for EPA, 21 percent for housing and 40 percent for the arts were unacceptable."); Bob Hohler, EPA Service Suffering Under Cuts: Local Towns, Ratepayers to Pick Up Tab, Agency Says, Boston Globe, Dec. 5, 1995, at 1 (proposed 23% reduction in the EPA's 1996 budget);

Dissent within the party reached a crescendo this summer when fifty-one House Republicans, the vast majority from the East, voted against legislation that would slash the Environmental Protection Agency budget by one-third and eliminate funding for a host of EPA programs, including regulation of sewage spills and toxic air pollution at oil refineries.

Under the prodding of House Whip Tom DeLay, a former Texas exterminator who once called the EPA "the Gestapo of government, pure and simple," what had begun as "regulatory reform" to cut red tape turned into an all-out assault on the popular Clean Air and Clean Water Act. Republicans began to look like enemies of the environment and tools of corporate interests, who were in fact drafting much of the legislation.  

Their extreme positions on many issues, including the environment, united the Democrats and gave President Clinton perfect targets by which to


DeLay and his assistants guided industry supporters in an ad hoc group whose name, Project Relief, sounded more like a Third World humanitarian aid effort than a corporate alliance with a half-million-dollar communications budget. On key amendments, the coalition provided the draftsman. And once the bill and the debate moved to the House floor, lobbyists hovered nearby, tapping out talking points on a laptop computer for delivery to Republican floor leaders.

define (and save) his Administration.\textsuperscript{225}

President Clinton cited Congress’ slashing environmental progress as one of the reasons for vetoing the spending resolution presented to him in the budget showdown leading to the long government shutdown in 1995, for which the public blamed the Republicans.\textsuperscript{226} Congressional Republicans had misread the 1994 elections, thinking it was a mandate for the Republican “Contract with America,” rather than voter disappointment with Clinton’s first two years as President.\textsuperscript{227} “Gingrich ‘misread the elections entirely. People did not vote to cut education and cut funding for

\textsuperscript{225} Ann Devroy, Opponents’ Issues Drive Clinton’s Political Recovery: Reelection Strategies Position President on Centrist Platform, WASH. POST, Oct. 9, 1995, at A1 (Clinton’s strategy was “to co-opt Republicans on the issues most popular with the American public. The next move is to identify the Republican issues that Americans are most uncomfortable with—identified by the White House as loosening environmental protections or cutting the social safety net—and make them stick.”); Carl M. Cannon, Clinton Enters New Year on Upswing, BALT. SUN, Jan. 1, 1996, at 1A (Clinton’s surge in polls from 40% to the high 50’s was fueled by rhetoric in defense of programs targeted by Republican budget cutters);

The GOP pushed to delay implementation of new meat inspection rules; postpone workplace regulations aimed at reducing repetitive stress injury; eliminate retroactive corporate liability at Superfund toxic waste sites; revise the Clean Air Act to provide regulatory relief to private and public sector entities overburdened by the law’s mandates; slash the budget for the Environmental Protection Agency; and pass riders easing enforcement of some pollution controls.


\textsuperscript{226} David E. Rosenbaum, Battle Over the Budget: the Details, N.Y. TIMES, Dec. 29, 1995, at A1; Helvarg, supra note 224; Campaign ’96, R.I.P., N.Y. TIMES, Nov. 3, 1996, at 4-14 (“Campaign historians will probably identify the day the Government shut down as the day Mr. Clinton began his political revival.”); Michael Weisskopf & David Maraniss, Stung and Beset, Speaker Breaks Down and Weeps, WASH. POST, Jan. 18, 1996, at A1 (“House Majority Whip Tom DeLay sauntered up to Vice President Al Gore and said: ‘You have to realize we’re serious. We’ll shut down the government if we have to balance the budget.’ ‘Our polls show you guys lose if the government shuts down,’ Gore responded.”); William Schneider, The Root of the Budget Fight: How Much Government Can an Affluent Society Afford?, L.A. TIMES, Jan. 7, 1996, at M1 (In ABC News poll 44% said the government shutdown was the GOP’s fault; only 25% blamed President Clinton). The truth was not so simple. Both sides were to blame for the budget shutdown . . . . But it didn’t matter. The public wasn’t interested in details. THOMAS ET AL., supra note 221, at 41.

the environment and cut funding for programs they care about."\(^{228}\) Gingrich "had mistaken the election returns of 1994 for a revolution, when only 19 percent of the eligible electorate had actually voted Republican for Congress and fewer still had understood what it was voting for."\(^{229}\)

"For several years, Daley has pushed for federal tax incentives to help cleanup tainted industrial sites, known as brownfields. President Clinton signed off on the idea earlier this year [1996], including $2 billion in his seven-year balanced budget plan to allow businesses that acquire sites in specific areas to deduct environmental cleanup costs."\(^{230}\) President Clinton and Vice President Gore drew public attention to the problem of "brownfields" or abandoned or underutilized urban property with some at least perceived contamination, which are by definition less than Superfund sites for purposes of Section 198,\(^{231}\) but are often contaminated by asbestos-containing materials among other hazardous materials.\(^{232}\) President Clinton linked his brownfield initiative with broader themes:

[T]he brownfields initiative—that doesn’t mean anything to most of you, but it will before long. A brownfield is a place where there used to be jobs in a city where there is now nothing but pollution. And what we aim to do is to clean up those brownfields so we can get rid of the pollution and bring back the jobs. And we’re going to do it all over America, and we are going to do it right here in St. Louis.\(^{233}\)


\(^{229}\) THOMAS ET AL., supra note 221, at 210.

\(^{230}\) Gillis, supra note 161, at 17. See Basil Talbott, supra note 212.

\(^{231}\) Section 198(d)(2) ("Hazardous substance" does not include any substance subject to Superfund remedial action). The EPA defines brownfields as "abandoned, idled or under-used industrial and commercial facilities where expansion or redevelopment is complicated by real or perceived environmental contamination." OFFICE OF SOLID WASTE AND EMERGENCY RESPONSE, EPA, BROWNFIELDS ECONOMIC REDEVELOPMENT INITIATIVE: APPLICATION GUIDELINES FOR DEMONSTRATION PILOTS 2 (Pub. No. EPA/540/R-94/068 1995).

\(^{232}\) See supra note 163 and accompanying text.

\(^{233}\) Remarks of President Clinton at Rally St. Louis, Missouri, FED. NEWS SERVICE (Sept. 10, 1996);
The terms of the political discourse below the Presidential level were extreme. Republican proponents of federal re-regulation of environmental controls demonized opponents as “the environmentalist lobby and their extremist friends in the ‘eco-terrorist underworld’ and ‘the green extremists.’” In turn, Gore demonized them with the metaphor of jihad against the environment. And never to be forgotten is House GOP Party Whip Delay’s reported description of the EPA as the Gestapo of the poison. And we will continue to seek additional resources for these and a few other areas in our ongoing budget negotiations.

Remarks by President Bill Clinton, First Lady Hillary Rodham Clinton, Vice President Al Gore and Mrs. Tipper Gore at the Signing of the VA/HUD Appropriations Bill in the Rose Garden, the White House, FED. NEWS SERVICE (Sept. 26, 1996);

I believe that there will be a movement, particularly of smaller-scale—like 300 and down—manufacturing facilities back to urban areas in the next 10 years, because I think the property will be cheaper and I think the workforce will be there. And I think if you have a serious welfare-to-work effort like this, you can really make it work. And between the funds we’re trying to give the cities to clean environmentally polluted areas to make them attractive for new investments again—this so-called brownfields initiative—and we’re going to try to triple the number of these empowerment zones, I believe that you can have this story repeat itself.

Remarks by President Bill Clinton During Roundtable Discussion with Local Leaders and Officials, FED. NEWS SERVICE (Sept. 10, 1996).

Since World War II many vice presidents served, as did Nixon and Agnew, primarily as political hatchet men for their presidents. See John Morton Blum, Presidents in the Wings, WASH. POST, Jan. 26, 1992, at X4; Jack W. Germond & Jules Witcover, Al Gore is Breaking His Wooden Wonk Mold Wide Open, BALT. SUN, Oct. 26, 1998, at 9A ("Vice presidents going back at least to Richard Nixon and Spiro Agnew have been cast as partisan hatchet men in off-year congressional elections. Mr. Gore is playing that role now, but with much more finesse and humor than either of those two earlier worthies ever did.").

Molly Ivins, A Greener GOP Camouflages Bid to Undo Controls, ARIZ. REPUBLIC, Dec. 21, 1995, at B5 (quoting “Republican Party memo advising members on how to appear concerned about the environment” while GOP’s “only moves [are] to repeal, cut back, downsize, eliminate or reverse existing environmental protections”).

Earth Matters (CNN television broadcast, October 28, 1995) (“I think that Mr. Gingrich and some of his partners who have been kowtowing to these right-wing extremists’ groups and conducting a jihad against the environment are beginning to get the results of the public opinion polls.” (voice over, Vice President Al Gore)); Jim Nichols, Revisionists Retreat: Republicans Back Off Touted Reform of Environmental Law in Light of Polls Showing Support for Protection of Resources, PLAIN DEALER, Oct. 22, 1995, at 1B. “Jihad” also is a popular label with the de-regulation camp as well. Karen Hosler, House GOP Backs Away From Curbs on the EPA, BALT. SUN, Nov. 3, 1995, at 1A (“The PR campaign against us has been unbelievable—it’s part of the jihad by environmental extremists,” said John Feehrey, a spokesman for Majority Whip Tom Delay.").
President Clinton's January 1996 State of the Union Address, reversing his Administration's earlier position, called for a tax subsidy for brownfield remediation. In early 1996 the Clinton Administration proposed Brownfield tax incentives in essentially the form enacted in 1997 as Section 198, which were also part of the Democratic Platform for the 1996 elections. This time the major Congressional supporters of a brownfield remediation tax subsidy were senators and such support was more or less bi-partisan. Probably recognizing the inevitability of urban brownfield targeting in proposed Section 198, a real estate lobbyist urged at the time that at least rapid amortization of cleanup costs, e.g., over sixty months, be available for a purchaser of contaminated suburban properties.

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237 See supra note 224.
238 Initially the Clinton Administration considered amortization (probably along lines of Mayor Daley's 5-year tax credit). Heidi Glenn & John Godfrey, Few Surprises in Clinton's '97 Budget Plan, 96 TNT 26-1 (Feb. 6, 1996).
239 Treasury Secretary, White House Budget Director, and Council of Economic Advisers Chairman Hold News Conference on President Clinton's 1997 Budget Proposal (Feb. 5, 1996) Transcript, FED. DOCUMENT CLEARING HOUSE (statement of Secretary of Treasury Robert Rubin).
241 Over the next four years, we want a second round of Empowerment Zones to bring economic growth to more American communities; a significant expansion of the Community Development Financial Institutions Fund to spur more private sector investment in local economies; and a new tax incentive to encourage further cleanup and redevelopment of brownfields. We are committed to American cities. We believe that vast opportunities for private investment exist in America’s cities. We want to leverage federal investment to maximize private sector investments in our urban centers and support a comprehensive approach to urban problems. Today's Democratic Party knows that the best way to bring jobs and growth back to our poorest neighborhoods is to harness the job-creating power of the private sector.
242 142 CONG. REC. S7179-7185 (daily ed. June 27, 1996) (remarks of Senators Carol Moseley-Braun, D-Ill., and Alfonse D’Amato, R-N.Y., both members of the Senate Finance Committee); see supra note 212.
243 MacEwen Statement, supra note 90, at 81 (“We would urge that the ‘brownfields’ concept providing an immediate tax deduction for the costs of cleaning up acquired contaminated land in targeted areas be extended to non-targeted areas as well. If not
President Clinton as a political entrepreneur had adopted the idea of a balanced budget enactment in 1996 and the Republicans' family tax credit, but he also wanted in the budget agreement certain direct and indirect (tax preference) spending increases, as for education and brownfields. In 1996, President Clinton was re-elected President—the first Democrat to do so since President Franklin D. Roosevelt—but the Republicans retained the control over both houses of Congress, which meant that their tax demands as well as his must be met. This set the

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immediate deductibility, than some rapid amortization period would seem appropriate for non-targeted areas.”). In oral testimony he suggested 60-month amortization. *Id.* at 78.

244 The origin of the [Taxpayer Relief] Act [of 1997] was an agreement between the Republicans [sic] leadership to provide the Clinton Administration with increased funding for education and child care in exchange for their long sought-after tax cuts. The most significant changes made by the Act came in the areas of child tax credits, college tuition credits and the capital gains tax.


246 In 1993, having campaigned on populist/class warfare themes, with Democrats in control of both chambers and President George Bush having vetoed essentially the tax bill that the Clinton Administration was pushing, President Clinton had increased the income tax rates on the highest income American citizens and corporations and not given a capital gains quid for the rate increase quo. 138 CONG. REC. S3279 (daily ed. Mar. 11, 1992) (remarks of Senator Steve Symms, R-Idaho) (“It seems to me once again we are going to soak the rich but this time they don’t even get anything in return.”) (speaking to the substantially similar individual ordinary income rate increase on the top five percent only without any increased capital gains preference). As it turned out, use of the increased revenues from such rate increases to reduce otherwise projected increases in the deficit lead to the Federal Reserve Bank’s lowering the interest rate, which in turn helped grow the economy and the stock market boom, from which the top five percent gained disproportionate income gains. See David Cay Johnston, Wealthiest Pay a Declining Share of Their Incomes in Taxes, N.Y. TIMES, Feb. 26, 2001, at C2 (the increase in share of income and declining effective rate due to the increase in capital gains income; one-third of all long-term capital gains taxes paid by fewer than 13,000 taxpayers); Robert Kuttner, *Alan Greenspan and the Temple of Boom*, N.Y. TIMES, Dec. 17, 2000, at 7-10
stage for classic "log rolling," in which a single piece of legislation with an up or down vote contains disparate elements appealing to different partisan factions.247

President Clinton acknowledged that he must cooperate with the Republicans.248 The Republican majorities in both houses of Congress

247 "Log rolling" originally meant bargaining between legislators to support each other's pet projects for mutual benefit.

Among settlers in the wilderness, cooperation in handling logs for land clearing and construction was a force overriding any differences among neighbors. So too in politics. "If you will vote for my interest," said Congressman B. F. Butler in 1870, "I will vote for yours. That is how these tariffs are log-rolled through.

M. Albert Figinski, Maryland's Constitutional One Subject Rule: Neither Dead Letter Nor An Undue Restriction, 27 U. BALTIMORE L. REV. 363, 364 n.8 (1998) (tracing use of political term back to beginning of 19th Century). The term also covers a bill where factions favoring disparate misjoined provisions in it may not have directly bargained for each other's support. The Taxpayer Relief Act of 1997 appears a mixture of both elements.

248 Doyle McManus, Into the Final Fray: How Did Candidate Clinton Pull Off His Amazing Political Resurrection?, L.A. TIMES, Feb. 11, 1996, at 10 ("Clinton has become what political scientists call an 'accommodator'—a president who accepts that he must work within a policy framework designed by his opponents, like Republican President Dwight D. Eisenhower in an earlier, Democratic age. He has become a 'yes, but' president.");

One of the ways that the St. Louis economy will grow faster—an[d the] economy of every city in this country—is if we invest more money in environmental cleanup. Our brownfields initiative, so-called—a lot of people don't know what a brownfield is—a brownfield is a place in a city that used to have jobs and now has pollution. That's what a brownfield is. And what we want to do is get rid of the pollution so the jobs can come back. All the major economic analyses are that it will become more economically advantageous for people to reinvest in cities again for new jobs in the future if we can take away the environmental problem. So, yes, balance the budget, but be careful how we do it. Do it in a way that brings us together, doesn't drive us apart.

Remarks of President Clinton, Democratic National Committee Dinner, St. Louis, Missouri, FED. NEWS SERVICE (Sept. 10, 1996) (emphasis added).
demanded a substantial capital gains tax cut and estate tax cuts as well as IRA's.\textsuperscript{249} Furthermore, it may be that the fall off in women voting in the 1994 Congressional elections perceived as having often lost the Democratic candidates a margin for victory, helped induce President Clinton to seek co-operation with the Republicans rather than confrontational tax-fairness rhetoric as a means of attracting back the lost women voters.\textsuperscript{250}


The third and last stage of a political window of opportunity, however, had not yet opened in 1996 for reasons unrelated to the brownfields issue. The Republicans would not agree with Clinton in 1996 on a balanced budget, with which any significant tax act was inextricably linked, prior to the November 1996 Presidential Election which they hoped to win.\textsuperscript{251} After the election there was not enough time left to accomplish such significant legislation (of which a brownfield tax deduction was a minor part). In 1997 the political window of opportunity for brownsfields tax legislation did open. While the number of news articles on brownsfields declined slightly from 1996 (from 132 to 127), the number specifically dealing with a brownsfields cleanup tax deduction exponentially increased.\textsuperscript{252} Many dealt specifically with the bi-partisan

\textsuperscript{249} See supra note 244 and infra note 266 and accompanying text.

\textsuperscript{250} In the 1996 Presidential election women overwhelmingly supported Clinton again, playing a disproportionate role in his re-election. Michael Kranish, \textit{Clinton, GOP Stake Middle-ground Claim}, BOSTON GLOBE, Nov. 7, 1996, at A1 (according to exit polls Clinton lead among women 54-38%; Dole, men 44-43% with the remainder going to Perot); Susan Baer, \textit{Clinton's Mandate to Preserve Status Quo; Voters Offer Ideas for Second Term}, THE SUN (Baltimore), Nov. 10, 1996, at A1 (noting that female voters were decisive in Clinton's victory).


\textsuperscript{252} Gore, Treasury Secretary Robert E. Rubin and the mayors criticized Congress for failing to include in draft tax legislation incentives to clean up contaminated industrial zones, hire people off welfare and invest in financial institutions that fund urban economic development . . . Congressional Republicans considered including the administration's urban initiatives in its tax package, but given the many competing interests, "not everything sought can be accepted," Fleisher [spokesman for the House Ways and Means Committee] said. Gore went to bat for
the urban initiatives because President Clinton is out of the country and Senate and House members plan to meet in conference soon to reconcile differences between their versions of the five-year, $85-billion tax-cut package.

Elizabeth Shogren, *White House, Mayors Urge Aid for Cities*, L.A. TIMES, July 8, 1997, at A10; Mark Sherman, *Gore Asks Mayors' Aid on Tax Cuts*, ATLANTA J. & CONSTIT., July 3, 1997, at A6 ("Neither the House nor Senate version of the tax bill included the brownfield or empowerment zone proposals, but Gore said he believes the Republican leadership in Congress will include them in the legislation that emerges from a conference of House and Senate negotiators this summer."); Michael Remenz, *Environmental Program To Aid Four Municipalities*, HARTFORD COURANT, May 14, 1997, at A3 ("Gore said fifteen federal agencies will pool resources to spend $300 million on the Brownfields program, which is coordinated by the EPA. The administration also is pushing Congress to enact an expanded tax break for businesses that move to the targeted areas.");

A bipartisan group of senators, including Illinois’ Sen. Carol Moseley-Braun, on Thursday introduced legislation to provide tax incentives for environmental cleanup . . . the latest version of so-called “brownfields” legislation . . . . Passage of some type of “brownfields” incentive has been a major priority for Mayor Richard M. Daley . . . . Senate Majority Leader Trent Lott (R-Miss.) predicted later Thursday that brownfields legislation “is going to be addressed this Congress. We may be able to get something done there.” The Senate Democratic leadership has proposed direct government grants for cleanup efforts while Republican proposals call for broad tax incentives not limited to distressed areas.

Mike Dorning, *Urban Cleanup Bill is Proposed*, CHI. TRIB., Jan. 31, 1997, at N4; William Neikirk, *Political Battle Lines Drawn*, CHI. TRIB., June 12, 1997, at N1 ("The president’s so-called ‘brownfields initiative,’ essentially a tax credit for businesses that develop environmentally contaminated sites, also was included in the measure . . . .");

President Clinton will propose what officials describe as his administration’s first comprehensive urban agenda in an address about inner-city problems today to the U.S. Conference of Mayors . . . . Many items in the president's urban plan are already disparate elements of the budget agreement, such as the nearly $2 billion in proposed tax incentives for businesses that agree to clean up old industrial sites known as “brownfields.”


Promoted heavily by Chicago Mayor Richard Daley, the so-called brownfields tax incentive included in the budget deal offers a break to developers who clean up environmentally contaminated industrial and
support for the provision or for the proposed tax bill in general, as well as
the policy entrepreneurship of Mayor Daley and others. The most sophisticated political analysis was that the Democratic leadership supported a provision limited to urban areas, while the Republican leadership called "for broad tax incentives not limited to distressed areas." Similarly news stories highlighted the political alignment of Clinton, Gore and the mayors—especially Mayor Daley, truly the first political entrepreneur of a brownfield cleanup tax

commercial property in or near high-poverty areas. The concept is to put abandoned, inner-city, industrial “brown fields” back in use rather than promote new development on outlying “green fields.” Budgeters estimate that over the next three years the provision will pour $1.5 billion in tax subsidies into environmental cleanups in the targeted high-poverty areas . . . Daley has been one of the concept’s earlier and more vigorous promoters, regularly championing the tax incentive for at least five years. U.S. Sen. Carol Moseley-Braun (D-Ill.) also lobbied for the measure as sponsor of the brownfields legislation in the Senate, and U.S. Rep. Jerry Weller, the Republican from Morris, backed a similar proposal from his position on the tax-writing House Ways and Means Committee.

Mike Doming, City’s “Brownfields” May See Long Green Out of Budget Deal, CHI. TRIB., Aug. 3, 1997, at C3;

The new laws [a balanced budget mandate and a tax cut] were hammered out of the partisan rancor that turned into a desperate need to show voters that Congress and the White House could get something done . . . . It provides tax credits for the cleanup of so-called brownfields or chemical waste dumps in inner cities. “The beauty of this package is that it really applies to every single American in one way or another,” said House Budget Committee Chairman John Kasich…who helped negotiate the deal.”


The two have common political interests. One is promoting federal legislation that would create a tax credit to encourage cleanup and reuse of thousands of polluted and abandoned industrial sites, so-called brownfields, in Chicago and the suburbs. Weller and Daley worked together to advance that in the last session of Congress.


Daley, who has made “brownfield” cleanup his top economic development priority as mayor and as president of the U.S. Conference of Mayors, endorsed two bills introduced by U.S. Rep. Jerry Weller (R-Ill.) this month. The first would permit investors to deduct up to $500,000 in environmental clean-up costs in one year and to capitalize the rest over a much shorter time.

The opening of the political window for enactment of such a tax incentive also is evidenced in the greater number of sponsors and political coalitions supporting it this year. Moreover, the Republican

Mayor Masiello shared the stage with Vice President Gore on Monday as the Clinton administration began a publicity offensive aimed at getting Congress to pass a tax-cut plan that will help the nation's cities. The House did not include such a tax incentive in its $85 billion tax-cut bill, and the Senate tax bill includes a much narrower tax break for brownfields development. House and Senate negotiators are attempting to forge a compromise, and the White House is working with them on a bipartisan tax bill.

Jerry Zremski, Mayor Teams Up with Gore to Push Tax Plan, BUFF. NEWS, July 8, 1997, at B1; Mark Sherman, Gore Asks Mayors' Aid on Tax Cuts, ATLANTA J. & CONST., July 3, 1997, at A6 (“In a conference telephone call with . . . [a half-dozen] mayors that also was open to reporters, Gore said the White House would push for tax breaks for cleaning urban industrial sites, dubbed ‘brownfields’ . . . .”); Bruce Alpert, Gore Asks Cities to Help Restore Tax Incentives, TIMES-PICAYUNE, July 3, 1997, at A3 (“[New Orleans Mayor] Morial asked Gore what the mayors could do to help restore the provisions [removed from the tax bills passed by the House and Senate last week], and was told the administration wants city leaders to contact their Democratic and Republican members.”);

Two different tax cut bills have passed the House and the Senate. The bills contain many good elements, but I do not believe they represent the best way to cut taxes, nor are they consistent with the balanced-budget agreement . . . . [My plan] will also provide tax cuts to businesses that clean up urban toxic waste sites, known as brownfields, and convert these sites to productive use.

Excerpts From Remarks By Clinton on Tax Cuts, N.Y. TIMES, July 1, 1997, at A16;

“The President has endorsed a federal tax credit for ‘brownfield’ cleanups, and congressional leaders this spring voiced their support for such a measure,” Daley said at a West Side press conference, where he was joined by colleagues from the U.S. Conference of Mayors. “Mayors from across the nation are speaking with one voice: It is time for the federal government to act.”


Underneath Washington’s partisan shouting is a current of convergence, with many Republicans and Democrats coming to similar conclusions about what the federal government must do to improve education, fix Medicare, and tackle social problems without either side abandoning its core beliefs. The result is the emergence of a new network of coalitions—a so-called “third force”—that may lead to progress on some of Washington’s most intractable problems . . . . Two think tanks with solid Republican and Democratic credentials join with Sens. Spencer Abraham (R) of Michigan and Joe Lieberman (D) of Connecticut to highlight areas in which the two parties can work together to pass legislation . . . . Cleanup of contaminated
leadership, Speaker of the House Newt Gingrich, R-Ga., and Senate Majority Leader Trent Lott, R-Miss., supported a brownfield tax provision, although House Ways & Means Chair Bill Archer, R-Tex., did not. Other Republican members of the Ways & Means Committee supported a brownfield tax incentive. There also was an increase in articles linking brownfield remediation with fighting urban sprawl and preserving greenfields. This reflected the political themes of the 1996 Clinton-Gore campaigns. As the head of EPA told a national conference,
"brownfields . . . [are] the hottest experiment in the fight against urban blight . . . . They have devised a new class of tax breaks to spur new uses for brownfields—adding a tool to the ever-growing list of development incentives." Again the most sophisticated reporting paints a very mixed picture as to the impact on brownfield cleanups of market forces and government incentives (the most important of which was the EPA delisting of brownfields from Superfund "status").

Spivak & Morris, supra note 252; accord Casey Bukro, Beginnings Of A Brownfield Transformation: Navistar’s $11 Million Wisconsin Steel Effort Marks An Important Step In The Cleanup Of Legacies Of The City’s Industrial Past, CHI. TRIB., Mar. 12, 1997, at N1 (“brownfields are one of the hottest topics to come out of the environmental industry in a long time”). Spivak and Morris further reported that “[b]rownfields are a hot topic because other issues on the urban agenda, notably crime, have been addressed.” Spivak & Morris, supra note 252.

The actual evidence cuts both ways. Some pieces of the urban resurgence appear to be almost purely market driven—meaning they would probably be happening no matter what Government had or hadn't done. Others do seem to be caused by a changing government climate. And some, like the nationwide decline in crime, are crucial but don't fit into either category. The story of the brownfields offers a textbook case of how all those forces combined. Brownfields are former industrial sites, many of them in poor urban areas, that are vacant and polluted, but not polluted enough to qualify for clean-up money from Washington. Beginning in 1994, the Federal Environmental Protection Agency quietly relaxed its formulas for the brownfields. A retail use, for example, would require a less rigorous, and less expensive, clean-up than a residential use. That change created a new industry, which arose to clean up and resell the properties. At the same time, the cataloguing of brownfield sites became a function of local government, which can respond to the needs of business faster than the Federal bureaucracy. And perhaps most crucially, investors who were looking for returns greater than the 12 percent to 15 percent typical in mainstream real estate saw urban values appreciating as the crime rate declined. “On a brownfield site, you can make 20 percent to 30 percent, if you do the numbers right,” said Christopher J. Daggett, president of Chadwick Partners, an Edison, N.J., company formed 19 months ago to get into the brownfields business. “When the market is tight, people look for other alternatives.” Retailers rediscovered cities for the same reason: higher returns than the suburbs, with too many stores, could offer. Companies like Disney went to Harlem not to do economic development, but to make money. An explosion in the number and size of Wall Street mortgage investment pools has similarly aided the cities without particular intent. The pools, which buy and sell residential and business mortgages, have grown so large that they find they can venture into urban areas, where risks and returns are both higher than in the suburbs, without significantly raising their overall risk. And the competition for the best return creates a pressure.
Although the Republicans still retained control of Congress after President Clinton’s 1996 re-election, the Administration’s representatives fought hard in the 1997 budget negotiations (resulting in a balanced budget in seven years) on behalf of Vice President Gore for such a brownfield remediation tax incentive and on behalf of President Clinton for education tax incentives and spending for children’s health insurance and restoration of disability benefits to legal immigrants. At the same time, the Republicans held to their vision of capital gains and estate tax relief, IRA expansion dear to their enterpriser wing, and a $500-per-child credit dear to their moralist wing and the middle class in general.


President Clinton started 1995 with a proposed budget that projected deficits indefinitely, then at mid-year under pressure from a GOP-controlled Congress proposed balancing the budget in 10 years, and finally submitted a detailed budget meeting their seven year time frame. See Susan Page, Budget Makes Clinton Middleman: Seven-year Plan Lets Him Lay Claim to Political Center, USA TODAY, Dec. 8, 1995, at 8A; David S. Broder, Revisiting the Issue of Clinton’s Character, WASH. POST, Nov. 22, 1995, at A6; Francis X. Clines, Battle Over The Budget, N.Y. TIMES, Nov. 21, 1995, at A16.

Gore...insinuated himself into the negotiations over the balanced budget, emerging with measures to help him with vital Democratic constituencies...Gore got his way on an empowerment-zone program...efforts he can present to inner-city voters, environmentalists...in the 2000 primaries. “During the balanced-budget negotiations, Erskine knew what the Vice President’s priorities were...and made sure they were negotiated as hard as possible.”


[The] best way to teach this recent period of U.S. history is to frame it in the context of a civil war. On one side, you had the Republican
Meeting all of this and keeping revenue effects in mind, the pay-go principle, first used in deficit years and now in surplus years, encourages a larger number of smaller provisions (limited temporally as well as by numbers of taxpayers benefitted, just as Section 198 was until 2000) with less revenue loss per provision. Thus the Daley-Gore-Clinton Party, which had been captured by the well-organized Christian right, the gun lobby and corporate America. They tolerated no positions but their own. On the other side, you had the Democrats, who represented religious tolerance, gun control and labor. They, too, tolerated no positions but their own, however much trouble they had finding them. The Republicans represented white males (especially southern white males), Bible-thumpers (not mutually exclusive) and tax-cutters. The Democrats represented enlightened white males (mostly in the Northeast), women and minorities. The schism ran deep along the fault lines of religion, abortion rights, civil rights, personal responsibility vs. government responsibility, and such basics as health care, the minimum wage and child welfare.


Editorial, *BOSTON GLOBE*, Feb. 2, 1999, at A14 ("President Clinton’s budget for the coming fiscal year shows him to be—not surprisingly—a crowd-pleaser who offers a little something for everyone but not a lot of any one thing to anyone.");

"This Administration, like the other administrations before it, has had a habit of creating a whole bunch of boutique programs each year, and taking a few dollars for this and a few dollars for that," Mr. Bond said. "I have generally opposed creating more boutique programs until we can fund the ones that already exist."

John H. Cushman, Jr., *Clinton Backs Environmental Power-Sharing*, N.Y. TIMES, Jan. 31, 1999, at 1-1; Bill Lambrecht, *EPA, Bond Disagree on Budget Proposals for the Environment*, ST. LOUIS POST-DISPATCH, Feb. 2, 1999, at A7 ("Sen. Christopher 'Kit' Bond, R-Mo., sees red flags in the budget proposal and an abundance of 'boutique programs' . . . . 'It sounds to me like the vice president has spent too much time traveling abroad, living in government housing and going to conferences where they come up with these boutique programs.'").

Much-heralded agreement [on the budget and taxes] makes only the most marginal changes in the size of government and in national priorities . . . . This is a minimalist agreement, a lowest-common-denominator compromise . . . . Sharing power in Washington now—and for the foreseeable future—is a thoroughly chastened Republican congressional majority and an equally chastened Democratic president.

*Cf.* Broder, *supra* note 244; This deal is a political classic . . . . When the economy gets hot and
policy entrepreneurship yielded some to the overall Clinton entrepreneurship. In the end Section 198 as enacted in the Taxpayer Relief Act of 1997 was a severely limited symbolic provision of little effect other than for the Clinton Administration to proclaim as evidence of its friendship to the cities.

e. Window of Opportunity for Enactment of Broader Section 198
Opens for Republicans: 2000

By 1999 the ineffectiveness of Section 198 had become painfully obvious, only two or three dozen sites had utilized it instead of the tens of thousands originally estimated. Before a 1999 House Ways & Means revenue pours in, Democrats point to the good things the state can spend money on, Republicans to the tax cuts they could pass . . . . [T]he difference is split. Some money goes to programs, some to tax cuts . . . . It happens that the federal budget was moving toward balance all by itself. Dionne, supra note 244;

[A] pale shadow of the tax cuts of more than $200 billion that Republicans originally sought. Clinton and his Democratic allies claimed victory in reshaping the tax cuts to include his priorities, such as tax breaks for education and for working-poor families . . . . As the product of political compromise, the tax bill looks more like a shopping list, lacking the ideological clarity or sense of overriding purpose that was seen in the 1986 tax-simplification bill or the 1981 tax cut that carried out the theory of supply-side economics.


\[270\] 1999 Hearings on Impact of Tax Law on Land Use, supra note 97, at 46 (statement of D. Reid Wilson, Chief of Staff, EPA) (“The states have surveyed their localities. And we have found thirty or forty of these sites, brownfield areas, have really been worked well and are using the tax incentive.”); id. at 65 (statement of Charles Bartsch, Senior Policy Analyst, Economic Development, Northeast-Midwest Institute) (“Only a couple of dozen sites have used the incentive as of summer 1999 . . . .”). See also infra notes 349-53 and accompanying text. Treasury still maintained that making Section 198 permanent would return 18,000 brownfields to productive use over the next 10 years. 1999 Hearings on Impact of Tax Law on Land Use, supra note 97, at 39 (written statement of Deputy Assistant Secretary of Treasury for Tax Analysis Leonard Burman); see id. at 33 (written statement of D. Reid Wilson, Chief of Staff, EPA) (“The Treasury Department estimates that the $.3 billion incentive [making Section 198 permanent, but still limited to empowerment zones] will leverage $3.4 billion in private investments and return some 8,000 brownfields to productive use.”). Surely this is one of the worst cases of inaccurate “painting by numbers.” See Michael J. Graetz, Paint-By-Numbers Tax Lawmaking, 95 COLUM. L. REV. 609, 611-13 (1995) (in Omnibus Budget Reconciliation Acts the “overriding goal . . . [is] insuring specific annual revenue effects of proposed tax policy
Subcommittee Hearing on the Impact of Tax Law on Land Use, the Clinton Administration’s Treasury representative rationalized that the temporary nature of existing Section 198 had been designed “to encourage faster clean-up of brownfields in targeted areas. But many taxpayers were unable to take advantage of the incentive because environmental remediation often extends over a number of years. For that reason the Administration’s budget proposed a permanent extension of the Brownfields Tax Incentive . . . .”

Other witnesses agreed with the advisability of a permanent extension of Section 198. Furthermore, long-time Republican supporters of a brownfield cleanup tax incentive advocated its extension beyond “empowerment zones,” to the suburbs and small towns. As Representative Nancy L. Johnson, R-Conn., who had proposed a provision like Section 198 as early as 1996, put it:

Talk about urban-rural disadvantages. You know, a brownfield site in a small town that may have only one or two parcels that could possibly attract a new business with jobs is just as much of a problem as a brownfield site in a city. But because they are rarely in these empowerment zones, they do not get the benefit of current law. So we need to allow that deduction for all brownfields . . . .

Treasury also rationalized the “empowerment zone” limitation in Section 198 to Representative Jerry Weller, R-Ill., another disbelieving long-time advocate of a cleanup tax incentive:

Mr. Burman. Obviously, we would like to work with you on the targeting of the tax incentive, to make sure it is reaching its intended use. The Brownfield Tax Incentive changes over the ‘budget period.’ . . . [R]elying solely on five- or ten-year annual revenue estimates and of fashioning tax legislation to achieve a particular result in a distribution table creates an illusion of precision when such precision is impossible.”). The suspicion arises that at least by 1999, these estimates of tax expenditures were being cooked up to allow bragging rights for aid to the cities.

271 1999 Hearings on Impact of Tax Law on Land Use, supra note 97, at 36 (statement of Deputy Assistant Secretary of Treasury for Tax Analysis Leonard Burman).

272 Id. at 46 (statement of D. Reid Wilson, Chief of Staff, EPA) (EPA has not seen Section 198 “used as much as the other brownfields programs.” If it were made permanent, “people will be more willing to get into it because they know it is going to be there reliably in the future.”); id. at 68 (written statement of Charles Bartsch, Senior Policy Analyst, Economic Development, Northeast-Midwest Institute).

273 Id. at 18 (statement of Rep. Nancy L. Johnson, R-Conn.)
was limited to the target areas, because in the higher-income areas market incentives should result in properties being redeveloped. The land is worth more than the cost of remediation.

The real concern is that in high-poverty areas the land, after being remediated might not be worth as much as it cost to do the remediation.

Mr. Weller. You know, Mr. Burman, one thing I have always found is that all of us, I think, as we drive through communities, regardless of how prosperous they are, we all have noticed that gas station that used to sit there that closed a few years ago and that has never been redeveloped. And of course, that is a brownfield. And that is the cost of the financial liability of that clean-up.

And I just do not understand why we have a bias against a middle-class community, or a community of any other economic standard, on whether or not they could take advantage of this tax incentive. The question I have is, why not allow any community anywhere the opportunity to use this tax incentive to revitalize and clean up abandoned brownfields? 274

274 Id. at 48-49. ("[T]he first and most visible impact most likely will come from development of the city’s estimated 450 abandoned gasoline stations. Many of them are in commercially desirable high-traffic areas but require an environmental cleanup because of leakage from fuel storage tanks."); Dorming, supra note 252. Abandoned contaminated gas stations, however, are not covered by CERCLA apart from the new definition of "brownfield." While lesser contamination by petroleum or petroleum products is covered by the 2002 "brownfield" amendment to CERCLA granting limitation of liability to innocent purchasers of brownfield sites, see supra notes 74-75 and accompanying text, the other CERCLA definitions (to which Section 198 cross refers) are not changed. 147 CONG. REC. S3904 (daily ed. Apr. 25, 2001) (remarks of Sen. James Inhofe, R-Okla., sponsor of "Inhofe Amendment"—which extends the brownfields definition to sites with a relatively low risk of contamination by petroleum or petroleum products) ("Neither this nor any other provision of S. 350, in any way, alters the exclusion of petroleum or petroleum products from the definition of ‘hazardous substance’ under section 101 of CERCLA."); see also 147 CONG. REC. S3884, S3900, S3896, S3903, H10,902-03. Thus, Section 198 still does not cover abandoned gas stations, almost half of all brownfields. See supra note 75. Non-residential buildings with friable asbestos (insulation) outnumber all brownfields by 40%—733,000 to 500,000. See infra note 315 and supra note 93 and accompanying text. Such buildings with flooring containing asbestos outnumber brownfields 7 to 1. See supra text accompanying note 94. Of course, these asbestos-containing buildings do not pose the same environmental or societal risks as brownfields—such asbestos usually poses an
Treasury danced around this question. (The Joint Committee Staff provided the best economic analysis of the effect of targeting the brownfield cleanup deduction.) The answer was that the exclusion appears based on politics, not policy. The Clinton Administration wanted to be known as the friend of cities and Vice President Gore wanted to campaign for President in 2000 as a proponent of cleaning up urban brownfields and preserving greenfields.

The EPA Chief of Staff also testified at these hearings that “we have heard from States and others that to make this [tax incentive] more broadly available we ought to look at changing the definition of what is a hazardous substance, to include petroleum, asbestos, and lead paint . . . . They certainly make good arguments as to how that would help them clean up brownfields quicker.” EPA “was working with our colleagues environmental problem only when the building is remodeled or demolished. However, the issue of tax treatment of asbestos remediation should be much the same conceptually as that of toxic or hazardous waste remediation. This was implicitly recognized in the Weller and Johnson bills. See also supra note 97.

With respect to environmental remediation, it is not clear that the restriction to certain areas will lead to the most socially desirable distribution of environmental remediation. It is possible that the same dollar amount of expenditures for remediation in other areas could produce a greater net social good, and thus the restriction to specific areas diminishes overall efficiency. On the other hand, property located in a nonqualifying area may have sufficient intrinsic value so that environmental remediation will be undertaken absent a special tax break. With respect to environmental remediation tax benefits as an incentive for general business investment, it is possible that the incentive may have the effect of distorting the location of new investment, rather than increasing investment overall. If the new investments are offset by less investment in neighboring, but not qualifying, areas, the neighboring communities could suffer. On the other hand, the increased investment in the qualifying areas could have spillover effects that are beneficial to the neighboring communities.
It again was not then politically workable since such logical broadening would probably have benefited suburbs more with buildings with indoor asbestos and lead releases triggered by remodeling, as contrasted with large cities with abandoned manufacturing plants and plenty of soil and especially groundwater pollution.\textsuperscript{281}

The 1999 Senate bill extended Section 198's coverage to suburban and rural contaminated property and its effective date to June 30, 2004.\textsuperscript{282} The Conference bill and enacted legislation, however, just extended Section 198's expiration date to 2001.\textsuperscript{283}

Then in 2000, after Vice President Gore did not attain the Presidency, Congress finally expanded Section 198 to apply to any area "at or on which there has been a release (or threat of release) or disposal of any hazardous substance" for which the taxpayer has received a statement from the appropriate state agency that such area meets this requirement and extended the sunset yet again to 2003.\textsuperscript{284} Now Section 198 clearly reaches brownfields in the suburbs, towns, and rural areas and perhaps will be extended by some states to indoor releases of asbestos and lead at least where the waste is removed from the site. The survival and growth of the program can be attributed to a blending of different programs—some appealing to Democrats and others generally favored by Republicans—into a single tax bill in 2000 and also the end of the political need of the Clinton-Gore Administration to favor cities over suburbs. At the same time the general 2000 anti-poverty initiative (which included the

\textsuperscript{280} ld. at 31 (statement of D. Reid Wilson, Chief of Staff, EPA).
\textsuperscript{281} See supra note 163 and accompanying text. News stories abound about urban groundwater pollution. A Boolean search for "groundwater w/10 pollution w/10 city" on March 6, 2002 resulted in 56 hits (4 before 1990).
\textsuperscript{282} The Committee would like to see more so-called "brownfield" sites brought back into productive use in the economy. Cleaning up such sites mitigates potential harms to public health and can help revitalize affected communities. The Committee seeks to encourage the clean up of contaminated sites. To achieve this goal, the Committee believes it is necessary to make two modifications to present law. First, it is necessary to expand the set of brownfield sites that may claim the tax benefits of expensing beyond the relatively narrow class of sites identified in the Taxpayer Relief Act of 1997. Second, it is necessary to permit taxpayers more time to avail themselves of the tax benefits of expensing.
\textsuperscript{283} S. REP. NO. 106-201, at 17 (1999).
brownfields legislation) promoted by President Clinton and House Speaker Dennis Hastert, R-Ill., “survived because it was one of the few trophies the Republicans could stand to let Clinton walk away with.” In short, after the city brownfields, a beneficiary of Democrat sentiments, had enjoyed a three-year window of opportunity, it was time to remove the competitive advantage enjoyed by the cities and allow the suburbs to reap the same tax incentive as to their brownfields, which was done contemporaneously with a variety of social and economic programs for “renewal communities.”

The brownfields news stories in 1999-2000 do not follow the garbage can/policy entrepreneurship pattern of earlier years, which here would be recognition of the problem of brownfields outside inner cities, linking the policy of extending Section 198 to such exurban sites with recognition of the problem, and a window of political opportunity for enacting such extension. In 1999 brownfield news stories mostly dealt with Clinton and Gore’s “smart growth” policy (or cleaning up brownfields and preserving greenfields as under Clinton’s proposed “Better American Bonds Incentive”) and occasionally state programs.

In 2000 brownfield stories naturally focused on environmental promises and records of the candidates in Gore’s and Bush’s Presidential campaigns, as well as general brownfield cleanup stories and the

285 David Naher & Lori Nitshke, Modest Tax Deal Passes, 58 CONG. Q. Wkly. 2860 (Dec. 16, 2000) (“The survival of the community renewal package was motivated in part by Clinton’s desire to bolster his legacy and in part by Hastert’s gentle prodding.”). See also id. at 2919; Lawmakers Clear Modest Tax Deal, 56 CONG. Q. Wkly. 1841 (2000).

286 See infra note 287.

Over the next two years, the money will be used to help local and state governments develop “smart growth” programs to direct development away from suburban sprawl and toward cities or village-like concentrations that preserve open space and reduce people’s dependence on cars... Al Gore is making efforts to stop sprawl a key thrust of his 2000 presidential campaign. He and President Clinton, in their new budget proposal issued yesterday, proposed a “livable communities initiative” with federal money to buy open space.

Peter J. Howe, EPA Takes on Sprawl in Region, BOSTON GLOBE, Feb. 2, 1999, at B1; Peter E. Howard, EPA Chief Endorses Clinton Bond Initiative, TAMPA TRIB., Feb. 3, 1999, at 3 (“Seizing on the popularity of the New Urbanism sweeping the country, President Clinton’s budget proposal is pushing an ambitious bond program to help communities stunt sprawl and preserve sensitive lands.”).


289 Francine Kiefer, Green Issues Alter Campaign Climate, CHRISTIAN SCI. MONITOR,
familiar topic of new state laws encouraging brownfield remediation.\(^{291}\)
Just one story mentions the proposed extension of the federal brownfields
tax incentive.\(^{292}\)

In conclusion, the amendment in 2000 of Section 198 to cover any
contaminated site so certified by the state is not the classic garbage can
model of linking a policy idea (apply to brownfields anywhere) with
problem recognition (brownfields everywhere\(^{293}\)). Instead it is much more
of an unfinished Republican "Public Choice" agenda of taking care of
non-poverty areas in small towns, suburbs, and even rural areas\(^{294}\)—all
more Republican areas than inner cities and poverty areas—and waiting
for the window of political opportunity to open for them, which occurred
in 2000 after the November election.\(^{295}\)

4. \hspace{1em} Symbolism


\footnotesize{Dave Simanoff, \textit{Brown Is Beautiful}, TAMPA TRIB., June 26, 2000, at 8.\(^{291}\)


\footnotesize{Tax Breaks Are on Way To Aid Development}, ST. LOUIS POST-DISPATCH, Dec. 17, 2000, at A7.\(^{293}\)

\footnotesize{Indeed, brownfields outside the inner cities never were "recognized" in the media as a problem. They were a problem mostly to Republican legislators. See supra notes 273-74 and accompanying text. The floor debate on the Small Business Liability Relief and Brownfields Revitalization Act, however, reveals that Democrats who represented rural states with brownfields, particularly mine-scarred sites or states with both urban and rural brownfields (especially abandoned gas stations), supported such broadening as well. 147 CONG. REC. S3889 (daily ed. Apr. 25, 2001) (remarks of Sen. Harry Reid, D-Nev.); 147 CONG. REC. H10,900 (daily ed. Dec. 19, 2001) (remarks of Rep. Frank Pallone, Jr, D-N.J.).\(^{294}\)

\footnotesize{ Cf. 147 CONG. REC. H10,900; 147 CONG. REC. S3890.\(^{295}\)

\footnotesize{See supra notes 122-24 and 284 and accompanying text.}
Political science literature utilizes "symbolism" to mean demonizing "political enemies" in political discourse, such as "economic royalists" by President Franklin Delano Roosevelt in the 1930's. Professor Mark Leff reasons that symbolism tends to deflect and reassure reform seekers, or at least the populace. Thus FDR's populist rhetoric undermined any true individual taxation reform efforts. In fashioning this thesis, Leff tells the story of FDR espousing soak-the-rich income tax policies particularly after 1935, while in fact regressive excise taxes actually raised from the masses even more revenues compared to "class tax" individual income tax revenues derived from between five percent and ten percent of income earners during the New Deal era.


During times of crises, as mentioned above, the top marginal rate did indeed increase. But the domain of these highest rates was so limited, at first, that they were little more than symbolic. The symbolism served an important purpose. The top marginal rate bracket attracted public attention. Due in part to the prominence and in part to the tendency to equate marginal with effective rates, the typical citizen might have thought, erroneously, that the tax system was steeply progressive, and that the truly rich were paying most of their income to the government. (Interestingly, studies have shown a tendency on the part of citizens to equate the actual highest marginal tax rate with the ethically appropriate or "just" one.) This belief in the burdens borne by the very rich might have made the people's own tax burdens appear to be less painful. Further, the device allowed Congress later to increase taxes without raising the highest rate bracket, simply by extending the reach of the highest bracket downward. The ratchetting-up of the top rate was a "foot in the door" phenomenon. Thus, in 1942, with the revenue demands of World War II escalating, the top bracket was raised from 81 to 88%—a rather minor change. But the income level at which this bracket kicked in plummeted, from five million ($5,000,000) to two hundred thousand dollars ($200,000)—a staggering drop. This move was in part non-prominent, because the citizenry had already digested the fact of high marginal tax rates.


Leff's elegant thesis is undercut factually in part by the story of FDR's ill-fated 1936 tax on undistributed corporate profits, which "was an integration provision intended to
in the earlier Mellon-dominated Roaring 1920's knew that fact. In the later WWII 1940's the federal income tax for the first time raised more revenue than regressive consumption and property taxes.

President Clinton consistently and successfully used symbolism (e.g., the failure of trickle down in 1992 and Republican attacks on the environment in 1995-1996) and then pushed for enactment of incremental pilot projects with small costs. The effect is the same as symbolic reform, the small pilot project legislation tends to lessen the pressure for complete resolution of the problem.

The 1997 version of Section 198 indisputably was intended to be such a small pilot project and hence symbolic reform. Mayor Daley, the

force out as dividends otherwise low-taxed (12.5% to 15%) corporate profits so they would go through the individual high 'tax mill' (which again had been raised to seventy-five percent at the top)." See John W. Lee, A Populist Political Perspective of the Business Tax Entities Universe: "Hey the Stars Might Lie But the Numbers Never Do," 78 TEX. L. REV. 885, 951 (2000). The corporate profits were forced out, but the high-income individual shareholders by-and-large avoided, if not evaded, taxation on them. Id. at 958. Had this reform provision produced its desired end, the individual income tax would have yielded far more revenue and hardly would have been symbolic.

For a long period of years we have relied on a limited rather than a general income tax. We have become accustomed to high exemptions and very low rates on the smaller taxable incomes . . . . Moreover, it must not be forgotten that the real burden of taxation in this country is due for the most part to local and State taxes, and they are borne, generally, by people of small and moderate incomes. (Mills had been a member of the House Ways & Means Committee in the early 1920's).

Lee, supra note 266, at 1394-95 (citing Hearings on the Revenue Act of 1932 Before the Senate Comm.on Finance, 72nd Cong., 3 (1932) (statement of Secretary of the Treasury Ogden Mills)). Mills had been a member of the House Ways & Means Committee in the early 1920's.


Lee, supra note 266, at 1397 ("The ultimate triumph of this [trickle-down] rhetoric was the successful 1992 Clinton presidential campaign.").

See supra notes 225-26 and accompanying text.

See supra note 267 and accompanying text

Still another meaning of "symbolic legislation" is legislation that, rather than balancing competing concerns in setting standards, addresses a single overriding concern, which causes difficulties in implementing such a statute with costs grossly disproportionate to its benefits. See John P. Dwyer, The Pathology of Symbolic Legislation, 17 ECOLOGY L.Q. 233, 234 (1990) ("the enactment of symbolic legislation reflects a breakdown of the legislative policymaking machinery, a system that all too frequently addresses real social problems in an unrealistic fashion," speaking to the Clean Air Act among others).
original policy entrepreneur of a brownfield remediation tax incentive limited to urban areas (excluding greenfields) testified, in response to a question as to the number of sites his proposal would cover in light of the 500,000 brownfield sites nationwide, that "this is a limited proposal that deals with some large urban areas and some smaller towns and rural areas on a four- or five-year commitment. The bill is really job creation and economic development." He then agreed with the presiding committee member's observation that "it really becomes something like a pilot project." The pilot project aspect is borne out by the story of Treasury estimates of the number of cities that would be remediated under Section 198—in 1996 30,000 sites; and in 1999, after some experience, only 18,000 over the next decade if Section 198 were made permanent. The ultimate proof of Section 198 being merely symbolic reform is that at a 1999 hearing a witness testified, and EPA and GAO data agreed, that from 1997 "only a couple of dozen sites have used the brownfield expensing incentive as of summer, 1999.

Prior to the millennial projected budget surpluses (now gone), it was politically difficult to increase spending programs; therefore, the Clinton Administration was largely limited to new tax expenditures. There too the Administration chose incremental initiatives, not only targeted, but also with sunsets to limit costs. (The post-facto Treasury

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308 Treasury Secretary Robert E. Rubin, Press Briefing on a New Brownfields Tax Incentive, The White House, Office of the Press Secretary (Mar. 11, 1996) ($2 billion cost and 30,000 sites over 7 years), available at 96 TNT 50-31 (Mar. 11, 1996); Zremski, supra note 255; Shogren, supra note 37; Clinton Proposes Tax Incentives, CHI. TRIB., Mar. 11, 1996, at C1 ("The White House said the program would make cleanup expenses fully deductible in the year they are spent and could return to productive use as many as 30,000 'brownfields' in the United States.").
309 1999 Hearings on Impact of Tax Law on Land Use, supra note 97, at 37, 39 (statement of Deputy Assistant Secretary of Treasury for Tax Analysis Leonard Burman).
310 Id. at 65, 68 (statement of Charles Bartsch, Senior Policy Analyst, Economic Development, Northeast-Midwest Institute). Accord id. at 46 ("30 to 40 of these sites") (colloquy between Rep. Jennefer Dunn, R-Wash., and EPA Chief of Staff D. Reid Wilson); see infra notes 349-53 and accompanying text for a GAO study to similar effect and Congressional reaction.
312 See supra note 267 and accompanying text.
rationalization that Section 198 "was designed to be temporary, to encourage faster clean-up of brownfields in target areas," had the opposite effect since "environmental remediation often extends over a number of years."

B. Brownfields: Political Rhetoric and Reality

1. Brownfield Rhetoric: City vs. Suburb

There are between 450,000 and 500,000 brownfield sites nationwide, which often do contain asbestos concentrations as evidenced in Congressional testimony and a recent tax decision.

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313 1999 Hearings on Impact of Tax Law on Land Use, supra note 97, at 36 (statement of Deputy Assistant Secretary of Treasury for Tax Analysis Leonard Burman).
314 Id.; accord id. at 31, 46, 65, and 68 (statements of EPA Chief of Staff, several members of Congress, and Charles Bartsch, Senior Policy Analyst, Economic Development, Northeast-Midwest Institute); 147 CONG. REC. S3884, S3886, S3887, S3891, H10,902, H10,903, H10,904.
316 1993 House Hearings (Part I), supra note 160, at 831 (statement of Chicago Mayor Richard Daley) ("problems include asbestos filled rubble, underground storage tanks, and hazardous waste").
Approximately 200,000 of these sites are primarily contaminated with petroleum.\(^{318}\) Policy entrepreneurship in Congress links brownfields with greenfields or undeveloped land outside the cities: (a) potential environmental cleanup liability, and (b) conventional tax wisdom regarding the non-deductibility of environmental cleanup costs by a purchaser of a brownfield—in "a strange twist of logic"\(^{319}\)—compared to an industrial property owner who having environmentally contaminated its property may deduct in one tax year the cost of remediation, creates "inequitable" incentives\(^{320}\) for companies to locate and develop in greenfields, generally in the suburbs. "[U]rban flight contributes to urban sprawl, taking jobs away from the city. It also results in the paving off of many of the greenfield areas of our country."\(^{321}\) Thus, the need for a tax incentive, enacted in 1997, creating a competitive advantage for the brownfields. But by 2000, apparently after the "brownfield rush" of the late 1990's had been completed, it was time to return the competing areas to parity. This even playing field was accomplished by rejecting the conventional wisdom regarding the non-deductibility of environmental cleanup costs and expanding the brownfield-type deductions to the greenfields. Thus, the logic shifted from creating an economic incentive to create jobs to promoting ecological improvements.

2. Brownfield Facts on the Ground

Brownfield versus greenfield rhetoric overlooks that many contaminated sites exist in suburbs as well as rural areas, too.\(^{322}\)

\(^{318}\) See supra note 274 and accompanying text.


\(^{320}\) Id. at S360 (remarks of Senator Alfonse D'Amato, R-N.Y.) Actually the ground water cleanup costs—to the extent they relate to a pumping station—are capitalizable and depreciable, and the purchaser cleaning up land contamination as contrasted with a building or equipment would not be able to depreciate these costs to the extent she had discounted her purchase price for such anticipated costs. In any event, environmental liability rules rather than tax rules drive the selection of greenfield over brownfield development. Eisen, Brownfields of Dreams, supra note 66, at 914. (maintaining that neither the tax nor the environmental liability rule apply to unknowing, innocent purchasers in some cases.).

\(^{321}\) 143 CONG. REC. S 8556 (daily ed. Jan. 30, 1997) (remarks of Senator Carol Moseley-Braun, D-III.); accord id. at S860 (remarks of Rep. Jeffords, R-Vt.) ("Most of these [brownfield] sites were abandoned during the 1970's and 1980's, as industrial development migrated away from urban areas to the greener landscape of the suburbs.")

\(^{322}\) See supra notes 122, 273-74 and accompanying text.
Recycling suburban sites would also save paving over true green space, but would serve different political constituencies than supporters of brownfield remediation. The urban areas with brownfields have far greater minority constituencies and patterns of Democratic voting.\footnote{See Nancey Green Leigh & Robert Gradeck, Urban Neighborhood Demographics Associated with Environmentally Suspect, Tax-Delinquent Properties: Equity and Redevelopment Implications, 25 REV. BLACK POL. ECON. 61 (1996); Vogel, supra note 205 (“Whether or not they started out that way, the areas now home to the most industrial blight are often poor, minority neighborhoods.”); Neal R. Peirce, $300 Million to Clean up Brownfields, THE PLAIN DEALER, Sept. 3, 1996, at 11B; Neal R. Peirce, How Superfund Stifles Urban Recovery, BALTIMORE SUN, May 2, 1994, at 9A.}

White males in the suburban areas, particularly in the Sun Belt and most recently, in the South in general have tended to vote Republican at all levels.\footnote{John W. Lee, Critique of Current Congressional Capital Gains Contentions, 15 VA. TAX REV. 1, 27-28 & n.108 (1995).} Since 1992 suburban voters have outnumbered urban voters nationally.\footnote{Karen M. Paget, Can Cities Escape Political Isolation?, AMERICAN PROSPECT, Jan-Feb. 1998, at 54; David Rusk, Cities Without Suburbs, NEW DEMOCRAT, May 1992, at 17; William Schneider, The Suburban Century Begins: The Real Meaning of the 1992 Election, THE ATLANTIC, July 1992, at 33; David Rohde, Future of ‘New’ Democrats Tested in Pennsylvania Race, CHRISTIAN SCI. MONITOR, Nov. 1, 1994, at 3; Adam Nagourney, Power of the Suburbs, USA TODAY, June 1, 1992, at 1A; Renee Loth, Citifying Suburbia: It Isn’t What It Was, US Census Figures Show, BOSTON GLOBE, Nov. 3, 1991, at B17.} Moreover, in both the 1992 and 1993 presidential election suburban women voters have constituted the swing constituency in Clinton’s electoral victories.\footnote{Michael Tackett, Clinton Could Turn Treaty Defeat Into Political Victory, CHICAGO TRIB., Oct. 17, 1999, at C5; see Robert L. Borosage, Politics: Kindred Fates—The Clinton, Nixon Cases, L.A. TIMES, Dec. 14, 1997, at M1 (Clinton “identified constituencies—suburban women, Latinos and low-income voters—vital to a new majority. He has pushed a strategy—a politics aimed at the suburbs—that fit the changing times.”); Marie Cocco, Clinton Makes Suburbs Safe for Dems, NEWSDAY, Nov. 6, 1996, at A47.} At first blush this would suggest that a brownfield provision targeted primarily to urban sites and excluding suburban sites would not be enacted, particularly by a Republican controlled Congress. Tax bills by and large are up or down votes. A form of “log rolling” took place.\footnote{Figiniski, supra note 247. Misjoinder of subjects in a bill subject to a single up or down vote is a form of log-rolling, id. at 372, which is more common in tax legislation than actual explicit bargaining. In omnibus budget reconciliation acts, however, with bargaining sessions between administration leaders and bi-partisan Congressional leaders from both houses, explicit bargaining is the norm.} In 1997 Republicans obtained a renewed capital gains preference while President Clinton obtained a number of
lesser provisions including Section 198.328.

According to some commentators, the perception of potential environmental liability for cleaning up pre-purchase contamination is by far the greater disincentive to purchase brownfields than adverse tax rules or any tax incentive such as Section 198.329. "While fears of environmental liabilities and costs of environmental compliance are factors contributing to brownfields abandonment, a cause-and-effect attribution is in error. Brownfield sites are the product of many interrelated phenomena, many of which are unrelated to environmental laws." For instance, losses of jobs in cities and often creation of brownfields as well were due in large part to loss of the manufacturing base, especially in the cities of the Northeast and old Midwest, with the manufacturing jobs going overseas not to nearby suburbs. Conversely,

328 "The origin of the Act was an agreement by the Republican leadership to provide the Clinton Administration with increased funding for education and child care in exchange for their long sought-after tax cuts." TAXPAYER RELIEF ACT OF 1997, supra note 244; Martin A. Sullivan, Capital Gains 1997: Old Issues for a New Congress, 74 TAX NOTES 124 (1997). This agreement was subject to much valid criticism. See, e.g., Broder, supra note 244; see also Dionne, supra note 244.

329 Mistick Construction . . . knows only too well about being an "innocent land owner." Mistick purchased an acre of land 10 years ago on the North Side. Before constructing an eight-story apartment building for handicapped individuals, an environmental assessment of the site was conducted. It was discovered that soil at the site had been contaminated by gasoline. Despite the fact that Mistick had nothing to do with the contamination, the state required that Mistick be responsible for all sub-surface investigations, sampling and monitoring. Hundreds of thousands of dollars later, the property remains vacant and unproductive . . . . By the time the environmental issues were resolved, the feasibility of the project was doubtful and the project was abandoned.


331 Federal, state and local policies and programs destroyed urban neighborhoods around the country and at the same time made moving to the suburbs easy. The GI Bill, interstate highways, high-density public housing, school desegregation policies and the change from an industrial economy to an information, distribution and retail economy moved middle- and upper-class families out of the nation’s major cities
the growth of new buildings and jobs in the suburbs reflected in part the growth in the service and knowledge industries. According to The Economist, the more recent boomlet in U.S. center city growth, while accompanied by various tax incentives and some direct grants, appears due to dropping urban crime rates and demographics.

When the cost of the cleanup is known, the price charged the purchaser would be reduced so that the seller actually bears the burden of the cleanup costs, and the property can be sold. However, if the cost of the cleanup is greater than the value of the land after the cleanup, the property is unsalable, absent a deduction for those costs. The combination of uncertainty of the amount of the liability and infeasibility of cleanup has led to the abandonment of sites in urban brownfields and non-payment of real estate taxes resulting in the local municipal ownership of most local brownfield sites. The obvious test of the effectiveness of Section 198 will be whether the suburban and rural areas experience a boom in cleanup efforts in the years 2000-2003 under the recent amendments to the law.

C. Section 198: Into the Maelstrom

Section 198 provides a temporary (now for six years from its effective date of January 1, 1998 until a twice-extended sunset, currently December 31, 2003) ordinary deduction for otherwise capitalizable costs of abatement or control, i.e., remediation, of hazardous substances incurred in connection with a "qualified contaminated site." Contaminated site means a business or investment property at which there has been a release (or threat of release) or disposal of any "hazardous substance," which in turn is defined by cross reference to CERCLA and into outlying areas, taking with them much-needed tax revenues for schools, police, fire protection and other services.

Maureen McAvey, St. Louis Region: The Doughnut and the Hole, ST. LOUIS POST-DISPATCH, Aug. 30, 1996, at 19C.

Id.

Aren't City Centres Great?, THE ECONOMIST, Aug. 14, 1999, at 23 (focusing on population increase).

See Tom Barnes, Stringent U.S. Industrial Waste Cleanup Laws Hit, PITT. POST-GAZETTE, Dec. 10, 1994, at C1 ("[C]ity government was 'the largest owner of contaminated property—brownfields—in Pittsburgh.'"); Tom Uhlenbrock, For Sale: 10,000 Parcels Of City-Owned Property, ST. LOUIS POST-DISPATCH, Feb. 20, 1996, at A1 (explaining that St. Louis has taken in a multitude of real estate, including a cemetery, through tax foreclosure, with title to a sixth of the city).

Section 101(14) or 102. Unfortunately, this cross reference does not pick up the subsequent “brownfield site” amendments enacted in 2002 to CERCLA, which add, for purposes of eliminating liability of innocent purchasers, a definition of “brownfield site” including, in addition to hazardous substances contamination by controlled substances (e.g., methamphetamine labs), low-risk petroleum or petroleum products contaminated sites (e.g., abandoned gas stations), and mine-scarred land. An obvious remedy is to change the Section 198 cross reference to “brownfield site” instead of to “hazardous substance.” The 1997 legislative history to Section 198 also adds that the definitions of hazardous substances are “subject to additional limitations applicable to asbestos and similar substances within buildings.” This rules out application of Section 198 to indoor emissions of asbestos, etc. In short, the only change here in 2000 was that “qualified site” now means a contaminated site in an area designated by the appropriate state agency as contaminated, rather than just in a “targeted” area; unfortunately contamination was not also broadened.

Under a conceptually correct interpretation of tax law principles the scope of Section 198 should be quite narrow, for it applies only to remediation costs otherwise capitalizable. We believe that remediation costs incurred by a purchaser should be capitalized only where the taxpayer discounted the purchase price for the contaminated property to take account of the anticipated cleanup costs. In that case the rule of parity and the deferred purchase price concept requires that when incurred the anticipated costs be treated as part of the purchase price of as it happens non-depreciable land (Remediation costs exceeding the fair market value of the property after cleanup might be currently deductible as

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336 Id. § 198(d)(1). The first section cross refers to a number of other environmental protection acts and the latter delegates to EPA regulations the task of defining hazardous substances.
337 See supra notes 74-75 and accompanying text.
338 In California, we have a terrible problem from the production of methamphetamine. It turns out that this terribly dangerous drug is not only illegal, not only does it destroy people—destroy people—but the byproduct of methamphetamine production is a toxic stew of lye, hydriodic acid, and red phosphorus. These elements threaten the groundwater and agricultural lands of the Central Valley and elsewhere in California where these secret methamphetamine labs are sited.
339 See supra note 75 and accompanying text.
a loss realized under Section 165[^341]. Where the purchaser did not
discount her purchase price for the costs of cleaning up contaminated land,
however, they should be deductible due to the lack of depreciation.[^342]

*United Dairy Farmers, Inc.* erroneously holds to the contrary.

The current or ordinary deduction under Section 198 is
recapturable under Section 1245 as if it were a depreciation of tangible
personal property,[^343] which is sound as a matter of tax policy. The tax
gain equal to the amount of such deduction would *not* have arisen on the
sale had the remediation costs been capitalized. In 1960, President John F.
Kennedy proposed "recapture" of depreciation as to tangible personal
property used in a trade or business upon its sale or exchange, i.e.,
recharacterization of otherwise capital gain under Section 1231 as
ordinary income to the extent of prior depreciation allowances taken as
ordinary deductions,[^344] in order to eliminate "the opportunity which now
exists of converting ordinary income into capital gains."[^345] Precisely the
same abuse would be possible under Section 198 but for the recapture
provision. This recapture provision creates, however, another disparity
between a taxpayer taking a deduction for remediation costs under Section
198 and under Section 162. For such statutory recapture is limited to
deductions claimed under Section 198[^346]. In contrast, environmental
cleanup costs deducted under the tax common law[^347] would not be subject
to "recapture" (due, however, to a failure of the tax benefit doctrine[^348]).

[^341]: See infra notes 474-509 and accompanying text.
[^342]: See infra notes 471-79 and accompanying text.
[^343]: I.R.C. § 198(e).
[^344]: Revising Tax on Gains from Sales of Depreciable Personal Property: Hearings on
H.R. 10491 and H.R. 10492 Before the House Comm. on Ways and Means, 86th Cong.
(1960).
[^345]: Id. at 3 (statement of Secretary of Treasury Robert B. Anderson).
[^347]: STAFF OF J. COMM. ON TAXATION, 105TH CONG., GENERAL EXPLANATION OF TAX
clarified that providing current deductions for certain environmental remediation
expenditures under the Act creates no inference as to the proper treatment of other
remediation expenditures not described in the Act.").
[^348]: Statistical recapture constitutes a partial codification of the tax benefit doctrine. See
difference is that statutory recaptures apply automatically upon certain dispositions of the
property as to which the recapturable deductions were taken, whereas the tax benefit
doctrine requires a year two event fundamentally inconsistent with the assumption upon
which the year one deduction was taken. *Id.* at 383-85. If the "repair" remediation
deduction is based upon the restoration principle, a year two disposition would not appear
inconsistent with the year one deduction. If, however, the year one deduction were based
Section 198 has rarely been utilized by taxpayers. EPA estimated that as of the end of 1999 only twenty to thirty sites had been designated nationwide.\(^{349}\) The General Accounting Office in a 2000 study of five states "operating some of the largest or most innovative brownfields programs in the nation"\(^{350}\) found that only twenty-three sites had been certified under Section 198 as of August 31, 2000.\(^{351}\) Senator Robert Torricelli, D-N.J., noted this in the floor debate on the "Small Business Liability Relief and Brownfields Revitalization Act."\(^{352}\)

In August of 1997, this body approved a potentially significant brownfields tax incentive. This tax incentive, referred to as the "expensing provision," allowed new owners of these contaminated sites to write cleanup costs off their taxes in the year they were deducted. This allows for increased cashflow for redevelopment projects. Surprisingly, despite the potential advantage of this expensing provision, there have been relatively few takers.

A GAO study reported in December of 2000 that in New Jersey there had been only three development projects which had even applied for this tax benefit. Developers told me they are discouraged from using the provision because of the provision's indefinite future and the exclusion of brownfield sites containing petroleum. There is simply no incentive for real estate developers to complete projects and market them quickly if the tax benefit they have derived is going to be taxed as ordinary income at 39.6 percent rather than capital gains at 20 percent.

The financial impact of that reality is very

\(^{349}\) See supra note 310.
\(^{350}\) GAO, BROWNFIELDS; INFORMATION ON THE PROGRAMS OF EPA AND SELECTED STATES 3 (GAO-01-52 2000) (Massachusetts, Michigan, New Jersey, Pennsylvania, and Wisconsin).
\(^{351}\) Id. at 34 (three each in Massachusetts, Michigan, and New Jersey, six in Pennsylvania, and eight in Wisconsin).
\(^{352}\) See supra note 74.
While these reasons, especially the inapplicability of Section 198 to petroleum contamination, may be significant factors in the scant use of Section 198 to date, probably a greater factor is that the cost of remediation is often more than the value of the land after the cleanup.\textsuperscript{354} The cost of cleanup is often four times the cost of site preparation for a comparable sized lot that is uncontaminated.\textsuperscript{355} The ideal tax answer to this problem would be to make the excess of such costs over the value after remediation into a tax credit, offsetting dollar for dollar such excess against federal income taxes. In such a regime the cost up to the value after remediation should be capitalized, just as the cost of a greenfield and the site preparation costs are capitalized and usually not depreciable. The potentially huge revenue losses from such a tax credit (over the deduction for such excess losses that should be allowed under a sound interpretation of tax principles\textsuperscript{356}) should be measured against the societal benefits of direct EPA grants.\textsuperscript{357}

\textsuperscript{353} 147 CONG. REC. S3900 (daily ed. Apr. 25, 2001) (remarks of Sen. Robert Torricelli, D-NJ). Much the same arguments were made in the 1999 Hearings on Impact of Tax Law on Land Use, supra note 97, at 65, 68 (prepared statement of Charles Bartsch, Senior Policy Analyst, Economic Development, Northeast-Midwest Institute); id. at 31, 46, 48 (statement of D. Reid Wilson, Chief of Staff, EPA).

\textsuperscript{354} Mary Sit, Making Hazardous-Waste Sites Saleable: New Agreement Protects New Owners and Encourages Recycling Contaminated Properties, BOSTON GLOBE, Nov. 26, 1994, at 43 (“Sites we want to really clean up might have such a high cost of cleanup—even if you got the property for nothing, it may still cost too much to acquire . . . .”) (quoting David I. Begelfer, Executive Director of the National Association of Industrial and Office Properties) (reporting on Massachusetts’ “clean site initiative,” a state pilot program ensuring a new owner of no liability for future hazardous waste clean-ups of contamination existing at purchase); Vogel, supra note 205 (“‘I think cost of cleanup is still a great impediment,’ said Edmund Frost, president of Clean Sites Inc. ‘Before brownfields are solved, we’re really going to have to dig deeper to find new ways to eliminate urban contamination and end urban sprawl,’ he added.”).

\textsuperscript{355} While the unremediated brownfield may be available at little or no cost, “total site costs per acre for long-time industrial sites in inner city areas can be quadruple those of a site of the same size in a new exurban development . . . . The mere presence of contamination has increased lending costs—more than three-fold in real dollar terms since 1980.” Hearing on Impact of Tax Law on Land Use Before the Subcomm. on Oversight of the House Comm. on Ways and Means, 94th Cong. 66 (1996) (written statement of Charles Bartsch, Senior Policy Analyst, Economic Development, Northeast-Midwest Institute).

\textsuperscript{356} See infra notes 471-509 and accompanying text.

\textsuperscript{357} Cf. Abouhaka, supra note 252 (arguing that it makes good sense to offer federal and state tax breaks to cleanup brownfields, but “costs—and longterm benefits—to taxpayers
In short, the tax common law as to asbestos remediation costs will continue to be determinative for many purchasers with serious environmental problems but not of the type that fit the definition of a “qualified contaminated site” (in particular, indoor friable asbestos and abandoned gas stations). Unfortunately in these wide areas where Section 198 is not determinative, as well as in the case of an owner of self-created contamination (to which Section 198 can never apply), as to remediation undertaken in connection with a general plan of rehabilitation or which adapts the previously contaminated site to a new use, “doubt” remains as to the deductibility of expenses incurred. A prime and frequent example is removing or otherwise remediating asbestos in aging structures built or acquired at a time when asbestos was not considered to be a potentially hazardous material. At a minimum, this uncertainty substantially increases the cost of such remediation. More likely the current uncertainty acts as a disincentive to the removal of potentially hazardous materials. This Article maintains that hazardous waste remediation costs by a purchaser should be capitalizable only where anticipated in the purchase price. Otherwise, such costs should be deductible under Section 162 on the ground that capitalization would result in no or slow depreciation and thus distort the taxpayer’s income, or constitute an economic loss currently deductible under Section 165.

need to be closely watched”).

358 STAFF OF J. COMM. ON TAXATION, 105TH CONG., DESCRIPTION OF REVENUE PROVISIONS CONTAINED IN THE PRESIDENT’S FISCAL YEAR 1999 BUDGET PROPOSAL, JCS-4-98, at 25 (Comm. Print 1998) (“The proposal to make permanent the expensing of brownfields remediation costs would promote the goal of environmental remediation and remove doubt as to the future deductibility of remediation expenses. Removing the doubt about deductibility may be desirable if the present law expiration date is currently affecting investment planning.”).

359 While significant progress has been made with regard to encapsulating asbestos and certain contaminated soil expenses, significant uncertainty remains as to the deductibility of expenses incurred in the course of removing asbestos from aging structures built or acquired at a time when asbestos was not considered to be a potentially hazardous material. At a minimum, this uncertainty substantially increases the cost of such remediation. More likely the current uncertainty acts as a disincentive to the removal of these potentially hazardous materials.

Letter from Steven A. Wechsler, on behalf of the National Realty Committee, to Treasury Secretary Robert Rubin ¶ 3 (Oct. 18, 1996), available at 96 TNT 222-225 (Nov. 14, 1996) [hereinafter Wechsler Letter].

360 See infra notes 471-72 and accompanying text.

361 See infra notes 474-509 and accompanying text.
Likewise remediation of self-created contamination should be currently deductible even if incurred in connection with a general plan of rehabilitation or a plan which adapts the previously contaminated site to a new use if the remediation adds no additional value compared to before the contamination occurred or was discovered.

Even where Section 198 is available, the common law of taxation, as to capitalization versus expensing, will still be relevant in determining whether recapture of a Section 198 deduction will apply if the remediated property is subsequently sold or disposed of by the taxpayer. Some aggressive remediating taxpayers who could meet the strictures of Section 198 might even prefer the "at best murky" common law,362 with a Section 162 "repair" deduction or a Section 165 loss deduction and no subsequent recapture, to a more "clear and consistent"363 Section 198 deduction accompanied by recapture of the deduction upon sale.

Finally, given the complex state of the common law of capitalization, the ex post facto nature of how environmental issues become known (i.e., innocent parties using what is later determined to be hazardous materials), it seems appropriate to lower the standards for the application of Section 198. The EPA identifies problems so severe that a "stick"—liability for cleanup and possible fines—may be required to prevent future contamination.364 But there may be other situations where environmental improvements should be encouraged—the business should be given a "carrot." The definitions of situations requiring penalties should differ from the situations where certain behavior should be encouraged.

IV. THE COMMON [MIS]UNDERSTANDING OF THE TAXATION OF ENVIRONMENTAL REMEDIATION COSTS

A. Overview

An ordinary business or investment expense is currently deductible under Section 162 in the tax year incurred or paid.365 An expenditure

362 MacEwen Statement, supra note 90, at 80.
364 See supra note 71.
365 I.R.C. § 162(a) (West 2002). A cash basis taxpayer deducts such expenditure in the tax year paid; an accrual basis taxpayer in the tax year in which all events have occurred, fixing the liability with reasonable certainty, subject to the economic performance rules. Treas. Reg. § 1.446-1(c) (as amended in 2001); Treas. Reg. § 1.461(h) (as amended in 1995).
capitalized under Section 263, in contrast, may be deducted from ordinary income only through (a) depreciation under Sections 168 or 169, usually ratably, over the useful life of the asset acquired, created, or improved by the expenditure or amortization; or (b) upon sale, destruction, or abandonment or other realization prior to the end of such life as a loss under Section 165.366 Thus Sections 162 and 263 are designed to more accurately calculate net income367 by generally matching expenses with revenue in the taxable periods in which the expenses actually generate that revenue.368

Conceptually, depreciation and amortization “consist of allocating a capitalized cost to the tax years to which it contributes to the production of income.”369 Capitalization is therefore necessary to prevent the distortion of the taxpayer’s net income that would result from deducting the entire cost currently of an expenditure “properly attributable, through


367 Taxing net annual income is a fundamental policy of the Code. See 50 CONG. REC. 3,849 (Part 4) (Aug. 28, 1913) (remarks of Sen. John S. Williams, D-Miss.). Today the keystone is Section 446’s mandate that a taxpayer’s method of income tax accounting must clearly reflect income. See I.R.C. § 446(b) (1994).

368 Justice Blackmun had provided this insight in Comm’r v. Idaho Power Co., 418 U.S. 1, 11 (1973) (“When the asset is used to further the taxpayer’s day-to-day business operations, the periods of benefit usually correlate with the production of income. Thus, to the extent that equipment is used in such operations, a current deduction is an appropriate offset to gross income currently produced.”). See generally Alan Gunn, Matching of Costs and Revenues as a Goal of Tax Accounting, 4 VA. TAX REV. 1 (1984) (using “matching” to mean only deferral of deductions for expenditures so as to more clearly match them with the income they produce and not the financial-accounting influenced notion of deferring current income to match future expenses or currently deducting expenditures because they relate to past revenue). For the notion that remediation costs should be matched with past revenue as sunk costs see Thomas L. Evans, Clear Reflection of Income: Using Financial Product Principles in Other Areas of the Tax Law, 48th ANN. FED. TAX CONF. OF U. CHI. LAW SCHOOL, 73 TAXES 659, 661 (1995); American Bar Association Section of Taxation Committee on Tax Accounting, Report on Capitalization Issues Raised Under Sections 162 and 263 by INDOPOCO, Inc. v. Comm’r, 50 TAX LAW. 181 (1996); Burgess J.W. Raby & William L. Raby, IRS Splits on ‘General Plan of Renovation’ Argument, 97 TNT 147-99 (July 31, 1997); United Dairy Farmers, Inc. v. United States, 267 F.3d 510, 519 (6th Cir. 2001) (“for a valid deduction under §162 for environmental clean up costs . . . the taxpayer [must have] contaminated the property in the ordinary course of its business”).

369 See John W. Lee, Doping Out the Capitalization Rules After INDOPOCO, 57 TAX NOTES 669, 679 (1992) [hereinafter Lee, Capitalization Rules]. For a restatement of an economic analysis of depreciation and more detailed analysis of the authorities discussed in this section, see Lee, Start-Up Costs, supra note 366, at 11.
amortization, to *later years* when the capital asset becomes income producing.\(^3\)

Self-evidently a deduction dollar is worth more today than it is tomorrow, or 7½ years later, and much more than thirty-nine years from now.\(^3\) If remediation costs are capitalized as an improvement, or if anticipated at purchase as payment of a contingent purchase price, and then added to the basis or depreciable cost of the remediated property under Section 1016, then they are (a) depreciable under Section 168 over a stated period, generally thirty-nine years and 7½ years in the case of remediated non-residential real estate improvements and equipment, respectively,\(^3\) or (b) conceivably not depreciable at all in the case of remediated land.\(^3\)

Businesses remediating hazardous waste therefore

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\(^3\) \textit{Idaho Power Co.}, 418 U.S. at 11 (emphasis added); accord INDOPCO v. Comm'r, 503 U.S. 79, 84 (1992) (Blackmun, J.) ("endeavors to match expenses with the revenues of the taxable period to which [the expenses] are properly attributable, thereby resulting in a more accurate calculation of net income for tax purposes"); Advance Notice of Proposed Rulemaking, Guidance Regarding Deduction and Capitalization of Expenditures, 67 Fed. Reg. 3461, 3462 (Jan. 24, 2002) ("A fundamental purpose of Section 263(a) is to prevent the distortion of taxable income through the current deduction of expenditures relating to the production of income in future taxable years.").


\(^3\) I.R.C. §§ 168(c), (d)(1) (half year convention).

\(^3\) Capital expenditures allocated to land are generally not depreciable with the exception of certain landscaping costs. I.R.S. PUBLICATION No. 946, \textit{HOW TO DEPRECIATE PROPERTY} (2001) ("Although you cannot depreciate land, you can depreciate certain costs (such as landscaping costs) incurred in preparing land for business use. These costs must be so closely associated with other depreciable property that you can determine a life for them along with the life of the associated property.");

Certain types of improvements to land (such as sidewalks, roads,
prefer a current deduction for these costs, which was Congress' thought behind Section 198—to encourage earlier cleanup of [a few] contaminated areas. Conversely not allowing a current deduction for, e.g., asbestos remediation costs, and instead requiring capitalization with attendant depreciation permitted only over a much longer period offers no tax incentive to voluntarily cleanup environmental hazards. Consequently, the enormous costs of EPA and OSHA regulation approved hazardous waste remediation fuels an intense tax debate over whether such costs should be (a) currently deductible under (i) Section 162 as a repair or (ii) under Section 165 as an economic loss, or (b) capitalized under Section 263 and if so, over what period they are then depreciable.

Taxpayers, the government, and commentators by-and-large have analyzed the taxation of environmental cleanup costs against the backdrop of the deductibility of repair costs. Since 1918, the business expense regulations' test for a currently deductible "repair" has been an incidental expenditure which neither appreciably extends the life nor increases the value of property, but keeps it in efficient operating condition. By


See 143 Cong. Rec. S860 (daily ed. Jan. 30, 1997) (remarks of Sen. Alfonse D'Amato, R-N.Y.) ("[T]he Federal Government needs to encourage development of once abandoned, unproductive sites that will bring real economic benefits to urban distressed and rural areas across the United States. By encouraging redevelopment, jobs will be created, economic growth will continue, property values will increase as well as local tax revenues."); S. Rep. No. 106-201, at 17 (1999) ("Committee seeks to encourage the clean up of contaminated areas").

See Black, supra note 70, at 1327.

See Glenn Carrington, Capitalization After INDOPCO and Into the New Millennium, 93 Tax Notes 813 (2001). A perceptive student note, however, argues that Section 165 should apply. See Coolidge, supra note 371. He solves the most difficult doctrinal problem to a loss deduction for toxic waste remediation, the realization requirement, with a "double discovery," that the "before" in the before versus after valuation or restoration rule is before the hazard was discovered, not before it existed. Such approach seems to have later been adopted by Norwest Corp. v. Comm'r, 108 T.C. 265 (1997). This Article argues that the realization requirement should be met by the remediation itself. See notes 487-89 infra and accompanying text.

Treas. Reg. § 45, art. 103 (1918).

Treas. Reg. § 1.162-4 (1960); see generally Black, supra note 70, at 1324-25; Roy
contrast, "[r]epairs in the nature of replacements" must be capitalized.\textsuperscript{379} Since 1958, the capitalization regulations have added that a repair which adapts the property to a new or different use must be capitalized,\textsuperscript{380} which originated in the oft-cited 1926 decision, \textit{Illinois Merchants Trust Co. v. Commissioner}.\textsuperscript{381}

The repair regulations have provided from the beginning that incidental repairs which “keep” property “in an ordinarily efficient operating condition” are currently deductible.\textsuperscript{382} Ultimately many courts came to distinguish repairs “necessary to put, rather than to ‘keep,’ . . . [the property] in an ‘ordinarily efficient operating condition’”,\textsuperscript{383} as capital. Indeed, some decisions characterized the “oft-litigated distinction between repair expenses and capital improvements . . . as the difference between ‘keeping’ and ‘putting’ a capital asset in good condition.”\textsuperscript{384} Putting

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Whitehead et al., \textit{The IRS Plows New Ground In the Tax Treatment of Land Cleanup Costs}, 48 OKLA L. REV. 417, 423 (1995). Chief Counsel’s office prior to Rev. Rul. 94-38 articulated 5 factors to be considered in evaluating the deductibility of soil remediation costs—capitalizing amounts which (1) add to the value or substantially prolong the useful life of property such as plant or equipment, or (2) adapt the property to a new and different use. \textit{See Mazo, supra} note 371, at 365-67. For criticism see Christine Black, \textit{Comment: Saving the Green: Who Should Pay for Environmental Cleanup Costs?}, 20 IOWA J. CORP. L. 671, 682-83 (1995) [hereinafter Black, \textit{Saving the Green}].
\textsuperscript{379} Treas. Reg. § 1.162-4 (as amended in 1994).
\textsuperscript{380} Treas. Reg. § 1.263(a)-1(b) (as amended in 1994); \textit{see also} Dominion Res., Inc. v. United States, 219 F.3d 359 (4th Cir. 2000). This rule first appeared in the 1954 code regulations. T.D. 6313, 1958-2 C.B. 114. This Article maintains that this rule (like the general plan of rehabilitation doctrine) must rest on the rule of tax parity; therefore, where cost of remediation if undertaken by a seller could not economically be passed on to a purchaser (because it adds no value above the uncontaminated value), the owner’s undertaking of the remediation should be deductible under Section 162 on the rationale that no or slow depreciation of the cost would distort the taxpayer’s income or as an economic loss “realized” under Section 165 as measured by the cost of remediation.
\textsuperscript{381} 4 B.T.A. 103, 106 (1926).
\textsuperscript{382} Treas. Reg. § 1.162-4 (1960). \textit{See also supra} note 378 and accompanying text.
\textsuperscript{383} Stoltzing v. Comm’r, 266 F.2d 374, 376 (3d Cir. 1959); Moss v. Comm’r, 831 F.2d 833, 835 (9th Cir. 1987); Walling’s Estate v. Comm’r, 373 F.2d 190, 193 (3d Cir. 1967); \textit{see generally} J. Wendell Bayles & Clair R. Rich, \textit{Repair or Capital Expenditure: The Tenth Circuit’s General Plan of Betterment Rule}, 1974 UTAH L. REV. 272, 283 (citing Jones v. Comm’r, 242 F.2d 616 (5th Cir. 1957)).
\textsuperscript{384} Moss, 831 F.2d at 835; Schroeder v. Comm’r, T.C. Memo 1996-336, 72 T.C.M. (CCH) 185 (1996). One commentator argues that the put-keep dichotomy obscures “a clear analysis of the taxpayer’s true condition. \textit{See Bayles & Rich, supra} note 383; at 288. Moreover, in analyzing this “put-keep” distinction as it applies to environmental cleanup costs, other commentators have argued that this test inevitably leads toward capitalization: “In the case of cleanup costs, as opposed to waste treatment costs or other preventive measures, it seems that the costs are indeed incurred to ‘put’ the taxpayer’s
property in an ordinarily efficient operating condition appears generally synonymous with the general plan of rehabilitation doctrine discussed below. The repair rules in general at best correspond only roughly with the emerging tests for capitalization/expensing.

B. "Contemporary Legal Context as to the Taxation of Remediation Costs"

Initially the Service denied any deduction for brownfield remediation requiring capitalization of the costs to the land. Gradually the Service shifted, as sketched by the Joint Committee on Taxation in 1996 in its Description of Revenue Provisions Contained in the President's Fiscal 1997 Budget Proposal, repeated virtually verbatim in


385 Moss, 831 F.2d at 835-36; Jones v. Comm'r, 242 F.2d 616, 617-18 (5th Cir. 1957); Jones v. United States, 279 F. Supp. 772, 776 (D. Del. 1968).
386 Cottage Savings Ass'n v. Comm'r, 499 U.S. 554, 563 (1991). The Supreme Court, in determining the meaning of the term "property differing materially" in Treas. Reg. § 1.1001-1, looked "to the case law from which the test derives and which we believe Congress intended to codify in enacting and reenacting the language which now comprises Section 1001(a)." Id.
387 Bukro, supra note 178 ("The IRS wanted Blacklidge to pay for the cleanup from savings, or after-tax dollars.")
388 STAFF OF J. COMM. ON TAXATION, 104TH CONG., DESCRIPTION OF REVENUE PROVISIONS CONTAINED IN THE PRESIDENT'S FISCAL YEAR 1997 BUDGET PROPOSAL (RELEASED ON MARCH 19, 1996), JCS-2-96, at 50 (Comm. Print 1996). For the exceptions under conventional wisdom to current deduction of remediation costs of owner-caused contamination, see supra text accompanying notes 28-29;

Generally, costs incurred for new buildings or for permanent improvements made to increase the value of any property (including amounts incurred to prolong the useful life of property or to adapt property to a new or different use) are not currently deductible, but must be capitalized. This general capitalization requirement covers both purchases and improvements to currently owned assets, but does not apply to repairs (which are generally deductible when incurred with respect to business and investment property).

In a ruling issued in 1994 (Revenue Ruling 94-38), the IRS concluded that certain costs incurred to clean up land and groundwater are currently deductible as business expenses. That ruling only
the 1997 legislative history of Section 198.\footnote{389}

The Joint Committee staff description and the Section 198 legislative history recite a few currently deductible repairs and capital expenditures general principles and then the holdings of post-\textit{INDOPCO} remediation rulings\footnote{390} with no explanation of underlying theory or attempts at reconciling superficially disparate results. First they contrast current deductible "incidental repairs" with "capital expenditures" which either materially add to the value, substantially prolong the useful life, or change the use of the taxpayer’s property having a life extending beyond the taxable year. The description and legislative history also cite \textit{INDOPCO, Inc. v. Commissioner}\footnote{391} for the proposition that expenditures producing significant economic benefits to the taxpayer extending beyond the current year must be capitalized to match such expenditures with the income produced.

The Joint Committee staff report and the Section 198 legislative

\begin{quote}
addressed cleanup costs incurred by the same taxpayer that contaminated the land, rather than someone who acquired previously contaminated property. Also, the cleanup was not done in anticipation of putting the land to a new use. Additionally, the ruling concluded that the cost of monitoring equipment with a useful life beyond the year of acquisition had to be capitalized. While this ruling resolved some issues, it is still unsettled whether other remediation costs not addressed in that ruling are currently deductible or must be capitalized.
\end{quote}

\footnote{389} S. REP. NO. 105-33, at 108-10 (1997); H.R. REP. NO. 105-220, at 485-86 (1997) (Conference Report). The only change from the 1996 Joint Committee description in the 1997 committee report was from "more recently" to "in 1995" in the last paragraph of these otherwise identical passages.

\footnote{390} H.R. REP. NO. 105-34, at 485 (1997).

\footnote{391} 503 U.S. 79, 87-88 (1992). See generally Lee et al., \textit{supra} note 100, at 643 n.36. The tax common law as to taxation of asbestos cleanup costs came to the fore in the aftermath of the Supreme Court’s 1992 decision in \textit{INDOPCO}. See Wechsler Letter, \textit{supra} note 359. This should be no surprise. The Service, as part of an Industry Specialization Program dealing with audits of large corporations, early listed the proper tax treatment of asbestos abatement expenditures as a "significant issue." See John J. Monaco, Executive Director Coordinated Examination Programs, \textit{Industry Specialization (ISP): Opportunities To Relieve Corporate Tax Burden} (Dec. 22, 1992), available at 92 TNT 256-17 (Dec. 24, 1992). This tact naturally generated audits of currently deducted asbestos remediation costs, leading to, first, two administrative rulings arising from such audits and then, more recently, two judicial opinions as to the tax treatment of asbestos remediation. See Tech. Adv. Mem. 92-40-004 (June 29, 1992); Tech. Adv. Mem. 94-11-002 (Nov. 19, 1993); Norwest Corp. v. Comm’r, 108 T.C. 265 (1997); Dominion Res., Inc. v. United States, 219 F.3d 359 (4th Cir. 2000).
history point out that the regulations “do not set forth a method of determining how and when value has been increased.”392 They continue that the tax court in Plainfield-Union Water Co. v. Commissioner393 had compared value after the expenditure with value before the condition necessitating the expenditure: “an expenditure which returns property to the state it was in before the situation prompting the expenditure arose, and which does not make the relevant property more valuable, more useful, or longer-lived [then before such event], is usually deemed a deductible repair.”394 The repair versus “increase in value” factor roughly corresponds with future benefit, although an expenditure may increase the property in value without increasing its useful life. Early on the courts acknowledged that most repairs result in an increase in value, at least to the taxpayer,395 otherwise it would not be economical to undertake the expense.396

The classic decision in Illinois Merchants Trust Co. defined a “repair” as “to restore to sound state or to mend.”397 The tax court began to analyze whether the expenditure increased the useful life of the property or made it more valuable than it had been before the event necessitating the expenditure,398 culminating in the restoration principle of the landmark tax court decision in Plainfield-Union Water Co. v. Commissioner.399 There the taxpayer was a public water company seeking to deduct the costs of replacing the lining in a water main after a switch from neutral well water to acidic river water caused tuberculation, reducing the carrying capacity of the pipe. The government asserted that the value of the piping to the taxpayer was materially increased by the expenditure. The tax court replied that “any properly performed repair adds value as compared with the situation existing immediately prior to that repair. The

394 Id. at 337.
395 Black Hardware Co. v. Comm’r, 39 F.2d 460 (5th Cir.), cert. denied, 282 U.S. 841 (1930) (capitalized expenditures which did not increase value or prolong useful life of the item in question but made it more valuable to taxpayer).
396 See William L. Raby, IRS Splits on “General Plan of Renovation” Argument, 97 TNT 20 (July 31, 1997).
398 Midland Empire Packing Co. v. Comm’r, 14 T.C. 635, 639, 641 (1950) (oilproofing meat packing basement after seepage from nearby oil wells so federal meat inspectors would not shut down packing plant).
proper test is whether the expenditure materially enhances the value, use, life expectancy, strength, or capacity as compared with the status of the asset prior to the condition necessitating the expenditure.\(^{400}\)

Revenue Ruling 94-38,\(^{401}\) relying on Plainfield-Union Water Co. v. Commissioner,\(^{402}\) stated that the appropriate test for determining whether expenditures increase the value of the damaged property and thus must be capitalized is a comparison of “the status of the asset after the expenditure with the status of that asset before the condition arose that necessitated the expenditure (i.e., before the land was contaminated by X’s hazardous waste).”\(^{403}\) According to the author of the ruling it was not meant to apply to asbestos remediation,\(^{404}\) but such pronouncement is not binding.\(^{405}\)

The description and committee report next set forth the holdings of several post-INDOPCO toxic waste technical advisory memorandums (“TAM’s”) in which the Service declined to apply the Plainfield Union valuation test and instead required asbestos insulation removal costs to be capitalized under a future benefits analysis: “the asbestos removal eliminated human health risks, reduced the risk of liability to employees resulting from the contamination, and made the property more marketable.”\(^{406}\) A subsequent TAM required the capitalization of asbestos removal and replacement costs in the converting of a boiler room to garage and office space, while permitting current deduction of the

\(^{400}\) Plainfield-Union Water Co., 39 T.C. at 338. Note that this doctrine is seen as starkly contrasted with a doctrine discussed in detail later in this Article, the General Plan of Rehabilitation Doctrine. See Mary Lou Hopun, To Expense or To Capitalize? The Impact of Federal Income Tax Treatment of Environmental Cleanup Costs under CERCLA, 19 U. DAYTON L. REV. 679, 688-89 (1994).

\(^{401}\) 1994-1 C.B. 35.

\(^{402}\) 39 T.C. at 338.


\(^{404}\) See Marlis L. Carson, Environmental Cleanup Ruling Has Narrow Impact, Says IRS’ Feldstein, 94 TNT 155-6 (Aug. 9, 1994); see generally Sommella, supra note 371, at 377 n.161.

\(^{405}\) See Armco, Inc. v. Comm’r, 87 T.C. 865, 867 (1986) (views of drafter of regulation not relevant as to meaning; “his opinion on the intended meaning . . . would be only one among a number of opinions held by individuals responsible for the adoption of the regulation . . . . [n]o one’s personal views can be accepted as a pronouncement of the intended meaning of the regulation”). This sound result is supported by the notion of institutional competency enunciated by William D. Popkin, Symposium on Statutory Interpretation: Foreword: Nonjudicial Statutory Interpretation, 66 CHI.-KENT. L. REV. 301, 307, 309-10 (1990).

encapsulation costs of asbestos insulation in an adjacent warehouse. In fact, the Service had initially resisted the Plainfield-Union Water Co. restoration principle, but then reluctantly accepted it, although first attempting to limit the rule to relatively sudden, unexpected, or unusual external factors and then conversely to where the property has progressively deteriorated.

The Joint Committee on Taxation ("JCT") description and Section 198 legislative history do not include TAM 93-15-004, the PCP cleanup TAM, which required capitalization of soil remediation but allowed amortization over the life of the taxpayer's chief operating asset. Rather they summarize Revenue Ruling 94-38. The ruling first considered the potential improvement to the land and, in an about face from that TAM, explicitly accepted the Plainfield Union valuation analysis, comparing the value of the land immediately before the contamination with its value after remediation. The ruling concluded that by returning the property to its original state, the treatment failed to improve the land. Nor did the "expenditures . . . prolong the useful life of the land, nor . . . adapt the land to a new or different use." Significantly for purposes of this Article, Revenue Ruling 94-38 also reasoned that:

Since the land is not subject to an allowance for depreciation, amortization, or depletion, the amounts expended to restore the land to its original condition are not

\[\text{\footnotesize\textsuperscript{410}}\] Plainfield-Union Water Co. v. Comm'r, 39 T.C. 333, 340-41 (1962), non-acq. 1964-2 C.B. 8. Rev. Rul. 94-38, 1994-1 C.B. at 37, specifically noted that Rev. Rul. 88-57, 1988-1 C.B. 8, was modified to the extent that it implied that the value test established in Plainfield-Union Water Co. cannot be an appropriate test for cases other than those in which there is a sudden and unanticipated damage to an asset.
\[\text{\footnotesize\textsuperscript{412}}\] Hearings on Miscellaneous Revenue Issues Before the Subcomm. on Select Revenue Measures of the House Comm. on Ways & Means (Part 2), 103d Cong. 1701 (prepared statement of Professor John Lee).
\[\text{\footnotesize\textsuperscript{413}}\] 1994-1 C.B. 35.
\[\text{\footnotesize\textsuperscript{414}}\] Id. ("During and after the remediation and treatment, the taxpayer will continue to use the land and operate the plant in the same manner as it did prior to the cleanup except that it will dispose of hazardous waste in compliance with environmental requirements.").
subject to capitalization under 263(a)(2). Accordingly, the expenses incurred by X for the soil remediation and ongoing groundwater treatment do not constitute capital expenditures under 263.\textsuperscript{415}

The implicit reasoning is that capitalization without amortization would distort the taxpayer's income more than a current deduction.\textsuperscript{416} Only that rationale explains the ruling's capitalization of costs allocable to constructing a groundwater treatment facility, which then was depreciable, while allowing current deduction of the soil remediation expenditures and ongoing water treatment expenditures. Assuming that the pumping facility would be useless and hence valueless once the ground water was cleaned up, its costs too should have been deductible under a \textit{Plainfield Union} restoration test.\textsuperscript{417}

The Joint Committee staff report and the committee reports accompanying Section 198 also describe TAM 95-41-005, which held that hazardous waste remediation costs were not deductible under Section 162 by a taxpayer who "acquired the land in a contaminated state."\textsuperscript{418} The TAM limited the \textit{Plainfield Union} or "restoration principle" of Revenue Ruling 94-38 to where "the taxpayer acquire[s] the property in a clean condition, contaminate[s] the property in the course of its everyday business operations, and incur[s] costs to restore the property to its condition at the time the taxpayer acquired the property."\textsuperscript{419}

The "restoration principle" is dubious in any event,\textsuperscript{420} but the TAM, in citing \textit{Mt. Morris Drive-In Theatre Co. v. Commissioner},\textsuperscript{421}

\textsuperscript{415} Id.
\textsuperscript{416} See Glenn R. Carrington, \textit{Capitalization after INDOPCO}, 53-2 N.Y.U. ANN. INST. ON FED. TAX'N §§ 25.01-.05 (1995); accord Lee et al., \textit{supra} note 100, at 639-40 n.21.
\textsuperscript{417} 1994-1 C.B. 35.
\textsuperscript{419} Id.
\textsuperscript{420} See Black, \textit{Saving the Green}, \textit{supra} note 378, at 682-84.
\textsuperscript{421} 25 T.C. 272 (1955), \textit{aff'd per curiam}, 238 F.2d 85 (6th Cir. 1956).

\[It\] was obvious at the time when the drive-in theatre was constructed, that a drainage system would be required to properly dispose of the natural precipitation normally to be expected, and that until this was accomplished, petitioner's capital investment was incomplete. In addition, it should be emphasized that here there was no mere restoration or rearrangement of the original capital asset, but there was the acquisition and construction of a capital asset which petitioner had not previously had, namely, a new drainage system.
alluded to a sounder basis for requiring a taxpayer to capitalize hazardous waste remediation costs when it knowingly purchases property in a contaminated state. *Mt. Morris Drive-In Theatre Co.* in effect holds that a cost incurred after acquisition, but anticipated at such time, must be capitalized as an acquisition cost under the rationale that until the anticipated cost is incurred the taxpayer’s investment is not complete.\(^{422}\) The tax court used reasoning reminiscent of the *Arrowsmith* doctrine.\(^{423}\) “If petitioner had included in its original construction plans an expenditure for a proper drainage system no one could doubt that such an expenditure would have been capital in nature.”\(^{424}\) In such event a rational taxpayer discounts her original purchase price for the anticipated costs.\(^{425}\) Failure to treat such anticipated expenditure as part of the purchase price would violate the rule of tax parity.\(^{426}\)

From this ultimately not quite “contemporary legal context,”\(^{427}\) Senate Finance Committee supporters of a tax deduction for brownfield remediation concluded that while a property owner who contaminated its property could deduct the cleanup costs, “in a strange twist of logic, someone who buys an environmentally damaged piece of property and cleans up that property is not allowed to expense these cleanup costs, but instead must capitalize the cost and depreciate the cleanup expense over

\(^{422}\) *Id.* at 274.

\(^{423}\) Lee, *Start-Up Costs, supra* note 366, at 30 n.121; cf. Bayles & Rich, *supra* note 383, at 284 (“Acquisition of a building and its immediate, substantial renovation is difficult to view as anything other than a single completed transaction.”).

In January, 1996, the IRS revoked and superseded TAM 9541005 (PLR 9627002). Noting that the company’s contamination of the land and liability for remediation were unchanged during the break in ownership by the county, the IRS concluded that the break in ownership should not, in and of itself, operate to disallow a deduction under section 162.

\(^{424}\) *Mt. Morris Drive-In Theatre Co.*, 25 T.C. at 274.

\(^{425}\) Rubin et al., *supra* note 384, at 11-15.

\(^{426}\) *See infra* notes 447-51 and accompanying text.

\(^{427}\) *See supra* note 386. The Joint Committee Staff model for this “legislative history” had been prepared prior to *Norwest Corp. v. Comm’r*, 108 T.C. 265 (1997), which was handed down subsequently, but prior to the committee prints, which were not updated.
many years." Similarly if the contaminated property is used for a new purpose after remediation the cleanup costs would be capitalizable. Commentators also scored the perceived disparity and the seeming favoring of asbestos encapsulation over asbestos removal.

D. Subsequent Judicial Developments

1. Introduction

Three major decisions involving environmental cleanup costs were decided either contemporaneously or subsequently—Norwest Corp. v. Commissioner, Dominion Resources, Inc. v. United States, and United Dairy Farmers, Inc. v. United States. Norwest Corp.'s significance is two-fold. (a) It applies the Plainfield Union test before the event and after the repair to remediation of asbestos inside a building from its construction by pegging the "before" to before the taxpayer discovered the health hazards of the asbestos, rather than following the Service's argument that there is no "before" because the building always contained asbestos. The tax court overturned this part of its opinion on the parties' stipulation that the asbestos remediation added no value to the property—any new insulation is less effective than asbestos which also is an excellent fire retardant. (b) Norwest Corp. held, however, that because the asbestos remediation was undertaken due to a remodeling of the building, the costs had to be capitalized under the "general plan of rehabilitation" doctrine. Note that usually there is not a sufficient release of asbestos

429 143 CONG. REC. S860 (remarks of Senator Alfonse D'Amato, R-N.Y.).
430 Black, supra note 70, at 1334-35; Lester Droller, IRS Continues Flawed Analysis of Treatment of Environmental Cleanup Costs: TAM 94-11-002, 94 TNT 88-41 (May 6, 1994). The distinction between removal and encapsulation has also been criticized as tenuous. Sommella, supra note 371, at 384.
434 The parties also disagree as to whether the Plainfield-Union test is appropriate for determining whether petitioner's asbestos removal expenditures are capital. Petitioner contends that it is the appropriate test because the condition necessitating the asbestos removal was the discovery that asbestos is hazardous to human health. Accordingly, until the danger was discovered, petitioner argues that the physical
within a building to trigger environmental concerns until demolition or remodeling disturbs the dried out ("fragile") asbestos insulation, etc., or asbestos floor tiles or drywall taping are removed in the remodeling.

*Dominion Resources, Inc.* declined to place "the focus on how much value an improvement adds to property." Rather the Fourth Circuit focused on the nature of the improvement.

If the improvement permits the property to be utilized in a different way, the improvement is most appropriately

presence of the asbestos had no effect on the building’s value. Only after the danger was perceived could the contamination affect the building’s operations and reduce its value.

Respondent, on the other hand, argues that the discovery that asbestos is hazardous and that the Douglas Street building contained that substance is not a relevant or satisfactory reference point. Respondent contends that the Plainfield-Union test does not apply herein because a comparison cannot be made between the status of the building before it contained asbestos and after the asbestos was removed; since construction, the building has always contained asbestos. In cases where the Plainfield-Union test has been applied (such as *Oberman Manufacturing Co. v. Comm‘r*, 47 T.C. 471, 483 (1967); *American Bemberg Corp. v. Comm‘r*, 10 T.C. 361, 370 (1948), aff’d. 177 F.2d 200 (6th Cir. 1949); and *Illinois Merchants Trust Co. v. Comm‘r*, 4 B.T.A. 103 (1926)), respondent continues, the condition necessitating the repair resulted from a physical change in the property’s condition. In this case, no change occurred to the building’s physical condition that necessitated the removal expenditures. The only change was in petitioner’s awareness of the dangers of asbestos. Accordingly, respondent argues that the Plainfield-Union test is inapplicable, and the Court must examine other factors to determine whether an increase in the building’s value occurred.

The parties have stipulated that the asbestos removal did not increase the useful life of the Douglas Street building. We recognize (as did petitioner) that removal of the asbestos did increase the value of the building compared to its value when it was known to contain a hazard. However, we do not find, as respondent advocates, that the expenditures for asbestos removal materially increased the value of the building so as to require them to be capitalized. We find, however, that had there been no remodeling, the asbestos would have remained in place and would not have been removed until a later date. In other words, *but for* the remodeling, the asbestos removal would not have occurred.

108 T.C. at 282-4.

considered a capital expenditure. If the improvement only restores value to the property that existed prior to deterioration or to a discrete event that damaged the property, the improvement may be properly treated as a deductible repair expense.\textsuperscript{436}

Significantly, the Fourth Circuit noted that the cost of the cleanup, "$2.2 million, may have dwarfed the value of the property itself prior to the cleanup—DLI paid $870,167 for it, and the average appraised value was less than $1.6 million."\textsuperscript{437} After remediation, the appraised value was $9 million.\textsuperscript{438} Rather than analyzing this case as a discounted purchase price, the Fourth Circuit applied a substantial alteration in character analysis.\textsuperscript{439}

The transferor subsidiary and the transferee parent corporation (the taxpayer) in Dominion Resources, Inc. filed a "consolidated return" under which, during the tax years in question, a group of related corporations do not report any gain or loss as to an intercompany transfer of property until its disposition outside the group.\textsuperscript{440} In effect the timing of recognition was on a single entity basis, but character of such gain or loss was determined on a separate entity approach.\textsuperscript{441} After 1995 the regulations were amended to adopt a "matching rule" under which character and other attributes as well as timing are determined on a single entity basis.\textsuperscript{442} Clearly at least

\textsuperscript{436} Id. at 371.
\textsuperscript{437} Id. at 372.
\textsuperscript{439} Dominion Res., Inc., 219 F.3d at 372.
\textsuperscript{440} Dominion Res., Inc., 48 F. Supp. 2d at 548; Treas. Reg. §1.1502-13 (1966). The transfer was necessitated because the utility company subsidiary could not under local law develop the property. And further, pursuant to local law, the property had to be transferred at 50% of appraised value. Dominion Res., Inc., 48 F. Supp. 2d at 548.
\textsuperscript{442} The prior intercompany transaction system used a deferred sale approach that treated the members of a consolidated group as separate entities for some purposes and as a single entity for other purposes. In general, the amount, location, character, and source of items from an intercompany transaction were given separate entity treatment, but the timing of items was determined under rules that produced a single entity effect. The matching rule of the proposed regulations expands single entity treatment by requiring the redetermination of the attributes (such as character and source) of items to produce a single entity effect . . . . The Treasury and the IRS believe that single entity treatment of both timing and attributes generally results in a clear reflection of
under the revised regulations, the parent would stand in the shoes of the transferee subsidiary and thus come within Revenue Ruling 94-38.

United Dairy Farmers, Inc. considered the plight of a taxpayer purchasing contaminated property, unknowing of the contamination. The trial court held that the before-versus-after test of Revenue Ruling 94-38 did not apply since the ground was contaminated when purchased (a convenience store with abandoned underground gasoline tanks that had been paved over). The taxpayer paid more for the properties than they were worth in a contaminated state. The district court unconvincingly found that the remediation costs increased the value because the taxpayer overpaid for the properties:

[H]ad the prices of the properties been adjusted to reflect the contamination on the properties, its remediation expenditures would have increased the values of the properties, and, therefore those costs would have to have been capitalized. The Court sees no reason for the taxpayer’s subjective belief as to the value of the property to control the determination of whether its remediation costs are deductible or whether they must be capitalized.

As discussed below, this reasoning is inconsistent with (a) the before (the effect of) the contamination is discovered approach in Norwest Corp., and (b) the better approach of avoiding distortion of income arising from no depreciation (unless trumped by discount of purchase price for anticipated cleanup costs).

In affirming the district court’s result, the Sixth Circuit agreed that the restoration principle was inapplicable to defects present when the taxpayer purchased the property and that cleanup costs of $260,000 as to property purchased for $760,000 was not an “incidental” expenditure. The Sixth Circuit went on to “harmonize” Dominion Resources, Inc., Plainfield-Union Water Co., and Revenue Ruling 94-38:

\[\text{Treas. Reg. } ^*_{\text{1.1502-13(a)(2)(1995); Preamble to Final Regulations Consolidated Groups and Controlled Groups: Intercompany Transactions and Related Rules, 60 Fed. Reg. 36671, 36673 (July 18, 1995).}

443 United Dairy Farmers, Inc. v. United States, 267 F.3d 510, 513 (6th Cir. 2001).


445 United Dairy Farmers, Inc. 267 F.3d at 518.
That is, three elements must be satisfied for a valid deduction under §162 for environmental cleanup costs: first, the taxpayer contaminated the property in its ordinary course of business; second, the taxpayer cleaned up the contamination to restore the property to its pre-contamination state; third, the cleanup did not allow the taxpayer to put the property to a new use. In *Dominion Resources*, the taxpayer did not satisfy the third element, because the cleanup allowed the taxpayer to put the property to new use as a real estate development. In this case, failure to satisfy the first element is sufficient for rejecting UDF's soil remediation claim.\(^{446}\)

2. Criticism of General Plan of Rehabilitation as Applied in *Norwest Corp.*

The most defensible policy for the general plan of rehabilitation doctrine is close to the taxpayer's argument in *Moss*. The doctrine is supported by the "rule of tax parity," between self-construction and purchase of a new facility—enunciated by the Supreme Court in *Commissioner v. Idaho Power Co.*\(^{447}\)—so that a taxpayer self-constructing a plant should not be tax advantaged over a taxpayer purchasing a plant or hiring an independent contractor to perform the construction work. In *Idaho Power Co.* Justice Blackmun justified capitalization of depreciation on vehicles used to transport employees of the utility company to a remote self-construction job site because a hypothetical contractor would have included such costs in her contract price to the taxpayer for the construction of the plant.\(^{448}\) This rule is based on the tax policies of horizontal equity (similarly situated taxpayers should be taxed the same\(^{449}\)) and neutrality (tax rules should not drive business

\(^{446}\) *Id.* at 519 (citation omitted).


\(^{448}\) Section 198 covers such costs, as well as those capitalized under Section 263A, but otherwise carves out depreciable assets.

decisions\textsuperscript{450}).\textsuperscript{451} Jones v. Commissioner\textsuperscript{452} came close to expressly adopting this rationale as underpinning the general plan of rehabilitation doctrine.\textsuperscript{453} There the Fifth Circuit applied the rehabilitation doctrine to the restoration of a historical building in the New Orleans "French Quarter" which was in complete disrepair.\textsuperscript{454} The Jones court reasoned that if the city had permitted the taxpayer to demolish the property as he requested,\textsuperscript{455} he would have constructed an entirely new building, the expense of which would not have been deductible.\textsuperscript{456} Accordingly, the renovation expenditures should not be currently deductible either.\textsuperscript{457}

Under the rule of tax parity, for instance, while replacing small items alone, such as shingles and window panes, would be currently deductible, their cost should be capitalized when part of an owner's rehabilitation of a structure. If such costs were incurred by a contractor in a turnkey project, she would include these items in her sales price. Such costs would then be part of the purchaser's overall cost in the construction project and be depreciated as part of the improvement.\textsuperscript{458} In contrast, in a

\begin{itemize}
  \item Because of the time value of money—real riskless interest rates are positive—a deduction taken today is worth more than one taken a year from now. Hence if an expense incurred to produce future income can be deducted from current income rather than postponed until it has borne its fruits, taxpayers will have an incentive to incur such expenses earlier than they would if there were no income tax; and tax law seeks, to the extent compatible with revenue and distributive objectives, to interfere as little as possible with the pattern of expenditures that would exist in the absence of taxation.
  \item Fishman v. Comm'r, 837 F.2d 309, 312 (7th Cir. 1988).
  \item Edward Yorio, The President's Tax Proposals: A Major Step in the Right Direction, 53 FORDHAM L. REV. 1255, 1262 (1985) ("In a sense, the neutrality criterion is the economic complement of the equality criterion: Where the equality criterion insists on equal tax treatment for reasons of morality, the neutrality criterion demands equal tax treatment for reasons of efficiency.").
  \item 242 F.2d 616 (5th Cir. 1957).
  \item See Jones, 242 F.2d at 617.
  \item In this case, the taxpayer did not want to make the repairs. He wished instead to demolish the structure and rebuild upon it. The city, however, refused to allow the taxpayer to demolish the property because it was considered a historical building. See Jones, 242 F.2d at 617.
  \item See id. at 620.
  \item See id.
  \item Under component depreciation some of such costs could be broken out separately.
  \item Lee, Start-Up Costs, supra note 366, at 34-35. However, such a method is not permitted for property depreciated under Section 168.
\end{itemize}
fair market value purchase of an asbestos remediated property, the seller would bear the cost of asbestos remediation because a new, comparable replacement building or machine would have no asbestos insulation and hence no cost of remediation. The seller could not economically include such a remediation cost in her sales price and be competitive with a comparable new building or machine. The seller may be allowed an ordinary deduction for such remediation.

The rule of parity also in effect applies in reverse so that a taxpayer employing an independent contractor is afforded tax parity with a taxpayer self-constructing an item. Extending this thought, assume that a taxpayer purchasing a remodeled and remediated building without asbestos insulation for use in her business would not functionally include the seller’s cost of remediating the asbestos insulation in her cost basis in the remodeled building because the seller could not economically pass on such cost to her but would instead have to absorb the remediation cost himself. (Such remediation costs could not be passed on because competing new or used property that never contained asbestos products would be that much cheaper.) Accordingly, a taxpayer self-remediating the asbestos insulation should not have to capitalize her cost under the general plan of rehabilitation doctrine even when undertaken in conjunction with remodeling as in Norwest Corp. As Glenn Carrington pointed out while still in the Chief Counsel’s office:

The plan of rehabilitation doctrine is secondary to failure under one of the four prongs of the [traditional repair versus replacement] test. “Rehabilitation alone in my view does not make you capitalize the costs; you must fail under one of these four prongs” . . . . The key is the general test, and whether individual repair expenditures would come together to represent a capital investment is a “facts and

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459 Cf. Coolidge, supra note 371, at 792.
460 Michelle Kamen Friedman & Avi O. Liveson, Rulings and Legislation Seek to Clarify the Tax Treatment of Environmental Cleanup Costs, 26 J. REAL EST. TAX’N 121, 125 n.8 (1999). Whether disposition costs are ordinary is debatable. Walling’s Estate v. Comm’r, 373 F.2d 190 (3d Cir. 1967), rev’ng 45 T.C. 111 (1965). The origin of the claim doctrine, requiring capitalization, applies to disposition costs as well as acquisition costs. Helgerson v. Comm’r, 426 F.2d 1293 (8th Cir. 1970). Such capitalized costs may cause the remediated property to be sold at a loss which could be ordinary under Section 1231.
461 Iowa-Des Moines Nat’l Bank v. Comm’r, 592 F.2d 433, 435-36 (8th Cir. 1979) (costs of purchased credit reports could be currently deducted because “had taxpayers directly acquired credit information, capitalization of the expense, including employee wages, would not have been required”).
The holding in *Norwest Corp.* that otherwise deductible asbestos remediation costs must be capitalized as part of a general plan of rehabilitation also results in economic inefficiency. The tax court noted that combining the asbestos remediation with remodeling was less expensive than carrying out each separately. Now tax advisers may be expected to recommend that asbestos remediation be performed apart from remodeling, presumably before. As long as the two activities are not linked under the step transaction doctrine, the asbestos remediation would be currently deductible under the intimations in *Norwest Corp.* rather than being depreciable over thirty-nine years. The tax savings likely would more than offset any increased pre-tax costs of separately remediating and remodeling. Thus, the tax consequences will drive the structuring of the asbestos remediation.

Assume, as *Norwest Corp.* holds, that a taxpayer in Scenario A remodeling a building and hence hastening asbestos remediation must capitalize the asbestos remediation costs and then depreciate them straight-line over thirty-nine years, but can take a current deduction if the

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462 J. Andrew Hoerner, *Service Ponders Environmental Cleanup Costs; Carrington Uncertain of Outcome*, 93 TNT 102-10 (May 12, 1993) (discussing Carrington’s 4 prongs, which are as follows:

1. *Increase in value.* The remediation costs must not materially add value to the property prior to the condition (for example, discharge of hazardous waste) that triggered the remediation efforts. *See* Oberman Mfg. Co. v. Comm’r, 47 T.C. 471 (1967); Plainfield-Union Water Co. v. Comm’r, 39 T.C. 333 (1962); Rev. Rul. 94-38.


4. *Incidental cost.* The remediation costs must not be more than incidental. Treas. Reg. § 1.162-4 provides that the cost of incidental repairs can be deducted. In TAM 9315004, the IRS viewed soil remediation costs as not “incidental” because the expenditures were for extensive replacements of significant sections of land. However, *see* Rev. Rule. 94-38 (discussed below), where extensiveness of the cleanup efforts seemingly was irrelevant. *See* also Rev. Rul. 2001-4, where the IRS ruled that costs of heavy maintenance of aircraft airframe are not required to be capitalized unless part of a plan of rehabilitation, modernization, or improvement to the airframe.

*INDOPCO’s effect on the four-prong test.* Based on various IRS pronouncements, the “significant future benefits” test of *INDOPCO* is an additional factor or prong that may have to be overcome in order to deduct environmental remediation costs.)
asbestos remediation is taken apart from a remodeling. (The apparent
difference is the erroneous application of the "general plan of
rehabilitation" doctrine because otherwise, according to Norwest Corp.,
no value or increase in useful life is added by restoration to an asbestos-free
state.) Taxpayers will instead simply structure the transaction differently.

In Scenario B the bank holding company, instead of remodeling,
removes asbestos from the bank building, reinsulates, and sells it to
another. At that point the asbestos remediation will either be currently
deductible or possibly reduce the gain or increase the loss on the sale by
the bank holding company of the asbestos remediation. Then the taxpayer
can lease, buy, or build another bank building at current reproduction fair
market value rates. (This hypothetical ignores any market or cost
problems in obtaining another branch bank permit.) The taxpayer could
then have an ordinary loss for the asbestos remediation under the
restoration principle and a new fair market value basis in the replacement
modern bank building.

In scenario C the taxpayer forgoes remodeling the bank building
and instead rewraps or encapsulates the asbestos insulation as needed in
the future (and never more than twenty-five percent at a time\textsuperscript{463}). While
this approach perhaps best fits the clear reflection of an income mandate,
it probably is the more contrary to environmental policies,\textsuperscript{464} social

\textsuperscript{463} In Tech. Adv. Mem. 94-110-02 (Nov. 19, 1993), the taxpayer was engaged in the sale
of rental warehouse space and related services with facilities consisting of a warehouse
and a boiler house with heating equipment that had not been used for several years. The
boiler house (and its equipment) and warehouse were treated as one asset for purposes of
depreciation. To secure a bank loan for expansion of its facility, the taxpayer was
required by its lender to abate asbestos in its boiler house and warehouse. The taxpayer
removed all asbestos-containing materials from its boiler house converting it into a two-
truck garage and office space which it rented to a related freight company. The taxpayer
engaged an asbestos contractor to perform asbestos encapsulation in the warehouse area,
re-.wrapping and encapsulating the damaged or punctured areas of asbestos-containing
pipe insulation which amounted to less than 25\% of the total pipes in the warehouse. The
TAM required capitalization of the remediation as to the boiler house but not as to the
warehouse. The TAM held that the costs incurred to remove asbestos in the warehouse
increased its value, use, and capacity as compared to its status in its original asbestos-
containing condition. It allowed a current deduction as to the re-.wrapping costs,
reasoning that they constituted incidental repair costs that neither materially added to the
value of its property nor appreciably prolonged its life. The application of a canvas or
plastic wrapping over damaged pipe insulation reduced, but did not eliminate, the threat
of exposure to airborne asbestos fibers. Moreover, because of the continued presence of
asbestos, the expenditure did not enable the taxpayer to operate on a changed, more
efficient, or larger scale. See Carrington, supra note 376, at 841.

\textsuperscript{464} There are generally three accepted methods of asbestos abatement: (1) encapsulation;
(2) removal; and (3) enclosure. Encapsulation involves the coating and sealing of walls,
policies (a remodeled bank building hiring local workers might help to stabilize a neighborhood), and probably even sound business policies.

3. Critique of United Dairy Farmers, Inc.

The result in United Dairy Farmers, Inc. is incorrect because the purchaser did not discount its purchase price for the remediation costs. Under the approach of Norwest Corp. the remediation added no value compared to before the taxpayer discovered the contamination. Of course, the two authorities conflict. Norwest Corp. is more sound.

As discussed further below, the better approach is to determine whether the remediation costs would be depreciable. The remediation of the soil would result in a nondepreciable addition to basis so that capitalization is not appropriate unless the costs were anticipated at purchase and reflected in the purchase price. They were not so reflected in United Dairy Farmers, Inc..

4. Better Doctrinal Ways

a. Post-INDOPCO Analysis of a Section 162 Deduction

Under INDOPCO, future benefits are a strong indicator of a capital expenditure, but "incidental" future benefits do not mandate capitalization. The better view is that the determination of whether future benefits require capitalization is ascertained under a balancing test: whether the burdens to the taxpayer (and to the government in contesting the taxpayer's current deduction of the expenditures in question) of such capitalization with slow or no depreciation outweigh the benefits to the government of more exact matching. Notwithstanding the restoration concept, most repairs and cleanups of toxic waste do yield future benefits. Many traditional repair authorities can be justified upon one of the "rough justice" balancing exceptions to future benefits capitalization, e.g., (a) small in amount, (b) ceilings, pipes, or other structures. Removal involves the elimination of asbestos from the property, while enclosure involves the construction of a barrier between the asbestos and the environment. Environmentalists prefer removal or perhaps enclosure over encapsulation.

See supra notes 17 and 131.

Brown, Saving the Green, supra note 378, at 681.

Where the burden on both taxpayers and Service to account for each item of property separately is great, and the likelihood of distortion of income is nil or minimal, the Code is not so rigid and so impracticable that it demands that nevertheless all items be accounted for.
short term or variable benefit,\textsuperscript{468} or (c) regularly recurring.\textsuperscript{469} None of

\begin{quote}
individually, no matter what the trouble or the onus . . . . The burden on plaintiff, if the minimum rule is not to be followed for income tax purposes, would be heavy; at the same time, the clearer reflection of income would be exceedingly slight if there were any at all. 
\end{quote}

Cincinnati, New Orleans & Tex. Pacific Ry. Co. v. United States, 424 F.2d 563, 572 (Ct. Cl. 1970); Sharon v. Comm’r, 66 T.C. 515, 527 (1976) (dictum) ($25 fee paid for license to practice in New York was a capital expenditure. “Since the amount of the fee is small, the petitioner might, ordinarily, be allowed to elect to deduct the full amount of the fee in the year of payment, despite its capital nature. Cf. sec. 1.162-12(a), Income Tax Regs., with respect to the treatment of inexpensive tools.”), aff’d, 591 F.2d 1273 (9th Cir. 1978), cert. denied, 442 U.S. 941 (1979); Lee et al., Rough Justice II, supra note 131, at 1523-27. For repair/improvement see Ingram Indus., Inc. v. Comm’r, T.C. Memo 2000-323, 80 T.C.M. (CCH) 532 (2000) (“If we were to assume that a new automobile cost $30,000, then a 1.6-percent maintenance cost would equal $480. Relatively and comparably, the $100,000 and $480 appear, at least in size, to represent an incidental as opposed to a major repair, improvement, or procedure.”); Treas Reg. §1.162-4 (1960) (“The cost of incidental repairs which neither materially add to the value of the property nor appreciably prolong its life, but keep it in an ordinarily efficient operating condition, may be deducted as an expense.”) (emphasis added)).

\textsuperscript{468} Southland Royalty Co. v. United States, 582 F.2d 604, 616-18 (Ct. Cl. 1978); Iowa-Des Moines Nat’l Bank v. Comm’r, 592 F.2d 433, 436 (8th Cir. 1979); see generally Lee et al., Rough Justice II, supra note 131, at 1527-28. The repair improvement formulation is whether the expenditure makes the asset longer-lived. See, e.g., Plainfield-Union Water Co. v. Comm’r, 39 T.C. 333, 337 (1962).

\textsuperscript{469} Both this court and the IRS have recognized this type of regularity as something that tends to support a finding of deductibility. Because they recur every year, there is less distorting effect on income from future tax year benefits over time. In every year, that is, while Freightways will be able to reap the tax advantage of deduction for some part of the following twelve months, it will have ‘lost’ the deductions for the months covered by the prior year’s licenses, for which it has already received the benefit. In a hypothetical last year of Freightways’ corporate life, it would finally be entitled to only a prorated deduction for licenses (if any) that are acquired during that year, partially evening out the score with the first year of deductions.

U.S. Freightways Corp. v. Comm’r, 270 F.3d 1137, 1145 (7th Cir. 2001); [A]locating these expenditures among the different books is not always necessary to produce the temporal matching of income and expenditures that the Code desiderates, because the taxable income of the author or publisher who is in a steady state (that is, whose output is neither increasing nor decreasing) will be at least approximately the same whether his costs are expensed or capitalized. Not the same on any given book—on each book expenses and receipts will be systematically mismatched—but the same on average. Under these conditions the benefits of capitalization are unlikely to exceed the accounting and other administrative costs entailed in capitalization.

these exceptions to future benefits capitalization would be available as to the cleanup costs of toxic waste. However, the fundamental principle underlying all of the capitalization-expensing rules is minimum distortion of income.\textsuperscript{470} Several authorities hold that where depreciation is not available capitalization is not appropriate, because capitalization without depreciation would distort the taxpayer's income.\textsuperscript{471}

The analysis in Part IV shows that the application of the general plan of rehabilitation was incorrect in \textit{Norwest Corp.}, but it also pegged the value in the before part of the restoration principle to before the dangers of the contamination were known by the taxpayer. Under this construction of the restoration rule a current deduction would be in order where the toxic waste remediation adds no value compared to the value before such dangers were known. Similarly where a purchaser was not aware of contamination, such construction of the restoration rule would result in a current deduction since there would be no increase in value compared to before the purchaser was aware of the contamination. A better reason for allowing a current deduction is that capitalization of remediation costs in either situation results in no depreciation if soil

\textit{See generally} Lee et al., \textit{Rough Justice II}, \textit{supra} note 131, at 1529-31, 1539-43. For repair /improvement see P. Dougherty Co. v. Comm'r, 159 F.2d 269, 272 (4th Cir. 1946) ("The work done was more in the nature of a permanent betterment or restoration than a \textit{recurrent repair or upkeep}. The benefits to petitioner were to last over a period of several years, perhaps for the remaining life of the barge. It was more like putting on a new roof . . . ." (emphasis added)).

\textsuperscript{470} Lee et al., \textit{supra} note 100, at 727-28.

\textsuperscript{471} The useful life of the survey is very uncertain; as the trial judge found, the estimates in a reserve study are subject to change at any time and have to be updated every few years to take account of subsequent developments. In those circumstances, it is not compulsory to amortize such a recurring item over a fixed time-interval. Neither is it appropriate to require capitalization without amortization; such a requirement would clearly distort Southland's income.

\textit{Southland Royalty}, 582 F.2d at 618; The start-up expenditures here challenged did not create a property interest. They produced nothing corporeal or salable. They are recurring. At the most they introduced a more efficient method of conducting an old business. \textit{The government suggests no way in which they could be amortized}. The government's theoretical approach ignores the practicalities of the situation, \textit{and permits a distortion of taxpayer's financial situation}. If an expenditure, conceded of temporal value, may be neither expensed nor amortized, the adoption of technological advances is discouraged.

remediation is involved or depreciation that is too slow if a depreciable asset such as a building is involved—slow because no value is added and there is no increase in useful life of the building and, hence, of the replacement insulation. This is a principled basis for a current deduction and the only rationale that explains the result in Revenue Ruling 93-28, where the soil remediation costs were currently deductible, but the water remediation costs were not since a depreciable asset was involved:

No other aspect of § 263 requires capitalization of X’s ongoing soil remediation or ongoing groundwater treatment expenditures. These expenditures do not prolong the useful life of the land, nor do they adapt the land to a new or different use. Moreover, since the land is not subject to an allowance for depreciation, amortization, or depletion, the amounts expended to restore the land to its original condition are not subject to capitalization under § 263(a)(2).472

This no depreciation rule would be unavailable where the purchaser knew of the contamination and discounted her purchase price for the cleanup costs, since in that case such costs would be a deferred part of the purchase price.

The adaptation to a different use repair rule also is justifiable only on a rule of parity analysis. The capitalization of asbestos remediation result reached in Dominion Resources, Inc. is correct, however, unlike the result in Norwest Corp., if the taxpayer is treated as having discounted its purchase price for the cost of remediation. Where the contamination is known and the taxpayer rationally discounts its purchase price, then the remediation costs are properly capitalized under Mt. Morris Drive-In Theatre Co. v. Commissioner,473 which also is justified under a rule of

472 Rev. Rul. 94-38, 1994-1 C.B. 35; see Lee et al., Rough Justice II, supra note 131.

473 [I]t was obvious at the time when the drive-in theatre was constructed, that a drainage system would be required to properly dispose of the natural precipitation normally to be expected, and that until that was accomplished, petitioner’s capital investment was incomplete. In addition, it should be emphasized that here there was no mere restoration or rearrangement of the original capital asset, but there was the acquisition and construction of a capital asset which petitioner had not previously had, namely, a new drainage system.

25 T.C. 272, 274 (1955), aff’d per curiam, 238 F.2d 85 (6th Cir. 1965). Tech. Adv. Mem. 95-41-005 (Sept. 27, 1995) (perceptively reading Mt. Morris Drive-In Theatre Co. as an example of origin of claim doctrine); see generally Lee, Start-Up Costs, supra note
b. Section 165 Loss Deduction

An alternate approach to current deduction of toxic waste remediation costs is a "loss" under Section 165. The loss regulations provide that a deductible "loss must be evidenced by closed and completed transactions [and] fixed by identifiable events . . . ." The case law holds that a mere diminution in value does not result in such a closed transaction. In this context a closed transaction or realization is a judicial gloss ensuring that only measurable economic changes or alterations in a taxpayer's anticipated future earnings are taken into account. "A decrease in value must be accompanied by some affirmative step that fixes the amount of the loss, such as an abandonment, sale, or exchange." Asset value fluctuations are not recognized as events giving rise to objectively measurable changes in economic worth.

A commentator has suggested that Section 165 should apply to losses caused by environmental contamination or hazards when the hazard is discovered, reasoning that a change in circumstances, such as enactment of a environmental hazard cleanup law, coupled with discovery of the environmental hazards as to the taxpayer's property, results in an economic loss being sustained within the meaning of Section 165. In Tech. Adv. Mem. 97-19-007, a nuclear-powered electric utility taxpayer similarly argued that incurring an obligation to store spent nuclear fuel ("SNIF") caused it to suffer a recognizable Section 165 loss not less than the costs of constructing the SNFISF. The Service disagreed, equating such obligation with a mere diminution in value. The Service later

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366, at 30 n.121.
474 Treas. Reg. § 1.165-1(b) (as amended in 1977).
479 Coolidge, supra note 371, at 803-05.
481 [M]erely incurring the obligation to encapsulate and store the spent
conceded an analogous capitalization issue on other, strained grounds once comparable storage containers had been filled.\textsuperscript{482} Asbestos remediation, for instance, is usually distinguishable from Tech. Adv. Mem. 97-19-007. As the TAM implies and as discussed below, a taxpayer may suffer a Section 165 loss as to a component of nuclear fuel is insufficient to sustain a loss that is deductible under section 165. Further, it is well recognized for tax purposes that a mere diminution in value will not result in a deductible loss under section 165.

The regulations under sections 165 and 167 do allow a loss deduction for the permanent withdrawal of depreciable property from use in a trade or business or in the production of income. Section 1.167(a)-8(a) of the regulations provides that the withdrawal of property may be accomplished by either selling or exchanging the asset or by actual physical abandonment. The taxpayer in this case has not sold or exchanged the asset in question, the SNFISF. \textit{[T]}he nuclear power plant continues to operate . . . \textit{[T]}hus there is no abandonment of the SNFISF as part of an overall shutdown and abandonment of the nuclear power plant.

In addition, the SNFISF itself had not been abandoned within the meaning of section 1.167(a)-8(4) . . . During the years at issue . . . no casks had yet been delivered to the taxpayer, used to store spent nuclear fuel, or place on the concrete pad. Thus no casks had yet been placed in service, and therefore no abandonment loss could be predicated on the storage of spent nuclear fuel in the casts.

\textit{Id.} at 31-32. \textsuperscript{482} Upon being filled with waste and sealed, the new USTs [underground storage containers] have no remaining useful life to X. X's new USTs are used merely to facilitate the disposal of waste and therefore are similar to a material or supply that is consumed and used in operation during the taxable year. Accordingly, because X acquired, filled and sealed the new USTs all in 1998, the costs of acquiring and installing the new USTs are not capital expenditures, but are ordinary and necessary business expenses deductible under \$162. The new USTs, which are used once and then sealed indefinitely, are distinguishable from the groundwater treatment facilities in Rev. Rul. 94-38, 1994-1 C.B. 35, which are used by the taxpayer substantially beyond the taxable year.

property, such as a building, while continuing to use the property.\footnote{See Coors Porcelain Co. v. Comm'r, 52 T.C. 682, 686, 694 (1969), aff'd, 429 F.2d 1 (10th Cir. 1970); Stanley Burke v. Comm'r, 32 T.C. 775, 779-80 (1959).} Asbestos insulation when remediated is in effect abandoned, or better removed or demolished, unlike the SNFISF facility which actually had not yet been built. In \textit{Gilman v. Commissioner}\footnote{72 T.C. 730 (1979). \textit{See also} McGee Grigsby \textit{et al., Section 280B: Impediment to Environmental Remediation?}, 97 TNT 139-72 (July 21, 1997).} the tax court in dictum approved a partial demolition loss under Section 165 when part of a building was demolished. There the taxpayer demolished the roof of a one-story building used in his business so that a second floor could be added. The tax court allowed a demolition loss for the removal of the roof.\footnote{\textit{Gilman}, 72 T.C. at 742 (stating that costs of demolition now must be capitalized to the cost of the land under Section 280B).} In the process of removing the first story roof and installation of the second story floor, the taxpayer removed and scrapped several air-conditioning units and duct work (attached to the first story roof and ceiling) belonging to his tenants and reimbursed them by installing new air-conditioning units and duct work attached to the new second story roof and ceiling. The tax court distinguished the hypothetical case where the air-conditioners belonged to the taxpayer: “If the air conditioners had belonged to petitioner, any portion of their basis which had not been recovered by depreciation at the time they were scrapped would be deductible when they were scrapped, and the new air conditioners placed on the second story roof would be depreciable over their useful life.” analogously, the costs of removing asbestos insulation should be deductible, only the costs of the new installation and its installation would be capitalized.

This article asserts that paying for such removal of friable asbestos insulation or any other toxic waste remediation supplies the realization event, taking the loss from a mere diminution in value created by the discovery of the hazard to a \textit{realized} economic loss. This is a step beyond discovery of the defect. Paying such a loss also evidences the \textit{amount} of the taxpayer’s economic loss from asbestos contamination once discovered. The casualty loss rules provide substantial authority for both notions. The regulations there limit casualty loss deductions to the lesser of (1) the difference in value of the injured property immediately before and immediately after the casualty—the functional equivalent of the \textit{Plainfield-Union Water Co.} restoration principle, or (2) the adjusted basis
of such property. 487 The regulations define acceptable means of determining such difference in value as (i) a competent appraisal or (ii) the cost of repairs (which the courts often prefer as the more realistic measure 488).

The cost of repairs to the property damaged is acceptable as evidence of the loss of value if the taxpayer shows that (a) the repairs are necessary to restore the property to its condition immediately before the casualty, (b) the amount spent for such repairs is not excessive, (c) the repairs do not care for more than the damage suffered, and (d) the value of the property after the repairs does not as a result of the repairs exceed the value of the property immediately before the casualty. 489

The tax court and other tribunals usually require that the repairs actually be made to avoid abuses from inflated estimates. 490 The same rules extend to the costs of removing (a) debris caused by a storm, or (b) dead pine trees killed by an infestation of southern pine beetles. 491 Under this approach, the loss deduction is not for the costs of repairs themselves; rather the cost of repair is evidence of the amount of the economic loss in value as to the property. 492 Thus the loss deduction is allowable in the year in which the loss occurs, rather than the year in which the repairs are

488 See, e.g., Clapp v. Comm'r, 321 F.2d 12 (9th Cir. 1963); Keith v. Comm'r, 52 T.C. 41, 49 (1969).
491 Bliss v. Comm'r, 256 F.2d 533 (2d Cir. 1958); accord Stuart v. Comm'r, T.C. Memo 1961-186, 20 T.C.M. (CCH) 938 (1961); Rev. Rul. 71-161, 1971-1 C.B. 76 (considering Gen. Couns. Mem. 34,438 (Feb. 22, 1971)) ("The presence of debris on the property contributes to the loss in the fair market value of the property immediately after the casualty. Thus, the cost of debris removal may be used, like the cost of repairs, as evidence of the amount of the casualty loss sustained . . ."); Gen. Couns. Mem. 37,236 (Aug. 26, 1977); Black v. Comm'r, T.C. Memo 1977-337, 36 T.C.M. (CCH) 1347 (1977) (under restoration costs rule "an estimate of the cost of totally removing the dead trees from the property would be reasonable estimate of the loss in value of the property as a result of the 30 trees dying.").
made.\textsuperscript{493}

The tax court has extended the casualty cost of repair rule by analogy to theft losses, for instance increasing an allowable theft loss by the costs of attempted recovery of the stolen property.\textsuperscript{494} Similarly paying the asbestos cleanup costs fixes the amount of the loss from the discovery of defects from the friable asbestos insulation.\textsuperscript{495}

c. Adjusted Basis Limitation on Allowable Loss

A substantial problem in toxic waste remediation is that the costs may exceed the taxpayer's adjusted basis (this is probably more likely in chemical waste contamination and less likely in remediating in-door asbestos products or underground gasoline storage tanks). Section 165(b) limits the amount of a deductible loss under Section 165 to the taxpayer’s adjusted basis in the loss property. The rationale for such adjusted basis limitation is that "[w]here the taxpayer suffers a loss from a destruction of market value greater than the cost of the property to him, that excess of value destroyed represents unrealized appreciation. And he may not claim a deduction for such loss because he has never recognized or paid a tax on the gain."\textsuperscript{496}

The issue then arises whether the cleanup costs are taken into account in the adjusted basis limitation. The taxpayer in \textit{Waldrip v. United States}\textsuperscript{497} sought to deduct as a casualty loss both the pre-casualty

\textsuperscript{493} Treas. Reg. §§ 1.165-1(d) and 1.165-7(a)(1) provide that a loss shall be allowed as a deduction only for the taxable year in which the loss is sustained. See, e.g., United States v. S.S. White Dental Mfg. Co., 274 U.S. 398 (1927); Hickman v. Comm'r, 207 F.2d 460 (4th Cir. 1953) (deduction allowed in year of hurricane damage, not year of repairs); cf. Comm'r v. Highway Trailer Co., 72 F.2d 913 (7th Cir.), cert. denied, 293 U.S. 626 (1934) (deduction allowed in the year of fire, not year of final judgment); Kunsman v. Comm'r, 49 T.C. 62 (1967) (damage to the taxpayer's swimming pool caused by a storm in 1959 did not give rise to a casualty loss deduction in 1962 when the pool was repaired; deduction may be permitted in years after the damage was sustained only in situations in which the full extent of the loss was not, or could not be known until the subsequent year).

\textsuperscript{494} Ander v. Comm'r, 47 T.C. 592, 594 (1967) (citing Treas. Reg. § 1.165-8 which provides that the deductible amount of a theft loss is to be determined consistently with the casualty loss rules).

\textsuperscript{495} Coolidge, supra note 371, at 810.

\textsuperscript{496} Ward v. United States, 428 F.2d 1288, 1292 (Ct. Cl. 1970), cert. denied, 400 U.S. 1008 (1971). \textit{Accord} Weyerhaeuser Co. v. United States, 32 Fed. Cl. 80, 100 (1994) (depletion block, not the tree stand, was the single, identifiable property), aff'd in part, rev'd in part, 92 F.3d 1148 (Fed. Cir. 1996), cert. denied, 519 U.S. 1091 (1997).

adjusted basis and capitalized cleanup costs. The taxpayer argued that
clean-up expenses have been generally recognized as constituting a
portion of the casualty loss and further, that because clean-up expenses are
an out-of-pocket expense, they are proper additions to basis in arriving at
the adjusted basis for determining the limits of the allowable deduction.
The taxpayer soundly contended that allowing a deduction for out-of-
pocket expenses in addition to his pre-casualty adjusted basis in the
property would not defeat the purpose for the basis limitation rule because
he would not be claiming a deduction for unrealized appreciation; further
such allowance would more nearly fulfill the purpose behind the statute:
compensating the taxpayer for either his actual economic loss or for his
out-of-pocket loss if his out-of-pocket loss is less than his economic
loss.498

The district court agreed with the government that existing
authorities find clean-up expenses are includable as a measure of the loss
under Treas. Reg. Section 1.165-7(b)(1)(ii), but not as an addition to the
taxpayer’s pre-adjusted pre-casualty basis. Waldrip misread, however, the
authorities it relied on.499 No other authority has considered the issue,
perhaps suggesting that the Service usually allows a loss deduction
measured by the cleanup costs.

An approach not inconsistent with Waldrip is to use the taxpayer’s
basis in the entire remediated property as the ceiling on the current loss
deduction. The loss regulations provide that a deductible loss is
determined “by reference to single identifiable property damaged or
destroyed.”500 The rationale for such a narrow construction is so that the
identity of “the property,” the loss of which will generate the deduction,
will be reasonable in relation to the loss.501 The claims court in
Weyerhaeuser Co. v. United States502 applied this regulation to damages

498 Id.
499 Id.

There is no direct evidence of the value of the property immediately
before and after the damage was done. We think, however, that the
expense of $41 for removal is some evidence of the amount of the
damage and there is no evidence to the contrary .... Respondent does
not contend that $41 was in excess of basis.

Stuart v. Comm’r, T.C. Memo 1961-186, 20 T.C.M. (CCH) 938 (1961); Bliss v. Comm’r,
27 T.C. 770 (1957), rev’d on other grounds, 256 F. 2d 533 (2d Cir. 1958), acq. 1957-2
C.B. 4 (holding that Commissioner erred in denying a deduction for any portion of the
loss, apart from the cost of removing the debris).
500 Treas. Reg. § 1.165-7(b)(2) (as amended in 1977).
501 Westvaco Corp. v. United States, 639 F.2d 700, 708 (Ct. Cl. 1980).
502 32 Fed. Cl. 80 (1994), aff’d in part 92 F.3d 1148 (Fed. Cir. 1996), cert. denied, 519
from the Mount St. Helens eruption and other casualties to sections of taxpayer’s logging road system and to trees in stands of timber. The government argued that the “single identifiable property” (“SIP”) as to (a) the logging roads was some linear unit of measurement such as mile of road; and (b) the timber, the timber stand maintained by the taxpayer. The taxpayer asserted that as to the logging roads the SIP was the entire road system; and as to the timber, the larger depletion block was maintained on the taxpayer’s tax records. The claims court agreed with the taxpayer as to the road system, analogizing it to a “large edifice.”

If a commercial entity erects one building, the whole structure would be considered as one unit, i.e., the SIP, notwithstanding the fact that one or more different groups or functions of the corporation occupy separate floors or sections of the building. If, for example, a casualty destroyed one portion of the structure, it could not be argued that the business should only be allowed to deduct the amount of basis attributable to that section of the building. Neither the fact that each function of the corporation operated independently nor the fact that the groups residing in the unaffected areas of the building continued in their performance of duty unimpeded by the casualty should affect the status of the structure as a single identifiable property. The entity constructed and maintained a single asset to be used as such in the conduct of its operations, and that is how it should be recognized.503

The claims court explained that the casualty loss provision was a remedial provision (and hence more liberally construed504) intended “to afford relief

503 Id. at 104.
to a taxpayer who has suffered a loss of capital by making him, to the extent of such investment, reasonably whole.\textsuperscript{505}

We believe that the same reasoning should apply to components of the edifice or building, such as asbestos insulation. This is particularly true since most likely only the building and not its components such as asbestos insulation can be tracked on the taxpayer's tax records. This approach still will not yield the correct result where remediation costs exceed the entire basis.

In sharp contrast to \textit{Waldrip}, the demolition loss rules point to the correct solution. The demolition loss regulations (which have not been amended to reflect 1984 changes\textsuperscript{506}) provide that where intent to demolish business or investment property is formed subsequent to its acquisition, a demolition loss is allowable under Section 165; and the allowable "amount of the loss shall be the adjusted basis of the buildings demolished increased by the net cost of demolition . . . . The basis of any building acquired in replacement of the old buildings shall not include any part of the basis of the property demolished.\textsuperscript{507}

The implicit rationale of the demolition loss regulations is sound. Following the logic of the pre-section 280B rule that where improved property is purchased without an intent to demolish the improvements, demolition of such improvements results in the taxpayer incurring an economic loss.\textsuperscript{508} This loss is measured in part by the cost of

\begin{footnotesize}
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\item The purpose of limiting the deduction to that of the adjusted basis remaining in the "single identifiable property" is to ensure that only the investment truly lost is used to offset income and to prevent the borrowing of basis from other assets to unreasonably increase the deduction. The regulation's purpose is manifestly not to enable the IRS to squeeze the deduction down to the smallest conceivable molecule of the taxpayer's venture, but rather to allow a loss that is reasonable and bona fide. Such a negative interpretation would be in direct conflict with the objective of the Code and the regulations. \\
\textit{Weyerhaeuser}, 32 Fed. Cl. at 104.


\item Treas. Reg. § 1.165-3(b)(1) (as amended in 1976).

\item What distinguishes this case from so many of the others is the undisputed fact that the building involved was built for a specific purpose and that its use for that purpose was abandoned by the owner by an economic event not of his making. It had become as worthless as
\end{itemize}
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V. CONCLUSION

The origin of Section 198 is the policy entrepreneurship of tax incentives to increase voluntary brownfield remediation, beginning in 1993 by Democratic Chicago Mayor Richard Daley and then picked up in 1996 by the Clinton Administration. After initially opposing Mayor Daley's proposal, the administration adopted it in the wake of the Republican-controlled Congress’ 1995 attempts to rollback federal environmental regulation. The big city mayors wanted any brownfield tax incentive to be targeted to them and denied to suburban communities. This position was articulated as leveling the playing field—but it also served as punishment for having taken jobs and population from the cities. The national policy entrepreneurs similarly aimed it primarily at “targeted” (high poverty) urban brownfields as part of a successful grand strategy of gaining the support of large cities and minorities for Clinton and Gore in the 1996 and 2000 Presidential elections.

In this early stage of the development of Section 198, the Clinton Administration demonized the Republican-controlled Congress as to its position on the environment, thus painting itself as a “friend of the environment,” but producing only “symbolic reform,” undercutting any true reform of tax treatment of toxic and hazardous waste remediation. Section 198 constitutes an even more symbolic reform, in that it was hardly ever used due to a number of design defects. A major defect arising from the already discussed “Public Choice” considerations was its limitation to targeted, largely urban brownfields. The Clinton Administration’s desire to keep revenue costs low in order to promote a lot of “boutique” incentives, providing a little something—but not much—for as many constituent interest groups as possible, lead to: (a) a near-term sunset of Section 198 (since twice extended); (b) the apparent exclusion of indoor releases of asbestos and other hazardous substances and abandoned gas stations; and (c) a deduction rather than a tax credit. All of this worked to make Section 198 of little use, other than as a fine piece of political rhetoric.

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if it had been destroyed by fire or other casualty loss. Its special purpose was stipulated by the parties and was so found by the Tax Court. Not one shred of evidence supports any finding of an alternate use for the building when Yates was obliged to abandon it and move to another location in order to retain the Ford franchise.

Republican supporters of a brownfield cleanup tax incentive consistently advocated eliminating the targeted aspect of Section 198 and extending it to any site state-certified as contaminated, especially suburbs and small towns. After Governor George W. Bush had been elected President in late 2000, with Republican control of Congress and the White House imminent for the first time since 1954, the Clinton Administration abandoned its cities-only strategy (now that it no longer mattered) and agreed to the expansion of Section 198 to cover brownfields everywhere, thereby encompassing Republican constituencies as well. This broadening still does not remedy the other design defects of a sunset, exclusion of low-risk petroleum or petroleum-product contaminated sites (e.g., abandoned gas stations), and indoor emissions of asbestos, etc.

The stick of punishing suburbs has already been eliminated. If Section 198 is to be cleaned up, the stick of punishing contaminators by denying Section 198 to them, inconsistent with general tax principles, also should be eliminated. Cost containment features (such as a sunset, exclusion of abandoned gas stations, and exclusion of indoor releases of asbestos by remodeling) similarly should be eliminated. With all of these tools, Section 198 should be effective to help cleanup lesser abandoned gas stations and indoor asbestos in remodeling. It still would be largely ineffective as to the very expensive cleanup costs of traditional brownfields, abandoned factory sites, etc. To work here, the carrot probably would have to be sweetened to a dollar-for-dollar tax credit.

There does not appear to be political support currently for any of the above statutory changes. Accordingly, Section 198 should be allowed to die a natural death—no more extended sunsets. Instead, Treasury and the Service should remediate the repair regulations to permit a current Section 162 deduction when remediation adds no value (and was not accounted for in the purchase price). The justification would be to avoid distortion of the taxpayer’s income from no or too slow depreciation and is also supported by the “reverse” rule of tax parity. Alternatively, when remediation adds no value a current deduction should be allowed under Section 165 as a realized economic loss. These steps still would not solve the problem of expensive brownfield cleanups. The tax expenditures that would have been used to extend Section 198 should be converted into direct expenditures, awarded by states and overseen by EPA, to cleanup brownfields.