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ENVIRONMENTAL JUSTICE AND THE USE OF HISTORY†

*Charles P. Lord**
*William A. Shutkin***

I. Introduction

Environmental harms have traditionally fallen most heavily on low-income communities and communities of color. In this essay, we take up the stories of two communities fighting against this disturbing trend and for environmental justice. In each community, we argue, the legal system has perpetuated environmental injustice by misreading or disregarding that community's history. These two stories reveal that a flawed or careless approach to history is often a root cause of environmental injustice. We suggest, therefore, that communities such as those discussed in this essay must vigorously prepare and proclaim their own histories, and must urge courts and other decisionmakers to examine history carefully and justly.

In Boston, a diverse group of residents lives at the crossroads of the inner-city where the South Bay/Newmarket Square area forms the meeting point of Dorchester, Roxbury, South Boston, and the South End. The residents who live in the South Bay/Newmarket Square area take pride in their efforts over the last several years to begin to change the character of their neighborhood from a blighted industrial zone to a blossoming commercial and residential area.[1] They

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[1] *See* Zachary R. Dowdy, *Coalition Files Suit to Stop South Bay Asphalt Plant*, Boston

fought the city for new street lights, neighborhood cleanups, and regular police patrols.[2] In 1988, the residents defeated a proposal to build a municipal waste treatment facility a few hundred yards from their homes. More recently, a new shopping mall employing upwards of a thousand people has opened nearby. In all, the residents have made significant progress toward realizing their vision of a better community—a cleaner place to live and a healthy economy.[3]

The South Bay/Newmarket Square area is a mixed-use district, however, and in 1992 a developer proposed to build an asphalt plant there. A permit is required for that use. In granting the permit, the Boston Zoning Board of Appeal determined that "historically and currently, the South Bay/Newmarket Industrial Development Area has been home to a broad diversity of industrial and commercial uses . . . . Consequently, the proposed use is . . . consistent with existing uses in the area, and not, therefore, detrimental to . . . the nearby Roxbury, South Boston, and South End neighborhoods."[4] Without much more, the Board evaded the rich history and present state of the area, summing it up in this simple paragraph.

History also played a central role in a case involving the aboriginal rights of the Abenaki, a Native American tribe of northern New England. According to the Abenaki's own texts, "[a]rchaeologists have proven that Abenaki have been in the Lake Champlain/Missisquoi homeland continuously since 9300 B.C."[5] The Abenaki claim that their ancestors maintained temporary and permanent settlements on the banks of the Missisquoi River and Lake Champlain in what is now northwestern Vermont. Until 1750, the Abenaki people of the Missisquoi region were "virtually undisturbed in their use and possession of their homeland."[6]

In 1765, an English trader named Robertson leased a plot of land from the Abenaki, who had reserved for themselves land for the nation's cornfields, and twelve farms on either side of the Missisquoi River. Between 1765 and 1800, the presence of European settlers increased, and, as a result, the Abenaki moved into unsettled areas of Missisquoi.[7] "After 1800, the Abenakis lived in the swampland areas

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GLOBE, Sept. 24, 1993, at 23; Michael Jonas, *Proposed Asphalt Plant Must Undergo Further Review*, BOSTON GLOBE, March 27, 1994, City Weekly at 5.

[2] Interview with Bruce Rose, Roxbury resident, in Boston, Massachusetts (Sept. 21, 1993).

[3] *Id.*

[4] South Bay Group, No. BZC-16523, at 2–3, 6 (City of Boston Bd. App. July 27, 1993).

[5] Sovereign Republic of the Abenaki Nation of Missisquoi, Presentation to Water Resources Board 1 (Oct. 1, 1992).

[6] *Id.*

[7] *Id.*

from Missisquoi Bay to Maquam."[8] As Abenaki legend holds, throughout the next century and a half the Abenaki "dispersed to secluded areas on the margins of villages . . . [and] continued to travel around the area, like their ancestors, camping to hunt, fish and gather at older sites including Maquam."[9]

Though the Abenaki thus claim a presence in their homeland going back 11,000 years, in 1992 the Vermont Supreme Court ruled that the Abenaki no longer hold "aboriginal title" to their ancestral homeland.[10] The court determined that the European settlers "intended" to extinguish that title.[11] The court examined the history of Abenaki movement in the area, explaining that "Indian conduct" is relevant to determining intent. According to the court, the Abenaki's history reveals the effect of European dominion over the Abenakis.[12] The court concluded that "it appears that the Abenaki response was predominantly passive. . . . Tribal presence continued through to the 1790's, but the tribe no longer controlled the area."[13] The court, therefore, concluded that the Abenaki no longer held title.[14]

Having recognized the complexity of the historical record, the court chose to ignore it. As a result, it also failed to address the question of justice. Because the history of Native Americans and indigenous peoples generally is largely one of domination and oppression,[15] an inquiry which ignores that history also ignores factors which shape our perception of justice.

In this Essay, we look at these two recent cases involving traditionally oppressed groups and their efforts to reclaim their environment. In each, we claim, history has been viewed in a manner that subtly abstracts discrete instances of oppression, thereby perpetuating in-

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[8] *Id.* at 4.

[9] *Id.*

[10] State v. Elliott, 616 A.2d 210, 214 (Vt. 1992). For a complete discussion of this case see *infra* notes 65–78 and accompanying text.

[11] *Id.* at 219 n.9.

[12] *Id.* at 219–20.

[13] *Id.*

[14] *Id.*

[15] On Native Americans and oppression, see generally MICHAEL DORRIS, PAPER TRAIL (1994); ROBERT A. WILLIAMS, JR., THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST (1990); Robert A. Williams, Jr., *Documents of Barbarism: The Contemporary Legacy of European Racism and Colonialism in the Narrative Traditions of Federal Indian Law*, 31 ARIZ. L. REV. 237 (1990). On indigenous peoples generally, see Hurst Hannum, *New Developments in Indigenous Rights*, 28 VA. J. INT'L L. 649, 667 (1988) ("[the] history of indigenous peoples is . . . the chronicle of their unsuccessful attempts to defend their land against invaders"); William A. Shutkin, Note, *International Human Rights Law and the Earth: The Protection of Indigenous Peoples and the Environment*, 31 VA. J. INT'L L. 479, 484–85 (1991). *See generally* Richard Falk, *The Rights of Peoples (In Particular Indigenous Peoples)*, *in* THE RIGHTS OF PEOPLES (James Crawford ed., 1988).

justice and allowing decisionmakers to hide behind what the political historian Walter Karp called history's "vast, all-concealing cloak."[16] In *Byda v. Board of Appeal of Boston*,[17] the Boston Zoning Board of Appeal relied casually on history in determining that the construction of an asphalt plant in an inner-city community historically overburdened with heavy industrial uses was "appropriate."[18] Yet, the Board never really confronted the history of the area nor did it recognize that it was obliged to examine that history scrupulously. Rather, it complacently looked to the area as it existed for a fixed period of time so as to make its inquiry facile and unproblematic.

In *State of Vermont v. Elliott*, the Vermont Supreme Court acknowledged that the Abenaki never affirmatively surrendered their rights in the land.[19] And yet the court based its denial of this Native American tribe's right to fish on ancestral lands without a license on nothing more than the "increasing weight of history."[20] Although the court seemed to recognize that it had a responsibility to examine the historical record, it nonetheless failed to engage that record's complexity and particularity, and ignored entirely the question of justice underlying the past events and practices at issue.

In each case, we suggest, history has been examined wholly uncritically so as to be treated as an unproblematic, objective guide for decisionmaking. Consequently, the Board in *Byda* and the *Elliott* court not only allowed past oppressive practices to continue unabated, but revealed by their uncritical stance that we as a legal community are powerless to change historical inequities. We have found that an awareness of the uses of history is critical to a community's fight for environmental justice. In order to avoid the hidden traps presented by simplistic histories, a community must be prepared both to demonstrate the limits or inadequacies of history as conceived by courts and other public institutions, and to articulate a more complete history that incorporates not only a view of the past, present and future, but also the question of justice.

Thus, in an effort both to transform impassive judges and others into public actors willing to engage the complexity of history and the knotty issue of justice, and to ameliorate the conditions of oppression the law often abides, we recommend that courts, zoning boards, and

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[16] Walter Karp, *In Defense of Politics: Against Theorists, Cynics, and the New Historians*, HARPER'S MAG., May 1988, at 43.

[17] No. 93 Civ. 5479 (Suffolk County Super. Ct. Sept. 22, 1993).

[18] *See infra* notes 22–64 and accompanying text.

[19] *See infra* notes 65–97 and accompanying text.

[20] State v. Elliott, 616 A.2d 210, 218 (Vt. 1992).

other decisionmakers adopt a pragmatic approach to history as well as one that addresses the question of justice.[21] That is, we urge government decisionmakers to realize the density and contingency of history and to integrate the issue of justice in their historical analyses. In so doing, we suggest that the idea of history as it applies to law ought to be enriched, to be viewed as embodying past injustices and the current aspirations of communities. Consequently, we argue, the use of history might help move us closer to a better democracy.[22]

II. *Byda v. Board of Appeal of Boston*: History and Complacency

To approach history casually and complacently, is to evade history's inevitably multiplicitous facts and to mask the many meanings the facts could support.[23] As *Byda* demonstrates, when history is viewed complacently it becomes simplistic and monolithic. As such, it operates as a trap to prevent communities long overburdened by uses no other area would tolerate from escaping that particular part of their past, and from realizing their visions for a better future.

A. *The Case*

On September 22, 1993, several residents of Roxbury and the South End, communities that in part comprise the City of Boston, filed a lawsuit against the Boston Zoning Board of Appeal.[24] The suit alleged that the Board exceeded its authority in granting a conditional use permit on September 8, 1993 to AP South Bay Corporation to construct an asphalt manufacturing facility at a site in the South Bay/Newmarket Square area of Roxbury located near the residents.[25] Though zoned for general industrial use, the zoning district abuts residential areas.

The residents who filed the suit are part of a larger group, the Coalition Against the Asphalt Plant. The Coalition represents over sixty neighborhood organizations from Dorchester, Roxbury, South

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[21] *See infra* notes 98–117 and accompanying text.

[22] *See infra* note 114 and accompanying text.

[23] *See* James T. Kloppenberg, *The Theory and Practice of American Legal History*, 106 Harv. L. Rev. 1332, 1334 (1993) (reviewing Morton Horwitz, The Transformation of American Law, 1870–1960: The Crisis of Legal Orthodoxy (1992) (discussing the critique by deconstructionist historians of the presentation of history as truth, or as an inevitability)).

[24] Byda v. Board of Appeal of Boston, No. 93 Civ. 5479 (Suffolk County Super. Ct. Sept. 22, 1993).

[25] *Id.*

Boston and the South End. These communities have significant African-American and Hispanic-American populations, among others. As well, they are largely low-income communities. Like most inner-city areas, Dorchester, Roxbury, South Boston and the South End traditionally have borne the brunt of heavy industrial uses and other locally undesirable land uses. From lead paint to particulate emissions to midnight dumping, these communities clearly have suffered disproportionately from environmental harms, yet have few resources to deal with these harms.[26]

Specifically, the plaintiffs in *Byda* claimed that the facility would not merely serve to further devalue their property and create more traffic and noise in their neighborhood, but also would seriously endanger their health. A 1988 decision by the Massachusetts Department of Environmental Quality Engineering,[27] for instance, found that residents of the South Bay area of Boston suffered from elevated health risks.[28] These included elevated cancer incidence and elevated mortality rates for cerebrovascular and ischemic heart disease, elevated infant mortality rates, elevated rates of pulmonary disorders, and elevated incidence of childhood lead poisoning.[29] Thus, particulate and gaseous air emissions from the operation of the facility might well cause harm to the plaintiffs, even though the emissions would be at levels below state and federal regulatory thresholds.

Moreover, the plaintiffs relied on a recent study by researchers at the Harvard School of Public Health demonstrating an association between fine particulate air emissions and mortality rates in inner-city areas.[30] The study, known as the Six Cities Study, makes clear

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[26] *See* Byda, No. 93 Civ. 5479, at 2–10; Jonas, *supra* note 3, at 5. This is the typical scenario of environmental justice cases. *See generally* CONFRONTING ENVIRONMENTAL RACISM: VOICES FROM THE GRASSROOTS (Robert D. Bullard ed., 1992); TOXIC STRUGGLES: THE THEORY AND PRACTICE OF ENVIRONMENTAL JUSTICE (Richard Hofrichter ed., 1993); Vicki Been, *What's Fairness Got To Do With It? Environmental Justice and the Siting of Locally Undesirable Land Uses*, 78 CORNELL L. REV. 1001 (1993); Luke W. Cole, *Empowerment as the Key to Environmental Protection: The Need for Environmental Poverty Law*, 19 ECOLOGY L.Q. 619 (1992).

[27] The Massachusetts Department of Environmental Quality is now called the Department of Environmental Protection.

[28] Site Assignment of South Cove Resource Recovery Facility (Dep't of Envtl. Quality Eng'g June 7, 1988)(final decision) at 11–12.

[29] *Id.*; *see* Letter from Lawrence A. Dwyer, Commissioner of Department of Health and Hospitals, City of Boston, to Secretary of Environmental Affairs Trudy Coxe, Feb. 28, 1994 (outlining the excess in hospital admissions of up to 100% for asthma and other respiratory ailments in Roxbury, South Boston and the South End as compared to the rest of the Commonwealth) (on file with the authors).

[30] Douglas W. Dockery et al., *An Association Between Air Pollution and Mortality in Six U.S. Cities*, 329 NEW ENG. J. MED. 1753 (1993).

that particulate air emissions at levels below those commonly held to be acceptable are hazardous to the health of inner-city residents.[31] Because the facility would produce significant amounts of particulate matter, the plaintiffs, already burdened with elevated health risks, were especially concerned about the proposed asphalt plant.[32]

In 1991, AP South Bay Corporation, then called Todesca Equipment Company, Inc., had applied for a conditional use permit to construct their asphalt plant in a middle-class neighborhood in Jamaica Plain, another Boston community.[33] Like the site in Roxbury, the Jamaica Plain site was zoned for general industrial and manufacturing use under the Boston Zoning Enabling Act.[34] The permit was denied, however, because the Inspectional Services Department determined, in part, that the asphalt plant was not an appropriate use for the area.[35]

B. *The Court and History*

Section 6–3 of the Zoning Enabling Act provides the conditions that must be met in order for a conditional use permit to be granted. The first condition states, in pertinent part, that "the specific site is an appropriate location for such use. . . ."[36] Though the language of the appropriateness condition is plainly ambiguous, its intent, like section 6–3 generally, is to ensure that the use in issue is consistent with past and existing uses so as not to disturb expectations regarding the character of the neighborhood, or otherwise adversely affect the neighborhood.[37] The appropriateness standard, therefore, necessarily requires the Zoning Board to consider the history of the neighborhood surrounding the site. That is, the appropriateness of the proposed use is contingent, *a fortiori*, upon the uses allowed in the past.

The Board, upon considering the history of the South Bay/Newmarket area, concluded that:

> Unlike other neighborhoods . . . South Bay/Newmarket's growth has principally depended upon industrial and commercial activity for most of the 20th Century.

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[31] *Id.*

[32] *See* Plaintiffs' Opposition to Defendant's Motion to Amend the Track Designation at 1–3, Byda v. Bd. of Appeal of Boston, No. 93 Civ. 5479 (Suffolk County Super. Ct., Nov. 12, 1993).

[33] Application for Conditional Use Permit, No. 3685 (Inspectional Servs. Dep't June 24, 1992).

[34] Acts of 1965, c. 665, Art. 3, § 3–1.

[35] Decision of the Inspectional Servs. Dep't, No. 3685 (City of Boston June 24, 1992).

[36] Acts of 1965, c. 665, Art. 3, § 6–3(a).

[37] *See id.*

> Historically and currently, the South Bay/Newmarket Industrial Development Area has been home to a broad diversity of industrial and commercial uses. . . . Consequently, the proposed use is pursuant to zoning, consistent with existing uses in the area, and not, therefore, detrimental to . . . the nearby Roxbury, South Boston, and South End neighborhoods.[38]

Once the Board determined that the South Bay/Newmarket area was traditionally home to industrial and commercial uses, its conclusions concerning the appropriateness of the facility for the area seem inexorable. To be sure, the Board's approach to history suggests the logic underlying its conception of "appropriateness." That is, the Board's historical "method," apparent in its brief findings, was uncritical and complacent. There essentially was no method. The Board did not inquire into the details or merits of past zoning decisions or the rich, protean history of the area, nor did it bother to compare existing uses to those of the past.[39] It simply accepted as a matter of course that because industrial uses were historically sanctioned in this area, they should continue to be.[40] This uncritical stance blinded the Board not only to the particularistic history of the South Bay/Newmarket area, but also to its present conditions, and led to a finding that the facility was appropriate.

C. *History and Complacency*

The Board's blindness suggests that the first step in addressing the role of history in environmental justice cases should be to challenge the complacent approach to history. In *Byda*, this complacency is revealed in the Board's casual treatment of history as somehow monolithic or involuntary. Some scholars have explored the dangers and pitfalls of portraying history this way. Their analysis helps demon-

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[38] South Bay Group, No. BZC-16523, at 2–3, 6 (City of Boston Bd. App. July 27, 1993). The Board "supported" this argument by reference to the surrounding land uses, noting that:

> [D]irectly abutting the Premises on the Southampton Street side is Waldo Bros., a brick and cement construction supply business. On the Moore Street side, at a site most recently occupied by Truck Center, Inc., a truck sales and service business, is the locus of the proposed Massachusetts Bay Transportation Authority . . . police vehicle operations, maintenance, and storage facility. New England Mail, Inc., and a vacant, bank-owned property abut the Premises on Cummings Street; and the long-dormant incinerator facility borders the Premises on South Bay Avenue. The area also includes meat and fish processing facilities; bakery operations; a Suffolk County correctional facility; and a shopping mall under construction. . . . In the recent past, the Premises were operated as an automotive junk yard. . . .

Id. at 2–3.

[39] *Id.*

[40] *Id.*

strate that the Board's complacent historical method is both insidious and indefensible.

Certainly, the use of history to justify or disparage present-day decisions and practices—and thereby to attempt to shape future events—is commonplace in both public and private discourse. The rhetorical power of history alone—its instant evocation of great eras and dramatic episodes, its inextricable link to romantic nationalism—makes history a powerful device in the hands of poets and politicians alike. Furthermore, history itself has often been viewed as something more than human, a "'full presence beyond the reach of play.'"[41] Historians, too, sometimes have seen themselves as "'heroic, . . . unprejudiced, dispassionate, all-seeing.'"[42] Walter Karp, bemoaning the tendency to view history as greater than the sum of its human parts, echoed Tocqueville when he wrote of "the 'dangerous tendency' of [this kind of] history: 'Men are led to believe that this movement [of society] is involuntary, and that societies unconsciously obey some superior force ruling over them.'"[43]

Yet, as Karp believed, the notion that history is somehow objective so as to be seen as controlling human events has grave consequences for the American republic.[44] He feared that such a notion is a "murk" that has "thickened into darkness and settled over power . . . like a vast, all-concealing cloak."[45] Karp continued, "the [twentieth] century is terrifying in its revelation of the power of deeds and the lust for dominion, and yet, astonishingly, it makes no dent in the new history."[46] In Karp's view, a synoptic approach—a God's-eye view—to history allows discrete deeds of oppression to go unchallenged by masking them with the veil of largeness and of objectivity.[47] The

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[41] Richard Rorty, *Trotsky and the Wild Orchids*, *in* WILD ORCHIDS AND TROTSKY: MESSAGES FROM AMERICAN UNIVERSITIES 29, 50 (Mark Edmundson ed. 1993) (quoting J. Derrida). G.W.F. Hegel, for instance, argued that history does not consist of meaningless chance but a rational, dialectical process, the essence of which is "none other than the progress of the consciousness of Freedom." *See* GEORGE W.F. HEGEL, THE PHILOSOPHY OF HISTORY 1–19 (J. Sibree trans. 1956). To Hegel, history alone entails the self-realization and complete development of spirit that constitute true freedom. *Id.*

[42] David A. Hollinger, *Truth by Consensus*, NEW YORK TIMES BOOK REVIEW, March 27, 1994, at 16 (quoting JOYCE APPLEBY ET AL., TELLING THE TRUTH ABOUT HISTORY (1994)).

[43] Karp, *supra* note 16, at 43 (quoting Tocqueville). Karp decried that "[t]o the writers of this new history, action no longer accounts for historic change. By a strange revolution of thought, social change is said to account for action. Society or economics or even 'history' itself orders and causes our conduct, reducing it to mere motion, habit, and rote. . . ." *Id.*

[44] *Id.* at 43.

[45] *Id.* at 43–44.

[46] *Id.*

[47] Federal Appeals Court Judge John Noonan, among others, makes a similar argument with

insidious effect of this approach on historians and others whose job it is to account for human events is to leave them powerless—"[l]ike a patient etherized upon a table."[48] Karp thus argues that a complacent historical method is dangerous, for it undermines our ability to redefine ourselves as a nation and to change the course of human events.

Legal discourse frequently employs history in one form or another and occasionally treats it as transcendent, bringing truth and legitimacy to legal decisions. Stare decisis, for example, holds that past decisions, simply by virtue of their historicity, their pastness, shall be binding. In this way, history, at least as revealed through particular decisions, controls contemporary cases. Moreover, Erwin Chemerinsky explains that the conception of history as both omnipotent and monolithic governs American jurisprudence.[49] The United States Supreme Court currently views history as virtually the sole source of legitimacy for the Court's decisions.[50] The ideas of originalism and neutral principles having run their course, Chemerinsky suggests that the Court now considers history the only neutral, objective standard by which constitutional cases should be adjudged.[51] Principles and practices embedded in America's social history thus serve to determine how the Court will rule.

Chemerinsky's analysis of the Supreme Court's use of history in its jurisprudence speaks pointedly to the role of history in environmental justice cases. In Chemerinsky's view, the Court has begun to use history and tradition in almost every aspect of its jurisprudence.[52] According to Chemerinsky, the increasing use of history and tradition stems from the central fallacy that history is determinative and objective.[53] Indeed, he suggests, "the focus on history is motivated, in part, by a desire for an objective basis for judicial decision-making to constrain the Justices and avoid results based on their personal preferences."[54] The Court's use of history suggests that in fact the opposite is true; history is subjective and cannot be cast as monolithic.

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respect to law. Noonan describes the "mask" of the law as a device lawyers, judges, and politicians have used to render public decisions they might well find offensive or immoral in their private lives. *See* J.T. NOONAN, JR., PERSONS AND MASKS OF THE LAW: CARDOZO, HOLMES, JEFFERSON, AND WYTHE AS MAKERS OF THE MASKS (1976).

[48] T.S. ELIOT, *The Lovesong of J. Alfred Prufrock*, *in* THE COMPLETE POEMS AND PLAYS 1909–1950 3, 3 (1971).

[49] Erwin Chemerinsky, *History, Tradition, the Supreme Court, and the First Amendment*, 44 HASTINGS L.J. 901, 901 (1993).

[50] *Id.*

[51] *Id.* at 903.

[52] *See id.* at 903–08.

[53] *Id.* at 912–13.

[54] *Id.* at 915.

Justice Antonin Scalia's due process jurisprudence, for instance, begins with the premise that a "liberty interest must be rooted in history and tradition."[55] In assessing whether a right can be protected under the Due Process Clause, Justice Scalia states that "[w]e refer to the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified."[56] In other words, Chemerinsky argues, "by Justice Scalia's view, a right can be protected under the Due Process Clause only if there is a specific tradition of recognizing the right."[57] Accordingly, Chemerinsky notes that the search for a single national "tradition" is ultimately fruitless, for in a system based on federalism there are likely to be many different traditions that vary by geography.[58] Further, he claims, traditions will vary over time. As well, and perhaps most critically, Chemerinsky suggests that the presentation of history as objective is undermined by the indeterminacy inherent in choosing the level of abstraction at which to describe the tradition.[59]

Taken together, Karp and Chemerinsky thus set forth how a community ought to prepare its arguments regarding history. Environmental justice advocates must attack complacency by raising the issue of historical method and debunking the widespread acceptance of history as monolithic. If the Board in *Byda* had been forced to look seriously at the history of the site, for instance, it would have discovered that the area was once home to thriving immigrant communities in the nineteenth century and well into the twentieth.[60] Moreover, the Board would have found that contemporaneous with the industrial development of the South Bay/Newmarket area, nearby communities were gradually deteriorating under the weight of the urban blight and neglect that characterizes much of the latter half of this century.[61] Moreover, with greater scrutiny, the Board would have seen that the same industrial uses that had grown out of a period of economic prosperity and urban development earlier in the century had now perished. Thus, for example, all that remains of heavy industry in the South Bay/Newmarket area is the corpse of an old municipal incin-

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[55] Michael H. v. Gerald D., 491 U.S. 110, 123 (1989). *See also* Chemerinsky, *supra* note 48, at 904–05.

[56] Michael H., 491 U.S. at 127–28 n.6.

[57] Chemerinsky, *supra* note 49, at 905.

[58] *See id.* at 915.

[59] *See id.* at 917.

[60] OSCAR HANDLIN, BOSTON'S IMMIGRANTS: A STUDY IN ACCULTURATION 99 (1979).

[61] *See* ROBERT GOTTLIEB, FORCING THE SPRING: THE TRANSFORMATION OF THE AMERICAN ENVIRONMENTAL MOVEMENT 75–80 (1993). *See generally* JANE JACOBS, THE LIFE AND DEATH OF GREAT AMERICAN CITIES (1961).

erator. The Board simply could not have discerned, given its uncritical approach, that the existing uses in the area are no longer industrial in the way the asphalt facility clearly is. From the construction supply business to the bakery to the correctional facility and the new mall, the area is decidedly non-industrial.[62]

To be sure, in the middle 1980s the communities surrounding the site had pledged to move the area in a new direction, away from past industrial uses insensitive to the quality of life of the area and toward only those industries and businesses that both create new job opportunities and operate without noxious emissions. This pledge is embodied in the regulations of the Newmarket Industrial Development Area.[63] Employing only six full-time staff and generating a host of gaseous and particulate emissions, in addition to significant traffic and noise, the proposed asphalt plant plainly violates the terms and spirit of the regulations.

The role of history in the Board's decision, therefore, is deeply problematic. In the Board's view, history is a monolithic, static object to be accepted uncritically. History as interpreted by the Board served to provide the justification for perpetuating past uses regardless of the accuracy of that history, the changing character of the area, and the new vision the neighborhood had developed in an effort to lighten or eliminate the damaging effects of past zoning decisions. The Board's view of history as object simply could not accommodate the particularistic, dynamic quality of either the past, present, or future.

Consequently, the Board in *Byda* rendered an impoverished version of the history of the South Bay/Newmarket area and a thin conception of appropriateness. History thus stands as an impermeable bulwark for the status quo. Notwithstanding the decidedly richer history of the area omitted from the Board's analysis, as well as the unequivocal commitment on the part of the community to move toward a better future, history in *Byda* operated to justify and perpetuate both past and present burdens disproportionately allocated. History as object, thus, can function like a giant trap even in the most routine instances.[64]

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[62] See Plaintiffs' Opposition to Defendant's Motion for Summary Judgment, Byda v. Bd. of Appeal of Boston, No. 93 Civ. 5479 (Suffolk County Super. Ct., Sept. 22, 1993).

[63] *See* Econ. Dev. & Indus. Corp. Regulations Applicable In Industrial Development Areas, §§ 50-30, 50-31 (1988).

[64] History here functions like the inescapable "iron cage" of bureaucratic rationality Max Weber described in criticizing the Enlightenment project. *See* HABERMAS AND MODERNITY 5 (Richard Bernstein ed., 1985).

Encouraging a court to embrace a critical historical method may not in itself, however, eliminate the use of history as a tool to perpetuate injustice. A court that rejects the complacent approach to history and the view of history as monolithic will not necessarily engage the complexity of history or address the issue of oppression. In pursuing environmental justice, it may not be enough that a court purportedly has an effective historical method.

III. *State of Vermont v. Elliott*: The Weight of History[65]

The Vermont Supreme Court's recent decision in *State v. Elliott*[66] presents a contrast between two approaches to history and calls to battle environmental justice advocates. The case is but one example of how a flawed, though seemingly sophisticated, historical method may be as bad as no method at all. Notwithstanding a court's embrace of a particular approach to history, as long as that approach is not itself rigorous or critical, a court may still arbitrarily select one community's story over another. Such an arbitrary selection might enhance the likelihood that the stories of the marginal or disenfranchised will be muted or ignored.

Unlike *Byda*, the *Elliott* case involves a decision-making body that at least recognized that it was obliged to undertake a serious examination of the past. However, the court in *Elliott* essentially shirked its responsibility, avoiding the interpretive problems posed by the historical record and leaving unanswered the question of justice. In *Elliott*, the Vermont Supreme Court's approach to history masked the flaws in its historical method that allowed it to find the answers to historical questions in the unequal social conditions of the present.

A. *The Case*

In October, 1987, thirty-six members of the Abenaki Nation staged a "fish-in" demonstration on land they claimed as their ancestral home. The State of Vermont charged the thirty-six with fishing without a license. In defense of its members, the tribe, a subpopulation of

[65] Professor Aviam Soifer has written about the Vermont Supreme Court's decision in State v. Elliott, 616 A.2d 210 (Vt. 1992), with particular emphasis on the court's notion of the weight of history and its use in rejecting Abenaki claims. Aviam Soifer, *Objects in the Mirror Are Closer Than They Appear*, 28 Ga. L. Rev. 533 (1994).

[66] 616 A.2d 210.

the Western Abenaki, claimed that it was not subject to state regulation because it held aboriginal rights to the land.[67]

The doctrine of aboriginal rights describes the ownership interest retained by Native Americans in lands that have been appropriated by European nations. The right arises from a tribe's occupation of an ascertainable ancestral homeland before European colonization and does not depend on treaty, statute or other formal declaration. In essence, the doctrine created a dual right to the land—the discovering European nation, the first in time, held title to the land subject to the Native American tribe's continued right of occupancy and use.[68] Aboriginal rights may be established if a currently viable Native American tribe has occupied land since before European arrival on the continent.[69]

Under the historical method established by those few courts that have addressed the issue of extinguishment, a sovereign may only extinguish aboriginal rights by an affirmative act.[70] Extinguishment must occur by act or consent of the European sovereign,[71] or may occur "by treaty, by the sword, by purchase, or by exercise of complete dominion adverse to the right of occupancy."[72] As the Court of Appeals for the Ninth Circuit stated in *United States v. Gemmill*, the central "question is whether the governmental action was intended to be a revocation of Indian occupancy rights . . . ."[73]

The *Elliott* case thus turned on the question of whether the sovereign intended to extinguish the Abenaki's rights. The trial court sought to answer this question by examining a series of events between 1763 and Vermont's admission into the Union in 1791.[74] In 1763, British Royal Governor Wentworth issued a land grant in an area that was then New Hampshire to a group later known as the Vermonters. By the conditions of the grant, the land would revert to the Crown after a certain time unless settled and cultivated. Specifically, the Crown required grantees to settle or cultivate five out of each fifty acres granted. Contemporaneous with the grants, a series of Royal Instruc-

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[67] *Id.* at 211–12.

[68] *Id.* (quoting FELIX S. COHEN & RENNARD STRICKLAND, HANDBOOK OF FEDERAL INDIAN LAW 486–87 (1982)).

[69] *Id.* at 212.

[70] *See id.* at 213.

[71] FELIX S. COHEN & RENNARD STRICKLAND, HANDBOOK OF FEDERAL INDIAN LAW 487 (1982).

[72] United States v. Santa Fe Pacific R.R. Co., 314 U.S. 339 (1941).

[73] 535 F.2d 1145, 1148 (9th Cir. 1976).

[74] Elliott, 616 A.2d at 215.

tions forbade settlers from settling in land occupied by Native Americans.[75]

A conflict between New York and New Hampshire over these lands ensued. Ignoring the original grants from Wentworth, the Governor of New York granted land to his subjects in the area of the Wentworth grants. In 1764, a British Privy Council order placed the lands in New York, but a 1767 order halted all settlement in the area. In 1769, New York began ejectment suits, but in the six years that followed, Vermonters took events into their own hands. The original grantees rallied around Ethan Allen and the Green Mountain Boys to keep out the New Yorkers and any other challengers.[76] In 1777, Vermont declared itself an independent republic. Four years later, the Republic negotiated with Congress the terms of its admission into the Union. While the Vermonters declared that the terms of the grants had yet to be fulfilled, they also declared that the grants had not been forfeited and that the cultivation and settlement requirements would be met.

Having examined this history, the trial court held that the Missisquoi Tribe held unextinguished aboriginal rights to the land at issue.[77] The trial court therefore dismissed the charges against the tribal members for fishing without a license.[78]

B. *The Vermont Supreme Court's Historical Method*

The Vermont Supreme Court disagreed with the trial court.[79] Refusing to answer whether the Abenaki are a viable tribe, the court nonetheless found that the Abenaki's aboriginal rights had been extinguished.[80] As Aviam Soifer has noted, the supreme court determined that the Abenaki's aboriginal rights had been extinguished by the "increasing weight of history," as measured by the "cumulative effect of many historical events."[81] This methodology marked a telling shift away from the trial court's approach and was fatal to the Abenaki's claim. The court's methodology highlights both the potential pitfalls inherent in the use of history by courts and the oppressiveness of history in this particular case.

[75] *Id.*
[76] *Id.* at 216.
[77] *Id.*
[78] *See id.* at 212.
[79] *Id.*
[80] *Id.* at 214.
[81] Soifer, *supra* note 65, at 543.

The supreme court in *Elliott* refused to limit the test for extinguishment to an examination of "discrete events."[82] Instead, the court examined "the cumulative effect of many historical events."[83] The court's approach was to examine whether the Abenaki's rights were extinguished by the "weight" of historical events, rather than a particular event or series of events. The court abandoned narrative as a way of describing historical events and replaced it with a scale on which to measure the persuasiveness or truth of conflicting stories. As a result, the court did not examine events in sequence and was not constrained by the need to tell a story, to explain conflicting events, or to resolve inherent contradictions. In short, the Vermont Supreme Court created a balancing test that compared the competing versions of the past.[84]

The net result of this transformation was to shift the burden of proof from the government to the Abenaki. While under a narrative method competing evidence would preclude getting at the truth of conflicting stories, under a balancing test the court could still weigh these stories in favor of the government. That is, instead of the government alone having to point to an affirmative act of extinguishment, the Abenaki also had to demonstrate convincingly that no such act occurred. For example, the court saw the interplay between the Royal Instructions and the Wentworth grants not as contradictory evidence on the issue of the sovereign's intent, but rather, when weighed against each other, as evidence of an interest in pacifying the region and not protecting Indians.[85] The court sidestepped the ambiguity of Wentworth's authority by declaring it irrelevant. The court stated that though Wentworth's grants may not have been authorized by the Crown, that did not detract from the vast political changes they engendered.[86]

Similarly, the court refused to assess whether or not the Abenaki actually abandoned their land. The court discerned in the 1777 Constitution of the Vermonter's Union an intent to dominate the land, which the court balanced against the Abenaki's intent to remain in the region. The court reasoned that the ambiguity surrounding the Abenaki's conduct during the period demonstrated an intent to leave their land.[87]

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[82] Elliott, 616 A.2d at 218.
[83] *Id.*
[84] *See id.*
[85] *Id.* at 218–19.
[86] *Id.* at 219.
[87] *Id.* at 219 n.9. That the Abenaki remain in northwestern Vermont, as they do throughout

By creating a balancing test, the Vermont Supreme Court managed to use ambiguity against the Abenaki. As a result, the court was able to approach the historical record freely and carelessly, while claiming that its interpretation of history was objective. By avoiding or ignoring the facts' contrary message, and by casting history in abstract terms,[88] the supreme court's balancing test transformed history into an effective tool for protecting the status quo. For instance, the court's reading of the "intent" of the various parties was inevitably colored by the social context as it existed at the time the case was heard. Thus, in the eyes of the court, that the Abenaki lived and continue to live on the margins of Vermont society proved their failure to vindicate their rights in the past.[89]

C. *The Trial Court's Historical Method*

The trial court in *Elliott* utilized an historical method that contrasted sharply with the one employed by the supreme court. The trial court's method embodies some aspects of the historical method that a community ought to encourage courts to use. The trial court's method and findings illustrate the payoff from rigorous historical analysis for traditionally oppressed communities.

As discussed above, the courts have looked to history to determine the intent of the sovereign—the United States or a state—based on evidence of a central act of extinguishment.[90] In pre-*Elliott* cases, where the courts found the central event indeterminate, they allowed that extinguishment be clarified by subsequent historical events.[91] Thus, under the traditional methodology, unless the government can establish its intent through an unambiguous act, or clarify its intent through subsequent events, the tribe presumably retains aboriginal title.

Under this method, courts examine the events to determine whether they tell a single story.[92] Though a court may clarify a sovereign's central act by reference to events that occurred months, years or even decades later, it must examine the historical evidence to determine whether it can be organized into a coherent narrative. Where the

much of northern New England, attests to the enduring intent of the tribe to stay put. Clearly, history itself belies the court's claim.

[88] Soifer, *supra* note 65, at 535–36.

[89] *See* Elliott, 616 A.2d at 219 n.9.

[90] *See supra* notes 70–73 and accompanying text.

[91] *See* United States v. Gemmill, 535 F.2d 1145, 1148 (9th Cir. 1976); United States v. Pueblo of San Idelfonso, 513 F.2d 1383, 1388–90, 1391–92 (Ct. Cl. 1975).

[92] Kloppenberg, *supra* note 23, at 1333–34.

court cannot, the government fails to prove that aboriginal rights were extinguished. Thus the burden of overcoming history's ambiguity falls on the government.[93]

The trial court in the *Elliott* case performed an "exhaustive" analysis of "extensive and meticulous" findings in order to assess whether the Abenaki's rights "were extinguished by either an express act or an act clearly and unambiguously any sovereign's intent to extinguish those rights."[94] The trial court decided, in essence, that the government had failed to show that a "single event constituted express or implied termination of aboriginal rights."[95] The trial court held that Wentworth did not have the authority to grant Native American lands, in light of the Royal Instructions prohibiting settlement on such lands.[96] As the original grants to settlers did not come from the sovereign, the trial court argued that there had been no extinguishment of aboriginal rights.[97] The government had failed to meet its burden of showing unequivocally, with reference to discrete events, that the Abenaki's rights had been extinguished. In other words, the conflict between the historical events, and the resulting ambiguity of the record regarding the issue of extinguishment, undermined the court's ability to tell the "true" story of extinguishment. Accordingly, the trial court ruled in favor of the Abenaki.

Approaching the historical record scrupulously and painstakingly, the trial court created a narrative, analyzing the historical events in sequence. Conflicting and indeterminate events precluded the possibility of constructing a "true" tale. The Abenaki thus triumphed as a result of ambiguity in the historical record. The trial court's approach was forthright about the uncertainty of historical events. Under the trial court's method, there can be no right answer in the historical record as long as there are competing stories. This method validates each version of the story. Thus, the trial court's methodology rejects the notion that history is objective or monolithic. Moreover, the *Elliott* court used an historical method that showed potential for vindicating the claims of traditionally disenfranchised groups. The trial court focused on the details, was attuned to the lessons of history and its particularities, and refused to draw grand conclusions—asking only whether the details supported a claim of intent.

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[93] The Government in at least one of these cases was unable to establish that aboriginal rights were extinguished until late in the day, due in large part to uncertainty as to whether white settlers had actually occupied the land in question. *See* San Idelfonso, 513 F.2d at 1388–90.

[94] Elliott, 616 A.2d at 214 (citing to the unpublished trial court opinion).

[95] *Id.* at 217–18.

[96] *Id.* at 218.

[97] *Id.*

The two Vermont courts used dramatically different methods. The trial court performed a meticulous and careful review of the historical record and sought to craft a narrative from the competing versions of the story. The Vermont Supreme Court jettisoned both the meticulous review of the record and the narrative format. The impact of this formulaic shift was profound, suggesting that environmental justice advocates must not only force courts to recognize history, but must also argue for a particular historical method.

Below we outline one historical method we think environmental justice advocates will find promising. Drawing on the work of historians engaged in the debate over the use and portrayal of history in public matters, we argue that a pragmatic approach to history is responsive to the needs of historically oppressed communities as long as it addresses the question of justice.

IV. Historical Method

The *Byda* and *Elliott* cases suggest that in the fight for environmental justice a community must make zoning boards and courts approach history deliberately and carefully.[98] Where *Byda* illustrates that communities must force decisionmakers to reckon with history, the *Elliott* case suggests that mere recognition of history's complexity is not enough. These cases suggest that communities fighting for environmental justice must also articulate and advance a particular approach to history.

James Kloppenberg's recent discussion of legal history posits specific recommendations as to how history should be approached by lawyers and historians alike.[99] Kloppenberg confronts the question Chemerinsky wrestled with: in light of the virtually universal condemnation of the notion that history might itself serve as a kind of Archimedean point, as a species of Truth, is there room for history in law?

As Kloppenberg explains, the dominant critique of legal history has focused on the separation between the abstract and the concrete in legal historical studies. He argues that any conceptual scheme for developments in history and law is apt to ignore, or miss entirely, concrete developments in the law.[100] Kloppenberg explains that there are currently two dominant approaches to history. On the one hand, there are the "deconstructionist historians" who are "attentive to the

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[98] *See supra* notes 41–65, 90–97 and accompanying text.
[99] *See* Kloppenberg, *supra* note 23, at 1333–44.
[100] *See id.* at 1332–33.

slipperiness of meanings in language."[101] These historians argue that when historical evidence is presented as unambiguous, its many meanings are buried beneath an artificially seamless interpretation.[102] Yet, Kloppenberg notes, "once one becomes committed to destabilizing meanings, it can be difficult to know where to stop."[103] In other words, he suggests, these historians are left to claim that historical evidence is indeterminate. In turn, they are rendered unable to make any reliable claims about either law or history.

On the other hand, as Kloppenberg describes, there are historians who seek to reconstruct historical contexts notwithstanding the indeterminacy of meaning of historical evidence. These scholars—the "reconstructionist historians"—look to the world from which texts and their authors emerge and "attempt to trace the meanings intended by authors, and understood by contemporary readers, through careful analysis of what was thinkable—and expressible—at the time a text was produced."[104] The problem here, Kloppenberg asserts, is that the reconstructionists ignore the indeterminacy critique—the compelling argument that any one text may have many different meanings—and thus they still hold that a true picture of the world can in fact be constructed, or reconstructed.

Between the deconstructionists and the reconstructionists are those committed to "pragmatic hermeneutics." According to Kloppenberg, pragmatic hermeneutics denotes a method of continuous investigation of the meaning of texts. In turn, this method is to be pursued by an "open and ever-expanding community of inquiry," to ensure that as many points of view as possible are involved in the interpretation of historical data.[105] As Kloppenberg describes, under a pragmatic hermeneutic approach the social and economic context of an idea is seen as central to the idea itself. Any document or form of expression must

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[101] *Id.* at 1334.

[102] *See id.* at 1334. Specifically, Kloppenberg writes that "when complex texts are used as pieces of purportedly unambiguous evidence, marshalled for straightforward contextual arguments, their multifaceted meanings are submerged beneath a smooth—and therefore misleading—surface constructed by historians oblivious to the instability of all linguistic signification." *Id.* at 1334.

[103] *Id.*

[104] *Id.* at 1335.

[105] *Id.* at 1336. Specifically, Kloppenberg describes "a method of continuous investigation and interpretation, *pursued by an open and ever-expanding community of inquiry,* of the relations of meaning within and among texts, and as a *process of interaction between critics and texts, between past and present.*" *Id.* (emphasis added). David Hollinger also describes a pragmatic approach to history as inclusive and pluralistic. He explains, for example, that the consensus-based theory that truth pragmatism espouses "is more defensible if the group of inquirers is genuinely open to women and minorities." Hollinger, *supra* note 42, at 16.

be carefully examined, such that the connections between parts and wholes—between each word, text and author and its historical context—are explored and re-explored.[106] Moreover, Kloppenberg explains that texts must be interpreted with sensitivity to the uncertainty of their meaning and to the "contested significance for us in the present."[107] Reviewing Morton Horwitz's *The Transformation of American Law, 1870–1960: The Crisis of Legal Orthodoxy*, Kloppenberg suggests that Horwitz has adopted something akin to pragmatic hermeneutics. Citing Horwitz's injunction to defy the impulse to "hide behind unhistorical and abstract universalisms," Kloppenberg explains that for Horwitz, pragmatism provides the necessary alternative to the status quo because it embraces the notion that principles may change over time, and because it appreciates the complex relationship between law and politics and theory and practice.[108] Pragmatic hermeneutics thus represents a way for courts and other decision-making bodies to engage the complexity and density of history. Akin to strict scrutiny in constitutional jurisprudence, pragmatic hermeneutics requires a painstaking, critical and deliberative study of the historical record. It demands the instantiation of abstract notions such as due process, appropriateness and extinguishment by examining socioeconomic contexts. As a result, it forces decisionmakers to confront the consequences of their decisions.[109] Moreover, evoking Ronald Dworkin's idea of judicial integrity, which holds that judges must respect legal precedent while conforming to the immanent political principles of our liberal democracy, pragmatic hermeneutics involves consideration of and sensitivity of the past as well as the present. That is, judges and others must undertake a serious examination of history, whether embodied in precedent or some other extant record, and a sober consideration of the here and now, of contemporary society's evolving norms.[110]

The historian Thomas Bender also argues for a better, fuller way of doing history, one that engages "[p]olitics, power, [and] public life

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[106] Kloppenberg, *supra* note 23, at 1337. He writes that "the separation of abstract ideas from socioeconomic context . . . when one employs the method of pragmatic hermeneutics." *Id.*

[107] *Id.*

[108] *Id.* at 1350–51. Kloppenberg quotes Horwitz's closing remarks: "[O]nly pragmatism, with its dynamic understanding of the unfolding of principle over time and its experimental appreciation of the complex interrelationship between law and politics and theory and practice, has stood against the static fundamentalism of traditional American conceptions of principled jurisprudence." *Id.*

[109] *See generally* JOHN A. ELY, DEMOCRACY AND DISTRUST (1980); G. STONE, ET AL., CONSTITUTIONAL LAW 565–757 (1991).

[110] RONALD DWORKIN, LAW'S EMPIRE 400–13 (1986).

. . . ."[111] Decrying the fragmentation of the historical profession into those scholars concerned with public history and those concerned with the histories of various subordinate groups, Bender calls for a new, synthetic history. He explains that historians of "women, blacks, immigrants, and others excluded from significant involvement in the public realm" view traditional public histories as "morally obtuse."[112] He adds that public history has in the past "devalued the lives of such groups."[113] Bender therefore argues that the relationship between different groups in society—the exclusion and subordination of one group by another—ought to be a part of any responsible "public" history. Only when the issues of exclusion and subordination become a part of public history, he suggests, can we begin to address adequately the question of justice. According to Bender, such an approach to history will invariably provoke the sorts of questions that challenge the status quo and lead to social change.[114]

Bender does not stop there. He explains that the "problem" of public culture is that it reduces to what Heidegger called the "public interpretation of reality"—a struggle involving the possession of meaning and the formal instruments of power.[115] Thus, Bender claims, the desire of powerful, dominant social groups to make their interpretation of the world universal is the central problem in the study of public culture. Analyzing, interpreting and understanding public culture is made difficult because those in power inevitably obscure or obliterate other voices. Thus, historians must not accept public culture as it is initially revealed. Rather, Bender argues, historians must investigate that culture, examine how it was made, and seek to understand the terms of participation of various groups in that culture. Such an investigation would thus not assume that all groups are represented in public and would seek to understand why some groups are more represented than others.[116]

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[111] Thomas Bender, *Wholes and Parts: The Need for Synthesis in American History*, 73 J. AM. HIST. 120, 125 (1986).

[112] *Id.* at 131.

[113] *Id.*

[114] *Id.* at 132. Bender proposes "to establish the relations of various self-defined, externally defined, and structurally defined parts to each other and to the public culture that is constituted from their relations. *Only then, when exclusion and subordination are established as relations in public, can meaning, significance, causation, and the question of justice be adequately addressed.* Such a history will be more likely to provoke the corrosive sort of questions always associated with historical moments ready for social change." *Id.* (emphasis added).

[115] *Id.* at 135.

[116] *Id.* As Bender puts it,

Bender therefore describes a new kind of history sensitive to the exclusion and subordination of certain groups in American history. In an effort to preserve the discipline of public history as a project for historians, Bender calls for responsibility and sensitivity.

In both *Elliott* and *Byda*, history is cast in abstract terms, rather than as a function of specific events; as soon as history is decoupled from the particulars and nuances and from narrative, courts or zoning boards are essentially free to choose the level of abstraction from which to approach history. History is still conceived of as "true," but the specific historical truth ultimately flows from a deeply subjective decision on the part of the judges or board regarding the level of abstraction engaged. The *Elliott* court's decision to weigh the sovereign's intent against the Abenaki's turned the tide; the presentist lens of the dominant culture used by the court focused on one intent while blurring the other. Similarly, the Board's decision in *Byda* to characterize the history of the area as primarily industrial while disregarding the condition of the neighborhood as it presently existed makes its findings appear inexorable. Each view of history, then, stemmed not from objectivity but from arbitrariness.

In the fight for environmental justice, it is not enough to argue that courts or zoning boards ought to engage history, for historical method itself has dramatic consequences on the quality of a particular decision. A community must also be prepared to argue that decisionmakers must perform a pragmatic historical analysis, free of abstractions and sensitive to the questions of justice and aspiration.

Borrowing from the ideas of Karp, Chemerinsky, Kloppenberg and Bender, a better method of doing history in environmental justice cases, and any cases involving issues of social justice, is available. This method entails two central features. First, courts and public officials must recognize that they are in fact doing history, that they are examining past events and practices and evaluating them in the light of some set of flexible criteria, such as a zoning board's use of the

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> [p]articular social groups seeking power and recognition want to make their interpretation of the world the universal one. The thrust by the powerful to define for themselves and for others a public culture that looks very much like their group values writ large presents the interpretive, analytical, and moral problem of the study of public culture. *Historians cannot take the public world on its own terms. It must be interrogated; we must inquire into its making, seeking to establish the various degrees and terms of participation of various groups in the public world. . . . Such a history would not assume that all relevant groups are represented in public. It would be concerned to know why some groups and some values are so much—or so little—represented in the public realm.*

Id. (quoting K. Mannheim) (emphasis added).

"appropriateness" standard. Second, having recognized that they are in fact conducting an historical investigation, courts and public officials must approach history pragmatically and with an eye toward justice. That is, they must interpret the historical record painstakingly and critically, with an understanding that their interpretation is necessarily provisional. They then must interrogate the past, "inquir[ing] into its making, seeking to establish the various degrees and terms of participation of various groups. . . ."[117] In this way, courts and public bodies will be forced to confront not only the complexities of history but also the matter of justice in history.

V. Conclusion

These cases from the front lines of the battle for environmental justice illustrate the dangers of history in the hands of zoning boards and courts. Recalling Karp's critique, these cases demonstrate powerfully how history can be used to cloak power and oppression in the garb of objectivity or abstraction.

Further, they suggest warnings for how history ought to be approached in city hall and the courtroom, and highlight the need for practitioners to be aware of the uses, and misuses, of history so that cases may be fought on the surest ground. A discussion of historical methods is not, at first blush, directly relevant to the work of environmental justice advocates and community organizers. Yet, complacency and the perverse use, or nonuse, of history in the two cases discussed in this Essay, and Chemerinsky's recent critique of the Supreme Court's methodology, raise the important question of the proper role of history in law generally and in environmental justice cases in particular.

Byda and *Elliott* demonstrate that history must be addressed by communities that face environmental justice issues. As *Byda* suggests, uncritical assessments of the history of an area or community, or the very history itself, may be hidden in the discrete criteria used by governmental bodies to chart the future of an area or neighborhood. Equally unsettling, as the *Elliott* case shows, is the notion that the historical treatment of a group may well be the pivotal issue in determining present and future distribution of environmental bur-

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[117] *Id.* at 135. This kind of critical pragmatic approach, sensitive to cultural pluralism and the question of justice, is similar to the one Joseph Singer calls for in First Amendment jurisprudence. *See* Joseph W. Singer, *Property and Coercion in Federal Indian Law: The Conflict Between Critical and Complacent Pragmatism*, 63 S. Cal. L. Rev. 1821, 1828–29 (1990).

dens and benefits. These cases reveal that traditionally oppressed communities must begin the fight for environmental justice by scrupulously examining the traps set by the uncritical notion of history as monolithic.

In addition, environmental justice advocates and activists must be prepared to articulate the limits of historical analyses and to convincingly recast history where it is part and parcel of the decision-making process. Recognition of the role of history as urged by Karp and the promise of an enriched historical method set forth by Kloppenberg and Bender could help inform the strategy in a case such as *Byda*. An understanding of the role of history in environmental justice cases allows the community to uncover, for instance, the pitfalls inherent in the key statutory term "appropriate." Use of Kloppenberg's pragmatic hermeneutic method and of Bender's synthetic approach might well facilitate the rich reconstruction of that key term, and thus reveal arguments that ought to be made as to its meaning.

Moreover, pragmatic hermeneutics and synthesis would enable plaintiffs to marshal nuanced historical arguments to neutralize the seemingly inexorable weight of the monolithic conception of history routinely presented by courts and zoning boards. Thus, at every opportunity, plaintiffs ought to articulate vigorously their own version of an area's past so that the final decision does not turn solely on the court's or zoning board's complacent interpretation. Moreover, plaintiffs from traditionally disfranchised communities should explain that history itself has been largely unkind to them and thus should not be used to perpetuate past inequities.

At the same time, in cases such as *Elliott*, an affirmative exposition of the limits of historical investigation by the Vermont Supreme Court would at least have shown that its rejection of the trial court's decision represented not a disagreement over doctrinal categories, but a fundamental disagreement over notions of history and historical methodology. An explicit disavowal by the court of the trial court's historical method might have at least forced the court to articulate its rejection of the notion that history is artifactual and particularistic. Forced to justify its methodology, the court may have been less willing to describe history in abstract terms and thus to ignore the contested factual record.

Discussion of methodology and recognition of the support among professional historians for the kind of careful work the trial court undertook would have compelled the court to confront the merits of its own historical analysis. That is, acknowledging the prevailing view among historians, that history can never be cast in simple, monolithic

terms,[118] would have forced the court into the uncomfortable position of having to reject the view of real historians in order to maintain that its decision turned on the "true" interpretation of competing histories.

Perhaps, too, traditionally oppressed communities such as those in *Byda* and *Elliott* should urge courts and zoning boards to embrace a conception of history that incorporates not only the dense and difficult past but the promising future. That is, in acknowledging that history will only take us so far in making decisions about today, courts, zoning boards and others should attempt to merge past and present in arriving at a history in a particular case. They should realize that the history of oppressed groups, of disfranchised communities, presents a largely negative lesson: a lesson that teaches what not to do but leaves unanswered the question of what to do today. That is why decisionmakers need to take into account the present aspirations of these communities when considering history—so that they may obtain guidance when the historical record is at best contested and at worst morally bankrupt.[119] By asking decisionmakers to consider the question of justice when they undertake a rigorous historical analysis, disempowered communities can begin to move away from that history and toward a better future. The argument for a better, richer history will thus mean that past injustices cannot be used to perpetuate social and environmental inequity. Decisionmakers will be required to ask not just where a community has been, but where it is now, where it wants to go, and where it should go as a matter of justice.

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[118] *See* Hollinger, *supra* note 42, at 16.

[119] For an argument that resonates with our own regarding the inadequacy of history as a guide for present-day decisions, see James Atlas, *Yesterday's Gone; History's Use As a Guidebook is Overrated*, N.Y. TIMES, Jan. 2, 1994, § 4 (The Week In Review) at 1, 4:

> By citing precedents, comparing one thing to another, we tame our fear of the unknown, establish a reassuring sense that every new experience has a name. . . . The trouble is that history . . . resists analogy. . . . The study of history deepens our sense of what it means to be human—but it doesn't make us prophets.

Id.