When Government Intrudes: Regulating Individual Behaviors that Harm the Environment

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REGULATING INDIVIDUAL BEHAVIORS THAT HARM THE ENVIRONMENT

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ABSTRACT

Emerging environmental problems and technologies, coupled with the existence of mature regulatory regimes governing most industrial sources of pollution, combine to reveal with new clarity the harms that individual behaviors and lifestyles inflict on the environment. However, changing how individuals impact the environment through their daily behaviors requires a reorientation of environmental law and policy and a balancing of government prerogatives and individual liberty. A growing body of legal scholarship recognizes the environmental significance of individual behaviors and lifestyles, critiques the failure of environmental law and policy to capture harms traceable to individuals, and suggests and evaluates strategies for capturing individual harms going forward. In this discussion, mandates on individuals have been largely dismissed or deemphasized as a potential policy tool for changing environmentally significant individual behaviors because of a widely shared view that (1) detection and enforcement of such mandates pose insurmountable technical, administrative, and cost barriers and (2) that their application to individuals would trigger insurmountable intrusion objections.

There are, however, reasons to believe, as to the first noted objection to the use of mandates, that the cost and feasibility of imposing mandates on environmentally significant individual behaviors may be less daunting than widely anticipated. With respect to the second objection (the intrusion objection, or the idea that mandates on individually significant environmental behaviors would so offend notions of individual liberty and privacy that they cannot be adopted or enforced), that objection to the use of mandates has yet to be subjected to critical examination to determine its source, scope, intransigence, or otherwise evaluate with particularity the obstacle that it (may) pose. Better understanding of whether, when and/or why mandates on environmentally significant behavior may trigger objections on the ground that they are “intrusive” would help to assess mandates as a policy tool for changing environmentally significant individual behaviors and could also provide guidance about how mandates could be structured to avoid such objections.

This Article undertakes an initial effort to better define and understand the intrusion objection to the use of mandates to change environmentally significant individual behaviors. Part I surveys prior and existing laws aimed at or impacting individual behavior and/or associated environmental harms to develop a rough sense of when such regulations have (and have not) triggered what could be characterized as intrusion objections. Part II then looks to substantive due process jurisprudence for further guidance about when and why government restrictions on individual freedom give rise to intrusion objections. Part III builds on Parts I and II to suggest some principles to guide the consideration and development of mandates on environmentally significant individual behaviors going forward and proposes an energy waste ordinance designed to avoid intrusion objections.
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The regime of a free society needs room for vast experimentation. Crises, emergencies, experience at the individual and community levels produce new insights; problems emerge in new dimensions; needs, once never imagined, appear. To stop experimentation and the testing of new decrees and controls is to deprive society of a needed versatility.¹

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Experience should teach us to be most on our guard to protect liberty when the government’s purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest

dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.2

Emerging environmental problems and technologies, coupled with the maturation of regulatory regimes governing most industrial sources of pollution, combine to reveal with new clarity the harms that individual behaviors and lifestyles inflict on the environment. Individual behaviors and lifestyles lie at the core of both the climate change problem and its potential solutions.3 Individuals directly pollute a range of environmental media in significant volumes – a third of the chemicals that form low-level ozone or smog can be traced to individual sources and “[h]ouseholds discharge as much mercury to wastewater as do all large industrial facilities combined.”4 Ever more sophisticated detection and mapping methods document resource depletion and the unsustainability of present (western) lifestyles and consumption.5 In the memorable words of one scholar, “[a]ctions that may not have previously appeared to be worthy of regulation have been found to cause significant adverse impacts cumulatively, over time, and in context – heading us toward a certain death by a thousand cuts.”6 However, using law to change how individuals impact the environment through their behavior and lifestyles presents a

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3 Including only “behaviors over which individuals have direct, substantial control” (and thereby excluding emissions associated with the production of consumer goods and food), the average American emitted over seven tons of carbon dioxide in 2000 for a total of 4.1 trillion pounds of individual emissions (compared to 3.9 trillion pounds attributable to the entire industrial sector). Michael P. Vandenbergh & Anne K. Steinemann, The Carbon-Neutral Individual, 82 N.Y.U. L. REV. 1673, 1693-94 (2007). Individual emissions constitute 32% of annual emissions in the United States. Id. at 1694.
5 For example, satellite mapping and other technologies are now used to more accurately assess deforestation and forest degradation, e.g., Scott J Goetz, et al., Mapping and Monitoring Carbon Stocks with Satellite Observations: A Comparison of Methods, 2009 CARBON BALANCE AND MANAGEMENT 4:2; there are journals focused solely on advanced methods of environmental monitoring, e.g., REMOTE SENSING OF ENVIRONMENT.
difficult task, one that will require a reorientation of environmental law and policy and also perhaps a balancing of government prerogatives and individual liberty.

Existing federal environmental laws focus on controlling the impacts of resource extraction, pollution generated by industrial sources (during, for example, manufacturing or production of a good), and processes for waste disposal. These laws rarely apply directly to individuals. And, in the few instances where federal environmental law does directly impose controls on individuals (for example, limits on the use of private property to protect wetlands or endangered species), enforcement has often been both controversial and halting.

A growing body of legal scholarship recognizes the environmental significance of individual behaviors and lifestyles, critiques the failure of environmental law and policy to speak directly to individuals as sources of environmental harm, and suggests and evaluates strategies for capturing

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7 Individuals are, for example, specifically exempted from regulation under Subtitle C of the Resource and Conservation Recovery Act through a regulatory exemption that allows individuals to dispose of hazardous wastes, without any controls, as part of the nonhazardous solid waste stream. See 40 C.F.R. § 261.4(b)(1) (2009) (setting forth the household waste exemption to RCRA that provides that “household waste,” or “any material . . . derived from households” is not deemed hazardous waste under the law, regardless of whether it exhibits hazard characteristics or contains listed hazardous wastes). See also Michael P. Vandenbergh, From Smokestack to SUV: The Individual as Regulated Entity in the New Era of Environmental Law, 57 Vand. L. Rev. 515, 523-29 (2004) [hereinafter “From Smokestack to SUV”] (reviewing traditional regulation of industrial sources and illustrating how it frequently fails to capture environmental harms arising from individual behaviors); Scott D. Anderson, Watershed Management and Nonpoint Source Pollution: The Massachusetts Approach, Comment, 26 B.C. Envtl. Aff. L. Rev. 339, 385 (1999) (“Traditional command and control environmental regulation often deals with the actions of large economic entities such as industry, municipalities or government. When environmental regulation begins to interfere with individual behavior, such as building homes or driving automobiles, public resistance increases.”). See generally Hirokawa, supra note 6, at 567 (“By excluding and exempting small and ‘minor’ actions from the scope of environmental regulations, prior environmental laws have essentially excused those actions from culpability for environmentally destructive action; such actions could be undertaken free from moral worth.”) (citing to environmental review statutes’ exemptions for minor activities).

This work cautions against relying solely on the abstract environmental protection norm to achieve broader changes in environmental behavior. It outlines challenges to changing individual environmental behaviors, arguing that the norm must be expanded to embrace personal responsibility. It suggests that environmental groups take the lead in educating individuals about the environmental effects of their actions. It questions the capacity to make choices consistent with such values and norms. It considers the policy ramifications of theories of individual identity choice and commitment development. It emphasizes the role of values and evaluating strategies for changing behaviors within the American evangelical community. It explains the connection between consumption and environmental harm. It identifies individual GHG-emitting behaviors most susceptible to change and suggests strategies for changing them. It describes the historical lack of attention to consumption from environmental policy, defining the concepts of consumer and consumption, discussing the relationship between law and consumer preferences, and explaining why consumption must now be addressed head on by environmental policy.
on price signals, product mandates, or other common indirect methods to change environmentally significant individual behavior or reduce the harms occasioned by such behavior and advocates use of a variety of policy tools, most importantly informational and norm campaigns. Notably, although direct mandates are the policy tool most commonly used to control environmental harms and mandates are recognized as having


10 For example, attempts to limit energy consumption by raising the cost of energy or imposing product efficiency mandates. Vandenbergh, Barkenbus & Gilligan, supra note 9, at 1704 (describing studies suggesting that behavior does not always respond to price signals); Robert R. Nordhaus & Kyle W. Danish, Designing a Mandatory Greenhouse Gas Reduction Program for the U.S., PEW CENTER ON CLIMATE CHANGE 45 (May 2003) (describing limitations on the effectiveness of product efficiency mandates, including the rebound and junker effects); Michael P. Vandenbergh, Amanda R. Carrico, & Lisa Schultz Bressman, Regulation in the Behavioral Era, 95 MINN. L. REV. 715, 765 (2011) (criticizing current GHG–control strategies aimed at the household sector for “reflect[ing] strong assumptions about the influence of price and thus often overlook[ing] other influences on behavior.”). See also Thomas Dietz et al., Household Actions Can Provide a Behavioral Wedge to Rapidly Reduce U.S. Carbon Emissions, 106 PROC. NAT’L ACAD. SCI. No. 44, 18452, 18453 (2009) (concluding that research suggests that a single policy tool may be insufficient to change individual and household behavior and that “interventions that combine appeals, information, financial incentives, informal social influences, and efforts to reduce the transaction costs of taking the desired actions” are most effective).

11 E.g., Ela, supra note 9, at 116-17; Vandenbergh & Steinemann, supra note 3, at 1724 (explaining the need to use both norm activation and traditional regulatory measures, “include[ing] taxes or subsidies, cap-and-trade schemes, standards that regulate the efficiency of consumer projects made by industrial firms, and support for new technologies and infrastructure”).

12 Command and control mandates on industrial point sources of pollution (setting a maximum volume of pollutant that may be emitted, requiring the installation of
the potential to enhance norm campaigns aimed at environmentally significant individual behaviors, mandates (or direct proscriptions on individual behavior) receive comparatively little attention as a policy tool for changing environmentally significant individual behaviors. This is so because it is widely viewed as infeasible to apply mandates to most environmentally significant individual behaviors.

Two reasons are frequently offered for why mandates are not a feasible policy tool for regulating environmentally significant individual behaviors standing alone. First, it would be difficult to enforce mandates.
against individuals, who are numerous, spread out, and frequently engage in environmentally significant behaviors in private. Detection and enforcement against individuals would be of questionable technical and administrative feasibility and prohibitively expensive.\(^{16}\) Second, even if mandates could be cost effectively enforced, they would trigger insurmountable intrusion objections – individuals would not accept government constraints (or the measures required to enforce them) on environmentally significant individual behaviors.\(^ {17}\)

There is, however, ground for optimism that the cost and feasibility of imposing mandates on some environmentally significant individual behaviors may be less daunting, or at least pose less of an obstacle, than widely anticipated. A host of technologies make it increasingly easier to identify and track environmental harms, including harms generated by individuals, such as household energy consumption and household waste production.\(^ {18}\) Many environmentally significant individual behaviors –

\(^ {16}\) Vandenbergh, *From Smokestack to SUV*, supra note 7, at 598.
\(^ {17}\) Lin, supra note 9, at 1152 (citations omitted) (“Often command-and-control regulation of individuals is politically infeasible because of its perceived intrusiveness. . . . Command-and-control regulation of individuals can also be inefficient and costly to enforce because of the large number of regulatory targets, their dispersed nature, and the difficulty of detecting environmental harms.”); Babcock, *Global Climate Change*, supra note 9, at 5-6; Vandenbergh & Steinemann, supra note 3, at 598-99.
from solo commuting to the disposal of household waste—occur in contexts with an external aspect that provides opportunity for detection and enforcement. Piggybacking of enforcement efforts on existing, local regulation may reduce administrative costs. And, most importantly, for purposes of enhancing norm campaigns, consistent enforcement may not be necessary—the enactment of mandates may exert an expressive effect even in the absence of rigorous enforcement.

It would thus be premature and over inclusive to foreclose the possibility of mandating changes to environmentally significant individual behaviors on the ground that it is technically or administratively infeasible. Even allowing, however, that the imposition of mandates on environmentally significant individual behaviors may in some circumstances be both technically and administratively feasible, a core objection to the use of mandates remains, the intrusion objection. Mandates on environmentally significant individual behaviors may, even if otherwise feasible, prove too intrusive to adopt and enforce:

Even if there were laws that reached these [environmentally significant individual] activities, there is modest.”).

See generally Barry Paddock, Grad Students Create Color-Changing Clothes That Detect Air Pollution, N.Y. DAILY NEWS, Jan. 19, 2011, at 11 (describing shirts that change color when exposed to pollution); Jyoti Madhusoodana, Cell Phone Cameras Help Monitor Atmospheric Black Carbon, MONGABAY.COM (Feb. 1, 2011), http://news.mongabay.com/2011/0201-black_carbon_madhusoodanan.html (equipping cell phones with an application allowing them to visually reveal levels of black carbon and providing these cell phones to households to monitor their air quality in an effort to encourage the adoption of clean cook stoves); Lyndsey Layton, Traceability Rule Represents Big Adjustment for Food Industry, WASH. POST, Jan. 24, 2011, at A01 (describing how “in some stores [consumers] can wave a smartphone above an apple or orange and learn instantly where it was grown, who grew it and whether it has been recalled.”).

19 Kuh, Capturing Individual Harms, supra note 13.

20 Cass R. Sunstein, On the Expressive Function of Law, 144 U. PA. L. REV. 2021, 2032 (1996) (“In many localities, such laws are rarely enforced through the criminal law, but they have an important effect in signaling appropriate behavior and inculcating the expectation of social opprobrium and, hence, shame in those who deviate from the announced norm. With or without enforcement activity, such laws can help reconstruct norms and the social meaning of action.”); Cass R. Sunstein, Social Norms and Social Roles, 96 COLUM. L. REV. 903, 958-59 (1996) (observing that even laws that are rarely enforced shape social norms and meanings “because there is a general norm in favor of obeying the law” and because the laws “inculcate both shame and pride.”).
would be serious problems enforcing them. Efforts to
detect and ultimately enforce against individual activities
that usually occur at home or in the immediately
surrounding area would trigger enormous political
resistance, as they would be seen as an interference with
individual liberty and an invasion of privacy. 21

This intrusion objection is often raised in roughly similar ways to help
explain why mandates on environmentally significant individual behaviors
are not a promising policy tool for capturing individual harms. 22 It appears
to be premised on observations of unsuccessful prior attempts to mandates
changes in environmentally significant individual behaviors, identified
cognitive limitations that may prevent individuals from recognizing the
(individually de minimis, collectively significant) harms that their actions
impose on the environment, empirical studies suggesting that constraints
on individual behavior can engender backlash, and common sense intuition
about the limits of public tolerance for government intervention. 23
Although not stated explicitly, the intrusion objection constitutes a
prediction by scholars about how the public and their elected
representatives will receive actual or proposed mandates on
environmentally significant individual behaviors. 24

In large measure, then, the intrusion objection rests on an unproven
prediction about popular and political responses to mandates on
environmentally significant individual behaviors. Importantly, however,
the intrusion objection has yet to be subjected to critical examination to test
this prediction or determine the source, scope, intransigence, or otherwise

21 Babcock, Assuming Personal Responsibility, supra note 4 at 123. See also
Vandenbergh, From Smokestack to SUV, supra note 7, at 598 (“To the extent
environmental harms caused by individuals are difficult to detect, enforcement is
expensive and intrusive. Even if sufficient resources were devoted to the effort, the
intrusiveness of enforcing these regulations may undermine compliance or produce
a political backlash.”).
22 E.g., Lin, Evangelizing Climate Change, supra note 9, at 1157-60; Babcock,
Global Climate Change, supra note 9, at 5-6; Vandenbergh & Steinemann, supra
note 3, at 598-99.
23 Babcock, Assuming Personal Responsibility, supra note 4, at 123; Vandenbergh,
From Smokestack to SUV, supra note 7, at 598.
24 In essence, the intrusion objection asserts that mandates on environmentally
significant individual behavior have limited utility as a policy tool because
politicians won’t adopt such mandates (because they will inspire public outcry) or,
if such mandates are adopted, they will engender public outcry and be repealed or
disobeyed.
evaluate with particularity the intrusion objection and the obstacle that it (may) pose to the use of mandates to change environmentally significant individual behaviors. Better understanding of if, when, how, and/or why mandates on environmentally significant behavior may trigger objections on the ground that they are “intrusive” would help to assess mandates as a policy tool for changing environmentally significant individual behaviors and could also provide guidance about how mandates could be structured to avoid such objections.

This Article undertakes an initial effort to better define and understand the intrusion objection to the use of mandates to change environmentally significant individual behaviors. Part I surveys prior and existing laws aimed at or impacting individual behavior and/or associated environmental harms to develop a rough sense of when such regulations have (and have not) triggered what could be characterized as intrusion objections. Part II then looks to substantive due process jurisprudence for further guidance about when and why government restrictions on individual freedom give rise to intrusion objections. Part III builds on Parts I and II to suggest some principles to guide the consideration and development of mandates on environmentally significant individual behaviors going forward and proposes an energy waste ordinance designed to avoid intrusion and related objections.

I. Surveying Regulation Designed to Reduce Individual Environmental Harms

A. Indirect Regulation of Environmentally Significant Individual Behaviors is Common and Widely Accepted

Government regularly nudges and prods Americans to behave in ways that are better for the environment. It designates carpool lanes to

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25 Some interesting empirical work has been done attempting to gauge perceptions of intrusiveness in the context of the Fourth Amendment. Christopher Slobogin & Joseph E. Schumacher, Reasonable Expectations of Privacy and Autonomy in Fourth Amendment Cases: An Empirical Look at “Understandings Recognized and Permitted by Society,” 42 DUKE L.J. 727 (1993). The authors of this study asked subjects to evaluate the intrusiveness of different types of government searches.

26 Interestingly, in their book Nudge, Richard H. Thaler and Cass R. Sunstein criticize the United States’ traditional reliance on command and control measures to reduce environmental harms and recommend greater reliance on indirect
reward those who ride share with a faster commute. It subsidizes public transportation and the purchase of hybrid vehicles to make cleaner travel less expensive. It permits manufacturers of energy efficient products to market those products with special government seals of approval and polices green marketing claims to make sure that consumers are not mislead about the environmental attributes of the products that they purchase. It sponsors public service campaigns exhorting us to (famously) Give a Hoot and (more recently) Change a Light Change the World (buy energy-efficient lighting), Turn Over a New Leaf (buy EPA Certified SmartWay cars), and Plug-In To eCycling (recycle our cell phones). It charges bottle deposits to encourage recycling and discourage littering. It encourages household energy efficiency through a growing array of measures, including tax rebates, pricing mechanisms (for example, charging more for energy use above a set baseline), weatherization programs, the installation of smart meters, public information and marketing campaigns (including neighbor-to-neighbor education programs), and other similar endeavors. It bars large grocery stores from regulation, or “good choice architecture,” specifically economic incentive systems (which directly regulate the market) and feedback and information (which, although aimed in some instances at individual behavior, do not mandate behavior change and perhaps more directly regulate norms). Thaler & Sunstein, supra note 9, at 183-96. However, in the narrow context of regulating individual behavior, indirect regulation (and nudges) is perhaps better characterized as the traditional and predominant method of regulating individual behavior, while direct mandates are less common and less used, in particular with respect to federal environmental policy.

27 See 23 U.S.C §§ 146, 149(b)(5), 166; see also Cal. Veh. Code § 5205.5 (West 2010).
31 For a description of a number of EPA Public Service Announcements, visit http://www.epa.gov/newsroom/psa.htm.
33 The American Reinvestment and Recovery Act, for example, included substantial funding for energy efficiency programs. Pub. L. No. 111-5, 123 Stat. 115 (2009). See also Elias L. Quinn & Adam L. Reed, Envisioning the Smart Grid:
Government also imposes upstream mandates that limit the environmental harms occasioned by a variety of individual behaviors. A host of product mandates dictate everything from the permissible amount of energy used by a variety of appliances and products, including the miles per gallon achieved by vehicles. These mandates are directed to the product manufacturers, but effectively limit individual choice about the types of products to buy and limit the environmental harms occasioned by, for example, taking a drive or using a refrigerator. Green building and zoning codes similarly dictate requirements on the built environment designed to limit environmental harms by, for example, encouraging individuals to reduce their energy consumption in a number of ways (mandating mixed use zoning to discourage car use by locating residences within walking distance of necessary services, requiring the use of energy efficient building materials that reduce heat and/or air conditioning demand).


For a good account of the principles of green building and its evolution from reliance on informational/voluntary approaches to mandatory requirements, see Hirokawa, supra note 6, at 511-19, 545-46 (2009); see also Patricia E. Salkin, Smart Growth and the Greening of Comprehensive Plans and Land Use Regulations, AMERICAN LAW INSTITUTE – AMERICAN BAR ASS’N (August 2008). Although in some sense these requirements are mandates directed to individuals at the juncture of construction or renovation, they do not directly operate on specific day to day behaviors yet serve to greatly constrain the same and are best viewed as a regulation of architecture. See BOS., MASS., ZONING CODE art. 37 (2010) (representing the first major city in the nation to require adherence to the U.S. Green Building Council’s LEED (Leadership in Energy and Environmental Design) Certified standard as part of the private development review process).
These are just a few examples of a web of regulation designed to indirectly change individual behavior or limit associated environmental harms by directly regulating the market (for example, by offering subsidies or imposing product mandates), norms (for example, through public information campaigns), or architecture (for example, green building and zoning codes, car pool lanes). These indirect methods of influencing individual behavior are common and, while they may trigger public opposition, public opposition to these measures is not (as in the case of direct mandates) held up as a major impediment to the use of indirect regulation generally. This is so although even these indirect measures can spur objections that sound quite like intrusion objections. The installation of smart meters in California, for example, which collect detailed information about an individual’s electricity use in an effort to

37 Of course, in addition to these indirect regulations that have as an express purpose either changing environmentally significant individual behaviors or limiting the environmental harms arising from those behaviors, there is an enormous volume of regulation that, while not aimed at influencing individual behaviors or associated harms, nonetheless significantly shapes (and frequently increases) the environmental harms imposed by individuals. Examples include everything from oil energy industry subsidies, ENDING THE ENERGY STALEMATE: A BIPARTISAN STRATEGY TO MEET AMERICA’S ENERGY CHALLENGES, NAT’L COMM’N ON ENERGY POLICY (Dec. 2004) (describing subsidies for domestic oil production totaling between $890 million and $1.54 billion), to agriculture policy, see Carrie Lowry La Seur & Adam D.K. Abellkop, Forty Years after NEPA’s Enactment It’s Time for a Comprehensive Farm Bill Environmental Impact Statement, Essay, 4 Harv. L. & Pol’y Rev. 201, 204-10 (2010) (describing the environmental impacts of Farm Bill policies) and transportation and housing policies, John Turner & Jason Rylander, Land Use: The Forgotten Agenda, in THINKING ECOLOGICALLY 60-66 (M. Chertow & D. Esty eds. 1997) (describing how transportation and housing policies exacerbated sprawl).

38 One specific form of indirect regulation aimed at individual behaviors – taxes or other significant price increases – is generally recognized as giving rise to often insurmountable public opposition. See ROBERT R. NORDHAUS & KYLE W. DANISH, DESIGNING A GREENHOUSE GAS PROGRAM FOR THE U.S. 16 (Pew Center on Climate Change, May 2003) (citation omitted) (observing that “25 years of environmental and energy policy experience suggests that it is difficult to gain public support for a program that relies principally on direct increases in the price of energy—either through taxes or regulatory measures—even where such a program arguably is more cost-effective or will result in a more equitable distribution of regulatory burdens than other approaches. Even in times of most compelling national circumstances, such as the 1973 Arab oil embargo, Congress was unwilling to use energy price increases to rein in consumer demand.”). See also Vandenbergh, Carrico & Bressman, supra note 10, at 757 (observing that even using the term “tax” as opposed to the term “offset” can trigger greater opposition among some groups).
encourage voluntary changes in energy use (thus, an indirect regulation of norms), has occasioned opposition on the ground that the meters constitute a “breach of privacy.”

Similarly, the federal statutory scheme of environmental protection in large measure reaches individual behaviors and associated environmental harms only indirectly. The core provisions of our major environmental statutes impose restraints primarily on larger entities engaged in resource extraction, waste creation (as a result of manufacturing, production, etc.), and/or waste disposal. Ultimately, many of these resource extraction and waste-creating processes are engaged in to satisfy the demands of individual consumption. As such, by limiting the environmental harms associated with the products of consumption, the regulatory regime indirectly limits the environmental harms that individuals contribute to by consuming those products. For example, a host of environmental statutes impose restrictions on (and thereby limit the environmental harms arising from) the harvest of trees and the process of manufacturing paper (including ultimate disposal of generated waste) thereby limiting, in turn, the environmental harm chargeable to an individual when he/she uses a piece of paper. It is thus fair to characterize environmental law and policy as imposing direct

40 Vandenbergh, From Smokestack to SUV, supra note 7, at 597-98 (“[T]he vast majority of the command and control regulations that seek to reduce environmental harms from individuals take the form of emissions controls directed at the industrial facilities that produce consumer products or restrictions on the environmentally harmful characteristics of consumer products, whether automobiles, thermostats, or home cleaners.”).
41 See Anderson, supra note 7, at 367 (“By relying primarily on regulation of industrial and municipal discharges, the general public has only indirectly contributed to cleaning up our waterways through higher consumer prices and sewer bills.”).
regulation primarily on larger, institutional entities and addressing individual behavior primarily through indirect regulation.\textsuperscript{43}

However, some laws (in particular local laws) do directly regulate environmentally significant individual behaviors. Examples of these laws, and whether and why they have triggered intrusion or other public objections, are considered below.

\textbf{B. Direct Regulation of Environmentally Significant Individual Behaviors}

A variety of common local ordinances and some state laws directly regulate environmentally significant individual behaviors.\textsuperscript{44} Many municipalities require that individuals sort their trash to separate out recyclable (and sometimes even compostable) waste.\textsuperscript{45} Local (and sometimes state) burn laws\textsuperscript{46} restrict or bar individuals from burning solid

\textsuperscript{43} Notably, this reliance on indirect regulation and paucity of direct regulation in the context of environmental controls directed at individuals may be unusual. In his article \textit{Structural Laws and the Puzzle of Regulating Behavior}, Edward K. Cheng posits that direct regulation of behavior (what he terms “fiat”) is the dominant method employed to control behavior in other contexts, including criminal law. \textit{See} Cheng, \textit{supra} note 15, at 715 (citation omitted) (“Historically, attempts to change behavior have been addressed primarily through fiat – legal prohibitions with accompanying penalties for noncompliance.”).

\textsuperscript{44} For an overview of some such measures, \textit{see} Vandenberg, \textit{From Smokestack to SUV, supra} note 7, at 599 n.321.

\textsuperscript{45} \textit{E.g.}, S.F., \textit{CAL. ENVIRONMENT CODE} §§ 1901-9112 (2010) (requiring separation of trash, compostable materials, and recyclables); \textit{SEATTLE, WASH., MUN. CODE} § 21.36.083 (requiring separation of trash and recyclables); \textit{PITTSBURGH, PA., CODE OF ORDINANCES} §§ 619.06 (2010) (requiring separation of trash and recyclables); \textit{NANTUCKET, MASS., CODE OF ORDINANCES} §§ 125-2, 125-6 (2009) (requiring separation of trash, compostable materials, and recyclables); \textit{N.Y.C., N.Y., RULES tit. 16, § 1-08(g) (2009)} (“Residents of residential buildings shall: (1) separate from other materials designated recyclable materials that are required to be recycled and shall place such separated materials in the appropriate containers . . . .”).

\textsuperscript{46} Local burn laws have long existed to address both local air pollution and fire concerns. \textit{CAL. PUB. RES. CODE}, § 4423.1 (West 1976). They are now widespread, adopted in some instances as part of state implementation of federal Clean Air Act requirements. \textit{E.g.}, Approval and Promulgation of State Implementation Plans: Idaho, 61 Fed. Reg. 27019 (May 30, 1996) (describing modifications to Idaho’s burn laws to satisfy CAA requirements).
fuels, as by limiting or prohibiting the use of fireplaces or wood stoves. Numerous jurisdictions limit the amount of time that individuals may idle vehicles and/or other emission-generating equipment. Prohibitions on littering are ubiquitous. Municipalities commonly adopt water conservation ordinances that prohibit or limit the time or duration of outdoor water use or prohibit water waste more generally (for example, by requiring the use of hoses that have an automatic shut-off nozzle or barring the washing of impervious surfaces); some require installation or retrofitting of low flow fixtures prior to the sale or major modification of a residential home. Many jurisdictions have tree protection ordinances that...

48 E.g., N.Y.C., N.Y., ADMIN. CODE § 24-163(a) (2009) (“No person shall cause or permit the engine of a motor vehicle, other than a legally authorized emergency motor vehicle, to idle for longer than three minutes . . . .”); BURLINGTON, VT., CODE § 20-55(e) (2009) (“No person shall leave idling for more than three (3) minutes any motor vehicle in any area of the city [with certain limited exceptions].”); SACRAMENTO, CAL., CITY CODE §§ 8.116.010 - 8.116.110 (2010) (requiring private property owners to ensure they do not allow commercial vehicles to idle on their property for more than five minutes and prohibiting individuals from idling certain gasoline powered equipment, marine vessels and off road equipment); DENVER, COLO., CODE OF ORDINANCES § 4-43 (2010) (prohibiting all idling for more than five minutes with a few exceptions). As with burn laws, restrictions on idling are sometimes enacted to comply with federal CAA requirements. See, e.g., Adopted HGB Post-1999 ROP/Attainment Demonstration SIP, App. J Vehicle Idling Restriction Documentation (Dec. 6, 2000) (describing SIP modifications including enhanced idling restrictions), available from the Texas Commission on Environmental Quality, http://www.tceq.texas.gov/implementation/air/sip/dec2000hgb.html.
49 E.g., FLA. STAT. § 403.413 (2010) (setting out the requirements of the Florida Litter Law); LINCOLN COUNTY, OR., ENVIRONMENT AND HEALTH CODE § 2.1505 (2010) (setting forth littering prohibitions).
50 EL PASO, TEX., CODE § 15.13.020 (2010), (setting forth a year round requirement that residents using public water with odd numbered addresses may water their lawns and outdoor plants only on Tuesdays, Thursdays and Saturdays whereas odd numbered addresses may only do so on Wednesday, Friday and Sunday and prohibiting all outdoor watering between the hours of 10am and 6pm from April 1 to September 30); EL PASO, TEX., CODE §15.13.030 B (2010) (prohibiting the waste of water, defined to include the run off of water from a residential property to form a pool in a street, alley, ditch or to run into a storm drain, failing to repair a leak within 5 days of discovering it, or washing any impervious surface such as sidewalks, paved driveways or patios except in case of emergency (ie, a health hazard)); Outside Water Usage, WATER AUTHORITY OF WESTERN NASSAU COUNTY (last visited Feb. 22, 2011),
limit the circumstances under which an individual may cut down a tree, even on private property. A number of states have recently enacted e-waste recycling laws that prohibit individuals from disposing of certain types of electronics as part of the household waste stream destined for municipal landfills. New Jersey recently adopted strict new rules regarding fertilizers that not only restrict their content, but also impose restrictions on when and how individuals can apply fertilizers to their lawns, for example. And many jurisdictions are either considering or

http://www.wawnc.org/cm/index.php?option=com_content&task=view&id=57&Itemid=26 (prohibiting outdoor water use from 10 am to 4 pm year round and providing that odd numbered addresses can water only on odd numbered days and even numbered may only water on even numbered days); TAMPA BAY, FLA., CODE § 26-97 (2010) (providing that, year round, residential users are limited to using hoses that have an automatic shut-off nozzle, limited to watering outdoors to two days a week depending on what number their address ends in, and barring watering completely between the hours of 8 am and 6 pm); RIO RANCHO, N.M., CODE ch. 17, art. 5, § 17-5-4 (2010) (prohibiting water waste and fugitive water where water waste is defined as the “nonbeneficial use” of water and fugitive water is described as water that runs from one property to another or to a public right of way, excluding storm water runoff and providing examples, including for landscaping purposes where the water regularly runs or seeps out of the landscaped area, where a sprinkler system overreaches the area it is intended to water reaching roads or neighboring properties and washing of hard surfaces or vehicles where that water excessively runs into adjacent property or public right of way); S.F., CAL., CODE ch. 12A, §§ 12A05, A10 (2009) (providing that prior to sale the seller (unless buyer agrees to do so contractually) is required to have an inspection by a qualified inspector who determines fixtures that must be replaced prior to sale and all showers, faucets and toilets are required to be replaced with low flow versions.).

For a detailed discussion of tree protection ordinances, see Keith H. Hirokawa, Sustaining Ecosystem Services through Local Environmental Law (unpublished manuscript on file with author). See also ATLANTA, GA., MUN. CODE §§ 158-28, 158-101, 158-102 (2010).

N.Y. ENVT. CONSERV. LAW § 27-2611(3) (McKinney) (prohibiting individuals from disposing of electronic waste in solid waste management facilities beginning in 2015); CONN. GEN. STAT. ANN. § 22a-636 (West) (providing that as of January 2, 2011, no person may dispose of covered electronic devices in the garbage); N.J. STAT. ANN. § 13:1E-99.109 (West) (providing that beginning January 2, 2011, disposal of classified electronic waste as household trash is prohibited).

2010 N.J. Sess. Law Serv., ch. 112 (ASSEMBLY 2290) (West), N.J. STAT. ANN. § 58:10A–62 (“No person shall: (1) apply fertilizer to turf when a heavy rainfall, as shall be defined by the Office of the New Jersey State Climatologist at Rutgers, the State University, is occurring or predicted or when soils are saturated and a potential for fertilizer movement off-site exists; (2) apply any fertilizer intended for use on turf to an impervious surface, and any fertilizer inadvertently
have recently adopted bans on felt-soled boots and waders aimed at reducing the spread of invasive species.54

These laws are generally enforced through fines; some authorize enforcement-related inspections, for example of trash containers, and some water conservation ordinances even authorize cutting off water service for repeat violators. 55 One unusual enforcement mechanism, adopted by a number of cities, is the use of radiofrequency identification (RFID) tags to monitor and track residential garbage volume and/or recycling rates; notably, this method of enforcement has occasioned accusations of government “snooping.” 56 However, although not always welcomed, the ubiquity and longevity of measures such as anti-littering ordinances and recycling requirements suggests that local laws directly relating a variety of

applied to an impervious surface shall be swept or blown back onto the target surface or returned to either its original or another appropriate container for reuse; or (3) apply fertilizer containing phosphorus or nitrogen to turf before March 1st or after November 15th in any calendar year, or at any time when the ground is frozen, except as provided otherwise in subsection b. of this section.”). 54 VT. STAT. ANN. tit. 10, § 4616 (2010) (“It is unlawful to use external felt-soled boots or external felt-soled waders in the waters of Vermont, except that a state or federal employee or emergency personnel, including fire, law enforcement, and EMT personnel, may use external felt-soled boots or external felt-soled waders in the discharge of official duties.”); Statewide Finfish, Supplemental Issues, ALASKA BD. OF FISHERIES (March 16-21,2010) (recording adoption of felt-soled wading boot ban to begin January 1, 2010), available at http://www.boards.adfg.state.ak.us/fishinfo/meetsum/2009-2010/statewide-finfish-2010.pdf. See also Felicity Barringer, Anglers Bring Unwanted Guests to Rivers Harmful Microorganisms Carried by Felt on Boots’ Soles Prompt Bans in U.S., INT’L HERALD TRIB., Aug. 17, 2010, at 4 (describing the conservation rationales for the bans and mentioning the Alaska and Vermont bans, as well as a proposed ban in Maryland).

55 S.F., CAL., ENVIRONMENT CODE § 1908 (2011) (authorizing fines of up to $100 for households that fail to property sort their recyclables/compostables and authorizing inspection of trash receptacles); RIO RANCHO, N.M. CODE ch.17, art 5, §17- 5- 7 C (2010) (providing that for utility users with less than 2 inch meter size, violators are fined $25, which increases by $25 for each additional violation until the 6th violation, at which point the fine is $150 and a water restriction device can be installed on the meter to restrict use until the violator can prove that the cause of the violation has ceased; on the 7th violation misdemeanor charges may be brought with fines not to exceed $500 and if the fines are not paid, water service will be disconnected).

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Although not aimed primarily at individual behavior, a number of federal statutes (sometimes implemented by state and local authorities through cooperative federalism arrangements) also directly regulate environmentally significant individual behaviors. As illustrated below, some of these efforts have encountered significant difficulties.

1. Clean Air Act

Under the Clean Air Act’s cooperative federalism arrangement, most states are afforded the authority to decide how to achieve federal national air quality standards within their boundaries (by obtaining approval of State Implementation Plans).\footnote{42 U.S.C. § 7410 (2006).} In exercising their authority to determine from which sources to require emission reductions sufficient to achieve national air quality standards, states have sometimes chosen (or been compelled by the magnitude of needed emission reductions) to regulate individual behaviors that contribute to air pollution.\footnote{Nonattainment areas, for example, may be required in some circumstances to include transportation control measures plans in their SIPs. 42 U.S.C. § 7511a (2006). Transportation control measures can include direct regulation of individuals, for example, trip-reduction ordinances or vehicle idling restrictions. 42 U.S.C. § 7408 (2006). See also 40 C.F.R. § 93.101 (2010) (defining a transportation control measure as a measure “of the type listed in CAA section 108, or any other measure for the purpose of reducing emissions or concentrations of air pollutants from transportation sources by reducing vehicle use or changing traffic flow or congestion conditions.”).} As noted above, burn laws and idling restrictions are sometimes enacted to satisfy CAA
requirements. Another notable example is the "environmental" speed limit imposed by the Texas Commission on Environmental Quality on the Houston-Galveston region. The speed limit was lowered from 70 mph to 55 mph in an effort to reduce emissions and satisfy CAA requirements. "The measure was vilified from the start and drew heated negative response from drivers," and was ultimately repealed after less than seven months when modeling showed that the reduced speed limits yielded relatively insignificant reductions in emissions.

EPA also sometimes mandates the inclusion of specific types of controls on individual behaviors in state SIPs. For example, in some circumstances, EPA requires that states include vehicle inspection and maintenance (I/M) programs in their SIPs (where, for example, regions fail to meet air quality standards). Although state I/M programs vary (with respect to the individuals covered and other implementation details, such as whether the checks are annual or biennial, where the checks can be conducted, etc.), the core element of an I/M program is the requirement that covered individuals test the tailpipe emissions from their vehicles. Owners usually cannot obtain required registrations for a vehicle unless it passes the emission test and thus vehicles that fail required emission tests must generally be repaired (or even scrapped). In short, I/M programs impose significant restraints directly upon individuals – first, test your car to obtain permission to drive it, and, second, don’t drive your car if it emits pollutants at a forbidden level.

Adducing the significance of these I/M programs for purposes of better understanding the intrusion objection is complicated. EPA’s efforts to require I/M programs, initiated in 1977, have occasioned over thirty years of controversy and dispute about everything from EPA’s authority to require states to implement these programs to the appropriate design and

60 See supra note 46.
62 Id. See also, Vandenberghe, From Smokestack to SUV, supra note 7, at 555-56 & n. 148 (“State and local efforts to reduce emissions by reducing speed limits have been hugely unpopular.”).
stringency of I/M programs and their efficacy.\textsuperscript{67} States, envisioned in the Act’s cooperative federalism scheme as the chief implementers of the Act’s requirements, proved recalcitrant with respect to the establishment and operation of I/M programs.\textsuperscript{68} And one source of this recalcitrance was public resistance to the expense, inconvenience, and perceived heavy handedness of I/M requirements.\textsuperscript{69} The years saw repeated implementation delays, EPA’s authority legislatively limited, and EPA’s requirements for the content of I/M programs significantly weakened.\textsuperscript{70}

It is tempting to explain the difficulties attending the establishment and operation of I/M programs as straightforward evidence of the intrusion objection at work — a significant restraint on environmentally significant individual behavior occasions public outcry and is politically stymied at every turn. A fuller explanation, however, suggests that this is not the case. First, while it is true that I/M program requirements sparked public outcry, a chief objection raised by individuals appears to have been inconvenience (as opposed to an assertion of government invasion of privacy or liberty).\textsuperscript{71} And surveys conducted of individuals who had their cars inspected indicated that they did not find the process unduly troublesome.\textsuperscript{72} Second,

\begin{itemize}
\item \textsuperscript{67} Id. at 1535-1600 (detailing the fraught implementation of vehicle maintenance and inspection requirements); Arnold W. Reitze, Jr. & Barry Needleman, \textit{Control of Air Pollution from Mobile Sources Through Inspection and Maintenance Programs}, 30 HARV. J. ON LEGIS. 409, 414-419 (1993) (commenting on states’ recalcitrance, court challenges to EPA’s authority to require I/M programs, and EPA’s relaxation of I/M requirements in light of state resistance).
\item \textsuperscript{68} McGarity, supra note 66, at 1619-25.
\item \textsuperscript{69} Id. at 1622 (“State agencies have generally demonstrated a great reluctance to take steps that could . . . arouse the general public.”).
\item \textsuperscript{70} Id. at 1535-1600.
\item \textsuperscript{71} McGarity, supra note 66, at 1601-03; Bill Dawson, \textit{Waits Choke Some Drivers as State’s Smog-Checks Get in Gear}, HOUSTON CHRON., Dec. 13, 1994, at A17 (reporting complaints about wait time and some general annoyance with new I/M requirements in the early days of their implementation); Steve Strunsky, \textit{It Could Be Worse. It Could Be Texas}, N.Y. TIMES, July 16, 2000, at 14NJ (reporting on discontent with wait times and inconvenience associated with New Jersey’s I/M program, but general overall support for emissions testing).
\item \textsuperscript{72} McGarity, supra note 66, at 1604 (observing that comment cards submitted by individuals in the early days of the Texas I/M program were generally positive) (“Tejas Testing [who implemented the Texas I/M program initially] provided the only hard data on consumer acceptance of the program when it announced that people who had actually used the system during the first week had filled out comment cards that were generally favorable. During the first two weeks in which more than 40,000 autos were tested, Tejas received only 500 complaints.”) (citations omitted); Strunsky, supra note 71, at 14NJ (reporting on a New Jersey
while public objection contributed to state opposition to I/M programs, it was only one of a number of factors informing that opposition. States also took issue with EPA’s initial attempts to force (commandeer) them to implement CAA programs, disagreed with basic implementation goals, and quickly piggybacked on the concessions that other states were able to win from EPA (regarding relaxed deadlines, I/M requirements, etc.). Finally, for all of this fraught history, I/M programs are now implemented in over thirty states, their requirements accepted as business as usual for millions of individuals.

poll finding that “8 in 10 respondents supported the enhanced inspection program. Among the 206 respondents who actually had their cars inspected under the new program, 52 percent said they were “very satisfied” with the experience.”). 73 See John Quarles, The Transportation Control Plans—Federal Regulation’s Collision with Reality, 2 HARV. ENVTL. L. REV. 241, 252-53 (1977) (reviewing cases that constrained EPA’s authority to require specific regulatory actions by states under the Clean Air Act).

74 McGarity, supra note 66, at 1619-1625 (“State officials often express frustration with the intrusiveness of federal programs. They resent being treated like junior partners in the relationship, and they react negatively to the threat of federal sanctions, even when those sanctions are merely refusals to provide federal dollars to fund state programs.”). A similar account helps to explain EPA’s inability to impose transportation controls under the Clean Air Act Amendments of 1970. See John Quarles, The Transportation Control Plans—Federal Regulation’s Collision with Reality, 2 HARV. ENVTL. L. REV. 241, 249-58 (1977). EPA attempted (and failed) to require transportation controls designed to reduce automobile use. Proposed measures included both direct (programs barring individuals from using their cars one day per week) and indirect (higher fees for parking, reduced parking availability) regulation of individual drivers. Id. at 245-46. The transportation control plans occasioned significant public outcry and this public outcry helped to defeat them, Id. at 249-50, but a variety of other factors (including many of the federalism tensions that plagued the implementation of I/M programs) contributed to their failure. Id. at 249-58.

75 For a description of current I/M programs, see EPA OFFICE OF TRANSPORTATION AND AIR QUALITY, MAJOR ELEMENTS OF OPERATING I/M PROGRAMS, March 2003 (EPA420-B-03-012), available at http://www.epa.gov/oms/epg/420b03012.pdf. See generally Benjamin Soskis, THE NEW Texas: Presidential candidates promote stereotypes about the state, but the reality is it looks more like the rest of America, DALL. MORNING NEWS, Oct. 8, 2000, at 1J (reporting on the results of polling showing that “[i]n 1999, 70 percent of those . . . polled supported emissions testing for all vehicles in Houston, up from 38 percent just four years earlier.”).
2. Clean Water Act

The Clean Water Act, although initially and primarily oriented toward larger point sources of pollution, also directly regulates individual behavior in a few ways. Most notably, individual property owners can be subject to controls on the use of their property designed to protect wetlands.\footnote{Individual property owners may also be required to control runoff from their property in some circumstances where a water body does not meet state water quality standards and Total Maximum Daily Loads have been developed. 33 U.S.C. § 1313(d) (2006). And individual behaviors, such as washing a car, may be regulated under provisions of the Act governing stormwater discharges. \textit{See generally} 33 U.S.C. § 1342 (2006) (“Municipal discharge permits for discharges from municipal storm sewers . . . shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers . . . .”). Efforts to restrict non-stormwater discharges to storm sewers include restrictions on car washing and other individual activities. For example, the City of South Portland website provides guidance about permissible types of outdoor car washing. \textit{See Outdoor Car Washing, City of South Portland}, http://www.southportland.org/index.asp?Type=B_BASIC&SEC=%7B845FE76B-380A-4630-97BC-F7F9D81A9040%7D&DE=%7BA673B004-F980-4A83-80E5-616BE61D56E9%7D (last visited Feb. 25, 2011) (“Regardless of the type of outside washing activity occurring, wash water is prohibited from directly entering surface waters (ponds, streams or wetlands), drainage ditches, storm drains or dry wells . . . . The use of acids, bases, metal brighteners, degreasing agents is prohibited for outside washing activities that do not discharge to a POTW.”).} Obtaining an individual § 404 permit can be a lengthy, complex, costly, and ultimately uncertain process.\footnote{Rapanos v. United States, 547 U.S. 715, 721 (2006) (“The average applicant for an individual permit spends 788 days and $271,596 in completing the process, and the average applicant for a nationwide permit spends 313 days and $28,915—not counting costs of mitigation or design changes.”) (citing Sunding & Zilberman, \textit{The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process}, 42 \textit{Natural Resources J.} 59, 74-76 (2002)). Of note, however, many common dredge/fill activities with minor impacts (for example, projects that fill half an acre or less of nontidal wetlands) are authorized under the auspices of nationwide general permits, which are much more readily obtained than individual permits. \textit{See Robin Kundry Craig, Environmental Law in Context} 834-35 (2d ed. 2008). And some evidence suggests that the permit process is becoming more customer friendly (i.e., easier to navigate). Kim Diana Connolly, \textit{Survey Says: Army Corps No Scalian Despot}, 37 \textit{ELR} 10317, 10325-10333 (2007) (reviewing Customer Service Surveys completed by section 404 applicants).} Permits may not issue, for example, if there...
is a “practicable alternative” to the proposed discharge that would not have the same adverse impacts on wetlands, or if issuing the permit would cause any of a number of specified effects, including contributing to “significant degradation of the waters of the United States.” Thus, a property owner who has long imagined building a swimming pool and gazebo in her backyard, or perhaps a cabin on the family’s lakefront property, may discover that doing so will require her to submit to a potentially complex federal permitting process, alter her plans to minimize impacts on wetlands, or perhaps even abandon her plans altogether if the permit is not authorized. Or, if she fails to recognize and/or heed the statute’s requirement and proceeds without a permit, she may be subject to civil and criminal penalties.

Section 404’s potential and actual interference with property rights occasions vociferous opposition to the program. Property owners challenge section 404 restrictions as unconstitutional takings (usually, unsuccessfully). Since 1985, the Supreme Court has thrice heard challenges brought by landowners contending that they should not be required to obtain a section 404 permit to develop their property on the ground that their property does not fall within the scope of the CWA’s jurisdiction over navigable waters. A variety of legislative proposals have been offered to limit the reach of the section 404 permitting

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79 See 40 C.F.R. § 230.10(a).
80 See 40 C.F.R. § 230.10(b)-(c) (specifying circumstances where a permit will not be granted).
81 Although states can be delegated the authority to implement the section 404 permitting program, only two states have accepted this authority. States offer a variety of rationales for the decision not to accept permitting authority, including “the controversial nature of section 404 permitting.” CRAIG, supra note 78, at 818.
83 Robert Meltz, CRS Report for Congress RL30423: Wetlands Regulation and the Law of Property Rights "Takings," (February 17, 2000), http://ncseonline.org/nle/crsreports/wetlands/wet-6.cfm (“Talk about wetlands preservation today and you may soon be talking about private property and takings. . . . Accounts of land owners aggrieved by wetlands regulation have been widely circulated by the property rights movement, and challenged by environmentalists.”).
84 Id. (reviewing wetlands takings cases).
program.\textsuperscript{86} Policy and advocacy groups continue to object to the constraints that the section 404 permitting program places on landowners.\textsuperscript{87} And scholars lament the perverse incentives created by uncompensated environmental land use regulations.\textsuperscript{88} Jonathan Adler observes, for example, that “[f]ederal wetlands regulations under section 404 of the CWA . . . likely discourage[s] wetland conservation and restoration on private land, and may even encourage land modifications that can destroy wetland characteristics.”\textsuperscript{89}

On the other hand, the section 404 permitting program chugs along. The U.S. Army Corps of Engineers receives roughly 85,000 permit requests annually\textsuperscript{90} and congressional proposals to limit the reach of the section 404 program compete with congressional proposals to expand the jurisdiction of the section 404 program.\textsuperscript{91} Moreover, Corps Customer Service Surveys reveal little animosity or opposition from individuals who have actually applied for a section 404 permit.\textsuperscript{92} And, notably, opposition to the section 404 program appears centered on the program’s uncompensated (and in the eyes of some, unfair) restrictions on property use. Under this account, the section 404 program is unfair because “[t]he benefits of wetlands preservation . . . — water filtration, wildlife habitat, protection against flooding and erosion — inure to the public. By contrast, the burdens of wetlands preservation, in terms of development denied, fall on the wetland owner.”\textsuperscript{93} (Moreover, although, as I have done above, examples of individual mom-and-pop landowners inconvenienced by the section 404 program are frequently relied on to provide anecdotal support

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\textsuperscript{86} Meltz, \textit{supra} note 83 (observing that “[i]n Congress, the ‘property rights issue’ has played out with particular force in the area of wetlands regulation. Many property rights bills have targeted wetlands regulation.”).

\textsuperscript{87} See e.g., Daniel R. Simmons & H. Sterling Burnett, \textit{Protecting Property Rights, Preserving Federalism and Saving Wetlands}, NCPA POLICY REPORT No. 291 (Oct. 25, 2006) (critiquing the section 404 permit program in large measure because of its interference with property rights and detailing examples of “abusive” application of the program to individual property owners).


\textsuperscript{89} \textit{Id.} at 313-14.


\textsuperscript{92} Connolly, \textit{supra} note 78, at 10325-10333 (reviewing Customer Service Surveys completed by section 404 applicants).

\textsuperscript{93} Meltz, \textit{supra} note 83.
for property rights critiques, the program much more commonly affects larger developments and much of the “public” opposition to the program resides with these larger, for-profit developers.) These property rights objections, premised largely on questions of fairness and arising from controls on uses of property as opposed to direct controls on individual behavior, present an objection that is distinct from the oft-referenced intrusion objection, which is characterized as a rejection of government interference with civil liberties.  

Finally, at least some resistance to the section 404 program is likely ascribable to the fact that it is almost always implemented by federal agencies regulating in an area traditionally left to local governments.  

3. Endangered Species Act

A core protection of the ESA is its prohibition on the “take” of listed endangered species. The term “take” is defined by statute to mean “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect,” and by regulation to mean an act which actually kills or injures wildlife, which may “include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.” The Act also prohibits the sale, import, export, or transport of a listed endangered species.  

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94 See Babcock, Assuming Personal Responsibility, supra note 4, at 123 (“Efforts to detect and ultimately enforce against individual activities that usually occur at home or in the immediately surrounding area would trigger enormous political resistance, as they would be seen as an interference with individual liberty and an invasion of privacy.”).

95 See generally, Rapanos v. United States, 547 U.S. 715, 737-38 (discussing states’ traditional authority over land use decisions).

96 Endangered Species Act § 9(a), 16 U.S.C.A. § 1538(a)(1)(B) (West 2010). The Act also prohibits the removal or damage of endangered plants in known violation of state law, Endangered Species Act § 9(a)(2)(B), 16 U.S.C.A. § 1538(a)(2) (West 2010), and the take prohibition sometimes extends to threatened species as well. 50 C.F.R. § 17.31(a).


98 50 C.F.R. § 17.3 (2010). Of note, however, the showing required to establish a take remains unclear and differs between jurisdictions. Steven P. Quarles & Thomas R. Lundquist, When Do Land Use Activities “Take” Listed Wildlife Under ESA Section 9 and the “Harm” Regulation, in DONALD C. BAUR & WM. ROBERT IRVIN, ENDANGERED SPECIES ACT: LAW, POLICY, AND PERSPECTIVES 207, 208-09, 224 (2002).
species.\textsuperscript{99} Violation of these provisions can lead to civil and criminal penalties; moreover, the Act provides a mechanism for prospective activities that might have these effects to be enjoined.\textsuperscript{100}

The ESA thus regulates individuals in two related but distinct ways. First, it prohibits individuals from directly killing, injuring, etc. or selling, transporting, etc. listed endangered species. Second, because significant habitat modification can also constitute a “take,” the Act also regulates individuals as property owners, effectively restricting use of their property. Even where a landowner doesn’t know whether modifying the habitat on her property will harm a protected species, she nonetheless faces a potentially difficult decision. “[W]here there is . . . a risk of future take, it appears that the landowner is free to make a difficult choice among the options of: (1) not conducting the land use activity and bearing the economic consequences; (2) applying for an incidental take permit and bearing the economic, delay, and permit uncertainty consequences; or (3) conducting the land use activity and bearing the consequences of potential civil and criminal liability if a take does occur.”\textsuperscript{101}

The first set of restrictions – on an individual’s freedom to directly kill/injure or sell/import/export/transport endangered species – has not engendered sustained public objection and appears to be relatively well accepted. However, the second set of restrictions on land use has inspired strident and sustained public objection.\textsuperscript{102} The land use restrictions are criticized as unfairly imposing costs of species protection on a subset of individual landowners,\textsuperscript{103} subjecting individuals to a confusing array of

\textsuperscript{100} Endangered Species Act § 11(a), (b), (e)(6), 16 U.S.C.A § 1640(a) (West 2010).
\textsuperscript{101} Quarles & Lundquist, supra note 98, at 233. \textit{See also} id. at 242-43 (“[L]andowners in areas inhabited by listed wildlife species face uncertainty as to whether their land use actions will be viewed as take. This springs from both factual uncertainty about whether the land use activity will actually injure a member of a listed wildlife species and legal uncertainty over the applicable tests for harm and harass.”).
\textsuperscript{102} \textit{E.g.}, Erin Morrow, \textit{The Environmental Front: Cultural Warfare in the West}, 25 J. LAND RESOURCES & ENVTL. L. 183, 184 (2005) (commenting that “[t]he broad regulatory powers and land use restrictions wielded by federal agents under the Endangered Species Act (ESA) have collided with western perceptions of private property and distrust of regulation,” and describing the “legal and cultural battles” occasioned by implementation of the ESA in the West).
\textsuperscript{103} Id. at 188 (“The ESA has been criticized by landowners, environmentalists, and economists alike because it unfairly allocates costs and creates perverse incentives. The ESA is justified because it provides collective benefits like potential medical
regulatory requirements and red tape, usurping local land use authority, creating perverse incentives (that cause landowners to harm species and destroy habitat to avoid regulation), and, most importantly, interfering with landowners’ property rights. The regulatory interpretation of the term “take” to include significant habitat modification was legally challenged, although ultimately upheld by the Supreme Court. Opponents of the Act have also brought suit alleging that it is unconstitutional, most notably arguing that application of the Act to intrastate species and/or property exceeds Congress’ authority under the Commerce Clause. Aggrieved property owners continue to (overwhelmingly unsuccessfully) argue that

discoveries, aesthetic pleasure, and ecosystem functions. The cost of species protection, however, falls on a much narrower subgroup.”); Mark Sagoff, Muddle or Muddle Through? Takings Jurisprudence Meets the Endangered Species Act, 38 WM. & MARY L. REV. 825, 826-26 (1997) (describing public reaction to the Supreme Court’s decision that significant habitat modification can constitute a prohibited take of a species, including the recommendation of the executive director of the American Lands Rights Association that property owners shoot and bury endangered species spotted on their land to avoid the Act’s strictures). See also Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 115 S.Ct. 2407, 2421 (1995) (Scalia, J., dissenting) (decrying the majority’s opinion as “impos[ing] unfairness to the point of financial ruin – not just upon the rich, but upon the simplest farmer who finds his land conscripted to national zoological use.”).

104 Sagoff, supra note 103, at 831-50 (describing property rights objections to the ESA); Richard B. Stewart, The Endangered Species Act: A Case Study in Takings Incentives: A Comment, AM. ENTERPRISE INST., Mar. 7, 1996 (explaining why individuals whose land is subject to ESA-related restrictions on use will likely be unable to obtain compensation under a takings theory and criticizing the Supreme Court’s decisions in Babbitt v. Sweet Home). See generally William J. Snape III, The Endangered Species Act: Anatomy of an Environmental Scapegoat, in Baur & Irvin, supra note 98, 519, 520 (“Because the act dares to inconvenience traditional notions of economic growth and development on behalf of nonhuman entities, it is a favorite target or industrial conservatives and ideological free-marketeers, who search or anecdotes to support their contention that the ESA not only doesn’t help species but is also this generation’s Communist Manifesto against individual freedoms.”).


106 E.g., GDF Realty Invs., Ltd. v. Norton, 326 F.3d 622 (5th Cir. 2003) (upholding the take prohibition as applied to intrastate species on intrastate property in Texas); Gibbs v. Babbitt, 214 F.3d 483 (4th Cir. 2000) (upholding application of the section 9 take prohibition to an experimental red wolf population in North Carolina and Tennessee); Nat’l Ass’n of Homebuilders v. Babbitt, 130 F.3d 1041 (D.C. Cir. 1997) (upholding application of section 9 of the ESA to a wholly intrastate species on a wholly intrastate property).
ESAs imposed restrictions on land use constitute a compensable taking.\textsuperscript{107} Scholars critique the perverse incentives that the Act creates for landowners to “disappear” endangered species and destroy potential habitat and stories of this kind of landowner behavior (colloquially termed “shoot, shovel and shut up”) abound.\textsuperscript{108} The Act was amended to allow individuals to apply for permits to “take” species in certain circumstances (thereby blunting its restrictions on property use).\textsuperscript{109} And Congress has entertained many proposals to amend the ESA, frequently to limit or remove restrictions on private landowners (or provide them with compensation).\textsuperscript{110}

\textbf{C. Lessons from Regulation of Environmentally Significant Individual Behaviors}

The above-described difficulties encountered in applying federal environmental statutes directly to individuals are often cited (including by this author) as evidence of the perils of trying to use mandates to control environmentally significant individual behaviors and, accordingly, to illustrate the limited utility of mandates.\textsuperscript{111} To some extent, the above examples map onto the standard critique of mandates as applied to individuals, which centers on cost and administrative constraints and public opposition (primarily to “intrusive” enforcement).\textsuperscript{112} For example, implementation burdens – the cost and administrative burden of testing emissions from hundreds of thousands of vehicles – appear to explain at

\begin{footnotesize}
\textsuperscript{107} Glenn P. Sugameli, \textit{The ESA and Takings of Private Property}, in Baur & Irvin, \textit{supra} note 98, at 441-58.
\textsuperscript{108} Adler, \textit{supra} note 88, at 319-32 (advocating for compensation for landowners and arguing that it would benefit species by removing harmful perverse incentives; detailing how the ESA causes landowners to undermine species preservation efforts).
\textsuperscript{109} Endangered Species Act § 10(a)(2)(B)(iv), 16 U.S.C.A. § 1539(a)(1)(B) (West 2010). \textit{See also} Baur & Irvin, \textit{supra} note 98, at 243-44 (describing efforts to provide landowners with greater certainty regarding compliance with the ESA).
\textsuperscript{111} Katrina Fischer Kuh, \textit{Using Local Knowledge to Shrink the Individual Carbon Footprint}, 37 Hofstra L. Rev. 923, 936 (2009); Vandenbergh, \textit{From Smokestack to SUV, supra} note 7, at 555.
\textsuperscript{112} Vandenbergh, \textit{From Smokestack to SUV, supra} note 7, at 597-600 (describing the difficulties of applying mandates to individual behaviors, including the cost and intrusiveness of enforcement, but recognizing that “although command and control measures are unlikely to be effective as the exclusive instrument for steering individual environmentally significant behavior, their expressive effects, in combinations with informational regulation and other measures, may be quite important.”).
\end{footnotesize}
least in part the difficulties encountered with respect to the CAA I/M programs, specifically states’ resistance to implementing those programs. And many of the above measures occasion(ed) public resistance. However, it is also clear that other factors, beyond implementation challenges and public opposition, contributed to the difficulties encountered in implementing measures designed to directly control individual behaviors. Federalism friction, in terms of state willingness to implement federal statutes through cooperative federalism arrangements, bedeviled the CAA’s vehicle I/M program. And, as discussed below, the public opposed these measures for a variety of reasons distinct from objections about the intrusiveness of government enforcement.

What is perhaps most interesting are the ways in which our prior experience regulating environmentally significant individual behaviors departs from, or at least complicates, the second prong of the traditional critique of the use of mandates, the intrusion objection. Although nowhere fully developed and explained, the intrusion objection generally posits that enforcement of direct controls on environmentally significant individual behaviors requires enforcement measures that individuals will reject as unacceptably intrusive, i.e., too invasive of civil liberties. This suggests that there is a hard stop, a government “no fly” zone where regulation of individuals is per se unacceptable, and that direct regulation of environmentally significant individual behaviors is of limited utility because it would so frequently transgress that “no fly” zone. Our experience with direct regulation of environmentally significant individual behavior complicates this view.

First, direct regulation of at least some environmentally significant individual behaviors is relatively common and generally accepted, primarily at the local level. This is so even where enforcement (or at least the threat of enforcement) is arguably quite intrusive (for example, recycling ordinances permitting searches of trash). Notably, the restrictions on the export, sale, etc. of endangered species has similarly not occasioned backlash. Second, public opposition to measures directly regulating environmentally significant individual behaviors does not appear

113 Babcock, Assuming Personal Responsibility, supra note 4 at 123. See also Vandenbergh, From Smokestack to SUV, supra note 7, at 598 (“To the extent environmental harms caused by individuals are difficult to detect, enforcement is expensive and intrusive. Even if sufficient resources were devoted to the effort, the intrusiveness of enforcing these regulations may undermine compliance or produce a political backlash.”).

114 See supra notes 55-58 and accompanying text.
to have been monolithic (in terms of content, breadth, or even strength, in particular over time), nor does it appear to have been expressed exclusively or even primarily in concerns about government intrusion. Conversely, the intrusion objection or other fatal public opposition (for example to environmental taxes) has arisen with respect to indirect regulation of environmentally significant individual behaviors as well. Public opposition sometimes appears to have arisen from a more straightforward rejection of a measure on typical balancing grounds (the benefits of the measure are not worth the cost, inconvenience, etc.).

With respect to restrictions on land use, property rights objections, while certainly containing an element of opposition to perceived government overreaching, are frequently rooted in claims about fairness, or the undue burden imposed on a select number of unlucky landowners. Indeed, with the possible exception of commentary suggesting that the use of RFID chips to enforce recycling ordinances constitutes government spying, not one of the above examples seems to provide a clear example of the intrusion objection in action. Finally, it is interesting to note that public opposition has not proven to be static over

115 Consider, for example, public complaints about vehicle I/M programs. See supra notes 71-72, and accompanying text.
116 In addition to the fairness objections noted above with respect to land use restrictions imposed under the section 404 program and section 9 of the Endangered Species Act, similar fairness objections sometimes arise in the context of objections to water use restrictions. Although common and generally accepted in many communities, complaints about water conservation ordinances often raise fairness issues. Residents of Nassau County often objected because they believed that restrictions were being instituted to allow for overdevelopment or that wealthier neighborhoods were allowed to use more water, Eric Schmitt, Nassau County Learns to Live With Less Water, N.Y. TIMES, Aug. 8, 1988, at ABS 23.

Similarly, in the Tampa Bay area, the South Florida Water Management District found in a public opinion survey that public opposition only seems to come into play when residents do not feel that others are not doing their part, particularly when the agricultural industry does not help conserve. David K. Rogers “Do Your Part” to Save Water, ST. PETERSBURG TIMES, Jan. 25, 1994, at 1B. See also, D.W. Deck, Letter to Editor, Re: Sinkhole insurance: Real Cause of Sinkholes Ignored, ST. PETERSBURG TIMES, Jan. 19, 2011, at 2 (arguing that overuse of water in other counties has detrimental effects for homeowners who are conserving); Shirley David, Letter to the Editor, Water Use Hurts Homeowners: Strawberry Growers, ST. PETERSBURG TIMES, Dec. 22, 2010, at 10A. In Rio Rancho, New Mexico, residents express concern about the water demands of new development and industry’s high use of water – the failure of industry to do its part to conserve. Jon Fleischer, Letter to the Editor, Building isn’t Drying Up, ALBUQUERQUE J., May 9, 2006, at A6; Gary W. Priester, Letter to the Editor, Drought Does Not Compute, ALBUQUERQUE J., May 9, 2006, at A6 (objecting specifically to Intel’s water usage).
time and geography, as evidenced by how commonplace vehicle I/M programs now are in many parts of the country.

A review of the regulation of environmentally significant individual behaviors does suggest, however, that, broadly speaking, indirect regulation of environmentally significant individual behaviors is the predominant method of regulating those behaviors. Additionally, while intrusion objections and public resistance frustrate some efforts at indirect regulation, the intrusion objection is not held up as a significant impediment to the use of indirect regulation generally (as it is with respect to direct regulation). This heavy reliance on indirect regulation of individuals and comparatively limited and fraught experience with direct regulation of individuals also suggests an interesting observation with respect to the intrusion objection. In some ways, indirect regulation is arguably more intrusive or at least more troubling from the perspective of protecting civil liberties than direct regulation. This is so for two reasons. First, in some of its common iterations (product mandates, for example), indirect regulation extinguishes individual choice – the individual does not have the option of choosing not to comply. Second, that indirect regulations are enforced against other entities (product manufacturers, etc.) also makes them (in some circumstances) less visible to the ultimately-regulated individual and, hence, less subject to democratic

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117 This should not be read to imply that environmental laws that indirectly regulate individuals occasion no public opposition. To the contrary, indirect regulation can and does inspire negative public responses, particularly where that indirect regulation is recognized as (or viewed as) imposing higher costs on individuals. See Vandenbergh, Carrico, & Bressman, supra note 10, at 739-40 (describing the defeat of a Maryland proposal to install residential smart meters with peak demand pricing capabilities and explaining how “[p]olicies that link new technology uptake to price signals in some cases can generate opposition to both.”); Anderson, supra note 7, at n. 242 (citing as an example of public backlash against indirect regulation water customers burning their water bills to protest higher costs attributable to the clean-up of Boston Harbor).

118 Of course, direct regulation through mandates also constrains liberty. See Thaler & Sunstein, supra note 9, at 186 (“Especially when compared with command-and-control systems, economic incentives have a strong libertarian element. Liberty is much greater when people are told, ‘You can continue your behavior, so long as you pay for the social harm that it does’ than when they are told, ‘You must act exactly as the government says.’”).

119 See Richard Posner, Social Norms and the Law: An Economic Approach, 87 AM. ECON. REV. 365, 367 (1997) (arguing that internalized norms, unlike external laws, deprive individuals of the opportunity to weigh obedience to law and thereby limit freedom)
controls. In short, in some circumstances indirect regulation may attract less public opposition in part because it obscures the controls it ultimately places on individuals.

Ultimately, however, information gleaned from a review of prior and existing direct regulation of environmentally significant individual behaviors, while it does suggest some interesting insights, does not provide a satisfying basis for drawing conclusions about the potential for applying mandates to environmentally significant individual behaviors, generally, or, more specifically, the obstacle that intrusion objections may pose to that project. The characterizations of public opposition offered above are gleaned from a review of newspaper articles, ad hoc surveys, and other similar sources, as opposed to contemporary and reliable social science data. As such, these characterizations are supported by some data, but not definitive or empirically defensible. Moreover, the dataset analyzed is necessarily incomplete. Missing are a potentially great number of measures that – perhaps because they were so obviously too intrusive – never crossed the lips of policymakers or flickered out so quickly that they left little record. Nor are the examples exhaustive. The analysis focuses primarily on the usual suspects – those instances of direct regulation most often cited as evidence cutting against the feasibility of mandates on individuals – and almost certainly misses (in particular local) examples of other types of direct regulation. Recognizing the limited utility of these factual examples for developing a better understanding of the intrusion objection, Part II seeks to gain insight on the intrusion objection from a more theoretical perspective, stepping outside of the context of environmentally significant individual behaviors and employing

\footnote{Lessig, \textit{supra} note 14, at 690 (observing that “indirect modes of regulation” face a “problem of regulatory indirection” because they “may allow the government to achieve a regulatory end without suffering political cost.”); Thaler \& Sunstein, \textit{supra} note 9, at 243-46 (suggesting a “publicity principle” that “bans government from selecting a policy that it would not be able or willing to defend publicly to its own citizens” to mitigate this potential concern). Of course, some indirect regulation – regulation of the market through taxes on consumer goods, for example – are highly visible. Of course, this visibility means that such measures are often rejected by the public, occasioning recourse to less visible means of indirect regulation or other regulatory strategies. See Thaler \& Sunstein, \textit{supra} note 9, at 187 (“[I]ncentive-based systems [such as GHG taxes] have not always gained political traction – in part, we think, because they make the costs of cleaning up the environment transparent. Announcing a new fuel efficiency standard sounds misleadingly ‘free,’ whereas imposing a carbon tax sounds expensive, even if it is actually a cheaper way of achieving the same goal.”).}
II. RECOGNIZING INTRUSION: LESSONS FROM SUBSTANTIVE DUE PROCESS

Governments regularly adopt and enforce laws that directly and indirectly restrict individual liberty (or, if you prefer to avoid constitutional connotations, freedom)\textsuperscript{121} in a variety of contexts without encountering insurmountable public opposition (as a result of perceived intrusion or otherwise). Speed limits, noise ordinances, compulsory education, building codes, product mandates, and criminal codes all limit individual freedom. By raising intrusion concerns as a particular impediment to mandates addressed to environmentally significant individual behaviors, the literature suggests that mandates aimed at these behaviors restrict individual freedom, either substantively or through their means of enforcement, in a way more likely to be deemed unacceptably intrusive. To better understand what renders mandates aimed at environmentally significant individual behaviors particularly offensive (or evaluate the claim that they are particularly offensive) it is useful to consider a question that is both more general and more limited. Namely, when and why are government restrictions on individual freedom unconstitutional because they are deemed unacceptably intrusive? For the reasons described below, substantive due process doctrine, and in particular early privacy cases, provides useful guidance about when laws are likely to trigger intrusion objections.

In substantive due process review, the judiciary retains a limited role to strike down laws that survive the political process and do not

\textsuperscript{121} For an interesting dispute over the terminology of liberty versus freedom, \textit{compare} City of Chicago v. Morales, 527 U.S. 41, 53 n. 19 (1999) (identifying a loitering as part of the liberty interest protected by the Due Process Clause but maintaining that “identification of an obvious liberty interest that is impacted by a statute is [not] equivalent to finding a violation of substantive due process”) \textit{with Id.} at 73, 84 (observing that speed limits “infringe[] upon the ‘freedom’ of all citizens” without raising constitutional concerns and criticizing the plurality for diluting the term “constitutional right”) (Scalia, J., dissenting). I generally use the term liberty in its broad sense to refer to the “ability of individuals to engage in freedom of action within society and free choice regarding most aspects of . . . private life,” JOHN E. NOWAK & RONALD D. ROTUNDA, \textit{CONSTITUTIONAL LAW} § 13.4(d)(vii), at 669 (6th ed. 2010).
contravene a right specifically protected in the Constitution but nonetheless invade “fundamental rights and liberty interests.” Political process checks and judicial review under specific provisions of the Constitution are otherwise deemed sufficient to weed out legislation that inflicts unacceptable deprivations of liberty. This judicial role is both disputed and narrowly defined, largely out of concern that the judiciary lacks institutional competence and/or acts at the bounds of (or even beyond) its constitutional authority when it undertakes the necessarily “subjective” task of identifying fundamental rights:

[W]e “ha[ve] always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended.” By extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action. We must therefore “exercise the utmost care whenever we are asked to break new ground in this field,” lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court.

A chief doctrinal constraint on substantive due process review is that heightened scrutiny is meant to be reserved for the most important, and historically demonstrably so, rights and liberties – those that are “rooted

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122 Washington v. Glucksberg, 521 U.S. 702, 720 (1997). Courts may also, of course, strike down laws that do not bear a reasonable relation to a legitimate state interest even were no fundamental right is implicated. At best, substantive due process review provides a judicial backstop to capture and avoid liberty deprivations that accord with a shared understanding of the appropriate role for government but slip through the political process; at worst, in the name of doing the former courts impose artificial and unnecessary constraints on government power out of synch with public and constitutional values. See, e.g. Lochner v. New York, 198 U.S. 45 (1905).


125 Id. at 720 (citations omitted).

126 Id. at 721 (internal quotation and citation omitted).
in the . . . conscience of our people” and constitute “vital principles in our free Republican governments” that “determine the nature and terms of the social compact.”

In the framework of substantive due process review, the intrusion objection would be understood to function as part of the political process check – laws restricting environmentally significant individual behaviors that trigger intrusion objections will not be enacted, will be repealed, and/or will be willfully disregarded and unenforced. Of course, the public may reject perfectly constitutional restrictions for a variety of reasons unrelated to intrusion concerns (they don’t accept that the environmental problem is real or important (or at least not important enough to warrant a particular government action), they don’t personally wish to be subject to the restriction, etc.). Thus, public and political tolerance for liberty deprivations to protect the environment does not generally have a constitutional dimension and may be indexed to considerations unrelated to intrusion objections. Moreover, although it is possible to imagine, say, a population control measure that might offend fundamental rights, the vast majority of measures that might be contemplated to change environmentally significant behaviors (requiring individuals to reduce the setting of their water heaters or keep their tires properly inflated) don’t implicate fundamental rights subject to heightened due process review.

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129 It is unclear whether the intrusion objection anticipates that most mandates on environmentally significant individual behavior will be rejected on intrusiveness grounds (because of how they must be enforced or otherwise encroach on privacy or individual autonomy, etc.) regardless of the value placed on the environmental benefit sought to be achieved, or whether the intrusion objection might function simply to outweigh environmental benefits, as where individuals conclude that the environmental benefits of a measure do not justify the discomfort of the intrusion required to achieve those benefits. (This latter analysis is akin to the balancing undertaken by the Court during the *Lochner* era, but now disavowed, wherein the Justices would “only approve laws where they believe[d] that the end of the law, based on their personal values, justifie[d] an intrusion on individual liberty.” NOWAK & ROTUNDA, § 11.5, at 489.) In either case, the obstacle that the intrusion objection poses to the use of mandates on environmentally significant individual behaviors depends on when, how, and to what extent mandates trigger the intrusion objection.
130 By one estimate, a “one-third increase in proper tire inflation would translate into CO2 savings of 12 million tons,” and reducing the temperature of a water heater from 140-150 degrees F to 120 degrees F “could produce as much as 1,466
Substantive due process review does, however, perform the same basic function as the intrusion objection – both impose boundaries on government restrictions of individual liberty. Importantly, both substantive due process review and public or political rejection of a measure on intrusion grounds function to forestall government action (even where it has a legitimate, rational purpose) where that action is deemed to intrude too greatly on individual liberty. Both processes demarcate the proper relationship between government and individual – what the government “cannot do” (substantive due process) or should not do (intrusion objection) based on the “nature and terms of the social compact.” And in imposing boundaries on government action, both processes locate the boundaries (self-consciously, in the case of substantive due process review; intuitively in the case of the intrusion objection) in accord with gestalt notions of “the [appropriate] balance [between the] . . . liberty of the individual . . . and the demands of organized society.” So, in substantive due process review, boundaries on government action are adduced by looking to “our Nation’s history, legal traditions, and practices” for “enduring themes of our philosophical, legal, and cultural heritages.” In the context of the intrusion objection, boundaries will be imposed where an environmental mandate gives rise to what the public – whose attitudes about the appropriate scope of government action are presumably shaped by this same history and tradition – views as “an

pounds of CO2 emissions reductions per year.” Vandenbergh, Barkenbus, & Gilligan, supra note 9, at 1746, 1748.

131 Recognized fundamental rights include “the specific freedoms protected by the Bill of Rights” as well as “the rights to marry; to have children; to direct the education and upbringing of one’s children; to marital privacy; to use contraception; to bodily integrity; and to abortion.” Washington v. Glucksberg, 521 U.S. at 720 (citations omitted).

132 Notably, substantive due process review also employs the terminology of intrusion to characterize government action that oversteps. See Lawrence v. Texas, 539 U.S. 558, 578 (2003) (holding that a state statute prohibiting same-sex sodomy violates the due process clause of the Fourteenth Amendment because it “furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.”); Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (“If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”).


interference with individual liberty and an invasion of privacy that is unacceptably intrusive.

Substantive due process analysis is, then, self-consciously grounded in value and tradition viewed as arising from and reflecting ingrained societal understandings about when the government oversteps its bounds. Justice Black’s dissent in *Griswold v. Connecticut* goes so far as to suggest that polling the public would prove a more reliable method of identifying fundamental rights than judicial review, which will hew instead to the “personal and private notions” of judges: “Our Court certainly has no machinery with which to take a Gallup Poll. And the scientific miracles of this age have not yet produced a gadget which the Court can use to determine what traditions are rooted in the ‘(collective) conscience of our people.’” The Court’s explanation of the need for substantive due process review in *Meyer v. Nebraska* similarly underscores the

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137 This is not to suggest that judicial and lay understandings of when government oversteps are, in fact or theory, precisely the same. That judicial review is needed at all indicates that the political process will not always weed out an unconstitutional liberty deprivation and judicial. This could, however, occur even where judicial and lay understandings of government intrusion concur. Liberty-depriving laws may be enacted because of flaws in the political process (such that the political process fails to reflect public liberty values) or be recognized as liberty-depriving but aimed at minority groups. Indeed, these accounts are frequently referenced to justify judicial review. United States v. Carolene Products Co., 304 U.S. 144 n.4 (1938). For example, one explanation offered of the privacy cases is that the Court is concerned with desuetude and the privacy cases signify “a judicial insistence that, if laws cannot be enforced directly – through the criminal law prohibiting certain activities – they cannot be enforced through indirect, sporadic, discriminatory routes that escape the same degree of public accountability.” Geoffrey R. Stone et al., *Constitutional Law* 842 (6th ed. 2009) (citing Cass R. Sunstein, *One Case at a Time* (1999)). So, in other words, the law is unacceptably intrusive under to the public, but opportunities for public resistance have been limited thus justifying Court policing of that boundary.

138 381 U.S. 479, 519 (1965).

139 *Griswold v. Connecticut*, 381 U.S. 479, 519 (1965) (Black, J., dissenting) (citations omitted). That substantive due process review has long permitted the Court to “actively enforce values which a majority of the Justices felt were essential in our society even though they had no specific textual basis in the Constitution,” and thereby effectively substitutes the judgment of the Court for that of the legislature and public, persists as a chief criticism of substantive due process review. *Nowak & Rotunda*, § 11.7, at 499.

140 262 U.S. 390 (1923) (striking down a law prohibiting the teaching of languages other than English).
connection between judicial and lay attitudes about the appropriate sphere of government conduct. The Court recounts that Plato endorsed and Sparta in fact did remove children from the care of their parents to be raised by “official guardians.”¹⁴¹ The Court then capitalizes on the presumed repugnance of this practice to explain that “[a]lthough such measures have been deliberately approved by men of great genius their ideas touching the relation between individual and state were wholly different from those upon which our institutions rest; and hardly it will be affirmed that any Legislature could impose such restrictions upon the people of a state without doing violence to both letter and spirit of the Constitution.”¹⁴² The Court’s rhetorical mechanism – providing an example designed to inspire a gut reaction of government overstepping – nicely captures a connection between the public and political response to laws that constrain liberty and substantive due process review, which purports at least to draw heavily from widely held and accepted understandings of the limits on government restrictions of individual liberty.

Finally, substantive due process review does not identify fundamental rights in a vacuum – it defines them in relation to challenged government action. That an area is identified as one involving a fundamental right does not preclude, or even subject to heightened scrutiny, any government action touching on that subject. Both what are understood as the contours of the right itself and the judicial review afforded in a particular case are indexed to the nature of government action.¹⁴³ In other words, the Court evaluates not only the subject matter (procreation, children, marriage) but also the specific means of government action (direct and total prohibition, incidental effect) to ascertain the existence of a fundamental right and determine whether it has been infringed. Thus, substantive due process review provides guidance about how the manner/method of government action can affect the level of perceived or actual constraint on individual freedom even where, as with respect to environmentally significant individual behaviors, fundamental rights or freedoms are not necessarily implicated.

Perceptions of and reactions to a proposed law’s constraints on liberty (as expressed through the political process) and the analysis of

¹⁴¹ Id. at 628.
¹⁴² Id.
¹⁴³ Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 873-75 (1992) (applying an “undue burden” test and observing that “our jurisprudence relating to all liberties . . . has recognized [that] not every law which makes a right more difficult to exercise is, ipso facto, an infringement of that right,” and that laws with an “incidental effect” on a right do not infringe upon it).
courts under substantive due process are thus both grounded in murky instincts about the proper “relation between individual and state.”\textsuperscript{144} Additionally, substantive due process review provides lessons not only about the subject matter (types) of liberties worthy of special protection, but also the means of government action most suspect in terms of infringing on liberties. For these reasons, explanations offered in substantive due process review for when, how, and why government action interferes with “‘deeply rooted’”\textsuperscript{145} fundamental rights and liberties – in particular those grounded in privacy interests – can shed light on when, how, and why a law might meet public (and thus political) resistance because it is perceived as unduly intrusive.

A review of substantive due process cases reveals that the individual behavior targeted, the policy tool chosen to change that behavior (means), and the requirements of enforcement all define the perceived intrusiveness of government action. Two principles in particular can be gleaned from these cases that help to illuminate the intrusion objection in the context of individual environmental mandates. First, direct mandates on individuals (for example, fines for vehicle idling) are likely to be viewed as imposing greater and more troublesome liberty deprivations than laws that constrain individual behavior indirectly (through, for example, product mandates that automatically prevent idling\textsuperscript{146}). Additionally, government restrictions on individual behavior may arouse greater resistance when they apply to behavior that occurs in or near (or typically occurs in or near) the home and/or must be enforced against in or near the home. These principles, as well as their relevance for purposes of assessing the intrusion objection, are described below.

A. **Direct v. Indirect Regulation**

The intrusion objection hypothesizes fatal resistance to the application of mandates to many environmentally significant individual behaviors. As discussed in Part I, the government already channels, influences and

\textsuperscript{144} Meyer v. Nebraska, 262 U.S. at 628.
\textsuperscript{145} Washington v. Glucksberg, 521 U.S. at 721.
\textsuperscript{146} See Vandenbergh, Barkenbus, & Gilligan, supra note 9, at 1727-28 (reviewing strategies for reducing personal motor vehicle idling and describing hybrid, integrated starter-generators, and micro-hybrid powertrain technologies that can be incorporated into car design to reduce idling).
regulates many of these behaviors through a variety of indirect means. The government regularly changes or effectively controls individual environmental behavior, and reduces (or increases) the environmental impacts of individual behavior, without imposing mandates directly on individuals. Most notably, product mandates constrain (and even in some cases extinguish) individual choice. A variety of subsidies, taxes, and public information campaigns encourage environmentally friendly behaviors or discourage environmentally harmful behaviors (for example, the use of public transportation). Building code and zoning requirements define the built environment and thereby constrain choices about where and how to live (with significant impacts on individual energy consumption). Moreover, as described in Part I, at least some direct regulation of environmentally significant individual behaviors already occurs, primarily at the local level, without inspiring insurmountable intrusion objections. Thus, it appears that individual environmental behaviors are not a sacrosanct subject matter per se – intrusion objections do not arise merely because the government adopts measures designed to change these behaviors. Indeed, that government may appropriately act to control or influence these behaviors indirectly seems to be widely accepted. The intrusion objection appears, then, to be rooted at least in part in the means used by government – the imposition of mandates directly on environmentally significant individual behaviors.

Mandates directly proscribe individual behavior. To illustrate the difference between direct mandates and policies that indirectly regulate individual behavior, consider energy conservation measures. As discussed in Part I, the government employs a variety of strategies to reduce home energy use. It requires that home appliances meet minimum efficiency standards, funds public information campaigns, maintains energy

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147 See supra pp. 13-18. As discussed in Part I, supra, some laws do directly regulate environmentally significant individual behavior, but these laws are relatively few in number and limited in their application.

148 See supra note 35 and accompanying text (describing product mandates).

149 See supra note 36 and accompanying text (describing green building and zoning codes).

150 See supra notes 44-54 and accompanying text (describing laws that directly regulate environmentally significant individual behaviors).

151 42 U.S.C.A §§6291-6309.

152 For an example, see the Department of Energy’s Lose Your Excuse energy efficiency education campaign, available at http://www.loseyourexcuse.gov/index.html#/index.
efficiency labeling schemes, and subsidizes home weatherization. It does not, however, directly bar individuals from using appliances that do not meet efficiency standards (let alone proscribe even readily detected behavior that wastes energy -- leaving porch lights burning all night, opening windows during the winter, etc.). It is, however, easy to imagine the resistance likely to greet proposals to ticket individuals for banned appliance use. What, if anything, is the salient difference between effectively preventing individuals from using inefficient appliances through product mandates and directly barring them from doing so?

Reasoning employed in the early contraception cases that laid the groundwork for recognizing a fundamental right to privacy – the dissents of Justices Douglas and Harlan in Poe v. Ullman and the decision in Griswold – proves particularly useful for thinking about this issue. These cases formally announce the use of substantive due process to protect privacy interests but, at this early juncture, do not advance a fully

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153 The ENERGY STAR labeling program was commenced by EPA pursuant to its authority under Section 103(g) of the Clean Air Act and is now administered jointly with the Department of Energy pursuant to the Energy Policy and Conservation Act, 42 USC 6294, as amended by the Energy Policy Act (2005).
156 381 U.S. 479 (1965).
157 The privacy interests considered in the context of the Fourth Amendment, discussed briefly infra with respect to the significance of the home, may prove another useful analogue, particularly as the Court confronts challenges to the government’s collection of personal data. See generally United States v. Karo, 468 U.S. 705 (1984), rehearing denied 468 U.S. 1250 (1984) (limiting on Fourth Amendment grounds the monitoring of a beeper brought into a home when it revealed facts about activities inside the home and observing that “[i]ndiscriminate monitoring of property that has been withdrawn from public view would present far too serious a threat to privacy interests in the home to escape entirely some sort of Fourth Amendment oversight.”); Whalen v. Roe, 429 U.S. 589 (1977).
158 Two Lochner era cases, Meyer v. Nebraska, 262 U.S. 390 (1923) (striking down prohibition on teaching languages other than English), and Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary, 268 U.S. 510 (1925) (striking down Oregon’s Compulsory Education Act that required public school attendance), can be viewed as the first privacy cases but do not use that terminology. See Jed Rubenfeld, The Right of Privacy, 102 HARV. L. REV. 737, 743 (1989) (identifying these cases as the “true parents of the privacy doctrine”
formed concept of “substantive” privacy (privacy that “attaches to the rightholder’s own actions” by “immunizing certain conduct—such as using contraceptives, marrying someone of a different color, or aborting a pregnancy—from state proscription or penalty”\textsuperscript{159}). Instead, while hinting at the substantive concept of privacy to come, the decisions anchor their holdings in “informational” privacy (a view of privacy familiar in the context of the Fourth Amendment where privacy is “employed to govern the conduct of other individuals who intrude in various ways upon one's life” by “limit[ing] the ability of others to gain, disseminate, or use information about oneself”\textsuperscript{160}). As such, these cases, instead of focusing primarily on whether or why the use of contraceptives is conduct substantively outside of the scope of state regulation, devote much more attention to analyzing whether and how the means adopted by the government independently infringe on privacy and liberty.\textsuperscript{162} This aligns

\textsuperscript{159} Rubenfeld, supra note 158, at 740.

\textsuperscript{160} Id.

\textsuperscript{161} See John Hart Ely, The Wages of Crying Wolf: A Comment on Roe v. Wade, 82 YALE L. J. 920, 929-30 (1973). Ely explains how Roe announced a new and more substantive right to privacy. He observes that although Roe cited to “aspects of the First, Fourth and Fifth Amendments . . . [which] limit the ways in which, and the circumstances under which, the government can go about gathering information about a person he would rather it did not have,” and Griswold’s holding was tethered to that notion of informational privacy by focusing on the intrusiveness of enforcement, Roe “is not a case about government snooping.” See also Rubenfeld, supra note 158, at 750 (explaining the distinction between informational privacy, with its origins in the Fourth Amendment, and substantive privacy and observing that with respect to Fourth Amendment/informational privacy cases “the claimant’s substantive conduct [is] irrelevant; at issue is the government’s manner of discovering the conduct” while “in [substantive] privacy cases, a court must resist the temptation to avert its eye. The court has no choice but to look the conduct in its face . . . and take its measure. Griswold proved to be very much about a right to use contraceptives rather than a right to keep secret what one does in the bedroom, just as Roe is about the right to have an abortion and Loving is about the right to marry interracially.”).

\textsuperscript{162} Ely, The Wage of Crying Wolf, supra note 161, at 930 (“[T]he Court in Griswold stressed that it was invalidating only that portion of the Connecticut law that proscribed the use, as opposed to the manufacture, sale, or other distribution of contraceptives. That distinction (which would be silly were the right to contraception being constitutionally enshrined) makes sense if the case is rationalized on the ground that the section of the law whose constitutionality was in issue was such that its enforcement would have been virtually impossible without the most outrageous sort of governmental prying into the privacy of the home. And this, indeed, is the theory on which the Court appeared rather explicitly
the approach in these cases more closely to the situation presented with respect to mandates on environmentally significant individual behaviors which, as noted above, will rarely touch on a fundamental privacy or other right.

The analysis in these cases supports the view that there can be a significant distinction between the perceived liberty deprivations imposed by measures that indirectly influence individual behavior and those that directly mandate changes in individual behavior. Even where the results in terms of governmentally-induced changes to behavior are the same, direct mandates on individual behavior can impose greater, or at least more salient, restrictions on freedom. Stated most clearly, in his dissent in *Poe v. Ullman* Justice Douglas explains that if the prohibition on the use of contraceptives challenged in that case had been directed to the sale or manufacture of contraceptives, as opposed to their use by individuals, it would not rise to the same level of concern:

If a State banned completely the sale of contraceptives in drug stores, the case would be quite different. It might seem to some or to all judges an unreasonable restriction. Yet it might not be irrational to conclude that a better way of dispensing those articles is through physicians. The same might be said of a state law banning the manufacture of contraceptives. Health, religious, and moral arguments might be marshaled [sic] pro and con. Yet it is not for judges to weigh the evidence. Where either the sale or the manufacture is put under regulation, the strictures are on business and commercial dealings that have had a long history with the police power of the States. The present law, however, deals not with sale, not with manufacture, but with use. It provides: ‘Any person who uses any drug, medicinal article or instrument for the purpose of

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See also *Carey v. Population Services Int’l*, 431 U.S. 687 (1977) (“Griswold did state that by ‘forbidding the use of contraceptives rather than regulating their manufacture or sale,’ the Connecticut statute there had ‘a maximum destructive impact’ on privacy rights. . . . This intrusion into ‘the sacred precincts of marital bedrooms’ made that statute particularly ‘repulsive.’ . . . But subsequent decisions have made clear that the constitutional protection of individual autonomy in matters of childbearing is not dependent on that element.”) (citations omitted).

preventing conception shall be fined not less than fifty dollars or imprisoned not less than sixty days nor more than one year or be both fined and imprisoned.\textsuperscript{164}

He also quotes a “noted theologian” who observes that “‘[t]he real area where the coercions of law might, and ought to, be applied, at least to control an evil – namely, the contraceptive industry – is quite overlooked.’\textsuperscript{165}

Similarly, in his dissent Justice Harlan emphasizes “the obnoxiously intrusive means [Connecticut] has chosen to effectuate [its] policy.”\textsuperscript{166} He suggests that the same result might be achieved by limiting distribution but deems the fact that the statute defines use by individuals as a crime dispositive: “[C]onclusive, in my view, is the utter novelty of this enactment. Although the Federal Government and many States have at one time or other had on their books statutes forbidding or regulating the distribution of contraceptives, none, so far as I can find, has made the use of contraceptives a crime.”\textsuperscript{167} He explains that the government may adopt a variety of approaches to target the same behavior, identifies other ways that the government might have gone about reducing the use of contraceptives, and argues that a direct prohibition on individual use presents a particularly troublesome means of influencing behavior:

The secular state is not an examiner of consciences: it must operate in the realm of behavior, of overt actions, and where it does so operate, not only the underlying, moral purpose of its operations, but also the choice of means becomes relevant to any Constitutional judgment on what is done. The moral presupposition on which appellants ask us to pass judgment could form the basis of a variety of legal rules and administrative choices, each presenting a different issue for adjudication. For example, one practical expression of the moral view propounded here might be the rule that a marriage in which only contraceptive relations had taken place had never been consummated and could be annulled. Again, the use of contraceptives might be made a ground for divorce, or perhaps tax benefits and

\textsuperscript{164} Id. at 519 (Douglas, J., dissenting) (citation omitted).
\textsuperscript{165} Id. at 521 (Douglas, J., dissenting) (quoting JOHN COURTNEY MURRAY, WE HOLD THESE TRUTHS 157-58 (1960)).
\textsuperscript{166} Poe v. Ullman, 367 U.S. at 554 (Harlan, J., dissenting).
\textsuperscript{167} Id.
subsidies could be provided for large families. Other examples also readily suggest themselves.\footnote{In short, Justice Harlan finds the Connecticut statute particularly problematic in part because it is applied directly to individual behavior. When the Court does ultimately strike down Connecticut’s birth control law in \textit{Griswold}, it continues to find the indirect/direct distinction significant, explaining that the law, “in forbidding the use of contraceptives rather than regulating their manufacture or sale, seeks to achieve its goals by means having a maximum destructive impact upon that [marital] relationship. Such a law cannot stand in light of the familiar principle, so often applied by this Court, that ‘a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.’”\footnote{This is not to suggest that the fact that the birth control laws applied to individual behavior drove the determination that they presented a substantive due process violation. The dissents in \textit{Poe v. Ullman} and the decision in \textit{Griswold} focus as well on the private nature of the decision involved (early articulation of a substantive privacy interest) and the method of enforcement (an exacerbation of the infringement on informational privacy), emphasizing that the prohibition “reaches into the intimacies of the marriage relationship” and (because of its prohibition on use) requires entry into the home for its enforcement.\footnote{Moreover, this should not be read to make a representation about (or rely upon) whether (under current doctrine) a prohibition on the sale or manufacture of contraceptives would give rise to a substantive due process violation. Indeed, the undue burden analysis employed in \textit{Carey v. Population Services International}, 431 U.S. 678 (1977) (invalidating a law prohibiting any person other than a licensed pharmacist from distributing contraceptives because “the Constitution protects individual decisions in matters of childbearing from unjustified intrusion by the State”) and \textit{Planned Parenthood of Southeastern Pennsylvania v. Casey}, 505 U.S. 833, 873-75 (1992) indicates that it would.}}

\textit{Id.} at 547-48 (citation omitted).
\footnote{\textit{Id.} at 519-20 (Douglas, J., dissenting). \textit{See also id.} at 496 (“Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives?”). Moreover, this should not be read to make a representation about (or rely upon) whether (under current doctrine) a prohibition on the sale or manufacture of contraceptives would give rise to a substantive due process violation. Indeed, the undue burden analysis employed in \textit{Carey v. Population Services International}, 431 U.S. 678 (1977) (invalidating a law prohibiting any person other than a licensed pharmacist from distributing contraceptives because “the Constitution protects individual decisions in matters of childbearing from unjustified intrusion by the State”) and \textit{Planned Parenthood of Southeastern Pennsylvania v. Casey}, 505 U.S. 833, 873-75 (1992) indicates that it would.}
behaviors are regulated through indirect means), namely that direct regulation of individual behavior may be expected to give rise to or create perceptions of government overstepping even where indirect regulation operates without objection to control the same behavior, for the same end.

Justice Douglas suggests two possibilities for why mandates on individual behavior present special concerns – the means necessary to enforce mandates on individuals may independently impose or exacerbate liberty deprivations and/or individuals, unlike “business and commercial dealings,” do not have a “long history with the police power of the States.” With respect to the first possibility, the means (a prohibition on use) may create problems by requiring for enforcement “governmental snooping” that includes “intolerably intrusive modes of data-gathering” – perhaps requiring (as discussed infra) encroachment on the most readily recognized sphere of private conduct, the home. Indeed, those aspects of the First, Fourth and Fifth Amendments that establish the penumbra that gives shelter to privacy rights “all limit the ways in which, and the circumstances under which, the government can go about gathering information about a person he would rather it did not have.”

The latter point – distinguishing between businesses and individuals – could be understood as part of the effort to index substantive due process doctrine to national tradition and custom (i.e., government control over this type of individual behavior is not usual or customary thus rendering it more vulnerable in substantive due process review). Another related explanation is suggested by Lawrence Lessig’s observation that “[o]ur constitution was written with direct regulation in mind – not because the framers did not understand indirect regulation, but rather because its significance was not great enough to systematically account.” (Notably, Lessig goes on to suggest that in light of the ubiquity of indirect regulation, more attention should be given to weighing the constitutionality of indirect regulation.) Additionally, mandates on individual behavior make more explicit – and hence uncomfortable – the balancing of government interests and personal autonomy. Personal autonomy is often identified as the basis for recognizing a right to privacy and is certainly an “interest that rights serve in our constitutional culture”: “As beings who are capable of self-direction, we have an interest in being able to make decisions for ourselves.

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173 This calls to mind the objections to the use of RFID chips to monitor recycling rates and enforce recycling ordinances discussed supra pp. 20.
174 Id.
175 Lessig, supra note 14, at 688.
and to act on those decisions that is sometimes independent of the interest in having the decision made that will be best for us in the sense of producing the greatest after-the-fact well-being.”

With respect to the energy efficiency product mandate discussed above, personal autonomy is arguably constrained in much the same (substantive) way as it would be by a direct prohibition. Whether imposed by constraining purchasing choice through a product mandate or by a prohibition on the use of inefficient appliances, both measures effectively restrict individual freedom to use energy inefficient appliances. However, in the context of the product mandate, the government constraint is enforced against the manufacturer and is less apparent to the individual.

The early privacy cases thus articulate and defend a distinction between direct and indirect government limits on liberty that is relevant to evaluating the extent or nature of the liberty deprivation. Regardless of its explanation, the proposition that restraints on freedom imposed directly upon individuals give rise to greater or at least more uncomfortable restrictions on freedom than measures that constrain individuals through indirect means proves useful for thinking about mandates as a policy tool for changing environmentally significant individual behaviors. It confirms that there are reasons to treat direct mandates as a special case, or at least differently than indirect measures, when assessing possibilities for public opposition. That a host of laws may indirectly control individual behavior should not be taken as evidence that a direct mandate on the same


177 Although perhaps more palatable because the constraint on choice is hidden, as discussed above, product mandates, norm management, or other forms of indirect regulation that do not allow individuals the opportunity to weigh a law before obeying it arguably impose greater or more troubling constraints on freedom. See Richard Posner, Social Norms and the Law: An Economic Approach, 87 AM. ECON. REV. 365, 367 (1997) (arguing that internalized norms, unlike external laws, deprive individuals of the opportunity to weigh obedience to law and thereby limit freedom).

178 It perhaps confirms the obvious to state that a prohibition is more intrusive than discouragement or encouragement that preserves some element of choice (see generally Cass R. Sunstein, Social Norms and Social Roles, 96 COLUM. L. REV. 903, 952 (1996) (identifying tools available to the government to change norms and observing that “[t]he most intrusive kind of government action is of course straightforward coercion,” like seatbelt laws). However, the distinction between direct and indirect government action does shed light on the less readily explained difference in reactions to direct mandates on behavior and indirect product mandates that impose the same substantive constraints on choice.
behavior would be accepted. More fundamentally, the distinction between direct and indirect constraints on individuals provides support for the general view that direct regulation is more likely to occasion intrusion and other objections than the more familiar and common mode of indirect regulation of environmentally significant individual behaviors. In short, intrusion objections are a more salient factor in the considering of direct mandates on environmentally significant individual behaviors.

B. The Significance of Home

As noted above, one of the explanations offered in the early privacy cases for why direct mandates on individual behavior present special concerns is that their enforcement can be intrusive, particularly where behavior occurs in the home. Similarly, one of the chief explanations for the intrusion objection is that environmentally significant individual behaviors “usually occur at home or in the immediately surrounding area” and efforts to detect or enforce against those behaviors will necessarily intrude on the home, thereby triggering privacy and liberty objections.

Discussions of the significance of the home in substantive due process cases suggest both a thin and a thick account of how the “home” affects the apparent or actual intrusiveness of government conduct. Under a thin account, grounded in traditional, Fourth Amendment-derived concepts of informational privacy, the physical space within and around the home is uniquely private and requires special protection from government snooping. Any regulation that requires for its enforcement (real or potential) government investigation into the home thus poses heightened concerns. Under a thick account, grounded in substantive conceptions of privacy, the fact that conduct occurs (at least mostly) in the home (“life which characteristically has its place in the home”) signals that the conduct itself may warrant heightened (privacy) protection. Even absent any government entry into the home, government interference in the details of certain spheres of private or home-centered behavior may thus give rise to government overreaching.

179 Poe v. Ullman, 367 U.S. 497, 519 (1961) (Douglas, J., dissenting). See also John Hart Ely, The Wages of Crying Wolf, supra note 161, at 930 (arguing that the distinction in Griswold between use as opposed to manufacture, sale or distribution was indexed to the required means of enforcement, which “would have been virtually impossible without the most outrageous sort of governmental prying into the privacy of the home.”).
180 Babcock, Assuming Personal Responsibility, supra note 4, at 123.
Turning first to the thin account of the significance of the home, substantive due process cases recognize the home as a private space warranting special protection from government invasion. The home is deemed “the most private of places” and laws that would require “police invasion” of the home for their enforcement are deemed particularly suspect. While even private behavior that occurs within the home can sometimes be regulated, the cases make clear that “public behavior” is more amenable to regulation than “that which is purely consensual or solitary.” Even in the absence of actual enforcement, the prospect of possible enforcement in the home is used to illustrate a law’s offensiveness. As explained by Justice Douglas, discussing a ban on the use of contraceptives that had not been enforced against individuals, “[i]f

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182 The concept of the sanctity of the home (generally) is not limited to or even rooted in substantive due process. See, e.g., D. Benjamin Barros, Home as Legal Concept, 46 SANTA CLARA L. REV. 255 (2006) (reviewing treatment of the home in a variety of legal contexts, including with respect to application of the Fourth Amendment and the protection of privacy interests). Express constitutional provisions (most notably, the Fourth Amendment) and a number of related doctrines similarly afford the home special protection. U.S. CONST. amend. III (“No Soldier shall, in time of peach be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.”); U.S. CONST. amend. IV (“The right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”). See also Stanley v. Georgia, 394 U.S. 557, 564 (1969) (invalidating a law barring possession of obscene materials and observing that in the “privacy of a person’s own home—that [First Amendment] right takes on an added dimension.”). For a discussion of the how the concept of the sanctity of the home has influenced understandings of the scope of fourth amendment protections, see Margaret Jane Radin, Property and Personhood, 34 STAN. L. REV. 957, 996-1002 (1982). From a property perspective, Margaret Radin explains that the home is property that can be understood as “personal,” or important for personhood, and therefore “worthier of protection” than other types of property. Id. at 987.
184 Poe v. Ullman, 367 U.S. at 521 (Douglas, J. dissenting) (quoting JOHN COURTNEY MURRAY, WE HOLD THESE TRUTHS, 157-58 (1960)). See also Poe v. Ullman, 367 U.S. at 547-48 (Harlan, J., dissenting) (“This enactment involves what, by common understanding throughout the English-speaking world, must be granted to be a most fundamental aspect of ‘liberty,’ the privacy of the home in its most basic sense . . . . “).
185 Id. at 546 (Harlan, J., dissenting) (emphasizing the sanctity of the home but identifying exceptions, including the government regulation of marriage, adultery, etc.).
we imagine a regime of full enforcement of the law . . . we would reach the point . . . where search warrants issued and officers appeared in bedrooms to find out what went on. . . . If it [the State] can make this law, it can enforce it.187

If this thin account defines the significance of the home for purposes of assessing the intrusiveness of government conduct, it has important implications. It suggests the possibility that where environmentally significant behaviors (even those that occur within the home) can be regulated – detected and enforced – without encroaching on the home, regulation may avoid intrusion objections. As noted above, a number of environmentally significant behaviors are either external to the home or have an external aspect – a thin account of the significance of the home suggests that these behaviors may be amenable to regulation without triggering intrusion objections.

If, however, the home has a more substantive (thicker) significance that affords special status to conduct that occurs within the home, the conclusions with respect to the intrusion objection might be quite different. That conduct occurs primarily in a physical space within and around the home is sometimes offered as a justification for why the conduct itself (procreation, etc.) falls within the scope of substantive privacy protections. In his dissent in Poe v. Ullman, Justice Harlan explains that what is relevant is not whether there has been an “intrusion into the home,” but whether there has been an intrusion “on the life which characteristically has its place in the home” because “if the physical curtilage of the home is protected, it is surely as a result of solicitude to protect the privacies of the life within.”188 Similarly, in Stanley v. Georgia, a First Amendment case striking down a law prohibiting the possession of obscene materials, the Court reasons that First Amendment rights are strengthened by due process privacy considerations where the regulated conduct occurs in the home.

187 Poe v. Ullman, 367 U.S. at 520-21 (emphasis added). See also id. at 554 (Harlan, J., dissenting) (“To me the very circumstance that Connecticut has not chosen to press the enforcement of this statute against individual users, while it nevertheless persists in asserting its right to do so at any time-in effect a right to hold this statute as an imminent threat to the privacy of the households of the State-conduces to the inference either that it does not consider the policy of the statute a very important one, or that it does not regard the means it has chosen for its effectuation as appropriate or necessary.”). A study that asked people to rank the intrusiveness of government searches similarly revealed that searches of the home are viewed as more intrusiveness than many other types of searches. Slobogin & Schumacher, supra note 25, at 738.

188 Poe v. Ullman, 367 U.S. at 551.
The Court references a “fundamental . . . right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy,” posits that the protected sphere of individual privacy includes, most importantly, individual “beliefs, . . . thoughts, . . . emotions and . . . sensations,” observes that “[o]ur whole constitutional heritage rebels at the thought of giving government the power to control men’s minds,” and sets forth the home as a space particularly important for the flourishing of private thoughts.\textsuperscript{189} Margaret Radin offers another thick conception of the significant of the home from a property perspective. With respect to “reason[s] the government should not prescribe what one may do in one’s home,” she recognizes the familiar need to protect liberty by protecting a “realm shut off from the interference of others,” but also adds the idea that the home is important for personhood because it is where “one embodies or constitutes oneself.”\textsuperscript{190} The location of conduct in the home thus supports identification of the conduct itself as private and outside the scope of government intervention.\textsuperscript{191}

To illustrate the significance of this thicker notion of the significance of the home – \textit{i.e.}, that the fact that behavior occurs in the home raises the bar for regulation of the behavior itself, regardless of means of enforcement – consider the following example. Recall the San Francisco ordinance described in Part I that mandates composting of degradable trash enforced by random checks of household waste for degradable material.\textsuperscript{192}

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\textsuperscript{189} Stanley v. Georgia, 394 U.S. 557, 564-65 (1969) (referencing “the right to satisfy . . . intellectual and emotional needs in the privacy of his own home” and “that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch”). One scholar points out with respect to \textit{Stanley} that in holding “that the government cannot prohibit certain conduct in the home that in another context would be subject to criminal sanction.” Barros, \textit{supra} note 182, at 273.

\textsuperscript{190} Radin, \textit{supra} note 182, at 992.

\textsuperscript{191} So, for example, if autonomy is viewed as the principle underlying the right to privacy, then perhaps the fact that conduct occurs in the privacy of the home is understood (or reflexively assumed) to make it more likely to be important to personhood. If anti-totalitarianism is identified as the principle underlying the right to privacy, then perhaps the fact that conduct occurs in the privacy of the home is understood (or presumed) to create a greater imperative to protect that conduct from government intervention to avoid “mind control.”

\textsuperscript{192} S.F., CAL., ENVIRONMENT CODE § 1908 (2011) (authorizing fines of up to $100 for households that fail to properly sort their recyclables/compostables and authorizing inspection of trash receptacles).
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Under a thicker conception of the home, the same regulation may nonetheless provide ground for objection (i.e., require special justification), not necessarily (or solely) because of the method or means of government “snooping,” but on a more substantive level – discomfort about government regulating the details of individuals’ food choices and preparation. (That the San Francisco ordinance itself has not encountered fatal intrusion objections does not resolve the question of whether the thin account, the thick account, or both obtain. It merely tells us that in this location any such objections, whether grounded in a thick or then conception of the home, have been overcome.)

In short, the privacy cases hint that even where means are available to detect/enforce mandates directed to small, day to day behaviors that occur within the home via some information external to the home, those mandates may encounter privacy/liberty objections (although obviously not of a constitutional nature). Whether the constitutionally recognized privacy interest is grounded in personal autonomy or anti-totalitarianism, it is easy to see the source of objection. The imperative to conform small, mundane home life decisions and behaviors (do I throw the carrot peels in the trash or a compost bin) to government regulations raises the specter of weighing down home life with worry about law compliance that could be viewed as infringing on personal autonomy (by preventing the home from providing a space for unfettered thinking, reflection, and the development of personhood) or threatening a kind of totalitarian standardization and mind “control.”


194 Indeed, one of the critiques of grounding the constitutionally-protected right to privacy in personal autonomy is the lack of a limiting principle because even the smallest decisions help define personhood. See Rubenfeld, supra note 158, at 754-55 (“The personhood thesis is this: where our identity or self-definition is at stake, there the state may not interfere. The paramount analytical difficulty is one of limitation. Where is our self-definition not at stake? Virtually every action a person takes could arguably be said to be an element of his self-definition. Decisions seemingly insignificant for constitutional purposes may well be felt by some to be central to their self-definition. Should our tonsorial preferences, for example, be constitutionally protected?”).

195 Stanley v. Georgia, 394 U.S. at 565. In arguing that the right to privacy is best grounded in anti-totalitarian rationales, Rubenfeld posits that, properly understood, the right to privacy prevents the state from dictating conduct that has significant, ongoing affirmative consequences for individuals (bearing a child, for example). Small day to day behaviors clearly would not warrant (constitutional) protection from government interference under this standard. However, Rubenfeld’s description of the anti-totalitarian rationale suggests the concerns potentially raised
This thicker account of the significance of the home raises the possibility that direct government involvement in a certain sphere of day to day behavior and choice that takes place in the home may be understood as private and therefore subject to intrusion objections even if the government has opportunities for detecting and enforcing against these behaviors that are external to the home or its environs. The Court cautions in *Washington v. Glucksberg*, “[t]hat many of the rights and liberties protected by the Due Process clause sound in personal autonomy does not warrant the sweeping conclusion that any and all important, intimate, and personal decisions are so protected.” But, of course, for present purposes the question is not whether activity falls within the scope of constitutional protection, but rather whether its regulation is interpreted as government overreaching (intrusion). Substantive due process cases tell us not only that a certain class of particularly important personal decisions are protected from government interference, but also reflect the view (also expressed in the context of the Fourth Amendment) that a sphere of freedom from government interference within the home is an important and recognized element of individual liberty and privacy. Individual behavior within the home – even about unimportant, day to day matters – may fall within a sphere where government interference is not welcome. Accordingly, we should be cautious about presuming that simply identifying an external way to detect/enforce against an environmentally significant individual behavior will deflect intrusion objections.

**III. DISCERNING PRINCIPLES**

The above analysis suggests a few principles helpful for understanding the significance of the intrusion objection and thinking about the design and use of mandates on environmentally significant individual behaviors. First, experience with existing regulation and reasoning by government control over such mundane day to day behaviors that, if not cognizable as a constitutional matter, may well inform public reaction: “The danger, then, is a particular kind of creeping totalitarianism, an unarmed occupation of individuals' lives. That is the danger of which Foucault as well as the right to privacy is warning us: a society standardized and normalized, in which lives are too substantially or too rigidly directed. That is the threat posed by state power in our century.” Rubenfeld, *supra* note 158, at 784. See generally Fallon, *supra* note 176, at 354 (identifying “‘systemic’ interests in avoiding abuse of government power or the collection of excessive power in the hands of government” as one of four primary interests underlying constitutional rights). 196 521 U.S. 702, 727 (1997).
employed in the early privacy cases support the view that indirect controls on individual behavior are more commonly accepted and less likely to trigger a variety of public objections than direct controls on the same behavior. This confirms a core precept underlying the intrusion objection, namely that direct controls on environmentally significant individual behavior may be particularly vulnerable to claims of government overreaching (or at least more vulnerable to such claims than comparable indirect measures). These concerns are likely to be particularly pronounced when the activity being regulated occurs primarily in or government enforcement crosses the boundaries of the home. Thus, even in circumstances where cost and administrative feasibility concerns can be addressed, the application of mandates to environmentally significant individual behaviors may be expected to present special challenges, particularly when applied to conduct that occurs in the home.

The above analysis also, however, suggests that the intrusion objection as presently articulated warrants both broadening and narrowing. A review of existing regulation reveals a broad spectrum of grounds for public opposition to direct controls on environmentally significant individual behaviors – unfairness in allocating the burdens of environmental protection, interference with property rights, straightforward balancing (the measure is too inconvenient/costly to justify the desired result). Thus, the intrusion objection (specifically) might better be viewed as one aspect of a more general phenomena, namely that direct regulation of environmentally significant individual behaviors is more likely than indirect regulation to spur public objection (of many varieties) because it makes costs borne by individuals clear to individuals. For example, indirect measures to reduce car use, such as zoning limitations on parking, higher gas prices, and commuter lanes, may cause an individual to submit to the inconvenience of car pooling. The individual may not, however, connect this inconvenience cost to the government measures indirectly causing the individual to bear that cost. However, with respect to a direct mandate requiring the individual to car pool the convenience costs imposed by the measure on the individual would be clear. Objection to government intrusion is but one of a variety of objections that direct regulation invites by not, in the manner of indirect regulation, obscuring the trade-offs and costs imposed on individuals. Thus, the intrusion objection might be viewed more broadly as a recognition that direct regulation of
environmentally significant individual behaviors may be expected to spur more pronounced public opposition of many types.  

With respect to narrowing, a survey of existing regulation suggests that the vulnerability of direct mandates to public objection (on intrusion grounds or otherwise) should not be viewed as a fatal Achilles heel of mandates as a policy tool to change environmentally significant individual behavior. A survey of existing regulation reveals that direct regulation of environmentally significant individual behaviors is not an area per se off-limits to government. Direct regulation of environmentally significant behavior occurs daily in a variety of forms in different communities, from recycling laws to burn limitations to vehicle inspections. Moreover, the above analysis suggests strategies for designing and applying mandates to minimize or overcome public objections. Mandates may be more likely to succeed where they do not impose disproportionate burdens on a select few (and therefore avoid fairness objections), they do not unduly transgress the home, they are designed to minimize inconvenience and other costs to the public, and they are effectively “sold” to the public (i.e., the benefits of the measure are demonstrable and communicated to the public). Finally, our experience with mandates on environmentally significant individual behaviors offers the possibility that objections may soften over time. Ideas and programs initially greeted with deep skepticism, such as the vehicle I/M program, may ultimately become routine. 

Finally, the above analysis suggests a few points about true intrusion objections, i.e., complaints that government regulation of individual behavior, even if it does not violate the Fourth Amendment, uncomfortably infringes on Fourth Amendment-derived concepts of information privacy. First, all modes of regulation are susceptible to intrusion objections. Even smart meters, which indirectly regulate individuals by collecting information to educate them about their energy use (and encourage voluntary conservation) or support peak pricing (regulate the market), can trigger intrusion objections. Second, although the intrusion objection is deemed particularly important with respect to direct regulation of environmentally significant individual behaviors because those behaviors can only be detected using methods likely to  

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197 It is of course fair to emphasize the particular salience of intrusion objections in this context where the behavior regulated occurs within or enforcement requires access to the home.

198 I have also argued elsewhere that local development and enforcement of mandates may facilitate their implementation. Kuh, Capturing Individual Harms, supra note 13.
trigger intrusion objections, experience to date with direct regulation of these behaviors suggests that this problem is not as pervasive as perhaps assumed. Many environmentally significant individual behaviors are presently regulated without triggering insurmountable intrusion objections and even some approaches that do occasion concerns about informational privacy (RFID tracking of garbage) are ultimately accepted in some communities.

So what would a mandate on environmentally significant behavior that respects these principles look like? Imagine a local ordinance prohibiting energy waste. The ordinance could include a catchall prohibition on energy waste and also provide a list of examples of prohibited conduct (all externally detectible) that might include excessive idling, driving with tires that are not properly inflated, failing to change a vehicle’s air filter at recommended intervals, leaving porch lights burning during daytime hours, using incandescent bulbs for outdoor lighting, failing to sort recyclables, and other energy wasting behaviors that offer a possibility for (external) detection outside the home. The ordinance could also include a disclaimer that it does not authorize in-home inspections. Individuals cited for a violation of the ordinance would be ticketed and have the option of paying a fine, submitting a receipt showing the purchase of an approved energy-saving device of equivalent value or submitting a signed certification that the individual had implemented an approved energy-saving measure at home. The benefits of the ordinance

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199 Many of these examples are taken from Michael Vandenberg’s article, Individual Carbon Emissions: The Low-Hanging Fruit, which identifies options for individuals and households to reduce energy consumption. Vandenberg, Barkenbus, & Gilligan, supra note 9, at 1718.

200 Some work suggests that fines may actually increase undesirable behavior, perhaps by communicating that individuals may engage in a behavior as long as they pay a “price” or displacing altruistic or intrinsic motivation. Uri Gneezy & Aldo Rustichini, A Fine is a Price, 29 J. LEGAL STUD. 1, 14 (2000); Bruno S. Frey & Reto Jegen, Motivation Crowding Theory, 15 JOURNAL OF ECON. SURVEYS 589,602-03 (2001) (reviewing empirical data demonstrating the crowding theory, including data showing that the initiation of fines for late pick-ups at a daycare center increased instances of lateness); Vandenergh, Carrico, & Bressman, supra note 10, at 755 (referencing the day care pick up data and discussing how economic incentives or penalties may undermine behavior change where behaviors are “already . . . governed by injunctive norms”). For present purposes, I leave open the possibility that the structure of fines could escalate to better approximate a penalty, as opposed to a price, or the mandate coupled with a public education campaign to mitigate this problem if necessary. Vandenergh, Carrico, & Bressman, supra note 10, at 755 (“Studies suggest a synergistic effect when incentives or fines are paired with a public education campaign to reinforce the
– the projected energy savings from changes in these types of behaviors as well as the most locally-salient rationale in favor of conserving energy (thrift, national security, avoidance of environmental harms) – should be clearly stated upon enactment, reiterated in the literature accompanying tickets, etc., and incorporated into any associated public information campaign.201

Structuring the ordinance in this manner could avoid some of the attributes of direct mandates on individuals likely to engender significant public opposition. As indicated above, the ordinance is imagined as a local ordinance. As I have argued elsewhere, local information may prove helpful in designing and enforcing mandates on individuals to avoid undue objection.202 Thus, the examples of prohibited conduct should be decided community-by-community, and communities should also adopt community-appropriate exemptions. Although unquestionably the ordinance would prohibit energy wasting conduct that occurs in the home (such as the use of standby power electricity), the express prohibition on home entry for enforcement and the fact that specific examples of prohibited conduct are limited to those that are externally visible may help to defuse intrusion objections. Yet, the ordinance has the potential to reach that in-home conduct by allowing individuals to satisfy ticket penalties by modifying their in-home behavior. Clear communication of the benefits of the ordinance and local tailoring to avoid prohibiting conduct that would prove highly inconvenient or costly in a given community could help blunt balancing opposition (i.e., this isn’t worth it). Explanations of the benefits of the ordinance should also hew to local attitudes and values. And the evenhanded and wide application of the ordinance should avoid fairness objections.

This should not be taken to suggest that this type of mandate would prove acceptable in all communities. However, it does seem likely to avoid some common objections to direct mandates and perhaps, therefore, expand the number of communities where it could prove successful.

201 Communication about the ordinance should take guidance from social science literature that provides insights about how best to communicate information to support behavior change. See Vandenbergh, Carrico & Bressman, supra note 10, at 741-66 (using behavioral research to provide a framework for accounting for both rational and extra-rational responses when attempting to change behavior).

202 Kuh, Capturing Individual Harms, supra note 13.
CONCLUSION

The conclusion of this Article is modest. The intrusion objection, frequently held up as a key reason why mandates cannot be relied upon to change environmentally significant behaviors, does not pose an insurmountable obstacle to the imposition of mandates. Mandates on environmentally significant behavior may be more feasible than the present literature suggests.

The intrusion objection does, however, capture two challenges to the use of mandates. First, to the extent that the enforcement of direct mandates more frequently requires the collection of information about individuals, mandates may more frequently occasion informational privacy objections than indirect regulation. As noted above, however, it appears that there are many opportunities to impose mandates without requiring the collection of this type of information and this objection can be overcome. Second, direct regulation, unlike some forms of indirect regulation, will often, by definition, make clear to individuals the costs (including inconvenience and economic costs) that the government is requiring them to incur in the name of environmental protection. Again, the obstacle that this poses is not insurmountable. Moreover, from a normative perspective, shunting controls on individuals into forms of indirect regulation that obscure costs to individuals and avoid democratic debate hardly seems the correct response to this “problem.” Instead, a combination of strategies – local tailoring, social science research on communication of the benefits and rationales for environmental protection laws, recognizing that time can soften public objection – can be employed to speak directly to public questions about balancing (is this law worth it).