PRESERVING THE TRUST:

THE FOUNDING OF THE MASSACHUSETTS ENVIRONMENTAL TRUST

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CITATION

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PRESERVING THE TRUST:
The Founding of the Massachusetts Environmental Trust

Charles H.W. Foster and James S. Hoyte

Boston Harbor

Set within Massachusetts and Cape Cod Bays, a 1,400 square mile water body stretching from Gloucester to Provincetown, is Boston Harbor, the area termed *Bay de Isles* by Samuel Champlain in 1605 and the site of one of the earliest of the European settlements in the New World. The estuaries of three small rivers - the Neponset to the south, the Charles to the west, and the Mystic to the north - comprise what is called the inner harbor. Outside of a line drawn roughly from Winthrop to Hull lies the outer harbor. Less than 50 miles from here is Stellwagen Bank, a shallow area so rich in endangered and other marine life that it is now designated as a National Marine Sanctuary.

Six distinct Boston neighborhoods and seven other municipalities touch upon the harbor. Within eleven miles of downtown Boston, there are thirty-one islands ranging in size from less than an acre to more than 200 acres. Eight different jurisdictions control the islands. In recognition of this complexity, Congress in 1996 authorized a Boston Harbor Islands National Recreation Area operating through a unique partnership of island owners and advisors. Upwards of a half- million people are now believed to visit the harbor islands annually.

An area of great natural diversity and beauty, Boston harbor is also the site of four centuries of human occupancy and use. It has suffered accordingly. In addition to direct runoff from adjacent areas, its natural flows are augmented by the delivery of wastewater from 43 Greater Boston area communities and some 5,500 businesses. The metropolitan water supply and waste disposal system, now the responsibility of the independent Massachusetts Water Resources Authority, is responsible for approximately 1 million gallons of such flows per day. Until 2000, when the final phase of secondary treatment came on line, Boston harbor had the reputation of being one of the nation's most polluted harbors.

The first federal enforcement conference on Boston harbor was held on May 20, 1968. It was reconvened on April 30, 1969. The finding was that Boston harbor was seriously polluted by the discharge of untreated or inadequately treated wastes. Following passage of the Federal Water Pollution Control Amendments of 1972 (the Clean Water Act), the pressure for remedial action further intensified. It was pointed out that even the provisions of Massachusetts' own Clean Waters Act were being violated.

The State Setting

Coming into office in 1983 as the Commonwealth's fourth secretary of environmental affairs, James S. Hoyte found himself the inheritor of a difficult situation. As a former Massachusetts Port Authority (MassPort) staff member and Arthur D. Little environmental specialist, Hoyte was not unfamiliar with organizational and issue complexity, but this one served notice as being a major challenge. The pumps at the Deer Island and Nut Island waste treatment facilities, antiques by any standard, were failing regularly and releasing millions of gallons of raw sewage into the harbor one hundred or more times annually. In consequence, the city of Quincy, in December of 1982, had filed a lawsuit in state court against the Metropolitan District Commission (MDC), an action some felt was disingenuous given Quincy's own combined sewer overflows (CSOs) that discharged directly into the harbor.

In June of 1983 Massachusetts Superior Court Judge Paul Garrity, following hearings, found that substantial amounts of inadequately treated sewage were being discharged into Boston harbor and adjoining waters. He appointed Harvard Law School professor Charles M. Haar as a special master to determine the facts and propose remedies. Concerned about the legislature's reluctance to provide appropriations relief, or even restructure the state wastewater functions, Garrity then issued an injunction barring any new connections to the sewer system until the problems were remedied, threatening to not only disrupt Boston's entire economic development program but to also put the state agency responsible into receivership.

In June of 1983, the Conservation Law Foundation of New England (CLF) compounded the legal stakes by filing its own suit against the Environmental Protection Agency (EPA) and

the MDC for pollution of the harbor. Fortunately for Hoyte, Federal District Court Judge David A. Mazzone stayed any action on the CLF filing until the Quincy state case had run its course.

Within his own organization, Hoyte found a "head-spinning" measure of disarray and disagreement. His coastal zone (CZM) administrator, Richard Delaney, was four-square behind a prompt and full clean-up. Hoyte's MDC commissioner, William Geary, who was being pressed by his agency to explore the waiver provisions of the federal Clean Water Act which allowed major metropolitan areas to resolve pollution through a combination of advanced primary treatment and discharge of effluent beyond the edge of the Continental Shelf, was concerned that his agency's submission should have a full and fair hearing. Furthermore, Geary felt that the various legal and enforcement proceedings were simply "piling on" an agency that had never been given the resources to resolve the problem itself. Hoyte's commissioner of environmental quality engineering, Anthony Cortese, and his water quality specialists found themselves caught between clear violations of both the federal and state's Clean Water Acts and their genuine inclination to work cooperatively with fellow state agencies. Then and there, Hoyte concluded that Boston harbor would have to be a major priority of his administration. The biggest issue, he felt, was not the clean-up itself, but whether the metropolitan Boston rate-payers would be willing to bear the costs.

Since revenue bonding would have to be used, a thorough assessment of financial capacity would be required. Instead of the usual Wall Street establishments, Hoyte turned to one of Boston's own institutions for help, the Bank of Boston. Meanwhile, a former MassPort colleague, Douglas MacDonald, now with the Boston law firm of Palmer & Dodge, was available to work with him to assess the possible legal, organizational, and structural alternatives. MacDonald was joined by a new young Bank of Boston officer, Edward Sullivan, a business-environment joint degree recipient from Yale, who would later go on to serve as commissioner of the Maine Department of Environmental Protection.

By the end of 1983, the results of the analysis were available. Revenue bonding of the harbor clean-up was, indeed, feasible. The instrument recommended was an independent water and sewer authority. By then, a drumbeat of favorable publicity had emerged through a series of

Boston Globe articles on the harbor. The governor's special commission on the harbor, chaired by former governor and environmentalist Francis W. Sargent, was also placing its weight behind the clean-up program.

On April 19, 1984 Massachusetts Governor Michael Dukakis, at Hoyte's recommendation, filed legislation authorizing the creation of an independent agency to take over operation of the MDC's water and sewerage divisions. Facing intense legislative opposition, the Dukakis bill was passed only after a highly publicized threat by EPA's regional administrator, Michael Deland, to seek an injunction to stop sewer connections unless the legislation was enacted. By the end of the year, the governor was able to sign into law an act establishing the Massachusetts Water Resources Authority (MWRA) with the secretary of environmental affairs serving as chairman ex officio.

By then, Hoyte could turn his attention to a resolution of the various court proceedings. Matters had only become worse, because in January of 1985, the regional administrator of the Environmental Protection Agency (EPA) had filed suit against the Commonwealth, the city of Boston, and now the new Authority seeking injunctive relief and civil penalties in federal court for repeated and continuing violations of the Clean Water Act, existing permits, and administrative orders, an action that further compounded Hoyte's growing annoyance with the federal participants. Most galling of all was the prospect that any fines imposed would go directly to the federal treasury and be unavailable for harbor clean-up. As he recalled later, Hoyte earlier had broached the prospect of of a consent order with the governor's office, but there was a reluctance to pursue such a course because of past settlements, especially those involving mental health, that had ended up costing the Commonwealth millions of dollars.

Besides, the litigating parties were still firmly wedded to carrying their cases to completion. Represented by the Attorney-General's office, curiously through its government and not its environmental bureau, Hoyte had little to say about how these cases would be handled, but he could not recall assistant attorney-general Douglas Wilkins favoring the idea of a settlement until the courts had determined their outcome.

That was not long in coming because in May of 1985 Judge Mazzone consolidated the CLF and EPA cases, lifted the stay, and in September of 1985 held the state legally responsible for polluting the harbor. It was now time to settle the penalty phases of the case. These discussions did not arise entirely *de novo*, because there was much happening within the state and nationally that would affect their outcome.

The National Setting

As Maureen Kennedy has observed (Kennedy, January 15, 1988), the concept of citizen suits has a firm foundation in the ancient English law tradition of *qui tam*, actions ensuring that the sovereign properly carries out its responsibilities. In the case of US environmental law, this was made explicit first in the Clean Air Act of 1970, and later in virtually all new federal environmental statutes.

The primary instrument for citizen suits today is Section 505 of the Clean Water Act, whose provisions are greatly facilitated by the regular reports required to be filed by any discharger under the National Pollution Discharge Elimination System (NPDES) of the Environmental Protection Agency (EPA). These provide *prima facie* evidence of violations. The statutes, however do not give citizen enforcers unlimited license to sue. They must have standing (i.e., be able to show injury to themselves); they are limited to civil actions only; their case must be based upon clear evidence of lack of diligence by government enforcement agencies; a prior notice of intent to sue must be filed with both the polluter and the enforcement agency; and any settlement negotiated to which the US is not a party is subject to review and approval by EPA and the Justice Department. But if successful, citizen suits can result in actions that substantially constrain and remediate environmental damage, and some can even result in the creation of enduring environmental trust resources.

Citizen suits are generally welcomed by enforcement agencies, because they help compensate for personnel and funding shortages. Further, they enable agencies to better target the use of their own resources and sidestep day-to-day political and policy differences. As an example, in the sensitive area of pollution emanating from the actions or facilities of other

agencies, citizen efforts as "private attorneys-general" have materially advanced compliance by government itself.

During the early 1980s, when environmental objectives established in the 1970s came under intense questioning and scrutiny, and federal environmental law enforcement went into a period of decline, citizen suits began to blossom. The emerging area of public interest law found ready expression in anti-pollution litigation. National organizations like the Natural Resources Defense Council (NRDC), the Environmental Defense Fund (EDF), and the Sierra Club Legal Defense Fund (SCLDF) began filing hundreds of lawsuits. They were joined by such regional groups as the Chesapeake Bay Foundation, the Atlantic States Legal Foundation, and the Conservation Law Foundation of New England (CLF). State-based organizations (e.g., the Nader-inspired Public Interest Research Groups) also took part.

So successful were these efforts that questions arose as to where the settlement funds were going, a subject of growing concern to the Justice Department and members of Congress. Upon inspection, an array of third party repositories was discovered ranging from local organizations at the site of the offense to more general environmental non-profits, colleges, and universities. The spirit of entrepreneurship (some said "bounty-hunting") was encouraged by defendants who were going to have to pay fines anyway and could possibly reduce litigation expenses and gain public credit through contributions in lieu of penalties, and a judiciary that was receptive to settlements that would dispose of court cases in a timely and equitable manner.

The more imaginative of the litigants created general repositories for settlements (e.g., the New York-based Open Space Institute served that function for the NRDC), leaving the actual use of the funds to the discretion of independent trustees. Where settlement moneys were substantial, and the environmental damage was so pervasive that it could only be remedied by other actions on behalf of the environment, it became the practice to seek enduring environmental trusts and have the settlement proceeds serve as a permanent endowment.

By all accounts, the benchmark of the environmental trust movement came in 1977 when the Allied Chemical Company of Virginia faced nearly 1,000 counts of illegal discharges of the pesticide Kepone into the James River. The result was a suggestion and later approval by

Federal District Court Judge Robert A. Merhige, Jr. of a contribution of $8 million by the company to found the *Virginia Environmental Endowment*, and a proportionate reduction of the fine due. A second major precedent occurred in New York's Hudson River valley. In 1981, environmental groups, government regulatory agencies, and utility companies settled their differences by creating a *Hudson River Foundation for Science and Environmental Research* using $12 million contributed by the companies in lieu of a portion of the penalties due. The concept of permanent environmental trusts - a category of "compulsory philanthropies" recognized by the *Chronicle of Philanthropy* (Stephen Greene, April 4, 1989) - thereupon came into being. Through augmentation by other settlements, and wise endowment management, these two environmental trusts alone now enjoy assets of $30-40 million each.

Proposals for other third-party entities, functioning as foundations under independent trustee oversight, began to appear across the country. Most arose, in VEE Executive Director Gerald McCarthy's terms, as "idiosyncratic accidents" (Roundtable minutes, March 27, 1987), but others felt that a more systematic approach to trust encouragement and formation was warranted. During the late 1980s, the World Wildlife Fund/Conservation Foundation took an active interest in the issue, sponsoring informal roundtables of existing trusts to help cross-pollinate experiences and intentions, and undertaking research of its own. A coalition of environmental trust leaders, led by the Fund for New England and the California Environmental Trust, began a campaign to persuade a reluctant Federal bureaucracy and a skeptical Congress of the merits of this approach. An ambitious program of nine regional environmental foundations nationally was drawn up at the request of the Andrew W. Mellon Foundation but never funded.

An additional innovation soon entered the scene - the emergence of the state-sponsored environmental trust. In 1985, Maryland enacted legislation creating the *Chesapeake Bay Trust*. Versions of this instrument then began to appear in California, the Gulf Coast, the Great Lakes, Long Island Sound, and even the Canadian provinces (e.g., New Brunswick). Despite their name, state environmental trusts are hybrid institutions, legally state agencies but empowered to act through trustee-led organizations that operate with substantial independence from the bureaucracy. Though often founded as the result of settlements, the state environmental trusts

have wasted little time in generating other sources of revenue. A favorite source of earmarked funds has been the specialty environmental license plate so popular with the public. In some states, state environmental trusts have become the major if not the premier environmental grantmakers in their localities.

Fund for New England

National and local events began to intersect in 1983. Returning from a two year stint as president of the Charlottesville-based W. Alton Jones Foundation, where he had worked closely with the Virginia Environmental Endowment, the senior author, Charles H.W. Foster, began an assignment with the New England Natural Resources Center (NENRC), a regional non-profit organization he had founded in 1970. It was just a question of time before New England experienced a pollution event of the magnitude of Virginia's Kepone spill, he advised the NENRC trustees, urging them to establish a regional environmental philanthropy in advance and begin building a track record of successful grantmaking. A visit from VEE executive director Gerald McCarthy confirmed the timeliness of such an initiative. Besides, with New England's own charitable record at the bottom of the national generosity index, and the environmental portion of its giving at the lowest levels, a specific environmental philanthropy was long overdue.

In December 1983, upon receipt of two foundation grants for such purposes, the trustees voted to establish a wholly-owned subsidiary, the *Fund for New England* (FNE), commission the preparation of an environmental philanthropic agenda for New England, establish a supportive Friends of New England contributors' network, and initiate a program of small grants to non-profit organizations in the region. They also authorized an active effort to encourage settlements in lieu of fines throughout New England.

A multi-faceted program then ensued. Acting in partnership with the California Environmental Trust, a comparable organization Foster had helped form in 1984, a determined effort was made to convince the EPA and the Department of Justice of the merits of environmental trust settlements. Personal overtures were made to former Californian Edwin

Meese, the new Attorney-General; to Meese's successor Richard Thornburgh; and to EPA administrator William B. Ruckelshaus. Key Congressional staff were convened for a briefing in Washington. Representative Gerry E. Studds (MA), chairman of the House Merchant and Marine Fisheries Committee's Subcommittee on Fisheries and Wildlife and the Environment, was persuaded to hold hearings on more creative uses of federal environmental enforcement authorities. In furtherance of these activities, the FNE commissioned an overall case statement on environmental trusts from Professor Donald Stever of Pace University, a former New Hampshire assistant attorney-general (Stever, 1987).

With the encouragement and assistance of the Washington-based World Wildlife Fund/Conservation Foundation (WWF/CF), a roundtable of like environmental trusts from Alaska to Chesapeake Bay was organized. Sessions were held in 1986 and 1987 to exchange ideas and experiences and begin organizing a national constituency. Foster's adjunct arrangement at Harvard University's Energy and Environmental Policy Center enabled research assistance through graduate student internships provided by the John F. Kennedy School of Government. Although the progress of events nationally proved to be discouraging, the March 1989 Exxon Valdez oil spill in Alaska revealed that at least some people were listening. Foster and Joseph Bodovitz of the California Environmental Trust were subsequently commissioned by the WWF/CF to undertake a feasibility study of a possible Fund for Alaska funded in large part by oil spill settlement monèys (Foster, Bodovitz, and Foster-Simons, September 1989), an initiative that, regrettably, was never implemented.

In the meantime, the FNE remained hard at work pursuing environmental trust resources within its own region. Agencies, attorneys, judges, and non-profit leaders were approached individually, as were parties engaged in current litigation. In October 1985, a full-scale presentation was made to the New England Governors' Committee on the Environment, composed of the principal state environmental officers of the region. All were supportive of the idea in principle, but individual cases seemed to encounter difficulties in practice. Outside of an unwillingness to stray from familiar procedures, the primary obstacles appeared to be the

enforcement agencies' strict insistence on nexus. This invariably led to carefully tailored settlements, often geared specifically to the interests of the oversight agency.

But in August 1987, lead attorney Chuck Caldart approached the FNE about serving as a third party repository for settlement funds derived from MassPIRG's successful suit against the General Electric Co. for pollution of the Saugus River (MA). The FNE subsequently agreed to serve as settlement funds manager, establish a Saugus River Improvement Fund, and administer and allocate $100,000 in court-approved penalty moneys. Encouraging though this development was, all eyes remained on the pending Boston Harbor pollution case, which promised to be a much more substantial source of settlement funds and a real test of the environmental trust concept in New England.

As a former Massachusetts secretary of environmental affairs, Foster enjoyed ready access to the state's Executive Office of Environmental Affairs where the responsibility for the case was centered. He found an attentive ear in current secretary (and co-author) James S. Hoyte. By singular coincidence, Hoyte's deputy secretary at that time turned out to be William Eichbaum, a former assistant secretary in Pennsylvania and Maryland who had first-hand knowledge of the creation of the Chesapeake Bay Trust and was familiar with the national roundtable deliberations.

The State-level Negotiations

The idea of a creative settlement kept being brought to Hoyte's attention. Former secretary of environmental affairs Foster, actively promoting the use of environmental trusts nationally under the auspices of the Fund for New England and the World Wildlife Fund/Conservation Foundation, apprised Hoyte regularly of similar or emerging precedents in Massachusetts, Virginia, Chesapeake Bay, the Hudson River, the Gulf Coast, the Great Lakes, California, and Alaska. Susan Ives, a Kennedy School graduate committed to a Boston harbor settlement as the result of a seminar paper she wrote for Harvard Law School professor and Quincy case master Charles Haar, had persuaded Hoyte to engage her as a consultant to pursue the particulars in more detail. Among trust options being explored by Ives were the use of

existing environmental philanthropies like the Fund for New England and the Fund for the Preservation of Wildlife and Natural Areas, or the creation of a special donor-advised fund within Boston's nationally-renowned community foundation, the Permanent Charities Fund. Hoyte, Eichbaum, Foster, and Ives remained in regular contact as the federal court cases drew to a close. Each was strongly committed to the concept of an environmental trust as part of any settlement.

How the Massachusetts trust proposal finally emerged, and who was its principal progenitor, remain obscured by passage of time. While there were many lines of outside influence, the trust agreement seems essentially to have been an endemic product. Consensus was possible because the litigators were satisfied when Judge Mazzone found for the plaintiffs. After that, the penalty discussions were secondary. Although he was not directly involved in promoting the environmental trust concept as was Judge Merhige in the Virginia Environmental Endowment formation, Judge Mazzone, according to Hoyte, "understood what was going on, was tough-minded throughout, but was not prepared to be punitive just for punishment's sake."

With case closure in sight, EPA regional administrator Michael Deland was anxious to restore his agency's collegial relationship with state agencies and was more than willing to help persuade a still-reluctant Department of Justice to go along with an alternate use of penalty moneys. He was encouraged to do so by his chief legal aide, Patrick Parenteau, whom he had recruited in 1984 after putting out a call to the Washington community for a "hard-charging regional counsel." In another stroke of good fortune for Boston Harbor, Parenteau, as lead counsel for the National Wildlife Federation, had been inspired by the Virgina Kepone case to press for a similar permanent trust settlement to protect the endangered whooping crane in Nebraska.

On the state's side, Governor Dukakis was already gearing up for a campaign for president of the United States, and his staff was more than willing to hand off to Hoyte given the press of national affairs. Hoyte's agencies, weary of the endless battles and public criticism, were ready to get on with the job of harbor clean-up under the new Authority. The state's Office of Coastal Zone Management was particularly interested in a possible trust arrangement, because

the $2 million in state penalty funding, if retained at the state level, could help satisfy the matching fund requirements for a major national estuary planning and research project for Boston harbor and Massachusetts Bay. And, in the legislature, a strong potential ally had appeared. Boston Representative Thomas Finneran, a harbor and environmental enthusiast, was determined to assist the state's environmental agencies and championed the trust concept as a vehicle to administer settlement funds. Later, Finneran became chairman of the influential House Ways & Means Committee and would subsequently be elected Speaker of the House of Representatives. It is doubtful that any settlement agreement could have been achieved and endorsed by the federal and state political stakeholders at the time without having as an element some vehicle for making environmentally beneficial use of penalty moneys.

Fortified by all of these events, Hoyte wrote Governor Dukakis on April 8, 1988 that the Commonwealth and the EPA had come to an agreement to settle the penalty phases with a fine of $425,000 payable to the federal treasury, and an appropriation of $2 million to establish a new Massachusetts Bay Environmental Trust. He characterized the agreement as now casting the Commonwealth as a "cooperative partner with the EPA in efforts to heal the harbor, and not as a recalcitrant violator" and urged action to establish the Trust and provide the required appropriation. On April 13, 1988, in a joint press release, state and federal officials formally announced agreement on the penalty phases of the enforcement action.

Although the exact parentage of the enabling act also remains murky, the drafting appears to have been largely the product of collaboration between Secretary Frank Keefe's Executive Office of Administration & Finance and Hoyte's EOEA. Because the legislature was already starting to consider the state's FY 89 budget, a decision was made to include the legislation as an outside section of the FY 89 Supplemental Budget. Representative Finneran agreed to shepherd the measure to passage.

After other coastal areas were added at the urging of legislators, Section 7 of Chapter 236 of the Acts of 1988 became law establishing the *Boston and Lynn Harbors and Massachusetts, Buzzards and Cape Cod Bays Environmental Trust Fund* (later simplified to the Massachusetts Environmental Trust) within the Executive Office of Environmental Affairs. A quasi-

governmental agency, the Trust was to be governed by a seven member board of "distinguished citizens" appointed by and responsible to the secretary. Although the $2 million in expenditures would be governed by the stipulation and order issued by the US District Court, and overseen by the Court, an important concession had been hammered out among the settlement parties. The use of the interest on the amounts held in trust was to remain discretionary with the Trust, thereby giving the trustees a head start on the larger philanthropic effort envisioned in the Trust's authorizing language. The next task for Hoyte would be to select and appoint the new trustees.

Hoyte invited his principal advisors, Eichbaum, Foster, and Ives, to suggest a slate of trustee candidates. Toward the end of 1988, an initial panel of "distinguished citizens" had been identified, cleared with the governor's office, and readied for appointment by the secretary. At that point, however, change was in the wind again. Dukakis had returned from an unsuccessful bid for the presidency to resume the remaining two years of his gubernatorial term. Hoyte had decided to join the world of private law practice. His successor would be former environmental activist and Dukakis policy advisor John DeVillars, later to become the regional administrator of EPA for New England. There was concern that the Trust would simply drop through the cracks. But thanks to both Hoyte and DeVillars, that did not happen. With the exception of two changes in the suggested trustee structure, matters were allowed to proceed virtually unchanged.

Consequently, in June of 1988 Secretary DeVillars appointed the initial slate of trustees, provided space for the Trust at the EOEA, approved the assignment of CZM's Judith Pederson to serve as acting executive director, and presided over the Trust's initial meeting. Appropriately, three of the individuals who had worked so hard for the establishment of the Trust - Hoyte, Finneran, and Foster - found themselves now charged with its implementation. In 1999, upon completion of his assignments as EOEA secretary and EPA regional administrator, DeVillars himself became a trustee.

The early evolution of the Trust included key decisions that seem to have ensured the support of some key constituencies. For example, by expanding the jurisdiction of the Trust to include other coastal areas beyond Boston Harbor, the Trust's proponents garnered crucial legislative support. The provisions for a discretionary grant program, albeit small, were

significant in mobilizing the interest of the grassroots and environmental communities. Perhaps most importantly, the existence of a small grant program at the outset provided a base upon which the Trust could build a major environmental grantmaking activity. This small fund component inspired the initial trustees to develop strategies for supplemental resources in recognition of a clear, pent-up demand for assistance at local levels.

Ten years later, the Trust could report an endowment on hand of nearly $5 million, and an independent inflow of funds from license plate revenues, interest, and other settlements sufficient to support a $1 million annual grants program. Thus, the modest innovation once thought to be simply part of the solution to Boston harbor's pollution problems within a decade, had become one of the largest environmental grantmakers in the entire Commonwealth of Massachusetts and a model for other states to envy and emulate.

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