

# EUROPE, THE UNITED STATES, AND THE GLOBAL CLIMATE REGIME: ALL TOGETHER NOW?

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## I. INTRODUCTION

The European Union (EU) and the United States have many things in common. These include that both are leading actors in the “Western world,” steeped in democratic traditions and committed to the rule of law. Both are also leading industrialized regions in the global economy. And yet, in recent years and on a range of issues, the EU and the United States could not have been further apart. One of them is what some would consider the single most important public policy challenge of our time: global climate

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change.<sup>1</sup> Climate change not only poses complex environmental and economic challenges, it is also the quintessential collective action problem.<sup>2</sup> Albeit to different degrees, all states contribute to climate change and all are affected by it. And unless states cooperate, a solution cannot be found. But bringing 191 states—and, in particular, the major greenhouse gas emitters—into a meaningful, long-term climate regime has proven to be the political and legal equivalent of squaring the proverbial circle.

It is all the more remarkable, then, that the 1992 United Nations Framework Convention on Climate Change (UNFCCC) boasts 192 parties, including the EU and the United States.<sup>3</sup> The ultimate objective of the UNFCCC is to achieve a “stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system.”<sup>4</sup> The convention provides that, initially, actions to that end be taken only by the developed countries and countries with economies in transition that are listed in Annex I to the Convention.<sup>5</sup> The Kyoto Protocol, in turn, established an initial five-year commitment period (2008-2012) during which Annex I countries would have to achieve specific emission reduction targets.<sup>6</sup> The Protocol’s first round of commitments, even if fully implemented, will fall far short of achieving the Convention’s objective, something that parties were aware of when the Protocol was negotiated. In the Protocol, therefore, they also agreed to begin consideration of new commitments well before expiry of the first commitment period.<sup>7</sup>

Discussions about such additional commitments have been underway for some time now, but have been sluggish and contentious, to say the least. Quite apart from agreeing upon how much greenhouse gas emissions should be reduced and in what time-frame, the biggest challenge has been to engage the key states in

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1. See David A. King, *Climate Change Science: Adapt, Mitigate, or Ignore?*, SCIENCE, Jan. 2004, at 176 (describing climate change as “the most severe problem that we are facing today”).

2. See Paul G. Harris, *Collective Action on Climate Change: The Logic of Regime Failure*, 47 NAT. RESOURCES J. 195, 196 (2007).

3. United Nations Conference on Environment and Development: Framework Convention on Climate Change, *adopted* May 9, 1992, U.N. Doc. A/AC.237/18 (Part II)/Add.1, *reprinted in* 31 I.L.M. 849 (1992) [hereinafter UNFCCC]; see UNFCCC, Status of Ratification, [http://unfccc.int/essential\\_background/convention/status\\_of\\_ratification/items/2631.txt](http://unfccc.int/essential_background/convention/status_of_ratification/items/2631.txt). php [hereinafter UNFCCC Ratifications] (providing a list of signatories and ratification of the convention as of August 22, 2007).

4. UNFCCC, *supra* note 3, at art. 2.

5. *Id.* at arts. 3.1, 4.2(a)-(b).

6. Conference of the Parties to the Framework Convention on Climate Change: Kyoto Protocol, at art. 3, *adopted* Dec. 10, 1997, U.N. Doc. No. FCCC/CP/1997/L.7/Add.1, *reprinted in* 37 I.L.M. 22 (1998) [hereinafter Kyoto Protocol].

7. See *id.* at art. 3.9.

the efforts to further develop the global regime. The European Union and its member states have been advocating demanding new commitments. However, some of the largest emitters of greenhouse gases do not have reduction obligations under the Kyoto Protocol. Until recently, these states—including, notably, the United States and large developing countries like China and India—have resisted even talking about future binding commitments.

The release of the Intergovernmental Panel on Climate Change's (IPCC) Fourth Assessment Report in 2007 injected a new sense of urgency into the discussions. The IPCC concluded that "[w]arming of the climate system is unequivocal, as is now evident from observations of increases in global average air and ocean temperatures, widespread melting of snow and ice, and rising global average sea level."<sup>8</sup> It also found that the unprecedented increases of greenhouse gas concentrations in the atmosphere during the industrial era are the result of human activities.<sup>9</sup> Further, the IPCC concluded that to have a reasonable chance of guarding against dangerous warming, global greenhouse gas emissions would have to peak in the next ten to fifteen years and, by 2050, would have to be reduced to less than half of 2000 emissions.<sup>10</sup>

These findings helped to prompt some shifts in previously entrenched positions.<sup>11</sup> The "Bali Roadmap," which was adopted at the December 2007 meetings of the parties to the UNFCCC and the Kyoto Protocol, speaks to the growing acceptance of a need for long-term action on climate change.<sup>12</sup> Eventually, the United

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8. Richard B. Alley et al., *IPCC, 2007: Summary for Policymakers, Contribution of Working Group I to the Fourth Assessment of the Intergovernmental Panel on Climate Change*, in CLIMATE CHANGE 2007 – PHYSICAL SCIENCE BASIS 5 (Susan Solomon et al. eds., 2007), available at <http://www.ipcc.ch/pdf/assessment-report/ar4/wg1/ar4-wg1-spm.pdf>. A growing chorus of voices warns that even the IPCC's worst-case scenarios are in fact too conservative and that global climate change is occurring at a much faster rate than expected, in part due to various feedback effects. See Thomas Homer-Dixon, *Positive Feedbacks, Dynamic Ice Sheets, and the Recarbonization of the Global Fuel Supply: The New Sense of Urgency About Global Warming*, in A GLOBALLY INTEGRATED CLIMATE POLICY FOR CANADA 37, 37 (Steven Bernstein, Jutta Brunnée, David G. Duff & Andrew J. Green eds., 2008).

9. See Richard B. Alley et al., *supra* note 8, at 2-3. Working Group I considers it to be "very likely" (more than ninety percent certain) that human impact accounts for these increases. See *id.* at 2-3, 3 n.6.

10. Terry Barker et al., *Technical Summary, Contribution of Working Group III to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change*, in CLIMATE CHANGE 2007: MITIGATION 36, 39-40 (B. Metz et al. eds., 2007), available at <http://www.ipcc.ch/pdf/assessment-report/ar4/wg3/ar4-wg3-ts.pdf>.

11. See Jutta Brunnée, *Shifting the Global Climate Debate: When Bad News Is Good News*, NEXUS, Fall 2007, at 30.

12. The "Bali Roadmap" comprises a series of outcomes of the 13th Conference of the Parties to the UNFCCC and the 3rd Meeting of the Parties to the Kyoto Protocol, held simultaneously in Bali, Indonesia, in December 2007. See *Summary of the Thirteenth Conference of Parties to the UN Framework Convention on Climate Change and Third Meeting of Parties to the Kyoto Protocol: 3-15 December 2007*, EARTH NEGOTIATIONS BULL., (Int'l Inst. for Sustainable Dev., New York, N.Y.), Dec. 18, 2007, at 1, 15-18, available at

States and the major developing country emitters joined the consensus. Still, climate diplomacy between the EU and the United States remains polarized, as it has been since the decision of the Bush Administration in 2001 to abandon the Kyoto Protocol. Indeed, according to many observers, the United States not only refused to take on the binding emission reduction commitments set out in the Kyoto Protocol, but also tried to undercut the U.N. climate regime by promoting alternative, non-binding initiatives.<sup>13</sup>

Either way, the United States has played far less of a leadership role in climate change talks than in other environmental negotiations.<sup>14</sup> Indeed, other states have openly expressed their resentment of the U.S. stance, as did Papua New Guinea's ambassador for climate change who made the following statements at the Bali negotiations: "[I]f for some reason you're not willing to lead, leave it to the rest of us. Please get out of the way."<sup>15</sup> If the loss of respect so powerfully captured in this rebuke were not enough, the United States may also have lost political influence at a critical juncture in global climate politics. Meanwhile, the EU has stepped into the leadership role, working hard to sustain the regime and to promote and shape its further evolution.<sup>16</sup>

Global climate governance is now at a critical juncture due to at least three circumstances: the need to set the tracks for a post-Kyoto regime, the overwhelming new evidence of the urgency of this task, and the opening created by the Bali Roadmap. What, then, are the prospects for global action and, more specifically, for the regime established by the UNFCCC and its Kyoto Protocol? Its future and effectiveness will depend on many factors, including whether key developing countries, such as China and India,<sup>17</sup> can be persuaded to join the effort. In turn, such developing country buy-in is arguably contingent on the actions of the main

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<http://www.iisd.ca/download/pdf/enb12354e.pdf>.

13. See, e.g., David Hunter, *The Future of U.S. Climate Change Policy*, in A GLOBALLY INTEGRATED CLIMATE POLICY FOR CANADA 79, 82-85 (Steven Bernstein, Jutta Brunnée, David G. Duff & Andrew J. Green eds., 2008).

14. See generally Jutta Brunnée, *The United States and International Environmental Law: Living with an Elephant*, 15 EUR. J. INT'L L. 617 (2004) (noting the shift in U.S. international environmental law policy agendas, but arguing that one event—the U.S. withdrawal from the Kyoto Protocol—is not necessarily representative of the shift).

15. Andrew C. Revkin, *Issuing a Bold Challenge to the U.S. Over Climate*, N.Y. TIMES, Jan. 22, 2008 at F2.

16. See Jutta Brunnée & Kelly Levin, *Climate Policy Beyond Kyoto: The Perspective of the European Union*, in A GLOBALLY INTEGRATED CLIMATE POLICY FOR CANADA 57, 59 (Steven Bernstein, Jutta Brunnée, David G. Duff & Andrew J. Green eds., 2008).

17. Together, China and India account for a fifth of global greenhouse gas emissions. See Lavanya Rajamani, *China and India on Climate Change and Development: A Stance That Is Legitimate but Not Sagacious?*, in A GLOBALLY INTEGRATED CLIMATE POLICY FOR CANADA 104, 104-05 (Steven Bernstein, Jutta Brunnée, David G. Duff & Andrew J. Green eds., 2008).

industrialized negotiating powers—the EU and the United States.<sup>18</sup> In determining the prospects for the global climate regime, therefore, it is important to inquire into the potential for leadership by the EU or the United States or, ideally, by both. What are the factors that account for the European and American approaches to international climate law and policy, respectively? Why has the EU been so committed to the global regime when the United States has not?

At first glance, the explanations would appear to lie in the respective interests and power of the EU and the United States. Undoubtedly, actors' interests influence their policies, and their relative power affects their ability to pursue these interests. And yet, as plausible as these explanations may seem, they are also too crude. They obscure important aspects of the processes through which policy choices come to be made. This Article explores the normative dimensions to these policy processes. Drawing on a constructivist understanding of international affairs,<sup>19</sup> the hypothesis is that international law, including the norms enshrined in the UNFCCC and the Kyoto Protocol, can come to shape policy processes, the interests that actors aim to pursue, and their power to do so. As will become apparent, international legal norms, for a range of reasons, have played a stronger role in shaping European, rather than American, climate policy. Interestingly, this fact seems to have strengthened the European approach to global regime building and catalyzed European interests. It appears to have made European policy positions and leadership more influential than the American efforts to weaken the U.N. regime.

The Article begins with a brief sketch of the climate regime as it has evolved under the UNFCCC and its Kyoto Protocol. It then highlights the main features of current approaches taken by the United States and the EU toward climate policy and to the global climate regime. Next, it explores some of the factors that might account for European and American policy trajectories. This discussion turns from the internal politics of the EU and the United States, to their respective identities as international actors and leaders, to European and American attitudes towards international law, and finally to the salience of international environmental norms for EU and U.S. policies. The Article concludes with an evaluation of the likely implications of these factors for the future of the U.N. climate regime and for the respective leadership roles of the EU and the United States within the regime.

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18. *See id.* at 105-08 (commenting on the Chinese and Indian negotiating positions).

19. *See infra* notes 136-40 and accompanying text.

## II. THE EVOLUTION OF THE GLOBAL CLIMATE REGIME

The UNFCCC, adopted at the Rio Earth Summit in 1992, contains principles and objectives to guide global climate policy and establishes institutions and processes for further treaty development. As already noted, its overarching objective is to avert “dangerous anthropocentric interference with the climate system.”<sup>20</sup> Among the Convention’s foundational principles is the notion that parties should take “precautionary measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects.”<sup>21</sup> Climate change is described as a “common concern of humankind,”<sup>22</sup> and parties are called upon to protect the climate system “on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities.”<sup>23</sup> The convention also stipulates that “developed country Parties should take the lead in combating climate change.”<sup>24</sup>

The Kyoto Protocol was adopted in 1997 to build on the general commitments set out in the Convention. It has been ratified by 181 states and the EU.<sup>25</sup> It imposes binding greenhouse gas (GHG) emission reduction commitments on parties listed in Annex I to the UNFCCC, but not on developing countries. Although this feature of the protocol has become increasingly controversial, it actually respects the abovementioned principles of the Convention.<sup>26</sup>

The Protocol requires Annex I parties to achieve, during a 2008-2012 “commitment period,” specified reductions in comparison to their 1990 emission levels. Compliance with these targets is assessed at the end of that period. Parties’ individual commitments vary. For example, while the United States, had it ratified the protocol, would have had to reduce its emissions by 7% below 1990 levels, the European Community (the legal entity that is party to the protocol)<sup>27</sup> committed itself to an 8% cut.<sup>28</sup> In addition to

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20. UNFCCC, *supra* note 3, at art. 2.

21. *Id.* at art. 3.3.

22. *Id.* at pmb1.

23. *Id.* at art. 3.1.

24. *Id.*

25. See Kyoto Protocol, *supra* note 6. As of October 16, 2008, the Kyoto Protocol had 182 parties. UNFCCC, Status of Ratification, [http://unfccc.int/kyoto\\_protocol/bacground/status\\_of\\_ratification/items/2613.php](http://unfccc.int/kyoto_protocol/bacground/status_of_ratification/items/2613.php) (last visited Feb. 24, 2009).

26. See Rajamani, *supra* note 17, at 110-12.

27. The EU, which currently has twenty-five member states, was established through the 1992 Treaty on European Union. See Ludwig Krämer, *Regional Economic Integration Organizations: The European Union as an Example*, in OXFORD HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW 853, 854 (Daniel Bodansky, Jutta Brunnée & Ellen Hey eds., 2007) (describing the salient distinctions). The EU and the European Community (EC) are legally distinct but have the same member states and largely the same institutions. *Id.* at 554-55. The EC rather than the EU is legally competent to enter into international agreements. *Id.* at 855.

the Community, its member states have their own commitments.<sup>29</sup> However, so long as the Community's collective obligation is met, member states will not be assessed for compliance with their individual targets.<sup>30</sup> This arrangement has come to be referred to as the "EU bubble."<sup>31</sup> To give all parties greater flexibility in meeting their emission reduction commitments, the Kyoto Protocol establishes trading mechanisms through which they (or legal entities under their jurisdictions) can exchange emission rights or emission reduction credits.<sup>32</sup> Another distinctive feature of the Protocol is a compliance procedure that is considerably more ambitious than the facilitative approaches that multilateral environmental agreements (MEAs) typically employ. It encompasses an enforcement branch, which is meant to ensure compliance with the emission targets and the related inventory and reporting commitments.<sup>33</sup>

Although the Protocol's commitment period has only just begun, its expiry in 2012 makes settling whether there will be subsequent commitments—and, if so, what kind of commitments and to whom they will apply—an increasingly urgent task. Failure to agree upon a Kyoto successor will have a number of ripple effects on global climate governance. The absence of clear signals regarding subsequent commitments will undermine the existing regime, in part because, legally speaking, Kyoto parties' emissions would be permitted to increase again after the expiry of the commitment period.<sup>34</sup> More and more parties will then be tempted to abandon efforts to meet their existing Kyoto commitments, and industry would lose key incentives to step up climate action. Indeed, some Kyoto parties, such as Canada, have already begun to advocate emission baselines and targets that deviate from the cornerstones established in the UNFCCC and the Kyoto Protocol.<sup>35</sup>

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28. See Kyoto Protocol, *supra* note 6, at art. 3.1, Annex B.

29. See *id.*

30. See *id.* at art. 4.1.

31. An internal "burden sharing agreement" has reallocated individual members' commitments within the EU bubble. See Jürgen Lefevere, *The EU Greenhouse Gas Emission Allowance Trading Scheme*, in CLIMATE CHANGE AND CARBON MARKETS: A HANDBOOK ON EMISSION REDUCTION MECHANISMS 75, 77 (F. Yamin ed., 2005).

32. See Kyoto Protocol, *supra* note 6, at arts. 6, 12, 17.

33. See *id.* at art. 18; Conference of the Parties Serving as the Meeting of the Parties to the Kyoto Protocol, Montreal, Can., Nov. 28 – Dec. 10, 2005, *Report of the Conference of the Parties Serving as the Meeting of the Parties to the Kyoto Protocol on Its First Session, Addendum, Part Two: Action Taken by the Conference of the Parties Serving as the Meeting of the Parties to the Kyoto Protocol at Its First Session*, at 92-103, U.N. Doc. FCCC/KP/CMP/2005/8/Add.3 (Mar. 30, 2006), available at <http://unfccc.int/resource/docs/2005/cmp1/eng/08a03.pdf>.

34. See HERMANN OTT, CLIMATE POLICY POST-2012 – A ROADMAP: THE GLOBAL GOVERNANCE OF CLIMATE CHANGE 4-5 (2007), available at [http://www.wupperinst.org/uploads/tx\\_wibeitrag/Ott\\_Taellberg\\_Post-2012.pdf](http://www.wupperinst.org/uploads/tx_wibeitrag/Ott_Taellberg_Post-2012.pdf).

35. The Canadian government has pegged its policy goals to a 2006 baseline, rather than 1990, and is advocating GHG intensity targets rather than absolute, Kyoto-style, tar-

Multiple tracks for considering further actions under the UNFCCC umbrella were established at the eleventh meeting of the Conference of the Parties to the Convention and the parallel first Meeting of the Parties to the Kyoto Protocol in Montreal in 2005.<sup>36</sup> An Ad-hoc Working Group was tasked, under article 3.9 of the Kyoto Protocol, with considering new commitments for Annex I parties. Given the Protocol's Annex I commitment focus, this track precludes consideration of developing country commitments. Article 9 of the protocol would allow for a broader review of the adequacy of the Protocol and its approach, but the G7 and China resisted the discussion of emissions-related commitments by developing countries. Given this resistance, industrialized states were unwilling to discuss a concrete negotiating mandate under article 3.9. However, an open-ended "dialogue" on "long-term cooperative action" was launched under the auspices of the Convention.<sup>37</sup> It is intended in part to keep the United States and Australia, the two industrialized countries that had refused to join the Kyoto Protocol, engaged in global deliberations, but it also provides a forum for engagement with developing countries.

As noted earlier, the 2007 IPCC findings helped inject new momentum into the discussions on future commitments. In particular, the IPCC drove home the point that global greenhouse gas emissions would have to peak around 2020 and would have to be dramatically reduced by 2050 if there was to be a reasonable chance of averting dangerous warming.<sup>38</sup> This message appears to have finally gotten through. The G8 leaders agreed at their June 2007 summit to aim for global emission reductions of at least 50% by 2050 and to work within a U.N. process.<sup>39</sup> And, at their December 2007 meeting in Bali after much wrangling, the parties to the UNFCCC adopted a decision on "long-term cooperative action" on climate change.<sup>40</sup> In the decision, dubbed the "Bali Action Plan,"

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gets. See CAN., REGULATORY FRAMEWORK FOR AIR EMISSIONS, at iv (2007), available at [http://www.ec.gc.ca/doc/media/m\\_124/report\\_eng.pdf](http://www.ec.gc.ca/doc/media/m_124/report_eng.pdf). In effect, this move to a new reference year amounts to an attempt by Canada to "grandfather" the significant emissions increases it has seen since 1990.

36. See Ott, *supra* note 34, at 17.

37. Conference of the Parties, Montreal, Can., Nov. 28 – Dec. 10, 2005, *Report of the Conference of the Parties on Its Eleventh Session, Addendum, Part Two: Action Taken by the Conference of the Parties at Its Eleventh Session*, at 4, U.N. Doc. FCCC/CP/2005/5/Add.1 (Mar. 30, 2006) [hereinafter *COP Eleventh Session*], available at <http://unfccc.int/resource/docs/2005/cop11/eng/05a01.pdf>.

38. See Barker et al., *supra* note 10, at 38-40, and accompanying text.

39. G8 Summit 2007, Heiligendamm, F.R.G., June 6-8, 2007, *Chair's Summary*, at 2 (June 8, 2007), available at [http://www.g-8.de/Content/EN/Artikel/\\_g8-summit/anlagen/chairs-summary.templateId=raw.property=publicationFile.pdf/chairs-summary](http://www.g-8.de/Content/EN/Artikel/_g8-summit/anlagen/chairs-summary.templateId=raw.property=publicationFile.pdf/chairs-summary).

40. See generally Chris Spence et al., *Great Expectations: Understanding Bali and the Climate Change Negotiations Process*, 17 REV. EUR. COM. & INT'L ENVTL. L. 142, 145 (2008) (providing an assessment of the Bali outcomes).



the parties launched a process aimed at arriving at an “agreed outcome” by 2009—a “shared vision” for global climate action “including a long-term global goal for emission reductions.”<sup>41</sup> Part of the significance of the Plan lies in the fact that it envisages climate action by all convention parties, rather than only those states currently committed under the Kyoto Protocol. Indeed, the language of the Action Plan moved away from the “Annex I” and “non-Annex I” party dichotomy that has constrained the current convention-protocol regime and refers to future actions by “developed” and “developing” countries.<sup>42</sup> To keep these accomplishments in perspective, while the compromise struck in the Action Plan does not preclude future binding targets, it does not entail a commitment to them either.<sup>43</sup> Similarly, the plan is silent on interim targets for 2020. Instead, the Bali Compromise recognizes that “deep cuts in global emissions will be required” and emphasizes the “urgency” of climate action.<sup>44</sup> The Ad-Hoc Working Group, established to consider future Kyoto commitments, went somewhat further and recognized that the IPCC’s findings “would require Annex I Parties as a group to reduce emissions in a range of 25% to 40% below 1990 levels by 2020.”<sup>45</sup> The group adopted a work program, pursuant to which the group is to report back to the Protocol parties by 2009.<sup>46</sup>

### III. AMERICAN AND EUROPEAN CLIMATE POLICY TODAY

#### A. *The United States*

While the United States has had long-standing concerns about internationally mandated climate action, the administration of George H.W. Bush eventually bowed to international pressure and supported the negotiation of the UNFCCC.<sup>47</sup> The United States

41. Conference of the Parties, Bali, Indon., Dec. 3-15, 2007, *Report of the Conference of the Parties on Its Thirteenth Session, Addendum, Part Two: Action Taken by the Conference of the Parties at Its Thirteenth Session*, at 3, U.N. Doc. FCCC/CP/2007/6/Add.1 (Mar. 14, 2008) [hereinafter *COP Thirteenth Session*], available at <http://unfccc.int/resource/docs/2007/cop13/eng/06a01.pdf#page=3>.

42. See *id.* at 3; see also Spence et al., *supra* note 40, at 150 (explaining the elimination of Annex I and non-Annex I terminology).

43. The Action Plan contemplates “[m]easurable, reportable and verifiable nationally appropriate mitigation commitments or actions, including quantified emission limitation and reduction objectives . . .” *COP Thirteenth Session*, *supra* note 41, at 3.

44. *Id.* at pmb1. The Action Plan also refers to the IPCC findings in a footnote. *Id.* at 3 n.1.

45. Ad Hoc Working Group on Further Commitments for Annex I Parties Under the Kyoto Protocol, Bali, Indon., Dec. 3-15, 2007, *Report of the Ad Hoc Working Group on Further Commitments for Annex I Parties Under the Kyoto Protocol on Its Resumed Fourth Session*, ¶ 16, U.N. Doc. FCCC/KP/AWG/2007/5 (Feb. 5, 2008), available at <http://unfccc.int/resource/docs/2007/awg4/eng/05.pdf>.

46. *Id.* ¶ 22(c).

47. See LOREN R. CASS, *THE FAILURES OF AMERICAN AND EUROPEAN CLIMATE POLICY: INTERNATIONAL NORMS, DOMESTIC POLITICS AND UNACHIEVABLE COMMITMENTS* 33-40, 78-

ratified the Convention shortly after its adoption at the 1992 Rio Earth Summit.<sup>48</sup> However, the ensuing international push for binding emission reduction commitments met with domestic misgivings that turned out to be impossible to overcome, especially once the Clinton administration agreed to the negotiation of a protocol that would not include developing country commitments.<sup>49</sup> Nonetheless, the United States was actively engaged in the negotiations and influenced significant aspects of the Kyoto Protocol, such as its emissions trading and compliance mechanisms.<sup>50</sup> In fact, the emissions trading regime drew inspiration from U.S. domestic practice, although the American policy proposals were specifically adapted to the international setting, so as to promote broad participation and economic efficiency.<sup>51</sup> The key features of the compliance regime were shaped in part by American efforts to ensure predictable consequences for non-compliance with emission reduction commitments and to carefully delineate the functions of the “enforcement” branch of the procedure.<sup>52</sup>

The Clinton administration also attempted to solicit “voluntary commitments” from key developing countries, an effort that was ultimately unsuccessful.<sup>53</sup> Thus, notwithstanding the influence it exerted on key features of the Kyoto Protocol, it was always unlikely that the United States would ratify the agreement. The Clinton administration was unable to forge bipartisan domestic support for the protocol.<sup>54</sup> Indeed, concerns about the economic implications of the required emission reductions and about the efficacy of a regime without developing country commitments prompted a unanimous Senate resolution against joining an agreement like the Protocol.<sup>55</sup> Therefore, when President Clinton

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81 (2006).

48. See UNFCCC Ratifications, *supra* note 3 (evincing U.S. support for the UNFCCC negotiation).

49. See CASS, *supra* note 47, at 124-33.

50. Daniel Bodansky, *U.S. Climate Policy After Kyoto: Elements for Success*, POL’Y BRIEF (Carnegie Endowment for Int’l Peace, Washington, D.C.), Apr. 15, 2002, at 2, available at <http://www.carnegieendowment.org/files/Policybrief15.pdf>; see also Amy Royden, *U.S. Climate Change Policy Under President Clinton: A Look Back*, 32 GOLDEN GATE U. L. REV. 415 (2002) (discussing U.S. climate change policy during the Clinton administration and its influence on the Kyoto Protocol).

51. See Jonathan B. Wiener, *Something Borrowed for Something Blue: Legal Transplants and the Evolution of Global Environmental Law*, 27 ECOLOGY L.Q. 1295, 1320, 1337-1443 (2001).

52. See Jutta Brunnée, *A Fine Balance: Facilitation and Enforcement in the Design of a Compliance Regime for the Kyoto Protocol*, 13 TULANE ENVTL. L.J. 223, 246, 248-50 (2000).

53. See CASS, *supra* note 47, at 174-75, 205-06.

54. See, e.g., Shardul Agrawala & Steinar Andresen, *US Climate Policy: Evolution and Future Prospects*, 12 ENERGY & ENV’T. 117, 120-24 (2001); Timothy Wirth, *Hot Air over Kyoto: The United States and the Politics of Global Warming*, HARVARD INT’L REV. 72, 72-73 (2002).

55. Byrd-Hagel Resolution, S. Res. 98, 105th Cong. (1997).

nonetheless signed the Protocol in 1998, he did so with the proviso that he would not recommend ratification unless the Protocol was adjusted to address U.S. concerns.<sup>56</sup>

The Bush administration took a far more hard-line stance on climate policy than its predecessor and, in 2001, rejected the Kyoto Protocol as unacceptably flawed.<sup>57</sup> Subsequently, the U.S. approach to the international climate change regime ranged from mere observation of negotiations, to efforts to convince other states—notably developing countries—of the Protocol's flaws, to emphasis on domestic approaches to the issue.<sup>58</sup> Thus, in 2002, in an effort to articulate an alternative policy approach, the Bush administration announced a national climate change initiative.<sup>59</sup> The aim of this initiative was to reduce, within ten years, the GHG intensity—specifically, the GHG emissions generated per dollar of gross domestic product—of the American economy by 18%.<sup>60</sup> These goals would be achieved through voluntary research and technology promotion initiatives.<sup>61</sup> However, from a climate protection perspective, the merits of the administration's emissions intensity approach were questionable. As many commentators have pointed out, the initiative merely tracked an existing trend towards lower GHG intensity of the U.S. economy, bringing little progress over a “business-as-usual” approach.<sup>62</sup> Furthermore, in view of projections for economic growth, the projected decrease in emissions intensity was likely to go hand-in-hand with an absolute increase in GHG emissions.<sup>63</sup> Unfortunately, even the government's own assessments of some of its flagship voluntary programs show that they have not lived up to expectations.<sup>64</sup> Still, the Bush admini-

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56. See Laura Campbell & Chad Carpenter, *United States of America*, 9 Y.B. INT'L ENVTL. L. 365, 367 (1998).

57. See Letter from President George W. Bush to Senators Hagel, Helms, Craig, and Roberts (Mar. 13, 2001), available at <http://www.whitehouse.gov/news/releases/2001/03/20010314.html>.

58. See Greg Kahn, *The Fate of the Kyoto Protocol Under the Bush Administration*, 21 BERKELEY J. INT'L L. 548, 551-55 (2003); see also Atle Christer Christensen, *Convergence or Divergence? Status and Prospects for US Climate Strategy*, FNI REPORT (Fridtjof Nansen Inst., Lysaker, Nor.), June 2003, at 1, 18, available at [www.fni.no/doc&pdf/rapp0603.pdf](http://www.fni.no/doc&pdf/rapp0603.pdf) (addressing U.S. efforts to influence developing countries).

59. President's Remarks Announcing the Clear Skies and Global Climate Change Initiative, 38 WEEKLY COMP. PRES. DOC. 232 (Feb. 14, 2002).

60. THE WHITE HOUSE, GLOBAL CLIMATE CHANGE POLICY BOOK (2002), available at <http://www.whitehouse.gov/news/releases/2002/02/climatechange.html>.

61. See *id.*

62. See Pew Center on Global Climate Change, Analysis of President Bush's Climate Change Plan, [http://www.pewclimate.org/policy\\_center/analyses/response\\_bushpolicy.cfm](http://www.pewclimate.org/policy_center/analyses/response_bushpolicy.cfm). (last visited Feb. 24, 2009).

63. *Id.* (predicting a 12% increase in total emissions); Patrick Parenteau, *Anything Industry Wants: Environmental Policy Under Bush II*, 14 DUKE ENVTL. L. & POL'Y F. 363, 368 (2004) (predicting a 14% increase over 1990 levels).

64. See U.S. GOVERNMENT ACCOUNTABILITY OFFICE, GAO-06-97, CLIMATE CHANGE: EPA AND DOE SHOULD DO MORE TO ENCOURAGE PROGRESS UNDER TWO VOLUNTARY PRO-

stration's climate policy continues to rely upon the promotion of research and development and a range of voluntary initiatives.<sup>65</sup>

At the international level, the Bush administration has shown a similar preference for voluntary, technology-focused approaches. In 2005, it helped launch the Asia-Pacific Partnership on Clean Development and Climate. The arrangement is meant to promote direct engagement between the world's fastest growing and probably largest future emitters of greenhouse gases in China, India, South Korea, the United States, Japan, Australia, and Canada.<sup>66</sup> However, it has received mixed reviews from other states, due to the concern it could undermine UNFCCC processes and, in particular, the effort to extend the legally binding emission reduction commitments under the Kyoto Protocol.<sup>67</sup> Similar concerns have been raised with respect to the administration's September 2007 effort to launch a "major economies" process that would bring the largest industrialized and developing country emitters together to consider voluntary actions to promote research and technology development.<sup>68</sup>

As far as the U.N. climate regime is concerned, the American approach has been to remain engaged in the deliberations under the UNFCCC but to resist any move towards future binding emission reduction commitments. As noted earlier, at the 2005 Montreal meetings of the Convention and protocol parties, it was decided to pursue a loose "dialogue" under the UNFCCC and separate discussions about potential future commitments under the Kyoto Protocol.<sup>69</sup> The United States agreed to support the convention-based dialogue on long-term cooperative action,<sup>70</sup> so long as it was clear that it would not inevitably lead to negotiations on new commitments.<sup>71</sup>

In 2007, in light of the IPCC's unequivocal evidence of climate change and of the urgent need for action, the Bush administration

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GRAMS 3-5 (2006), available at <http://www.gao.gov/new.items/d0697.pdf>.

65. Hunter, *supra* note 13, at 87-91.

66. Asia-Pacific Partnership on Clean Development and Climate, <http://www.asiapacificpartnership.org/> (last visited Feb. 24, 2009).

67. MSNBC, U.S., Partners Sign Own Climate Pact: Technology Focus Contrasts with Mandatory Emission Cuts in Kyoto Treaty (July 28, 2005), <http://www.msnbc.msn.com/id/8730232/>.

68. See U.S. Department of State, Major Economies Process on Energy and Climate Change, <http://www.state.gov/g/oes/climate/mem/> (last visited Feb. 24, 2009); see also Andrew C. Revkin, *Bush Climate Plan: Amid Nays, Some Maybes*, N.Y. TIMES, June 4, 2007, at A9, available at <http://www.nytimes.com/2007/06/04/washington/04climate.html>.

69. See *COP Eleventh Session*, *supra* note 37 and accompanying text.

70. See *id.*

71. See Beverley Darkin, *The Montreal Climate Change Negotiations – What Next for Climate Policy?*, CHATHAM HOUSE (The Royal Inst. of Int'l Affairs, London, Eng.), Jan. 2006, available at [http://www.chathamhouse.org.uk/publications/papers/download/-/id/46/file/3023\\_climatemeeting160106.doc](http://www.chathamhouse.org.uk/publications/papers/download/-/id/46/file/3023_climatemeeting160106.doc).

began to change the tone of its policy. While it continues to insist that any future emission reduction commitments by industrialized countries would have to go hand-in-hand with developing country commitments, the administration has shown greater willingness to consider long-term action under the auspices of the UNFCCC. This shift in approach found expression in its decisions to support the 2007 G8 summit declaration and, most recently, the Bali Action Plan.<sup>72</sup>

Of course, it is far from clear that the United States is in fact prepared to move from declarations of good intentions to an agreement that requires tough climate action. After all, it decided to support the Action Plan only once several developing countries had openly criticized it for pressing them to make commitments while refusing to do the same.<sup>73</sup>

Moreover, the concession came only once references to the need to reduce industrialized countries' emissions between 25% and 40% below 1990 levels by 2020 were dropped from the text. U.S. representatives indicated that they deemed even cuts of 25% to be unachievable, and the White House expressed its "serious concerns" about the Bali outcome.<sup>74</sup> Since the Bali meetings, the United States has indicated some new willingness to accept binding international obligations. However, the administration remains vague on the nature of those commitments and continues to insist that an effective framework requires the participation of "all major economies, developed and developing alike."<sup>75</sup>

The growing international isolation of the Bush administration coincided with a series of domestic developments that suggest the odds for a more significant international policy shift are improving. First, at the sub-national level, a wide range of local, state, and regional initiatives have sought to push beyond the Bush administration's foot-dragging on climate change.<sup>76</sup> For example, a growing number of U.S. cities have committed to reducing their GHG emissions compared to 1990 levels, in some cases by percentages

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72. See *supra* note 39 and accompanying text; Hunter, *supra* note 13, at 83.

73. See *supra* note 15 and accompanying text.

74. Juliet Eilperin, *Bali Forum Backs Climate 'Road Map,'* WASH. POST, Dec. 16, 2007, at A01, available at [http://www.washingtonpost.com/wp-dyn/content/article/2007/12/15/AR2007121500471\\_pf.html](http://www.washingtonpost.com/wp-dyn/content/article/2007/12/15/AR2007121500471_pf.html).

75. Forbes.com, US Ready for 'Binding' Reductions of Greenhouse Gases: Official Update (Feb. 25, 2008), <http://www.forbes.com/feeds/afx/2008/02/25/afx4691077.html>.

76. See generally Robert B. McKinstry, Jr., *Laboratories for Local Solutions for Global Problems: State, Local and Private Leadership in Developing Strategies to Mitigate the Causes and Effects of Climate Change*, 12 PENN ST. ENVTL. L. REV. 15 (2004) (describing how despite the transboundary nature of greenhouse gas emissions, U.S. states have responded to the lack of federal action by establishing their own policies to address this environmental issue).

that exceed the requirements of the Kyoto Protocol.<sup>77</sup> At the state level, California has taken a leadership role, *inter alia*, by enacting the Global Warming Solutions Act. While not pegged to the Kyoto targets, the Act sets regulatory requirements for significant GHG emission reductions, likely to be complemented by a cap-and-trade program. Through the Western Climate Initiative, launched in November 2007, California is exploring collaboration on various climate change strategies, including emissions trading, with other western states and some Canadian provinces.<sup>78</sup> Finally, a regional emissions trading program, the Regional Greenhouse Gas Initiative (RGGI), will begin operating in the Northeast and Mid-Atlantic regions in 2009, committing participating states to mandatory carbon dioxide (CO<sub>2</sub>) emission reductions from power plants.<sup>79</sup>

Second, recent developments suggest that some shifts will also occur in U.S. federal climate policy, most likely after the next president takes office. In a decision that could have far-reaching implications, the U.S. Supreme Court rejected the argument of the Environmental Protection Agency (EPA) that, because GHGs did not constitute "air pollutants" within the meaning of the Act, it did not have jurisdiction to regulate GHG emissions under the federal Clean Air Act.<sup>80</sup> Leaving aside the question whether climate change could be addressed through existing federal legislation, a growing number of legislative proposals specifically aimed at climate change have been placed before the U.S. Congress. According to the Pew Center on Global Climate Change, the 110th Congress was particularly active with 235 bills, resolutions, or amendments having been proposed as of July 2008.<sup>81</sup> While there are significant differences between the major bills, common themes are proposals for cap-and-trade systems and emission goals that are focused upon long-term reductions with a 2050 horizon.<sup>82</sup> Last, but certainly not least, President Barack Obama has promised "vigorous engagement" in the international negotiations for a new climate treaty.<sup>83</sup> What remains to be seen is how flexible the new

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77. See Hunter, *supra* note 13, at 95

78. John Doerr, California's Global-Warming Solution, TIME (Sept. 3, 2006), <http://www.time.com/time/magazine/article/0,9171,1531324,00.html>; Western Climate Initiative, <http://www.westernclimateinitiative.org/> (last visited Feb. 24, 2009).

79. Regional Greenhouse Gas Initiative (RGGI), <http://www.rggi.org/about.htm> (last visited Feb. 24, 2009).

80. Massachusetts v. EPA, 127 S. Ct. 1438, 1450 (2007).

81. Pew Center on Global Climate Change, Legislation in the 110th Congress Related to Global Climate Change, [http://www.pewclimate.org/what\\_s\\_being\\_done\\_in\\_the\\_congress/110thcongress.cfm](http://www.pewclimate.org/what_s_being_done_in_the_congress/110thcongress.cfm) (last visited Feb. 24, 2009).

82. See Hunter, *supra* note 13, at 93-94.

83. See David Adam, Global Climate Change Decisions on Hold for Obama Administration: New Targets Would Not Be Discussed Until the Summer, to Give the US President-elect Time to Signal His Intentions (Dec. 12, 2008), <http://www.guardian.co.uk>

administration will be on the long-standing U.S. insistence that other major developing country emitters make simultaneous climate commitments.<sup>84</sup>

### B. The European Union

It is largely due to European determination that the Kyoto Protocol entered into force without the United States—the single largest emitter of GHG at that time.<sup>85</sup> The EU, which accounts for roughly 14% of global greenhouse gases,<sup>86</sup> lobbied hard for the buy-in needed to bring the protocol into force.<sup>87</sup> The United States's decision not to join the protocol was seen by many European policymakers as an affront and as further evidence of rising American “unilateralism.”<sup>88</sup> Thus it is fair to say that European policy was motivated both by a desire to move the global climate regime forward and a desire to prove that even the most powerful state in the world could not determine international outcomes.<sup>89</sup>

The European “bubble” as a whole is projected to meet its Kyoto commitments.<sup>90</sup> While some states, such as the United Kingdom and Germany, have reached or are on track to meet their EU-internal allocations,<sup>91</sup> others, such as Italy, Spain, and Portugal, find it difficult to meet their targets.<sup>92</sup> Thus, notwithstanding po-

/environment/2008/dec/12/poznan-climatechange.

84. See Joanna Depledge, *Crafting the Copenhagen Consensus: Some Reflections*, 17 REV. EUR. COM. & INT'L ENVTL. L. 154, 158 (2008).

85. Recent figures suggest that China has now overtaken the United States in total emissions. See John Vidal & David Adam, *China Overtakes U.S. as World's Biggest CO<sub>2</sub> Emitter*, The Guardian, June 19, 2007, <http://www.guardian.co.uk/environment/2007/jun/19/china.usnews>. In per capita terms, however, China's emissions are only about one quarter of U.S. emissions. *Id.*

86. Press Release, European Union, *A New Industrial Revolution: Parliamentarians Debate EU Responses to Climate Change* (Jan. 10, 2007), available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+IMPRESS+2007001IPR11004+0+DOC+PDF+V0//EN&language=EN>.

87. See, e.g., Hermann E. Ott, *The Bonn Agreement to the Kyoto Protocol – Paving the Way for Ratification*, 1 INT'L ENVTL. AGREEMENTS: POL., L. & ECON. 469 (2001); see also *infra* note 173 and accompanying text.

88. See, e.g., Tony Karon, *When It Comes to Kyoto, the U.S. Is the “Rogue Nation,”* TIME (July 24, 2001), <http://www.time.com/time/world/article/0,8599,168701,00.html>; see also David D. Caron, *Between Empire and Community – The United States and Multilateralism 2001-2003: A Mid-Term Assessment*, 21 BERKELEY J. INT'L L. 395, 398 (2003).

89. See *infra* notes 172-75 and accompanying text.

90. China View, *Barroso Says EU Will Meet Kyoto Targets* (Oct. 29, 2007), [http://news.xinhuanet.com/english/2007-10/29/content\\_6972705.htm](http://news.xinhuanet.com/english/2007-10/29/content_6972705.htm).

91. DAVID SUZUKI FOUND., *WHO'S MEETING THEIR KYOTO TARGETS?* 1 (2006), available at [http://www.davidsuzuki.org/files/climate/Kyoto\\_Progress.pdf](http://www.davidsuzuki.org/files/climate/Kyoto_Progress.pdf); GERMAN MINISTRY FOR THE ENV'T, NATURE CONSERVATION & NUCLEAR SAFETY, *TAKING ACTION AGAINST GLOBAL WARMING: AN OVERVIEW OF GERMAN CLIMATE POLICY 5* (Thomas Kappe et al. eds., 2007), available at [http://www.tokyo.diplo.de/Vertretung/tokyo/ja/05\\_WiWiss/Umwelt/download/datei\\_BMU\\_20Taking\\_20action\\_20against\\_20global\\_20warming.property=Daten.pdf](http://www.tokyo.diplo.de/Vertretung/tokyo/ja/05_WiWiss/Umwelt/download/datei_BMU_20Taking_20action_20against_20global_20warming.property=Daten.pdf).

92. See Editorial, *No More Hot Air*, 446 NATURE 109, 109 (2007).

tential difficulties with the bubble's internal allocations, since some member states can make greater emission reductions than required by the protocol, others can use these additional reductions to make up for shortfalls in their Kyoto performance. The countries that joined the EU more recently, and thus not included in the "bubble," are expected to meet their individual Kyoto targets.<sup>93</sup>

As for the EU's overall greenhouse gas emissions profile, roughly 80% of emissions stem from the energy sector.<sup>94</sup> Energy consumption is expected to grow in the coming years, with electricity demand likely to grow by 1.5% per year. The EU's reliance upon energy imports is projected to increase from the current 50% to 65% by 2030.<sup>95</sup> These trends, along with concerns about global warming, prompted concerted efforts to integrate climate and energy policies in Europe.<sup>96</sup> The result has been a Europe-wide policy shift towards diversification of energy supply, carbon pricing, advancement of cleaner technologies and fuels, and promotion of behavioral changes through public information, education, and incentive programs. Germany even claims that a "third industrial revolution" is underway—a transition from carbon-intensive energy sources to a low carbon society built upon renewable energies and energy efficiency.<sup>97</sup>

An EU-wide cap-and-trade system, the European Emissions Trading Scheme (ETS), has become a central part of the European regulatory framework. The ETS was launched in 2005 to promote compliance with the individual targets assigned to each member state within the EU bubble.<sup>98</sup> Approximately 45% of EU emissions, from four industrial sectors, are currently covered by the ETS.<sup>99</sup> The system's initial phase ran until 2007. It was designed to be a trial and error period for both private and public sector actors, readying them for Kyoto compliance. The ETS is now in its second

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93. European Env't Agency [EEA], *Greenhouse Gas Emission Trends and Projections in Europe 2006*, at 23, EEA Report No. 9/2006, (2006), available at [http://reports.eea.europa.eu/eea\\_report\\_2006\\_9/en/eea\\_report\\_9\\_2006.pdf](http://reports.eea.europa.eu/eea_report_2006_9/en/eea_report_9_2006.pdf).

94. *Communication from the Commission to the European Council and the European Parliament – An Energy Policy for Europe*, at 3, COM (2007) 1 final (Oct. 1, 2007) [hereinafter *Commission Communication*], available at [http://ec.europa.eu/energy/energy\\_policy/doc/01\\_energy\\_policy\\_for\\_europe\\_en.pdf](http://ec.europa.eu/energy/energy_policy/doc/01_energy_policy_for_europe_en.pdf).

95. *Id.* at 3-4.

96. *See generally id.* (calling for Europe to "act now, together, to deliver sustainable, secure and competitive energy").

97. *See* GERMAN MINISTRY FOR THE ENV'T, NATURE CONSERVATION & NUCLEAR SAFETY, *supra* note 91, at 8.

98. *See* Council Directive 2003/87/EC, 2003 O.J. (L 275) 32, 32-36, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:275:0032:0046:EN:PDF>.

99. JOSEPH KRUGER ET AL., *DECENTRALIZATION IN THE EU EMISSIONS TRADING SCHEME AND LESSONS FOR GLOBAL POLICY* 5 (2007), available at <http://www.rff.org/Documents/RFF-DP-07-02.pdf>.



phase, which runs from 2008-2012 and matches the first commitment period under the Kyoto Protocol.

When the United States introduced emissions trading into Kyoto negotiations in 1997, the EU was wary of the idea.<sup>100</sup> But upon the United States's withdrawal from the Protocol, Europe became the main champion of GHG emissions trading, even modeling its approach on the United States's acid rain trading program for sulfur dioxide emissions.<sup>101</sup> Of course, in view of the sovereignty concerns raised by an international trading program, the ETS is much more decentralized than the acid rain trading program.<sup>102</sup> The Emissions Trading Directive requires member states to comply with certain objectives, such as national emission targets, but allows them to achieve these objectives through a broad range of national policies.<sup>103</sup>

While the ETS has been an important testing ground for abatement strategies, trial has indeed been accompanied by a fair amount of error. Over-allocation of allowances and early abatement produced considerable price-volatility. At one stage, emissions were roughly 4% lower than the amount of allowances distributed, leading the price of a carbon ton to drop below €1.<sup>104</sup> In October 2007, to avoid further collapse of the carbon price, the EU announced a 10% reduction in the amount of available allowances for the second phase of the ETS.<sup>105</sup> Indeed, observers now expect carbon prices to rise due to a "net shortage in carbon credits through 2012."<sup>106</sup>

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100. A. Denny Ellerman & Barbara K. Buchner, *The European Union Emissions Trading Scheme: Origins, Allocation, and Early Results*, 1 REV. ENVTL. ECON. & POLY 66, 67 (2007).

101. Joseph A. Kruger & William A. Pizer, *Greenhouse Gas Trading in Europe: The New Grand Policy Experiment*, ENV'T, Oct. 2004, at 8, 10-13.

102. See Kruger et al., *supra* note 99, at 24; see also Ellerman & Buchner, *supra* note 100, at 68.

103. See Council Directive 2003/87/EC, *supra* note 98; Kruger & Pizer, *supra* note 101, at 11.

104. David Gow, *Smoke Alarm: EU Shows Carbon Trading Is Not Cutting Emissions*, *The Guardian*, Apr. 3, 2007, <http://www.guardian.co.uk/business/2007/apr/03/carbonemissions>. According to some commentators, this problem resulted from lack of installation data, which in turn led to overestimation of emissions. See Denny Ellerman & Barbara Buchner, *Over-Allocation or Abatement?: A Preliminary Analysis of the EU ETS Based on the 2005 Emissions Data 1* (Ctr. for Energy & Env'tl. Pol'y Res., Working Paper No. 06-016, Nov. 2006), available at <http://tisiphone.mit.edu/RePEc/mee/wpaper/2006-016.pdf>.

105. EurActiv.com, *Commission Tightens Screw on Carbon Market* (Oct. 29, 2007), <http://www.euractiv.com/en/climate-change/commission-tightens-screw-carbon-market/article-167966>.

106. Leila Abboud, *Europe Struggles to Meet Carbon Commitments: But Traders Still Bullish on Cap and Trade*, *TORONTO GLOBE & MAIL*, Apr. 3, 2008, at B11.

Notwithstanding these start-up problems, between 2005 and 2007 the ETS became the largest single carbon market in the world, accounting for 67% of the volume of credits traded internationally and for 81% of the value of the global market.<sup>107</sup> To further strengthen the ETS, the EU adopted a “Linking Directive.”<sup>108</sup> The directive is to enable emissions allowance or credit trading with other Annex I and non-Annex I parties, through the Kyoto Protocol’s flexibility mechanisms. As of October 2007, the EU ETS has been linked with the trading schemes of Iceland, Liechtenstein, and Norway.<sup>109</sup> The directive also keeps the door open to linking the ETS with trading schemes of states or sub-state entities that are not parties to the Kyoto Protocol. For the moment, such linkages have been permitted in other carbon markets opening themselves to ETS allowances. For example, in the United States, the Northeast and Mid-Atlantic RGGI will allow covered sources to purchase EU allowances for compliance.<sup>110</sup> The EU has also joined several U.S. states, the Canadian provinces of British Columbia and Manitoba, Norway, and New Zealand in an “International Carbon Action Partnership.” This Partnership, also launched in October 2007, is meant to promote exchange on best practices in design and implementation of emissions trading schemes and to explore linkage potential and barriers.<sup>111</sup>

The ETS is central to European efforts both to implement existing Kyoto commitments and to lay the foundation for future commitments. European climate policy has not been exclusively inward looking. The EU has been extremely active in formulating proposals for international climate policy. Since 2005, EU policy development has been anchored in the goal of limiting global temperature increases to 2°C above pre-industrial levels,<sup>112</sup> a tempera-

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107. *Proposal for a Directive of the European Parliament and of the Council Amending Directive 2003/87/EC so as to Improve and Extend the Greenhouse Gas Emission Allowance Trading System of the Community*, at 2, COM (2008) 16 final (Jan. 23, 2008) [hereinafter *Directive Proposal*], available at [http://ec.europa.eu/environment/climat/emission/pdf/ets\\_revision\\_proposal.pdf](http://ec.europa.eu/environment/climat/emission/pdf/ets_revision_proposal.pdf).

108. See Council Directive 2004/101/EC, 2004 O.J. (L 338) 18, 18-23, available at <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:338:0018:0023:EN:PDF>.

109. Reuters, EU to Link Emissions Scheme With 3 Countries (Oct. 26, 2007), <http://www.reuters.com/article/environmentNews/idUSL268295520071026>.

110. Pew Center on Global Climate Change, Q & A: Regional Greenhouse Gas Initiative, <http://www.pewclimate.org/rggi/qanda> (last visited Feb. 24, 2009).

111. Int’l Carbon Action P’ship [ICAP], *Political Declaration* (Oct. 29, 2007), available at <http://www.icapcarbonaction.com/declaration.htm>.

112. See, e.g., Council Information Note (EU) No. 7242/05 of 11 Mar. 2005, at 2, available at <http://register.consilium.europa.eu/pdf/en/05/st07/st07242.en05.pdf>; *Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions: Limiting Global Climate Change to 2 Degrees Celsius – The Way Ahead for 2020 and Beyond*, at 2, COM (2007) 2 final (Oct. 1, 2007) [hereinafter *Commission Communication Limiting Climate Change to 2°C*], available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2007:0002:FIN:EN:PDF>.

ture target that is now widely seen as providing a reasonable chance of avoiding “dangerous” climate change.<sup>113</sup> The 2°C target, therefore, has become linked to discussions about what is required to meet the objective of the UNFCCC, which is to stabilize GHG concentrations in the atmosphere at “a level that would prevent dangerous anthropogenic interference with the climate system.”<sup>114</sup> There is now broad consensus, reflected in the 2007 report of the IPCC, that CO<sub>2</sub> concentrations in the atmosphere must be stabilized at around 400 parts per million (ppm) to keep temperature increases at 2°C. If other GHG are included in the estimates, concentrations must stabilize at around 450 ppm CO<sub>2</sub> equivalent (CO<sub>2</sub>-eq).<sup>115</sup> While there continues to be debate about the medium and long-term emission reductions required to achieve these stabilization goals, there is general agreement that delayed reductions significantly constrain the stabilization opportunities and increase the risk of more severe climate impacts.<sup>116</sup>

In light of this scientific evidence, the EU maintains that all major emitters must agree to take climate action. Yet, in its details, the EU position differs significantly from the United States’s insistence on developing country commitments. The EU is calling for global emissions to peak in the next ten to fifteen years, a benchmark it asserts is achievable through emission reductions of 30% below 1990 levels by industrialized countries by 2020. Developing countries would not be asked to commit to absolute emission reductions, but would be expected to begin reducing the growth of their emissions. However, by 2020, developing country emissions are projected to exceed the total emissions of industrialized countries. Therefore, the EU calls for developing countries to commit to emission reductions after 2020, along with measures to avoid emissions from deforestation.<sup>117</sup> According to current EU propos-

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113. See Alan Carlin, *Global Climate Change Control: Is There a Better Strategy Than Reducing Greenhouse Gas Emissions?*, 155 U. PA. L. REV. 1401, 1430 (2007) (noting that “although there is no certainty that all abrupt changes can be avoided if temperature changes were kept below 2°C, there is believed to be a rapidly increasing risk above that level”).

114. UNFCCC, *supra* note 3, at art. 2.

115. See Lenny Bernstein et al., *Summary for Policymakers, in CLIMATE CHANGE 2007: SYNTHESIS REPORT 21* (2007), available at [http://www.ipcc.ch/pdf/assessment-report/ar4/syr/ar4\\_syr\\_spm.pdf](http://www.ipcc.ch/pdf/assessment-report/ar4/syr/ar4_syr_spm.pdf). Note that at 450 ppm CO<sub>2</sub>-eq the mean risk of surpassing a 2°C target is 47%, and the risk of overshooting 2°C is only “unlikely” at 400 ppm CO<sub>2</sub>-eq, which reduces the mean risk of exceeding the target to 27%. Bill Hare & Malte Meinshausen, *How Much Warming Are We Committed To and How Much Can Be Avoided?* 75 CLIMATIC CHANGE 111, 131 (2006).

116. See Lenny Bernstein et al., *supra* note 115, at 19; see also M.G.J. DEN ELZEN & M. MEINSHAUSEN, MEETING THE EU 2°C CLIMATE TARGET: GLOBAL AND REGIONAL EMISSION IMPLICATIONS 2 (2005), available at [http://www.mnp.nl/en/publications/2005/Meeting\\_the\\_EU\\_2\\_degrees\\_C\\_climate\\_target\\_global\\_and\\_regional\\_emission\\_implications.html](http://www.mnp.nl/en/publications/2005/Meeting_the_EU_2_degrees_C_climate_target_global_and_regional_emission_implications.html) (arguing that a delay of global efforts to stabilize and then decrease emissions by as little as a decade could require a doubling of the rates of abatement with concomitant costs).

117. See *Commission Communication Limiting Climate Change to 2°C*, *supra* note 112,

als, major developing countries should commit to reductions of 50% below 1990 levels by 2050, while industrialized states would reduce their emissions between 60% and 80%. This staged and differentiated approach to emission reductions, according to the European Commission, reflects industrialized countries' historical contributions to current GHG levels in the atmosphere and to deforestation, as well as their greater technological and financial capacity.<sup>118</sup>

To prompt global action, the now twenty-seven EU member states pledged to reduce their emissions by at least 20% below 1990 levels by 2020 and 30% below 1990 levels if other industrialized nations join the effort.<sup>119</sup> The EU currently projects that it will meet its new 2020 emissions target through a range of strategies,<sup>120</sup> including increasing the share of energy derived from renewable sources to 20% of total use by 2020,<sup>121</sup> increased reliance upon biofuels to 10% in the transportation sector by 2020, efficiency standards, carbon capture and storage, and possibly banning incandescent light bulbs by 2010.<sup>122</sup> The European Commission has also proposed to establish a single energy market, lifting trade barriers in an effort to encourage energy source diversification.<sup>123</sup> In addition, a third phase of the ETS is to run from 2013 to 2020.<sup>124</sup> Given that the ETS covers only about half of EU CO<sub>2</sub> emissions, the European Commission suggests that the third phase of the ETS include mechanisms for curbing emissions from aviation, passenger cars, road freight transport and shipping, residential and commercial buildings, agriculture, forestry, and non-CO<sub>2</sub> greenhouse gases.<sup>125</sup> The EU's 2020 target, combined with the third ETS phase, are of global significance, as they reassure the private sector actors that a carbon price will exist after the Kyoto Protocol expires in 2012.<sup>126</sup>

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at 9-10.

118. *Id.* at 9; see also U.S. DEP'T OF ENERGY, ENERGY INFO. ADMIN., GREENHOUSE GASES, CLIMATE CHANGE AND ENERGY (2008), available at <http://www.eia.doe.gov/bookshelf/brochures/greenhouse/greenhouse.pdf> (providing an overview regarding greenhouse gases).

119. *Climate Control; Charlemagne*, THE ECONOMIST (U.S.), Mar. 15, 2007 at 59.

120. See *id.*

121. This goal represents a significant improvement over the less than 7% today and would enhance energy efficiency by 20% by 2020. See *Commission Communication*, *supra* note 94, at 13. This initiative translates to 780 tons of CO<sub>2</sub> saved annually. *Id.*

122. BBC NEWS, EU Agrees Renewable Energy Target (Oct. 25, 2007), <http://news.bbc.co.uk/2/hi/europe/6433503.stm>.

123. Quirin Schiermeier, *Europe Moves to Secure Its Future Energy Supply*, 445 NATURE 234, 234-35 (2007).

124. See *Directive Proposal*, *supra* note 107, at 7-8.

125. See *Commission Communication Limiting Climate Change to 2°C*, *supra* note 112, at 6-7.

126. See *Directive Proposal*, *supra* note 107, at 7.

## IV. FACTORS SHAPING U.S. AND EU CLIMATE POLICY

The approach of the United States to global climate change differs significantly from that of the European Union. As the preceding section has illustrated, the United States has been at best a reluctant participant in international regime building efforts and has yet to develop a proactive national approach to GHG emission reductions. By contrast, the EU has been consistently supportive of the global climate regime. Over the last ten years or so, it has also worked hard to put in place a regulatory and policy infrastructure that could support its international goals and deliver region-wide emission reductions.

*A. Beyond Interests and Power*

At first blush, it may be tempting to put these policy differences down to the respective interests of the United States and the EU. After all, the assumption that states' conduct is determined by their relative power and the pursuit of their interests is common not only among casual observers of international affairs; it also finds support in the rationalist or even realist outlook that remains dominant among international relations (IR) theorists.<sup>127</sup> Rationalism holds that states will only agree to international norms that meet their interests and will only comply with such norms as long as they do. States may turn to international law (IL) for predictable rules and stable institutional structures, and they may adjust their interest assessments as they interact within international institutions.<sup>128</sup> Nonetheless, international law tends to be seen as weak in the face of countervailing interests because, in the absence of centralized enforcement, it must rely on the voluntary compliance of states. In short, international regimes and norms are seen as reflections of underlying power or interest balances, rather than independent factors influencing behavior.<sup>129</sup> A strongly nationalist stream of U.S. constitutional law scholarship recently reasserted precisely this type of outlook as the proper way to understand the "limits of international law."<sup>130</sup>

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127. See Peter J. Katzenstein, Robert O. Keohane & Stephen D. Krasner, *International Organization and the Study of World Politics*, 52 INT'L ORG. 645, 658 (1998).

128. See *id.* at 679.

129. See David J. Bederman, *Constructivism, Positivism, and Empiricism in International Law*, 89 GEO. L. J. 469, 473 (2001) (noting that, through this lens, international law is seen as "epiphenomenal").

130. JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* 3 (2005) ("[I]nternational law emerges from states acting rationally to maximize their interests, given their perceptions of the interests of other states and the distribution of state power."). The authors' sweeping claims have been met with significant criticism from IL and

On this account, it seems plausible to conclude that U.S. climate policy is driven by the fact that it has quite simply not been in the American interest to commit to binding GHG emission reductions. In light of the upward trajectory of U.S. emissions, the required measures would have been costly,<sup>131</sup> whereas the benefits of such actions were uncertain. The latter conclusion was initially buttressed by the lingering doubts about the evidence of global warming and may now be fed by assertions that it is uncertain that climate change can be averted through emission reductions.<sup>132</sup> In any case, the argument contends that there is little point in making costly climate policy choices unless the emerging major emitters in the developing world do the same.<sup>133</sup>

As for the European Union, it seems plausible that ratification and implementation of the Kyoto Protocol was a relatively easy step, given the emission trajectories of Eastern European countries and the fact that emission reductions in Germany and the United Kingdom could offset increases in other member states.<sup>134</sup> Additional interests in supporting Kyoto might be chalked up to the desire to embarrass the United States after its rejection of the Kyoto Protocol and to assume a global leadership role.<sup>135</sup> And yet, it is not clear that these considerations fully explain why the EU stuck with the climate regime after the United States dropped out, knowing that bringing the United States and other large emitters into the regime would be an uphill battle. After all, without the participation of the major emitters, there is little point in adhering to the regime.

An alternative account of international relations, which has been gaining ground among IR theorists and international lawyers alike, suggests that purely interest based explanations of state conduct are at least incomplete. Constructivists challenge rational-

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IR scholars with a wide range of theoretical commitments. See, e.g., Symposium, *The Limits of International Law*, 34 GA. J. INT'L & COMP. L. 253 (2006) (comprising critiques of *The Limits of International Law* from multiple scholars).

131. See Cass Sunstein, *Of Montreal and Kyoto: A Tale of Two Protocols*, 31 HARV. ENVTL. L. REV. 1, 33-36 (2007); see also Kathryn Harrison & Lisa McIntosh Sundstrom, *The Comparative Politics of Climate Change*, 7 GLOBAL ENVTL. POL. 1, 3-5 (2007) (attributing variations in Kyoto ratification and compliance in large part to variations in compliance costs).

132. See generally, Carlin, *supra* note 113 (arguing that the "Kyoto Approach" is unlikely to achieve its goals of averting climate change).

133. See, e.g., Michael P. Vandenberg, *Climate Change: The China Problem*, 81 S. CAL. L. REV. 905 (2008), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1126685](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1126685).

134. See Sunstein, *supra* note 131, at 36-37; see also Richard Benedick, *Morals and Myths: A Commentary on Global Climate Policy*, WZB-MITTEILUNGEN, Sept. 2005, at 15, 16 (contrasting the obligations of the EU bubble, in light of the UK, Germany, and Russia, with the daunting challenges facing the United States); Jonathan Baert Wiener, *On the Political Economy of Global Environmental Regulation*, 87 GEO. L.J. 749, 773-81 (1999).

135. See Sunstein, *supra* note 131, at 27-28.

ist IR theory to explain the origin of the interests that are said to be determinative of behavior. Constructivism views interaction as central to shaping human conduct.<sup>136</sup> It does not deny the significance of interests and power in accounting for state conduct. Rather, the key claim is that interests are not simply given and then rationally pursued but that the social construction of actors' identities is a major factor in interest formation.<sup>137</sup> Similarly, power is not simply a function of material factors but is relational and socially constructed in important ways.<sup>138</sup> However, the ends of social interaction are not predetermined but can be discovered and learned.<sup>139</sup> Constructivists show how, through interaction and communication, actors generate shared knowledge and shared understandings that then become the background for subsequent interactions. In the process, social norms emerge that help shape how actors see themselves, their world, their interests, and their powers. In other words, constructivism suggests that international legal norms and regimes have the potential to be more than merely dependant variables; rather, they have the potential to exert influence on states and their conduct.<sup>140</sup>

The hypothesis of this Article is that—while interests do influence American and European climate policy—legal norms, too, have the potential to do so, including the norms enshrined in the UNFCCC and the Kyoto Protocol. Building on a review of salient comparative literature the discussion now turns to a consideration of some of the factors that might account for European and American policy trajectories and substantiate the hypothesis.<sup>141</sup> The discussion moves from the internal politics of the EU and the United States, to respective identities of the EU and the United States as international actors and leaders, then to European and American

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136. See Emanuel Adler, *Constructivism in International Relations*, in HANDBOOK OF INTERNATIONAL RELATIONS 95, 100-104 (Walter Carlsnaes, Thomas Risse & Beth A. Simmons eds., 1st ed. 2002).

137. See Christian Reus-Smit, *Constructivism*, in THEORIES OF INTERNATIONAL RELATIONS 188, 198-99 (3d ed. 2005).

138. See generally Michael Barnett & Raymond Duvall, *Power in International Politics*, 59 INT'L ORG. 39 (2005) (arguing that international relations scholarship needs to recognize that there is not one, but four concepts of power that shape how global outcomes are produced); Ian Johnstone, *The Power of Interpretive Communities*, in POWER IN GLOBAL GOVERNANCE 185 (Michael Barnett & Raymond Duvall eds., 2005) (considering the impact of law in terms of three different forms of power).

139. See EMANUEL ADLER, COMMUNITARIAN INTERNATIONAL RELATIONS: THE EPISTEMIC FOUNDATIONS OF INTERNATIONAL RELATIONS 19-22 (2005).

140. See Jutta Brunnée & Stephen J. Toope, *International Law and Constructivism: Elements of an Interactional Theory of International Law*, 39 COLUM. J. TRANSNAT'L. L. 19, 31 (2000).

141. I thank Josh Rosensweig for his invaluable assistance in fleshing out the typology of factors.

attitudes towards international law, and finally to the impact of international environmental norms on their policies.

### *B. Environmental Values and Domestic Politics*

In comparative assessments of European and American environmental policy, including climate policy, it is often asserted that Europeans are more environmentally conscious, while Americans are more inclined towards individualism and commercialism and are suspicious of government intervention.<sup>142</sup> Climate change is also said by some observers to be a much more significant issue in election campaigns in Europe than in the United States.<sup>143</sup> In addition, American governmental, scientific, and even moderate environmentalist communities are seen to be more sympathetic to market-oriented approaches than their European counterparts.<sup>144</sup>

And yet, a survey of public opinion polls about the severity of the climate change problem in the United States and the EU from the late 1990s through 2001 finds relatively little difference.<sup>145</sup> Although, following the release of the IPCC findings in 2007, the differences in concern about climate change appeared to be more pronounced,<sup>146</sup> it is difficult to draw firm conclusions about European

142. See, e.g., Theofanis Christoforou, *The Precautionary Principle, Risk Assessment, and the Comparative Role of Science in the European Community and the US Legal Systems*, in GREEN GIANTS? ENVIRONMENTAL POLICIES OF THE UNITED STATES AND THE EUROPEAN UNION 17, 41 (Norman J. Vig & Michael G. Faure eds., 2004); JAMES CONNELLY & GRAHAM SMITH, *POLITICS AND THE ENVIRONMENT: FROM THEORY TO PRACTICE* 249-52 (2d ed. 2003); Ludwig Krämer, *The Roots of Divergence: A European Perspective*, in GREEN GIANTS? ENVIRONMENTAL POLICIES OF THE UNITED STATES AND THE EUROPEAN UNION 53, 67-70 (Norman J. Vig & Michael G. Faure eds., 2004) (emphasizing the philosophy of individuality and anti-government sentiment in the United States and the comparative importance of social issues in Europe); Cinnamon Carlarne, *Climate Change Policies an Ocean Apart: EU & US Climate Change Policies Compared*, 14 PENN ST. ENVTL. L. REV. 435, 474-77 (2006); John Vogler & Charlotte Bretherton, *The European Union as a Protagonist to the United States on Climate Change*, 7 INT'L STUD. PERSP. 1, 19 (2006).

143. Carlarne, *supra* note 142, at 475-76.

144. George (Rock) Pring, *The United States Perspective*, in KYOTO: FROM PRINCIPLES TO PRACTICE 185, 215 (Peter D. Cameron & Donald Zillman, eds., 2001).

145. THOMAS L. BREWER, WHERE IS THE TRANSATLANTIC DIVIDE IN PUBLIC OPINION ON CLIMATE CHANGE ISSUES? EVIDENCE FOR 1989-2002, at 7-8 (Centre for European Policy Studies, Policy Brief No. 35, 2003), available at <http://aei.pitt.edu/1977/01/PB35.pdf>. But cf. Carlarne, *supra* note 142, at 474-77. Because every survey is different, these numbers are difficult to compare. Carlarne finds that "only" 39% of U.S. respondents identified climate change as a "serious and pressing problem." *Id.* at 475. Conversely, Brewer finds that, in two different surveys, 49% of Europeans and 46% of Americans assigned climate change the highest risk rating in their respective surveys. BREWER, *supra* note 145, at 8.

146. According to a 2008 poll by the Pew Center for Research and the Press, 47% of U.S. respondents think of climate change as a very serious problem. Angus Reid Global Monitor, Americans See Global Warming as Serious Problem (Apr. 11, 2008), [http://www.angus-reid.com/polls/view/americans\\_see\\_global\\_warming\\_as\\_serious\\_problem/](http://www.angus-reid.com/polls/view/americans_see_global_warming_as_serious_problem/). By contrast, 57% of respondents to a 2008 "Eurobarometer" poll conducted by TNS Opinion & Social in the twenty-seven EU countries listed climate change as their top environmental concern. Angus Reid Global Monitor, Europeans Concerned about Climate Change (Mar. 21,



and American environmental value structures. Some commentators also caution that current attitudes must be considered against the backdrop of broader patterns of EU and U.S. environmental policy.<sup>147</sup> For example, while U.S. environmental policies actively developed in the 1960s and 1970s, slowed during the 1980s under Reagan, and appeared to grind to a halt in the 1990s, European environmental policy seems to have moved in the opposite direction.<sup>148</sup> Others suggest that this account still paints an unfair picture of U.S. environmental policy, given that numerous environmental statutes were enacted in the United States since the 1980s and that on various issues the United States has pursued more precautionary approaches than Europe.<sup>149</sup> In any event, given the increasing policy activity at the state level, it seems implausible that weaker environmental values account for the global climate policy of the United States.<sup>150</sup>

Aside from the views of the general public and the broader policy trends, it is worth asking whether political processes in the United States and the EU predispose the latter towards stronger climate policy making. For many observers, the American democratic process is distorted because of government capture by large industry, which undercuts effective climate policy.<sup>151</sup> By contrast, an effective network of environmental non-governmental organizations (NGOs) and politically influential “green” parties are seen to reinforce public support for climate action in Europe.<sup>152</sup> It is not clear, however, that the differences between European and American climate policy can be explained on the basis of domestic poli-

2008), [http://www.angus-reid.com/polls/view/europeans\\_concerned\\_about\\_climate\\_change/](http://www.angus-reid.com/polls/view/europeans_concerned_about_climate_change/).

147. See Brunnée, *supra* note 14, at 620-28 (discussing the policy trajectory of the United States).

148. See Vogler & Bretherton, *supra* note 142, at 8-9; David Vogel, *Ships Passing in the Night: the Changing Politics of Risk Regulation in Europe and the United States* 1, 2 (European Univ. Inst., Working Paper No. 2001/16, 2001), available at [http://www.iue.it/RSCAS/WP-Texts/01\\_16.pdf](http://www.iue.it/RSCAS/WP-Texts/01_16.pdf).

149. Jonathan B. Wiener, *Comparing Precaution in the United States and Europe*, 5 J. RISK RES. 317, 336-37 (2002) [hereinafter Wiener, *Comparing Precaution*] (arguing that relative environmental regulatory activism varies widely from one risk to the next); Jonathan B. Wiener, *Whose Precaution after All?: A Comment on the Comparison and Evolution of Risk Regulatory Systems*, 13 DUKE J. COMP. & INT'L L. 207, 250 (2003) [hereinafter Wiener, *Whose Precaution?*].

150. See Kristen H. Engel & Scott R. Saleska, *Subglobal Regulation of the Global Commons: The Case of Climate Change*, 32 ECOLOGY L.Q. 183, 213-14 (2005); Barry G. Rabe, *North American Federalism and Climate Change Policy: American State and Canadian Provincial Policy Development*, 14 WIDENER L. J. 121, 128-131 (2004).

151. Miranda A. Schreurs, *The Climate Change Divide: The European Union, the United States, and the Future of the Kyoto Protocol*, in GREEN GIANTS? ENVIRONMENTAL POLICIES OF THE UNITED STATES AND THE EUROPEAN UNION 207, 223 (Norman J. Vig & Michael G. Faure eds., 2004) (finding that the industrial lobby is a stronger force in the U.S. than in Europe); Engel & Saleska, *supra* note 150, at 214 (suggesting that capture of the U.S. government by special interests is one of two likely causes of the failure to act).

152. Harrison & Sundstrom, *supra* note 131, at 9; Schreurs, *supra* note 151, at 223.

tics. For some observers, *both* the industrial and environmental lobbies are better organized in the United States than in Europe.<sup>153</sup> Others emphasize the power of the European industry, which often has greater access to and influence over EU political processes than does the environmental lobby.<sup>154</sup>

### *C. Political Structure*

Since the ratification of a treaty requires the “advice and consent” of a two-thirds majority of the U.S. Senate, environmental agreements can become entangled in the deliberations of the Senate’s Foreign Relations Committee. As hinted above, they are also exposed to political lobbying by an array of domestic constituencies, especially when MEAs require reopening the carefully negotiated compromises that are contained in many U.S. domestic environmental laws. While the administration of George W. Bush is generally said to have neglected environmental protection,<sup>155</sup> it is important to recall that even the more sympathetic Clinton administration was unable to navigate its international environmental priorities through the competing domestic agendas in the Senate.<sup>156</sup> The unanimous support for the Byrd-Hagel resolution illustrates that these difficulties cannot simply be attributed to party politics. Determined pursuit of domestic priorities by actors from across the political spectrum appears to have replaced the consensus on internationalism in Congress.<sup>157</sup> In addition, the push and pull of divided government between the President and

153. See Detlef Sprinz & Martin Weiss, *Domestic Politics and Global Climate Change Policy*, in INTERNATIONAL RELATIONS AND GLOBAL CLIMATE CHANGE 67, 79-81 (Urs Luterbacher & Detlef F. Sprinz eds., 2001); Pring, *supra* note 144, at 200-207 (depicting a fierce struggle between industry interests and a strong group of effective domestic NGOs).

154. Jon Hovi, Tora Skodvin & Steinar Andresen, *The Persistence of the Kyoto Protocol: Why Other Annex I Countries Move on Without the United States*, 3 GLOBAL ENVTL. POL., Nov. 2003, at 1, 9 (describing fierce industry opposition, albeit ultimately overcome, to binding emissions targets in the period from 1996-1998); Regina S. Axelrod, Norman J. Vig & Miranda A. Schreurs, *The European Union as an Environmental Governance System*, in THE GLOBAL ENVIRONMENT: INSTITUTIONS, LAW, AND POLICY 200, 205-06 (Regina S. Axelrod, David Leonard Downie & Norman J. Vig eds., 2d ed. 2005) (finding that the industry lobby has had substantially greater access to EU political processes and that the environmental lobby has generally been outmatched).

155. See, e.g., Julian Borger, *Bush Disarms the Pollution Police*, GUARDIAN WEEKLY, Nov. 13-19, 2003, at 6; Christopher Drew & Richard A. Opiel Jr., *How Industry Won the Battle of Pollution Control at E.P.A.*, N.Y. TIMES, Mar. 6, 2004, at A1; Editorial, *An Environmental Deficit*, N.Y. TIMES, Feb. 11, 2004, at A28; Andrew C. Revkin, *Panel of Experts Finds that Anti-Pollution Laws Are Outdated*, N.Y. TIMES, Jan. 30, 2004, at A15.

156. See *supra* notes 54-55 and accompanying text; see also John Dernbach, *U.S. Adherence to Its Agenda 21 Commitments: A Five-Year Review*, 27 ENVTL. L. REP. 10504, 10512 (1997) (discussing the Clinton administration’s efforts to garner support for its climate and energy policies).

157. See Stewart Patrick, *Don’t Fence Me In: The Perils of Going It Alone*, 18 WORLD POL’Y J., Fall 2001, at 2, 8.

Congress seems particularly conducive to environmentally conservative policy outcomes.<sup>158</sup>

These dynamics differ significantly from what unfolds in the European context. According to some observers, the parliamentary systems in European states make it easier for executive action on the international stage to be ratified at home.<sup>159</sup> Arguably more important is the fact that the EU's political and legal structure has promoted far greater inclination toward multilateralism than the U.S. constitutional framework and political processes.<sup>160</sup> EU environmental multilateralism can be traced back to the late 1970s. The experience with the negotiation of an international ozone layer regime demonstrated to EU member states the benefits of collective policy-making, and that national interests need not fall victim to a European environmental policy approach. Thus, when climate talks picked up speed in the early 1990s, EU member states had already become comfortable with more flexible interpretations of sovereignty and were generally open to global solutions, even when inconsistent with short-term economic interest.<sup>161</sup>

Some commentators stress the importance of EU institutional structures as forums for interaction. According to one observer,

[A]lthough institutionalized EU foreign policy cooperation may have been created by intergovernmental bargaining, over time states have increasingly learned to define many . . . of their foreign policy positions in terms of collectively defined values and goals . . . [I]nstitutional mechanisms have both pre-empted the formation of fixed national foreign policy

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158. See Daniel Bodansky, *Transatlantic Environmental Relations*, in EUROPE, AMERICA, BUSH: TRANSATLANTIC RELATIONS IN THE TWENTY-FIRST CENTURY 58, 65 (John Peterson & Mark A. Pollack eds., 2003).

159. See Kathryn Harrison, *The Road Not Taken: Climate Change Policy in Canada and the United States*, 7 GLOBAL ENVTL. POL. 92, 97 (2007); Wiener, *Comparing Precaution*, *supra* note 149, at 341.

160. But note that, rightly or wrongly, the involvement of the EU in environmental policy causes concerns among some U.S. observers that treaty ratification at the EU level—and EU policy more generally—is divorced from member state processes and hence less meaningful. See Vogler & Bretherton, *supra* note 142, at 11-12; see also Elizabeth DeSombre, *Understanding United States Unilateralism: Domestic Sources of U.S. International Environmental Policy*, in THE GLOBAL ENVIRONMENT: INSTITUTIONS, LAW, AND POLICY 181, 194 (Regina S. Axelrod, David Leonard Downie & Norman J. Vig eds., 2d ed. 2005) (arguing that the E.U. is more cavalier than the U.S. about ratifying treaties without the ability to implement); Sabrina Safrin, *The Un-Exceptionalism of U.S. Exceptionalism*, 41 VAND. J. TRANSNAT'L LAW 1307, 1324-41 (2008), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1018142](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1018142) (illustrating through various examples the assertion that, while the EU readily joins international agreements, it frequently seems special accommodations).

161. Krämer, *supra* note 142, at 67.

preferences and . . . socialized its elite participants into articulating a common European policy.<sup>162</sup>

Others suggest that the involvement of a large number of different actors in climate policy (initially fifteen member states, the European Parliament, the Commission, and the Presidency) facilitates mutual reinforcement, with multiple spaces for policy discourse and multiple actors that can “strategically pass the leadership baton off to the next player” when so required.<sup>163</sup> Different actors might play leadership roles at different times, and broader factors—such as favorable public opinion and media attention, active NGOs, or an industry open to compromise—come to be embedded in a process of multi-level reinforcement.<sup>164</sup>

#### *D. International Leadership and Identity*

The attitude of the United States vis-à-vis the global climate regime stands in some contrast to the leadership role that it tended to play in earlier environmental treaty making processes.<sup>165</sup> Arguably, some of the reasons for its apparent retreat from global environmental leadership can be found in the characteristics of treaty-based international environmental lawmaking. Notably, with an institutional core and open-ended regulatory agenda, modern MEAs resemble international organizations in many respects.<sup>166</sup> Regular meetings of MEA parties have become the forums in which most of the international environmental lawmaking activity now takes place.<sup>167</sup> Treaty parties are engaged in continuously evolving information gathering, negotiation, and consensus-building processes that make it harder for individual parties to determine agendas, to resist regime development, and to extricate themselves from regime dynamics.<sup>168</sup> Perhaps most importantly,

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162. Sonia Lucarelli, *Values, Identity and Ideational Shocks in the Transatlantic Rift*, 9 J. INT'L REL. & DEV. 304, 316 (2006) (emphasis omitted) (internal quotation marks omitted) (citing Michael E. Smith, *Institutionalization, Policy Adaptation and European Foreign Policy Cooperation*, 10 EUR. J. INT'L REL. 95, 99-100 (2004)).

163. Miranda Schreurs & Yves Tiberghien, *Multi-Level Reinforcement: Explaining European Union Leadership in Climate Change Mitigation*, 7 GLOBAL ENVTL. POL., Nov. 2007, at 19, 40.

164. *Id.* at 40-42 (pointing to the Commission on emissions trading, a variety of states taking leads at different times, and the Parliament as a general avenue for green politics).

165. See Brunnée, *supra* note 14, at 620-28 (discussing U.S. involvement in key MEAs).

166. See Robin R. Churchill & Geir Ulfstein, *Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little-Noticed Phenomenon in International Law*, 94 AM. J. INT'L L. 623, 658 (2000).

167. See Jutta Brunnée, *COPing with Consent: Law-Making under Multilateral Environmental Agreements*, 15 LEIDEN J. INT'L L. 1, 2 (2002).

168. See Thomas Gehring, *International Environmental Regimes: Dynamic Sectoral Legal Systems*, 1 Y.B. INT'L ENVTL. L. 35, 54-55 (1990). *But see* George W. Downs, Kyle W.

the ongoing interactions and negotiations among MEA parties tend to generate patterns of expectations and normative understandings that guide and constrain subsequent policy choices and legal development within the regime.<sup>169</sup> In addition, these multi-lateral negotiations provide opportunities for coalition building that enable smaller states to influence outcomes and dilute the influence of more powerful states.

It might be said, then, that the United States was secure—perhaps even over-confident—in its identity as a singularly powerful state, seeing no need to curry favor with other states in the climate negotiations while looking to insulate itself from the treaty dynamics described above. This pattern is not unique to environmental issues. Operating from its position of geo-political strength, the United States has opted increasingly to exercise leadership through issue-specific “coalitions of the willing.”<sup>170</sup> In the climate context, the Asia-Pacific Partnership and the Major Emitters Initiative may be illustrations of this brand of “distinctly American internationalism.”<sup>171</sup>

By contrast, the European Union came to see climate change as an opportunity to assume the global leadership role.<sup>172</sup> After the United States’s withdrawal from the Kyoto Protocol, the EU worked to bring fence-sitters such as Canada and Japan into the treaty, making numerous concessions on points on which it had insisted in its earlier negotiations with the United States.<sup>173</sup> For some, these concessions suggest that “it was political benefits associated with leadership, rather than a sense of responsibility for the global environment, that was the major driving force for this course of action.”<sup>174</sup> For others, the need to establish global leadership was not so much about prestige or political benefits as about the desire to forge a collective EU identity. Thus EU climate

Danish & Peter N. Barsoom, *The Transformational Model of International Regime Design: Triumph of Hope or Experience?*, 38 COLO. J. TRANSNAT’L L. 465, 466 (2000) (arguing that regimes based on the Transformational Approach actually have less cooperative depth than non-Transformational arrangements).

169. See Brunnée, *supra* note 167, at 45.

170. Richard N. Haass, Dir., Council on Foreign Relations, From Reluctant to Resolute: American Foreign Policy After September 11, Remarks to the Chicago Council on Foreign Relations (June 26, 2002), available at <http://www.state.gov/s/p/rem/11445.htm>.

171. See NAT’L SEC. COUNCIL, NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 1 (2002), available at <http://www.whitehouse.gov/nsc/nss.pdf>.

172. Hovi, Skodvin & Andresen, *supra* note 154, at 16.

173. See SCOTT BARRETT, ENVIRONMENT AND STATECRAFT: THE STRATEGY OF ENVIRONMENTAL TREATY-MAKING 371 (2005) (arguing that it was the departure of the United States from the Kyoto Protocol and the abrasive attitude of the Bush administration that prompted the EU to reinforce its efforts); see also Sibylle Scheipers & Daniela Sicurelli, *Normative Power Europe: A Credible Utopia?*, 45 J. COMMON MKT. STUD. 435, 446-50 (2007) (arguing that EU climate policy was substantially designed, and is perpetually positioned, in opposition to U.S. policy).

174. Hovi, Skodvin & Andresen, *supra* note 154, at 19.

change policy provided an opportunity to transcend the perception of the EU as an anonymous bureaucracy and to cast it as a purposive and influential international player.<sup>175</sup>

These considerations are closely related to another factor that is unique to the character of the EU as a supra-national entity. Thus, in contrast to military or economic power typically wielded by states, an important element of EU power is considered by some commentators to be “normative,” resting in its ability to develop norms and to promote them internationally.<sup>176</sup> This normative dimension to EU politics is said to be rooted in its origins in the immediate post-war period. Observers point to the European desire to transcend nationalist politics and to the creation of an “elite-driven, treaty based, legal order,” a supra-national political entity dedicated to respect for human rights and the rule of law.<sup>177</sup> Accordingly, the consolidation and legitimation of the EU enterprise requires continuous reinforcement of its normative basis.<sup>178</sup> The EU, therefore, consistently positions itself as in favor of multilateralism,<sup>179</sup> international law, and binding international obligations.<sup>180</sup> Evidence for the normative power thesis can be found especially in EU climate policy,<sup>181</sup> which not only mirrors the above-mentioned broader positioning patterns but, as will be discussed shortly, also has strong normative dimensions.

175. See Michael Grubb & Joyeeta Gupta, *Implementing European Leadership, in CLIMATE CHANGE AND EUROPEAN LEADERSHIP: A SUSTAINABLE ROLE FOR EUROPE?* 287, 306-09 (Joyeeta Gupta & Michael Grubb eds., 2000); see also Atle C. Christiansen & Jørgen Wettestad, *The EU as a Frontrunner on Greenhouse Gas Emissions Trading: How Did It Happen and Will It Succeed?*, 3 CLIMATE POLY 3, 6 (2003).

176. See Ian Manners, *Normative Power Europe: A Contradiction in Terms?*, 40 J. COMMON MKT. STUD. 235, 252-53 (2002).

177. *Id.* at 241.

178. The idea of normative power bears some resemblance to Joseph Nye’s account of “soft power.” See JOSEPH S. NYE JR., *THE PARADOX OF AMERICAN POWER: WHY THE WORLD’S ONLY SUPERPOWER CAN’T GO IT ALONE* 9 (2002) (explaining that soft power means “getting others to want what you want,” and “rests on the ability to set the political agenda in a way that shapes the preferences of others”). But while Nye’s argument may be said to be about the importance of soft power given the character of the times, Manners’ concept of “normative power” is tied more closely to the political and historical character of the European Union. See Manners, *supra* note 176, at 252-53.

179. See generally Lucarelli, *supra* note 162, at 316 (“[T]he existence of the European integration process, with its institutions, rules and actors has gradually become an institutional form that coordinates relations among states on the basis of generalized principles of conduct: that is multilateralism. Multilateralism has become a praxis of behaviour which represents normality; defections from normality occur, but are denounced as infringements of acceptable behaviour.”).

180. See generally Scheipers & Sicurelli, *supra* note 173, at 452 (connecting the EU stance to its concern for “the creation of binding rules for the global community, since it aims at international law-making, namely the establishment of multilateral treaties and legal institutions”); see also *infra* Part IV.E.

181. See generally Scheipers & Sicurelli, *supra* note 173.

*E. Attitudes Toward International Law*

The respective European and American attitudes toward international law have received extensive treatment in the literature. For some observers, the differences in attitude have interest or power-based explanations. For example, the European commitments to international law and multilateralism are said to be mainly reflections of “deep misgivings” about U.S. global hegemony.<sup>182</sup> Europe, therefore, merely deploys international law strategically, both to tie the United States into restrictive institutional arrangements and to accuse it of violating its existing obligations.<sup>183</sup> Although this perspective is quite common in the literature,<sup>184</sup> it remains unclear why international legal rules would tend to favor weaker actors, such that Europe would be more inclined than the United States to invoke them.<sup>185</sup> Nor does it explain why the EU appears to be equally inclined towards reliance on international law in its relations with the vast majority of other, weaker states.

Another set of perspectives on attitudes towards international law focuses less on the instrumentalism of weaker or stronger actors than on the intellectual traditions and deep ideational structures of European and American societies. Several commentators locate the differences between European and American attitudes in the contrast between the alleged European commitment to legalism and positivism and the alleged American rule-skepticism and pragmatic policy-orientation. According to this line of reasoning, Americans tend to understand law instrumentally and see international law as a means for the promotion of values that are taken to be universal.<sup>186</sup> Meanwhile, for Europeans, only legal methodology ought to be universal, thus the enduring emphasis on positivism.<sup>187</sup>

182. Robert J. Delahunty, *The Battle of Mars and Venus: Why Do American and European Attitudes Toward International Law Differ?*, 4 LOY. U. CHI. INT'L L. REV. 11, 39 (2006).

183. *Id.* at 43-44; see also STEPHEN M. WALT, TAMING AMERICAN POWER: THE GLOBAL RESPONSE TO U.S. PRIMACY 144-52 (2005); G. John Ikenberry, Strategic Reactions to American Preeminence: Great Power Politics in the Age of Unipolarity (July 28, 2003), [http://www.dni.gov/nic/confreports\\_stratreact.html](http://www.dni.gov/nic/confreports_stratreact.html).

184. See Martti Koskenniemi, *Perceptions of Justice: Walls and Bridges Between Europe and the United States*, 64 ZAÖRV 305, 311-12 (2004) (stating that “[i]nstrumentalism is the position of the powerful actor” and that “[l]egalism is the position of the weaker party”).

185. See generally Shirley V. Scott, *Is There Room for International Law in Real-Politik?: Accounting for the US ‘Attitude’ Toward International Law*, 30 REV. INT'L STUD. 71, 87-88 (2004) (arguing that U.S. leadership in post-war international law-making and institution building was designed to consolidate and perpetuate U.S. dominance).

186. See Koskenniemi, *supra* note 184, at 311-12; see also James C. Hathaway, *America, Defender of Democratic Legitimacy?*, 11 EUR. J. INT'L L. 121 (2000).

187. See Koskenniemi, *supra* note 184, at 311-12; see also Guglielmo Verdirame, *‘The Divided West’: International Lawyers in Europe and America*, 18 EUR. J. INT'L L. 553, 555-56 (2007).

Another stream in the literature relates European support of international law to either historical or political context. For some observers, then, contemporary European legal multilateralism is closely connected to the post-war goal of replacing recourse to raw politics and military confrontation with a rule-based administrative order.<sup>188</sup> One commentator has suggested that the European commitment to international law is rooted in the fact that

it knows it owes its very existence to international law. The institutions that structure it and enabled it to reconstitute itself after the war derive directly from international law, and each of the states that make it up has a very strong sense of its dependence on the others, something for which there is no equivalent in the United States . . . .<sup>189</sup>

The European belief in supra-national governance stands in contrast to the American emphasis on national political community and democratic governance. Indeed, waning American enthusiasm for grand multilateral projects, such as ambitious MEAs, may have been further dampened by the fact that international environmental law has attracted the attention of those who are concerned about the encroachment of international law on U.S. sovereignty.<sup>190</sup> While arguably not a majority view, concerns about international law are shared across the political spectrum.<sup>191</sup> For example, some conservative commentators describe MEAs as “genuine threats” to American sovereignty<sup>192</sup> and opine that increasing international environmental regulation “reduces the accountability that comes from a country’s internal system of checks

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188. See, e.g., Verdirame, *supra* note 187, at 556.

189. Pierre-Marie Dupuy, *The Place and Role of Unilateralism in Contemporary International Law*, 11 EUR. J. INT’L L. 19, 21 (2000); see also Lucarelli, *supra* note 162, at 328 (“Dismissing the pillars of world order would have meant dismissing fundamental pillars of a European political identity still largely under construction.”).

190. Direct evidence of these concerns can be found in Senate deliberations on multilateral environmental agreements. For example, some objections to ratification of the Biodiversity Convention were based on the fact that the COP “will meet after the treaty is in force to negotiate the details of the treaty,” and this would contravene the Senate’s ‘constitutional responsibilities to concur in treaties.’ ” Robert F. Blomquist, *Ratification Resisted: Understanding America’s Response to the Convention on Biological Diversity, 1989-2002*, 32 GOLDEN GATE U. L. REV. 493, 544-45 (2002) (quoting Sen. Kay Bailey Hutchison).

191. See generally Oona A. Hathaway & Ariel N. Lavinbuk, *Rationalism and Revisionism in International Law*, 119 HARV. L. REV. 1404 (2006) (arguing that the significance of *The Limits of International Law* is its reflection on the deepening convergence between rationalist and revisionist approaches to international law).

192. Terry L. Anderson & J. Bishop Grewell, *It Isn’t Easy Being Green: Environmental Policy Implications for Foreign Policy, International Law, and Sovereignty*, 2 CHI. J. INT’L L. 427, 436 (2001).



and balances, and increases international tension.”<sup>193</sup> In turn, a prominent center-left constitutional law scholar has argued that international law in general, given that its goals inherently lie beyond domestic political processes, is incompatible with the American constitutional commitment to democratic self-government.<sup>194</sup> Similar concerns are evident in the ongoing debate over the application of international norms by domestic courts.<sup>195</sup> In short, it appears that the apprehension, vis-à-vis MEAs in general and the climate change regime in particular, is being reinforced by generic concerns about international law.

### *F. International Environmental Norms*

As noted earlier, a number of foundational principles of international environmental law underpin the global climate regime: common concern of humankind, common but differentiated responsibilities, and precautionary action. The response of the United States and the European Union to these principles has been markedly different.

While the EU accepted the inclusion of these principles in the UNFCCC and other international instruments adopted at the Rio Earth Summit, it has since sought to contain their impact by resisting claims that they may have acquired customary international law status and by challenging broad interpretations of the principles. For example, the United States insisted on qualifying the text of the precautionary principle in the Rio documents by inserting the requirement that precautionary measures be cost-effective.<sup>196</sup> It has been suggested the “highly legalistic and adversarial” character of the American regulatory system is among the reasons why the United State is resisting an internationally binding precautionary principle.<sup>197</sup> Specifically, resort to courts for citizen suits to enforce regulatory standards or tort actions for com-

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193. *Id.* at 435.

194. See Jed Rubenfeld, *Unilateralism and Constitutionalism*, 79 N.Y.U. L. REV. 1971, 1975 (2004).

195. See, e.g., Roger P. Alford, *Misusing International Sources to Interpret the Constitution*, 98 AM. J. INT’L L. 57 (2004) (arguing that using international law to aide in interpreting the U.S. Constitution is inappropriate and inadvisable); Kenneth Anderson, *Foreign Law and the U.S. Constitution*, 131 POLY REV. 33 (2005) (criticizing *Roper v. Simmons* for Justice Kennedy’s use of international law as an aide in interpreting the U.S. Constitution); Curtis A. Bradley, *International Delegations, the Structural Constitution, and Non-Self-Execution*, 55 STAN. L. REV. 1557 (2003) (highlighting the constitutional concerns of delegating authority to international institutions); John McGinnis & Ilya Somin, *Should International Law Be Part of Our Law?*, 59 STAN. L. REV. 1175 (2007) (criticizing the penetration of raw international law into the domestic legal sphere because of the lack of democratic control over the content of international law).

196. See Wiener, *Whose Precaution?*, *supra* note 149, at 251.

197. See *id.* at 246.

penetration are considered far more common in the United States than in Europe.<sup>198</sup> As for the concept of common but differentiated responsibilities, the United States has had several concerns.<sup>199</sup> It is intent on avoiding any implication of legal responsibility for global environmental problems, such as climate change. Similarly, it is resisting claims that past contributions to a given environmental problem, or relative capacity to address it, predetermine MEA design such that developed countries must take the lead in assuming MEA obligations, that developing countries' responsibilities are always reduced, and that any action by developing countries must be financially and technically supported by developed countries.<sup>200</sup> At a more normative level, it is also possible that the concept of common but differentiated responsibilities and its redistributive implications are at odds with deeply held egalitarian values.<sup>201</sup>

In any case, while the United States may be supportive of individual MEAs that reflect precautionary approaches to environmental protection and provide for differentiated commitments, it has tended to be skeptical of the value of broad customary norms that would require such approaches as a matter of principle.<sup>202</sup> As a result, in the international arena, the United States has maintained its resistance to the precautionary principle and to common but differentiated responsibilities. For example, at the 2002 Johannesburg Summit on Sustainable Development, it was against

198. *See id.* at 259-61. By the same token, negotiators may be concerned that Europe will not end up with genuinely equivalent commitments since enforcement by domestic actors is less likely. *See* Harold K. Jacobson, *Climate Change: Unilateralism, Realism, and Two-Level Games*, in MULTILATERALISM AND U.S. FOREIGN POLICY: AMBIVALENT ENGAGEMENT 415, 425 (Stewart Patrick & Shepard Forman eds., 2002).

199. *See* Christopher C. Joyner et al., *Common But Differentiated Responsibility*, in, PROCEEDINGS OF THE ANNUAL MEETING-AMERICAN SOCIETY OF INTERNATIONAL LAW 362, 362-63 (2002).

200. These concerns were first raised in relation to Principle 7 of the Rio Declaration on Environment and Development. United Nations Conference on Environment and Development: Rio Declaration on Environment and Development, at prin. 7, adopted June 14, 1992, UNCED Doc. A/CONF.151/5/Rev.1, reprinted in 31 I.L.M. 876, 877 (1992) [hereinafter Rio Declaration]. The United States offered the following interpretative statement on Principle 7:

The United States understands and accepts that principle/7 highlights the special leadership role of the developed countries, based on our industrial development, our experience with environmental protection policies and actions, and our wealth, technical expertise and capabilities.

The United States does not accept any interpretation of principle/7 that would imply a recognition or acceptance by the United States of any international obligations or liabilities, or any diminution in the responsibilities of developing countries.

United Nations Conference on Environment and Development: Rio Declaration on Environment and Development, Rio de Janeiro, Braz., June 3-14, 1992, *Report of the United Nations Conference on Environment and Development*, ¶ 16, U.N. Doc A/CONF.151/26 (Vol. IV), available at <http://www.un.org/documents/ga/conf151/aconf15126-4.htm>.

201. Jacobson, *supra* note 198.

202. Joyner, *supra* note 199, at 363.

strong American objections that endorsements of both principles found their way into the summit instruments.<sup>203</sup>

By contrast, the aforementioned international norms have all been embraced by the EU and its member states. An arguably important factor has been the degree to which these principles resonated with norms that were already operational within the EU. For example, the precautionary principle is actually enshrined in the treaty constituting the EU.<sup>204</sup> Similarly, it could be said that the EU's very premise of environmental regionalism and collective priority setting recognizes environmental issues as "common concern[s],"<sup>205</sup> thus disposing the EU toward this principle at the global level as well. Perhaps most importantly, EU practice in a wide range of policy areas suggests an acceptance of common but differentiated responsibilities<sup>206</sup> and of the idea of international equity more generally. The EU comprises an economically diverse but nonetheless relatively homogenous group of states. Homogeneity has facilitated common identity formation and joint problem-solving. In turn, economic diversity, by exposing wealthier states to the limitations experienced by poorer countries, has injected the principle of equity into the EU's international environmental policy.<sup>207</sup> Indeed, some observers specifically point to the elaboration of an EU climate policy and demonstrate how significant differences were resolved through negotiation.<sup>208</sup> Thus, through the internal burden sharing arrangement, some EU states agreed to heavier obligations in order to offset weaker commitments by more poorly placed states, illustrating the internal EU commitment to common but differentiated responsibilities-like principles.<sup>209</sup>

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203. *Summary of the World Summit on Sustainable Development: 26 August – 4 September 2002*, EARTH NEGOTIATIONS BULL. (Int'l Inst. for Sustainable Dev., New York, N.Y.), Sept. 6, 2002, at 4-5, available at <http://www.iisd.ca/download/pdf/enb2251e.pdf>; see also Marc Pallemerts, *International Law and Sustainable Development: Any Progress in Johannesburg?*, 12 REV. EUR. COM. & INT'L ENVTL. L. 1 (2003), 8-9 (discussing the U.S. concerns regarding the two principles).

204. Jonathan B. Wiener, *Precaution*, in OXFORD HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW 597, 599 (Daniel Bodansky, Jutta Brunnée & Ellen Hey eds., 2007).

205. Joyner et al., *supra* note 199, at 358.

206. See Rio Declaration, *supra* note 200, at prin. 7.

207. See Jørgen Wettstad, *The Complicated Development of EU Climate Policy*, in CLIMATE CHANGE AND EUROPEAN LEADERSHIP 25, 25-26, 43-44 (Joyeeta Gupta & Michael Grubb eds., 2000); see also Paul G. Harris, *The European Union and Environmental Change: Sharing the Burdens of Global Warming* 17 COLO. J. INT'L ENVTL. L. & POL'Y 309, 314 (2006) (attributing the EU position to its comparatively sympathetic position on international equity).

208. Axelrod, Vig & Schreurs, *supra* note 154, at 200.

209. *Id.* at 206.

## V. CONCLUSIONS

It is encouraging that large developing country emitters, like China and India, signed onto the Bali Action Plan and that the Plan suggests there is room for moving beyond the rigid categories of Annex I and non-Annex I states. Similarly, given the previous attitude of the Bush administration, the fact the United States joined the consensus and has since shown some willingness to consider binding commitments could be seen as major breakthroughs. Bringing more than 190 nations together in a process aimed at the adoption of a climate pact by 2009 will be difficult, but it is not quite the equivalent of the fall of "the Berlin Wall of climate change," as some have claimed.<sup>210</sup> Aside from the need to secure credible developing country commitments, it is uncertain whether the Roadmap will lead beyond good intentions and whether Europe and the United States will be able to turn tense rivalry into constructive engagement.

Still, when the trajectory of the international climate change regime is considered in light of the range of factors that might account for the evolution of the EU and U.S. approaches to climate policy, at least some tentative conclusions can be drawn. While the interests of the EU and the United States clearly influence their respective policy choices, there is also evidence that normative factors play a significant role.

As this discussion has illustrated, these normative factors and their impact on EU and U.S. climate policy cannot be reduced to differences in environmental values or popular concern about climate change. Rather, a complex array of interrelated factors affect how each actor relates to the international climate regime. These pertain, first, to the manner in which the EU and the United States have actually been engaged in the regime and with its goals and principles. Secondly, these regime-based factors interact with the internal political structures and processes of the EU and the United States, respectively. Third, engagement with the regime and internal political features translate back into an international policy posture, including the outward projection of particular normative commitments. Finally, to stress the importance of these three interlocking layers is not to deny the importance of the interests pursued by each actor or of their relative power. Indeed, as will become evident, some of these interests and powers actually derive from normative factors or are reinforced or constrained by them.

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210. Eilperin, *supra* note 74 (quoting U.N. Climate Chief Yvo de Boer).

*A. Engagement with the Climate Regime  
and Its Goals and Principles*

As this article has demonstrated, the European Union has been actively engaged in the U.N. climate regime throughout its long evolution, working to shape and, increasingly, to sustain and extend the regime. Against this backdrop, one feature of European climate policy should perhaps not come as a surprise: the extent to which it is built around the U.N. regime. Most obviously, EU policy is premised upon keeping the UNFCCC at the core of the global climate regime. Although the EU is not excluding the option of different commitment tracks (different speeds and approaches), its negotiating efforts are geared to maintaining the basic architecture of the Kyoto Protocol.<sup>211</sup>

More importantly, however, European climate policy is actually framed in terms of the “ultimate objective” of the UNFCCC: to avert dangerous climate change.<sup>212</sup> EU policy aims to keep global temperature increases to 2°C, which in turn requires both shorter and longer term action to limit GHG concentrations in the atmosphere.<sup>213</sup> To these ends, the EU proposes collective action to ensure that global GHG emissions peak in the next ten to fifteen years and decrease by 50% below 1990 levels by 2050.<sup>214</sup> EU policy, of course, is not entirely idealistic; EU members seek both to preserve the significant investments already made in climate policy and to gain competitive advantages from it.<sup>215</sup> Nonetheless, in building its policy around the environmental objective of an international agreement, the EU approach differs significantly from that of the United States.

EU policy is also framed in terms of the principles enshrined in the UNFCCC. In arguing for a global regime with commitments by all key players, European policy is not merely pragmatic but treats climate change as a common concern of humankind. Furthermore, EU policy statements acknowledge the greater economic and technological capacity of industrialized countries and their greater historical contributions to climate change. In effect, EU policy proposals are guided by the common but differentiated responsibilities principle and the idea that developed countries must take the lead

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211. See, e.g., Angela Merkel, Fed. Chancellor of F.R.G., Speech at the “Mitigation” Panel of the U.N. Secretary-General’s High-Level Event on Climate Change (Sept. 24, 2007), available at <http://www.bundesregierung.de/Content/EN/Reden/2007/09/2007-09-24-rede-bk-high-level-event.html>.

212. See UNFCCC, *supra* note 3, at art. 2.

213. *Commission Communication Limiting Climate Change to 2°C*, *supra* note 112, at 2-3.

214. *Id.* at 4-5.

215. See Brunnée and Levin, *supra* note 16, at 69-70.

in combating climate change.<sup>216</sup> These north-south equity principles underpin the differentiated 2020 and 2050 emission goals advocated by Europe. Presumably, the EU views significant action by industrialized countries, coupled with an approach that recognizes developing country concerns and grievances, as best suited to promoting genuinely global climate action.

The approach of the United States to the global climate regime has been very different. As shown earlier in this article, its attitude towards the U.N. climate regime has been one of reluctance and even resistance. While there has been engagement in the treaty process, American policy has consistently sought to avoid having its policy options tied down by the regime. This stance has been due in part to domestic political dynamics and in part to the long-standing rejection of the regime's core commitments. Thus while the United States has not challenged the treaty's objective of averting dangerous climate change, it has only recently come to fully accept the international scientific consensus on climate change and on the need for urgent action. More importantly, however, the United States has consistently challenged the principles that underpin the Convention, in particular the propositions that states have common but differentiated responsibilities to address climate change and that industrialized countries should take the lead in doing so. In other words, whereas the EU has fully embraced these propositions internally and then built its international policy around them, the United States has been hostile to them and its international policy has been to question, avoid, or even undermine them by promoting alternative approaches. It is important to note, however, that referring here to "the United States" masks the wide array of climate policy initiatives that have emerged in the domestic political arena, some of which embrace the U.N. climate regime. However, the domestic resonance of the regime is more likely to relate to its basic objective and its multilateral approach, than to the idea of common but differentiated responsibilities.

### *B. Internal Political Structure and Processes*

The European Union's internal political structure and processes appear to be considerably more disposed toward global climate policy. It may be asked, in this context, whether the focus of this article on EU climate policy, rather than the policies of individual European states, is analytically sound. Of course, there are significant differences between the state-based structure of the

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216. *See supra* notes 117-18 and accompanying text.

United States and the supra-national entity that is the European Union. Nevertheless, the EU has emerged as an increasingly important international actor, especially in the climate policy context. Furthermore, it is arguable that the supra-national structure of the EU and the multi-level engagement it fosters have been particularly conducive to dense engagement with the global regime and to the emergence of a strong European climate policy. The U.N. climate regime binds both the EU and its member states, and its requirements have come to be enshrined in EU and national laws. The legal framework of the EU produces continuous interactions between international, European, and national laws, as well as between various international, European, and domestic actors. In light of the policy patterns surveyed in this article, it is fair to say that the EU, its member states, and arguably even its public, have actually internalized the goals, values, and principles of the global climate regime to a significant degree. These norms have become woven into the legal and policy discourse within Europe and perhaps even into the identity of the EU as a member of a global climate community.

Another dimension to the EU's supra-national character is important here. The EU as an actor is constituted by international law. Its member states have pooled significant aspects of their sovereignty. They have long been comfortable with a supra-national approach to law and policy-making. Indeed, support for international law, even for international "constitutionalization,"<sup>217</sup> have at least some of their roots in the post-war desire of European states to embed nationalism in a collective, international enterprise.

Again, the contrast with the United States is notable. In the United States, there is no comparable range of internal political arenas in which the engagement with the climate regime could take place. The closest analogy to the EU's multi-level processes may be the experimentation and regulatory competition that has been taking place among the local, state, and federal levels. However, unlike in the EU context, these processes are not specifically focused on the engagement with or translation of international norms into the domestic realm. Furthermore, the main arena in which such engagement should take place, the U.S. Senate, has been hostile to international regulation throughout the existence of the U.N. climate regime. Indeed, the domestic resistance to the UNFCCC and the Kyoto Protocol is tied into much broader discomfort with the threats that international law is seen, at least by some, to pose to American constitutionalism and sovereignty.

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217. Erika de Wet, *The International Constitutional Order*, 55 INT'L & COMP. L.Q. 51, 51 (2006).

*C. Outward Projection of Norms and International Leadership*

As suggested above, the European Union has not only internalized the central norms of the global climate regime but has also built its international climate policy around these parameters. Given the resonance that the objective and principles of the U.N. regime have internationally, it is arguable that this approach has enabled the EU to articulate a policy that is more likely to be seen by others as persuasive and legitimate. In particular, the EU has accepted the premise of common but differentiated responsibilities and has focused its negotiating efforts on clarifying how this principle is to be translated into concrete commitments. Thus, especially in relation to the goal of bringing major developing countries to accept GHG reduction commitments, it stands to reason that the EU approach is more likely to be successful than the American posture. In short, global climate policy has provided the EU with an opportunity to cast itself as an international norm leader.

By contrast, the United States has tended to define itself in opposition to the regime, casting itself as a powerful actor that speaks frankly about the flaws of the international policy effort. Notably, the American approach has not been to attempt to shape the common but differentiated responsibilities principle in a particular way but to challenge it outright and to adopt instead a “we will not reduce emissions unless you do too” posture. This policy on developing country commitments is connected to a more broadly negative attitude towards the climate regime. Ironically, it may be that this policy stance actually honors the normative power of the regime in the resistance. That is, it may be precisely because the United States is aware of the potential power of internationally agreed principles and processes that it has sought to resist both.

Yet, whatever the reasons for the American approach, it would appear to have weakened rather than strengthened the United States’s ability to persuade and lead internationally. Ultimately, soft power depends on credibility.<sup>218</sup> In this context, it matters that the American Kyoto withdrawal and its subsequent policies are widely seen as part of a broader pattern. A country’s ability to get others to want what it wants will be diminished if it is perceived as a purely self-interested actor, which is precisely what U.S. climate change policy has invited. In addition, “à la carte” multilateralism<sup>219</sup> and over-reliance on coalitions of the willing, be it in the environmental context or beyond, undermine rather than enhance perception of the United States as a trustworthy, good-faith ac-

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218. NYE, *supra* note 178, at 69.

219. Patrick, *supra* note 157, at 2.



tor.<sup>220</sup> This assessment applies in particular to U.S. relations with European and other states that perceive a duty to cooperate to be at the very heart of the international legal order.<sup>221</sup> But as the “if for some reason you’re not willing to lead, leave it to the rest of us . . . [p]lease get out of the way”<sup>222</sup> rebuke to U.S. policy at the Bali meeting suggests, the damage has been much wider.

#### *D. Norms, Interests, and Power*

These concluding observations are not intended to suggest that the United States has pursued an interest and power-based climate policy whereas the EU has been engaged in an entirely idealistic policy exercise nor are they intended to suggest that interests and power play insignificant roles. The opposite is the case.

First of all, aside from the practical goal of designing a policy that can in fact avert dangerous climate change, there are other very pragmatic reasons for the European approach to global climate policy. Most notably, the EU investments in the Kyoto Protocol will not see a return unless an assertive post-2012 approach is adopted at the global level. Simply put, EU policy planning is banking upon the UNFCCC/Kyoto architecture, with present and future targets pegged to the 1990 baseline of the Kyoto Protocol and launching an emissions trading system that is premised upon the existence of hard emission caps. These policies entail considerable competitive advantages, such as accelerated technological innovation and accelerated conversion to a low-carbon economy. EU climate policies have also brought strategic advantages, especially in relation to the global carbon market. Any future global emissions trading system, as well as other national or regional systems, will likely be shaped with the ETS in mind. All of these advantages are best maintained by ensuring that a global climate regime builds on the existing foundations.

It should also be noted that the EU’s unilateral pledge of 20% GHG emission cuts below 1990 levels by 2020, when examined more closely, is not as ambitious a commitment as it might appear at first glance. This pledge is rendered possible by the fact that the 2020 emissions of the new Eastern European member states are

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220. Harold Hongju Koh, *On American Exceptionalism*, 55 STAN. L. REV. 1479, 1487, 1499-1501 (2003).

221. Pierre-Marie Dupuy, *The Constitutional Dimension of the Charter of the United Nations Revisited*, 1 MAX PLANCK Y.B. U.N. L. 1, 5 (1997).

222. Revkin, *supra* note 15.

projected to be 32% below 1990 levels,<sup>223</sup> giving the EU's collective commitment extra emissions room.<sup>224</sup>

Finally, as discussed in the preceding section, normative dynamics play an important part in the leadership role that the EU has taken with respect to international climate policy, but that leadership role also greatly serves EU interests and indeed enhances its normative power. Having framed its policy in terms of the U.N. regime and built up its leadership on that basis, the EU is well placed to shape the future of the global regime. It has also enabled the EU to cast itself in opposition to perceived U.S. hegemony and, potentially, to further strengthen its policy position by tapping into broader international aversion to U.S. power politics.

Ironically, it appears that the normative dimension to EU climate policy is more likely to serve its interests than the much more explicitly interest-driven policy of the United States serves U.S. interests. Thus, while U.S. policy at first blush appears to serve its interests ("no costly commitments unless other major emitters do the same"), a closer look suggests that this policy may have come at a substantial cost. Not only has the United States lost a good deal of its "soft power," it also appears to have conceded international leadership ground to the EU. Moreover, it has allowed the EU to emerge as a center of gravity for much climate policy making. This is clearly evidenced by the ETS, which is the likely anchor for any future expansion of global emissions markets.

This is not to say that the United States cannot reclaim its leadership role or influence international climate policy. In fact, all indications are that this is precisely what it will begin to do now that President Obama has taken office. No doubt, the future climate policy of the United States will be driven to a considerable extent by domestic legislative initiatives. At the same time, American climate leadership will also require reengagement in the global regime and with its normative foundations. To be sure, the assessment of policy factors in this article suggests that it is unlikely that the United States would ever internalize global climate norms to the same extent as the EU. But it also suggests that the American ability to shape the international climate regime might actually be enhanced if U.S. policy was framed in terms of the principles that underpin the existing regime. This does not mean that the United States would not, or should not, look to flesh out or even reshape these principles in pursuit of its policy priorities. However, it does suggest that the U.N. climate regime and its

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223. DAVID SUZUKI FOUND., *supra* note 91, at 2.

224. For this reason, some commentators have called for a unilateral pledge of a 30% cut by 2020. See OTT, *supra* note 34, at 36.

foundational principles are more influential than one might think, operating both to enhance and to constrain the interests, powers, and even identities of international actors.

If this assessment is correct, the prospects for the global climate regime may not be as dire as many observers have suggested. It remains to be seen whether the U.N. climate regime will succeed in drawing the EU and the United States, as well as other key actors, onto the same page. However, it is arguable that both the European Union and the United States, for different and yet interrelated reasons, will find themselves looking to the U.N. regime as they vie for global climate leadership. All together now?



**TAKING PUBLIC INTERESTS IN PRIVATE PROPERTY  
SERIOUSLY: HOW THE SUPREME COURT  
SHORT-CHANGES PUBLIC PROPERTY RIGHTS IN  
REGULATORY TAKINGS CASES**

KATE SHELBY\*

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### I. INTRODUCTION

The U.S. Supreme Court has decided several regulatory takings cases involving land and water in the past couple of decades. All of these cases were decided in accordance with the basic regulatory takings precedent created by the Court.<sup>1</sup> However, those cases may have had different outcomes if the Court considered the public's rights in those properties.

The U.S. Supreme Court has completely ignored the issue of public rights in property that abuts water in regulatory takings cases, including *Palazzolo v. Rhode Island*,<sup>2</sup> which involved a dispute over a landowner's ability to fill coastal marshlands. Some scholars suggest that the Court acknowledged the possibility of public rights in private property in *Lucas v. South Carolina Coastal Council*,<sup>3</sup> in which the Court stated that background principles are a bar to regulatory takings claims.<sup>4</sup> However, the Court's disregard for public rights in property was made clear from its remand instructions<sup>5</sup> to the Rhode Island Supreme Court to evaluate *Palazzolo* only with regard to the landowner's investment-backed expectations under *Penn Central Transportation Co. v. City of New York*.<sup>6</sup> The Rhode Island Supreme Court instead remanded the case to the superior court with instructions to consider public

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1. See, e.g., *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1028-29 (1992); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 839 (1987); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 434-35 (1982).

2. 533 U.S. 606 (2001).

3. 505 U.S. 1003 (1992).

4. See, e.g., Daniel A. Nussbaum, Note, *McQueen v. South Carolina Coastal Council: Presenting the Question of the Relevance of the Public Trust Doctrine to the Total Regulatory Takings Analysis*, 53 S.C. L. REV. 509, 520-21 (2002).

5. *Palazzolo*, 533 U.S. at 630-31.

6. 438 U.S. 104 (1978).

rights under the public trust doctrine and nuisance law,<sup>7</sup> and the superior court found that the landowner did not own the coastal marshlands that he sought to fill because those lands belonged to the public and were held in trust by the state.<sup>8</sup> Unfortunately, this is not the only case where the Supreme Court has neglected to acknowledge that public rights are at stake in cases involving land and water.<sup>9</sup>

This Article uses *Palazzolo v. Rhode Island* as the setting for a discussion about conflicts that arise between public and private rights in regulatory takings cases involving properties containing both land and water. Additionally, this Article criticizes the Supreme Court's failure to recognize public rights in these properties and asserts reasons why the Court should recognize these rights. Part II examines the conflict between public and private property regimes with regard to mixed land-water property. Part III explores state nuisance law, the public trust doctrine, and the law of custom as a state's primary means for enforcing public rights in private property. This section also discusses the trend by the Supreme Court of favoring private property owners in property disputes over mixed land-water properties. Part IV discusses *Palazzolo's* history, the Rhode Island Superior Court's decision on remand, and criticizes the U.S. Supreme Court for disregarding the public rights at stake in that case. Part V asserts reasons why the Court should recognize public rights in private property and discusses a new approach to regulatory takings jurisprudence. Finally, Part VI looks to the future of regulatory takings cases involving property containing land and water.

## II. COLLIDING PROPERTY REGIMES

"In the traditional American view . . . property is seen to be not only an economic boon, but a key ingredient of American liberty—where individual rights are sacrosanct over the needs of the group."<sup>10</sup> Using the bundle of sticks metaphor, rights in property are defined only with regard to the individual landowner, with each stick representing a right that a property owner holds

7. *Palazzolo v. State ex rel. Tavares*, 785 A.2d 561 (R.I. 2001).

8. *Palazzolo v. Rhode Island*, No. WM 88-0297, 2005 WL 1645974, at \*7, \*15 (R.I. Super. Ct. July 5, 2005).

9. See *McQueen v. S.C. Dep't of Health and Env'tl. Control*, 533 U.S. 943 (2001) (remanding in light of *Palazzolo*); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987).

10. James S. Burling, *Private Property Rights and the Environment after Palazzolo*, 30 B.C. ENVTL. AFF. L. REV. 1, 2 (2002).

against others, including the rights to possess, alienate, and use the property and the right to exclude others.<sup>11</sup>

Critics argue that using the bundle of sticks metaphor to define property rights discounts public rights and interests in private property and leads private property owners to believe they have more rights in their property than they really do.<sup>12</sup> They contend that “[t]he essence of the metaphor is that property is a set of rights exercisable against others, in contrast with a set of shared interests in an object or a set of shared commitments with respect to control and management of a resource.”<sup>13</sup> Therefore, many environmentalists and advocates of a community-based legal philosophy for property argue that the traditional American view of property does not include environmental concerns or account for private property owners’ duties to others.<sup>14</sup>

### *A. Conflicts Between Different Views of Property*

Conflicts often arise in the United States between private owners and the public (or the state) because many properties can be categorized under more than one of the four basic property regimes: private, common, state, and nonproperty.<sup>15</sup> For example, zoning regulations, nuisance laws, and mandatory easements for utility services subject even the highest forms of private property ownership to “public rights of access, use, or control.”<sup>16</sup> Viewing property rights as a “web of interests”<sup>17</sup> in property or as a bundle of rights in a community-based resource may reduce conflicts between private and common or state property regimes, as they account for public property rights and private landowners’ duties to refrain from creating nuisances, polluting, or over-consuming resources.<sup>18</sup>

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11. Craig Anthony Arnold, *The Reconstitution of Property: Property as a Web of Interests*, 26 HARV. ENVTL. L. REV. 281, 284-85 (2002).

12. See Myrl L. Duncan, *Reconceiving the Bundle of Sticks: Land as a Community-Based Resource*, 32 ENVTL. L. 773, 780-83 (2002); Arnold, *supra* note 11, at 291-93.

13. Arnold, *supra* note 11, at 303.

14. See Burling, *supra* note 10, at 2-3.

15. DANIEL H. COLE, POLLUTION & PROPERTY: COMPARING OWNERSHIP INSTITUTIONS FOR ENVIRONMENTAL PROTECTION 8-9 (2002) (“[P]rivate property’ . . . typically denotes property owned by individuals holding rights to use . . . dispose of, and exclude others from resources. ‘Common property’ . . . refers to collective ownership situations, in which the owners cannot exclude each other, but can exclude outsiders. ‘Public’ or ‘state’ property . . . is a special form of common property supposedly owned by all the citizens, but typically controlled by elected officials . . . who determine the parameters for access and use. Finally, ‘nonproperty’ . . . denotes a situation in which a resource has no owner: all are at liberty to use it; no one has the right to exclude anyone else.”).

16. *Id.* at 9.

17. Arnold, *supra* note 11, at 284.

18. *Id.* at 344; Duncan, *supra* note 12, at 801.



*B. Conflicts Where Land Meets Water: Regulatory Takings**1. Regulatory Takings Generally*

Often, private and public property regimes collide in regulatory takings cases, with state or federal regulations imposing on private property owners. In those cases, one form of rights generally wins out over the other. Nevertheless, early U.S. Supreme Court decisions favored public and private property rights somewhat equally. For example, in *Mugler v. Kansas*,<sup>19</sup> the Court held that a state's use of its police power to prohibit land uses that it finds injurious to the "health, morals, or safety of the community" does not constitute a "taking" under the Fifth Amendment.<sup>20</sup> Similarly, in *Hadacheck v. Sebastian*,<sup>21</sup> the Court ruled that a state does not "take" a landowner's property or otherwise unconstitutionally limit a landowner's rights with regard to her property by imposing nuisance regulations on the property in accordance with its police power.<sup>22</sup>

Expanding on those rulings, the Court created the regulatory takings doctrine in *Pennsylvania Coal Co. v. Mahon*.<sup>23</sup> In that case, the Court held that a non-nuisance police power regulation may constitute a taking if the regulation greatly diminishes the landowner's property value.<sup>24</sup> Further defining the doctrine in *Penn Central Transportation Co. v. City of New York*,<sup>25</sup> the Court ruled that whether a government regulation of private property constitutes a taking under the Fifth Amendment requires an "ad hoc, factual [inquiry]"<sup>26</sup> into the circumstances of the case including the "economic impact of the regulation,"<sup>27</sup> the "extent to which the regulation has interfered with [the claimant's] distinct investment-backed expectations,"<sup>28</sup> and the "character of the government action."<sup>29</sup> The Court also held that when the government regulation amounts to a taking the value of the property is based on the private owner's legitimate investment-backed expectations.<sup>30</sup> Finally, the Court noted that "[a] 'taking' may more readily be found when [the] interference with property can be characterized as a

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19. 123 U.S. 623 (1887).

20. *Id.* at 668-69.

21. 239 U.S. 394 (1915).

22. *Id.* at 409-10.

23. 260 U.S. 393 (1922).

24. *Id.* at 415-16.

25. 438 U.S. 104 (1978).

26. *Id.* at 124.

27. Burling, *supra* note 10, at 12.

28. *Penn Cent. Transp. Co.*, 438 U.S. at 124.

29. *Id.*

30. *Id.*

physical invasion by government . . . than when the interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.”<sup>31</sup>

However, because the Court’s current view of property rights as a bundle of sticks does not include public rights or interests, public property rights are often overlooked or discounted in Supreme Court cases. For example, in *Loretto v. Teleprompter Manhattan CATV Corp.*,<sup>32</sup> the Court held that permanent physical occupation of an owner’s property by the government always constitutes a taking, “whether the action achieves an important public benefit or has only minimal economic impact on the owner.”<sup>33</sup> Likewise, in *Lucas v. South Carolina Coastal Council*,<sup>34</sup> the Court ruled that an ad hoc factual inquiry into the circumstances of the case is not required if a non-nuisance police power regulation “denies all economically beneficial or productive use of [the] land.”<sup>35</sup> In order to avoid compensating the landowner, the government must show that “the proscribed use interests were not part of his title to begin with.”<sup>36</sup> The Court further held that regulations that “severe . . . must inhere in the title itself, in the restrictions that background principles of the [s]tate’s law of property and nuisance already place upon land ownership.”<sup>37</sup> Moreover, in *Palazzolo*<sup>38</sup> the Court abolished the “notice rule” that barred a landowner from claiming a regulatory taking when the challenged regulation was in place at the time the landowner purchased the property<sup>39</sup> and held that such a landowner’s regulatory takings claim was ripe for review.<sup>40</sup>

Similarly, in *Nollan v. California Coastal Commission*<sup>41</sup> the Court shifted the burden of proof to the government to show that an “essential nexus” exists between a legitimate government purpose in conditioning a land-use permit and the needs created by the private owner’s proposed development.<sup>42</sup> The Court held that “protecting the public’s ability to see the beach, assisting the public in overcoming the ‘psychological barrier’ to using the beach created

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31. *Id.*

32. 458 U.S. 419 (1982).

33. *Id.* at 434-35.

34. 505 U.S. 1003 (1992).

35. *Id.* at 1015. This is often referred to as the “complete wipeout” or “total taking” rule. *Id.* at 1030.

36. *Id.* at 1027.

37. *Id.* at 1029.

38. 533 U.S. 606 (2001).

39. See Eliezer Drew, Note, *Changing the Past: The Right of a Post-Regulation Acquirer to Challenge a Regulation*, 14 FORDHAM ENVTL. L.J. 415, 425-26 (2003).

40. *Palazzolo*, 533 U.S. at 630.

41. 483 U.S. 825 (1987).

42. *Id.* at 837-39.

by a developed shorefront, and preventing congestion on the public beaches<sup>43</sup> did not constitute an important government purpose.<sup>44</sup> Finally, in *Dolan v. City of Tigard*,<sup>45</sup> the Court expanded on *Nollan*'s ruling by stating that a "rough proportionality" must exist between conditions on the land-use permit and the effect on the public from the development.<sup>46</sup> The Court found the requirement that a landowner dedicate a portion of her land to maintain the quality of a city's storm drainage system and for a public bicycle and pedestrian pathway was not roughly proportional to the landowner's plans to double the size of her retail store.<sup>47</sup>

## 2. Regulatory Takings Where Land Meets Water

Where "publicly owned waters . . . cross privately owned lands," "property regimes may come into conflict."<sup>48</sup> This is especially true in regulatory takings disputes over property where land meets water; conflicts often arise between advocates of a community-based approach to property rights and those who seek to limit government and public regulation of property.<sup>49</sup> These conflicts arise because "[a]quatic resources such as riparian land[s] and wetlands are already to some degree imbued with public concerns, and may arguably be subject to navigational servitudes, the public trust doctrine, and even, some suggest, the law of custom."<sup>50</sup> In fact, the concept of owning riparian lands and water is very different than the concept of owning dry land.

Since Roman times, water has been treated as common property.<sup>51</sup> "[R]iparian owners possessed a usufructuary right—the right to use water while ensuring the flow of the stream remained undiminished as it passed to their downstream neighbors."<sup>52</sup> The doctrine of usufruct "created correlative public and private rights. . . . [P]rivate rights were held subject to the overriding community interest."<sup>53</sup> American law followed the doctrine of usufruct, protecting common interests in water through public rights, ownership,

43. *Id.* at 835.

44. *Id.* at 838-39.

45. 512 U.S. 374 (1994).

46. *Id.* at 391.

47. *Id.* at 394-96.

48. COLE, *supra* note 15, at 154.

49. *See id.* at 166, 168-71.

50. Burling, *supra* note 10, at 2.

51. Zachary C. Kleinsasser, *Public and Private Property Rights: Regulatory and Physical Takings and the Public Trust Doctrine*, 32 B.C. ENVTL. AFF. L. REV. 421, 423 (2005).

52. Duncan, *supra* note 12, at 792 (footnote omitted).

53. *Id.* at 794.

and regulation.<sup>54</sup> Today, landowners in the United States “can own non[-]navigable water bodies such as small ponds. . . . They cannot, however, own waters flowing in navigable water bodies; at most, they can possess limited use rights (*usus* and *usus fructus*).”<sup>55</sup>

Indeed, “[m]ost rights in water are public/state property, managed by the federal and state governments.”<sup>56</sup> For example, in the eastern United States, riparian consumers are subject to the concept of reasonable use, in which states grant the right to use water subject to conditions benefiting the public.<sup>57</sup> Likewise, in the western United States, water appropriation laws require citizens to use water in ways that benefit the community and are not wasteful.<sup>58</sup> In most of the country, water use permits are not granted if they will adversely affect public interests.<sup>59</sup>

“Water, in short, is a public resource. Individual interests in water, which the public chooses to recognize, must accordingly be used consistently with the larger public good, which itself evolves over time to reflect changing public needs and values.”<sup>60</sup> Therefore, where certain properties, such as wetlands or coastal marshlands, have characteristics of riparian lands and dry lands, proponents of public interests in property seek to use water laws as a model for securing public rights in aquatic lands and expanding state regulation to all other property. Consequently, supporters of greater individual property rights and the bundle of sticks metaphor argue for strict limitations on public rights in all property.<sup>61</sup> In these situations “it may become impossible to enforce one set of rights in the resource or resource amenity without violating others.”<sup>62</sup> “Thus, it is often over aquatic resources that the battle between the competing visions of property is most keenly fought.”<sup>63</sup>

54. *Id.* at 792-94. Examples of public rights, ownership, and regulation include the navigation servitude and the public trust doctrine. A navigation servitude is “the federal government’s dominant easement in navigable waters,” which allows the federal government to protect navigation through and commerce in water. *Id.* at 792. Similarly, the states own the beds and banks of navigable waters in trust for the public under the public trust doctrine and may not alienate title to these lands unless it is done in the interest of the public. *Id.*; see *infra* Part III.B.

55. COLE, *supra* note 15, at 21.

56. *Id.*

57. James H. Davenport & Craig Bell, *Governmental Interference with the Use of Water: When Do Unconstitutional “Takings” Occur?*, 9 U. DENV. WATER L. REV. 1, 24 (2005).

58. *Id.* at 32.

59. *Id.* at 31-32.

60. Duncan, *supra* note 12, at 795.

61. See Stephanie Reckord, Comment, *Limiting the Expansion of the Public Trust Doctrine in New Jersey: A Way to Protect and Preserve the Rights of Private Ownership*, 36 SETON HALL L. REV. 249, 272-79 (2005) (arguing that “[t]he Supreme Court’s loyalty to traditional property values may be the only roadblock for states that intend to strip landowners of their Fifth Amendment rights” through the public trust doctrine).

62. COLE, *supra* note 15, at 154.

63. Burling, *supra* note 10, at 3.

The U.S. Supreme Court, viewing property rights as only an individual's bundle of sticks,<sup>64</sup> has taken the side of proponents of private property rights in this conflict between private and public property regimes, blatantly overlooking public property rights in its recent regulatory takings decisions.<sup>65</sup> For example, in *Palazzolo*, the Supreme Court completely ignored the possibility of public rights in the coastal marshlands on the landowner's property under the public trust doctrine.<sup>66</sup> Because of this, some advocates of private property rights have hailed *Palazzolo* as a decision that "firmly rejects the vision of property as a state[-]derived benefit that can be altered at will by the State."<sup>67</sup> The Court's act of overlooking public rights was magnified when, on remand, the Rhode Island Superior Court focused on the issues of public nuisance and the public trust doctrine, holding that the public owned the coastal marshlands.<sup>68</sup> The superior court viewed property rights as a bundle but did not define the rights in that bundle with regard to only the individual.<sup>69</sup> Using a more community-based view of property, the court upheld public rights in uncontaminated drinking water and in land below the mean high tide line;<sup>70</sup> the court held that even the landowner benefited from these public rights regulations.<sup>71</sup>

### III. PUBLIC RIGHTS AND PRIVATE PROPERTY

Despite the traditional view of property rights as an individual's bundle of sticks, several doctrines exist to protect public interests in property against private owners' rights. State nuisance law and the public trust doctrine are two of the most common defenses offered by states against regulatory takings claims. Customary law and state constitutional law are also increasingly recognized by state courts as valid defenses of public rights in private property.

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64. See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1027 (1992) (stating that citizens acquire a bundle of rights when they receive title to property); see also *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 433 (1982) (referring to property as a bundle of rights); *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979) (stating that the right to exclude others is "one of the most essential sticks in the bundle of rights that are commonly characterized as property").

65. See COLE, *supra* note 15, at 173 (arguing that "[t]he Court has been willfully oblivious to the fact that many, though by no means all, of the regulatory takings cases it decides arise where existing public and private rights collide.").

66. See *Palazzolo v. Rhode Island*, 533 U.S. 606, 627 (2001).

67. Burling, *supra* note 10, at 3.

68. *Palazzolo v. State*, No. WM 88-0297, 2005 WL 1645974, at \*8-17, (R.I. Super. Ct. July 5, 2005).

69. *Id.* at \*14.

70. *Id.*

71. *Id.* at \*31.

### A. Public Nuisance Law

Since the nineteenth century, nuisance law has constituted an affirmative defense against regulatory takings claims. *Mugler*,<sup>72</sup> decided in 1887, and *Hadacheck*,<sup>73</sup> which followed in 1915, both recognized the power of states to impose nuisance regulations on private property without compensating landowners.<sup>74</sup> Because of these rules, state nuisance law remains a viable defense of public rights in regulatory takings cases.<sup>75</sup>

In fact, for years state nuisance and nuisance abatement laws have constituted winning defenses against takings claims by mining companies over subsidence regulations and by businesses that were shut down to curtail illegal drug sales and prostitution.<sup>76</sup> More recently, nuisance law has expanded to include some natural resources.<sup>77</sup> Today, some state nuisance laws “may bar liability for acts which have not historically been considered to be common law nuisances,” such as wetlands protection regulations.<sup>78</sup>

### B. The Public Trust Doctrine

Another mechanism for protecting public property rights is the public trust doctrine, which is based on the concept of holding land in trust for the public to use. The doctrine finds its origins in “the Institutes of Justinian, a body of Roman civil law assembled in approximately 530 A.D.”<sup>79</sup> Utilizing the concepts of common property, the Romans “extended public protection [of natural resources] to the air, rivers, sea, and seashores, which were unsuited for private ownership and dedicated to the use of the general public.”<sup>80</sup> Eventually, the public trust doctrine found its way to medieval Europe and into English law.<sup>81</sup>

In England, the concept of a public trust became part of common law. The English developed a method “that emphasized the need to balance community interests with private ownership

72. *Mugler v. Kansas*, 123 U.S. 623 (1887).

73. *Hadacheck v. Sebastian*, 239 U.S. 394 (1915).

74. *See Mugler*, 123 U.S. at 668-69; *Hadacheck*, 239 U.S. at 410-12.

75. *See Hendler v. United States*, 38 Fed. Cl. 611 (Ct. Fed. Cl. 1997), *aff'd*, 175 F.3d 1374 (Fed. Cir. 1999).

76. David L. Callies, *Nuisance and Background Principles: The Lucas Exceptions*, SJ052 ALI-ABA 473, 508-12 (2004) (Westlaw).

77. Michael C. Blumm & Lucas Ritchie, *Lucas's Unlikely Legacy: The Rise of Background Principles as Categorical Takings Defenses*, 29 HARV. ENVTL. L. REV. 321, 336 (2005).

78. *Id.*

79. George P. Smith II & Michael W. Sweeney, *The Public Trust Doctrine and Natural Law: Emanations Within a Penumbra*, 33 B.C. ENVTL. AFF. L. REV. 307, 310 (2006).

80. *Id.*

81. Nussbaum, *supra* note 4, at 515.

rights.”<sup>82</sup> This idea influenced early American laws that protected public access to navigable waters, and the U.S. Supreme Court determined that all states own “submerged lands” in trust for the public.<sup>83</sup>

Thus, an affirmative duty was placed on states to preserve public rights in the beds and banks of navigable waters.<sup>84</sup> For example, no state may alienate public rights in public trust lands. In *Illinois Central Railroad Co. v. Illinois*,<sup>85</sup> the first case to establish the public trust doctrine in the United States, the Supreme Court held that even after the state granted all property interests in a section of land to the railroad, the state still had a duty under the public trust doctrine to maintain primary ownership of the navigable waters on the property and to protect those waters for public use.<sup>86</sup>

Little resulted from *Illinois Central Railroad Co.* or the public trust doctrine until the 1970s, when Professor Sax revived interest in public property rights with his article *The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention*.<sup>87</sup> Since then, many state courts “have increasingly found footholds for public trust arguments in state constitutions, state statutes, and in the common law,”<sup>88</sup> causing varied usage of the public trust doctrine among states.<sup>89</sup> However, the U.S. Supreme Court has made little reference to the public trust doctrine in the past half-century. Arguably, the public trust doctrine was last mentioned in 1988, when the Court held in *Phillips Petroleum Co. v. Mississippi*<sup>90</sup> that states owned tidelands and coastal wetlands that were subject to the ebb and flow of navigable waters in trust for the public.<sup>91</sup> The

82. Smith II & Sweeney, *supra* note 79, at 311.

83. *Id.* at 312. In *Illinois Central Railroad Co. v. Illinois*, the Court held that ownership of these lands passed to the states under the equal footing doctrine, which maintained that when a new state entered the Union it did so on equal footing with other states that were already part of the Union. 146 U.S. 387, 434-35 (1892). Therefore, when the original thirteen states took jurisdiction from England after the Revolutionary War, they took ownership of the beds and banks of navigable water bodies, which the English held in trust for the public. *Id.*; see also COLE, *supra* note 15, at 21; Charles F. Wilkinson, *The Headwaters of the Public Trust: Some Thoughts on the Source and Scope of the Traditional Doctrine*, 19 ENVTL. L. 425, 439-43 (1989).

84. Smith II & Sweeney, *supra* note 79, at 313.

85. 146 U.S. 387 (1892).

86. *Id.* at 452-55.

87. Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970).

88. Blumm & Ritchie, *supra* note 77, at 342.

89. For example, New Jersey courts have upheld the public’s right to use dry-sand beach areas to access beaches under the public trust doctrine, while New Hampshire rejected a statute granting rights to the same effect. See Opinion of the Justices (Public Use of Coastal Beaches), 649 A.2d 604, 611 (N.H. 1994); *Matthews v. Bay Head Improvement Ass’n*, 471 A.2d 355, 365 (N.J. 1984).

90. 484 U.S. 469 (1988).

91. *Id.* at 484-85.

Court determined that the authority to define which lands are protected under the public trust doctrine rests with the states.<sup>92</sup>

### C. *The Law of Custom*

An increasingly popular defense of public property rights in regulatory takings cases comes from the ancient idea of custom. Modern customary law is based on the writings of William Blackstone and the law of English custom.<sup>93</sup> Three sources of customary law exist according to Blackstone: general custom (common law), the procedural custom of courts, and “‘particular customs,’ practiced by and affecting the inhabitants of a defined geographic area.”<sup>94</sup> Particular customs are typically referred to as the law of custom, or customary law, and there are seven criteria that must be met in order for the custom to be used in court against a common law principle, such as “exclusive possession of private land.”<sup>95</sup> “To be valid, enforceable, and to therefore result in a property right in the land of another, despite common-law principles to the contrary, a custom [must] be immemorial, continuous, peaceable, reasonable, certain, compulsory, and consistent.”<sup>96</sup>

In early American law, courts rejected the concept of custom, believing that to allow customary easements on private property meant the land “must lie open forever to the surprise of unsuspecting owners, and to the curtailment of commerce.”<sup>97</sup> As a result, many courts thought public interests were better served by legislation than by enforcing immemorial customs.<sup>98</sup> However, in the past fifty years, state courts have recognized particular public rights customs in disputes over public and private property, most commonly using customary law to grant public beach access and to defend against regulatory takings claims.<sup>99</sup> For example, Texas courts “have upheld state legislation purporting to simply restate existing customary rights to use the beaches of the state, regardless of private ‘ownership.’”<sup>100</sup> The Idaho Supreme Court also stated that it would uphold customary rights if each of Blackstone’s seven essential elements were met.<sup>101</sup> Similarly, the Hawaii Supreme Court

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92. *Id.*

93. Gregory M. Duhl, *Property and Custom: Allocating Space in Public Places*, 79 TEMP. L. REV. 199, 206 (2006).

94. Callies, *supra* note 76, at 478.

95. *Id.*

96. *Id.*

97. *Id.* at 480.

98. *See* Duhl, *supra* note 93, at 210.

99. *Id.*

100. Callies, *supra* note 76, at 481.

101. State *ex rel.* Haman v. Fox, 594 P.2d 1093, 1101 (Idaho 1979).



held “that traditional and customary rights of native Hawaiians may be practiced on public and private land . . . anywhere in the state.”<sup>102</sup> The court further found that agencies must rule on applications for development permits with these customary rights in mind.<sup>103</sup>

In addition, the Oregon Supreme Court used the law of custom to uphold public rights of access to dry sand beach areas in *Oregon ex rel. Thorton v. Hay*.<sup>104</sup> Oregon had tried to prohibit landowners from fencing in the dry-sand beach area of their lot “between the sixteen-foot [vegetation] line and the ordinary high-tide line of the Pacific Ocean.”<sup>105</sup> The court held that Oregon’s Pacific coastline should be handled uniformly and that customary laws would ensure consistent treatment by keeping out “tract-by-tract litigation” that could “fill the courts for years.”<sup>106</sup> The court found their decision merely confirmed a “public right, and at the same time it [took] from no man anything which he has had a legitimate reason to regard as exclusively his.”<sup>107</sup>

#### *D. Other Public Rights*

Besides these three protections for public property rights, many other methods of protecting public interests in property exist. Some state courts have held that states own wildlife in trust for the public.<sup>108</sup> In addition, federal navigation servitude and state water laws protect water in common for the people.<sup>109</sup> Many state constitutions also protect public rights in natural resources.<sup>110</sup> For example, Hawaii’s constitution states that citizens must use and develop Hawaii’s natural resources “in furtherance of the self-sufficiency of the State.”<sup>111</sup> Montana, California, and Louisiana also protect waters and natural resources in the public’s interest.<sup>112</sup> Additionally, Alaska’s constitution holds water, fish, and wildlife “in their natural state” in common for its citizens to use.<sup>113</sup>

Moreover, some states adhere to the natural use doctrine, which maintains that a property owner does not have an “absolute

102. Callies, *supra* note 76, at 484 (discussing Public Access Shoreline Haw. v. Haw. Planning Comm’n, 903 P.2d 1246 (Haw. 1995)).

103. *Pub. Access Shoreline Haw.*, 903 P.2d at 1273.

104. 462 P.2d 671 (Or. 1969).

105. *Id.* at 672.

106. *Id.* at 676.

107. *Id.* at 678.

108. *See, e.g.*, Blumm & Ritchie, *supra* note 77, at 353.

109. *See Duncan, supra* note 12, at 801.

110. *See, e.g.*, ALASKA CONST. art. VIII, § 3; HAW. CONST. art. XI, § 1.

111. HAW. CONST. art. XI, § 1.

112. *See* CAL. CONST. art. XIII, § 8; LA. CONST. art. IX, § 1; MONT. CONST. art. IX, § 2.

113. ALASKA CONST. art. VIII, § 3.

and unlimited right to change the essential natural character of his land so as to use it for a purpose for which it was unsuited in its natural state and which injures the rights of others.”<sup>114</sup> The natural use doctrine applies “whether the regulated land is a wetland within a shoreland area, or land within a primary environmental corridor, or an isolated swamp.”<sup>115</sup> Many states have cited the doctrine in arguing that compensation is not due for denying permits to build on land unsuitable for development unless it is filled or otherwise transformed.<sup>116</sup>

### *E. Absence of Public Rights Analysis in Supreme Court Opinions*

The role that public nuisance, the public trust doctrine, customary law, and other protections for public rights could take in regulatory “takings analyses suggests that property rights are perhaps more communal than generally acknowledged, and reveals that it may make sense to think about property rights from an interconnected, community-based perspective.”<sup>117</sup> Many state courts now see property as a bundle of rights in a community-based resource.<sup>118</sup> However, the U.S. Supreme Court continues to see property as just the individual’s bundle of sticks.<sup>119</sup>

#### *1. Past Regulatory Takings Decisions Involving Land and Water*

Two of the more recent Supreme Court decisions involving disputes over property where water abutted land were held in favor of the private property owners.<sup>120</sup> In both of these decisions, the majority opinions completely discounted public rights in the property in question and articulated rules making it more difficult for public rights to be recognized.

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114. *Just v. Marinette County*, 201 N.W.2d 761, 768 (Wis. 1972).

115. *M & I Marshall v. Somers*, 414 N.W.2d 824, 830 (Wis. 1987).

116. *Blumm & Ritchie*, *supra* note 77, at 344-45. New Hampshire, South Dakota, Florida, Georgia, New Jersey, and South Carolina have each upheld the natural use doctrine under *Just v. Marinette County*. *Id.* at 345.

117. Kleinsasser, *supra* note 51, at 456.

118. *See, e.g.*, David J. Bederman, *Using the Law of Custom to Redefine Property Rights*, 14 A.L.I. 71 (1996); Sean T. Morris, Comment, *Taking Stock in the Public Trust Doctrine: Can States Provide for Public Beach Access Without Running Afoul of Regulatory Takings Jurisprudence?* 52 CATH. U. L. REV. 1015, 1015-23 (2003).

119. *See, e.g.*, *Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994); *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979).

120. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987).

*a. Nollan v. California Coastal Commission*<sup>121</sup>

In *Nollan*, the Nollans owned a beachfront lot in California.<sup>122</sup> They applied to the California Coastal Commission (“Commission”) in 1982 for a coastal development permit to demolish their existing home and build a new one.<sup>123</sup> The Commission granted the Nollans a building permit in exchange for a public passage on their property between the mean high tide line of the Pacific Ocean and a seawall on their property.<sup>124</sup> After the Nollans filed a petition against the conditional grant, the Commission found that construction of a new home would contribute to a “wall” of residential properties blocking the view of public beaches, would keep the public from realizing that public beaches existed near these residences, and would increase private use of the beaches.<sup>125</sup> The Commission stated that the public easement would increase the ease with which the public could access the beaches surrounding the Nollans’ property and that similar conditions were imposed on other development permits in the area.<sup>126</sup>

The Nollans filed a regulatory takings claim with the California Superior Court, which held that the condition on the permit was unconstitutional because the Nollans’ proposed home would not adversely affect “public access to the sea.”<sup>127</sup> The California Court of Appeal reversed, holding that the imposition of the condition on the permit was proportional to the burdens that the new home would create on the public.<sup>128</sup> The U.S. Supreme Court, in a majority opinion authored by Justice Scalia, found that no essential nexus existed between the government’s purpose for conditioning the development and the condition on the permit itself.<sup>129</sup> Justice Scalia stated that had the Commission conditioned the Nollans’ development permit on height, width, or fence requirements for their home to preserve the public’s view of the beach, California would have acted validly under its police power to protect public interests.<sup>130</sup>

The majority opinion completely discounted arguments made by the Commission and amicus curiae that denying the public a right of access to the tidelands below the Nollans’ property, which

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121. 483 U.S. 825 (1987).

122. *Id.* at 827.

123. *Id.* at 828.

124. *Id.*

125. *Id.* at 828-29.

126. *Id.* at 829.

127. *Id.*

128. *Id.* at 830.

129. *Id.* at 837.

130. *Id.* at 836.

were owned by the state under the public trust doctrine, would harm public rights by promoting beach overcrowding, increasing beach erosion, and blocking views of the ocean.<sup>131</sup> The Court also ignored provisions of the California Constitution and the 1972 Coastal Initiative, which stated that the California coastline was a “valuable natural resource belonging to all the people and existing as a delicately balanced ecosystem”<sup>132</sup> and required the state to preserve resources of the coastline “for the enjoyment of the current and succeeding generations.”<sup>133</sup>

Furthermore, even Justice Blackmun’s dissent discounted the public rights at stake.<sup>134</sup> Although he believed that an “essential nexus” existed between the conditions on the permit and the Commission’s purpose for those conditions, Justice Blackmun stated that the Court’s opinion did not “implicate in any way the public[ ] trust doctrine” and that “[t]he Court certainly had no reason to address the issue.”<sup>135</sup>

Justice Brennan, joined by Justice Marshall, dissented from the majority’s ruling finding a compensatory taking of the Nollans’ property.<sup>136</sup> Arguing that the majority imposed a harsher than normal standard of rationality review on California’s imposition of the condition on the Nollans’ permit,<sup>137</sup> Justice Brennan stated that this narrow view of rationality was widely discredited in American constitutional case law.<sup>138</sup>

Unlike the majority opinion, which viewed property rights only in terms of the individual’s bundle of sticks,<sup>139</sup> Justice Brennan, taking a more expansive view of those rights as a bundle in a community-based resource, recognized the public rights at stake in this case.<sup>140</sup> By ignoring the state’s ownership of land up to the mean high tide land, Justice Brennan argued the Court gave the Nollans a “windfall at the expense of the public.”<sup>141</sup> Citing findings by the Commission that the mean high tide line of the beach near

131. See Brief of the Council of State Governments et. al. as Amici Curiae Supporting Appellee, *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825 (1987) (No. 86-133), 1987 WL 864767 at \*6; see also COLE, *supra* note 15, at 169 (arguing that “the Court’s ruling may have had the perverse effect of requiring the state to pay for the privilege of preventing the Nollans from destroying state property”).

132. Brief of the Council of State Governments et. al. as Amici Curiae Supporting Appellee, *supra* note 131, at \*9 (quoting California Coastal Zone Conservation Act of 1972, CAL. PUB. RES. CODE § 27000 et seq.).

133. *Id.* at \*9-10.

134. *Nollan*, 483 U.S. at 865 (Blackmun, J., dissenting).

135. *Id.*

136. *Id.*

137. *Id.* at 842-43 (Brennan, J., dissenting).

138. *Id.* at 846.

139. *Id.* at 831 (majority opinion).

140. *Id.* at 846-48 (Brennan, J., dissenting).

141. *Id.*

the Nollans' property fluctuated throughout the year, Justice Brennan recognized that at times the mean high tide line extended past the seawall constructed on the Nollans' property.<sup>142</sup> Therefore, the state owned those tidelands in trust for the public, and the condition imposed on the permit would have ensured that the Nollans' development and future development of that area "would not disrupt the historical expectation of the public regarding access to the sea."<sup>143</sup>

*b. Lucas v. South Carolina Coastal Council*<sup>144</sup>

In 1986, David Lucas purchased two beachfront residential lots in South Carolina, where he intended to build single-family residences.<sup>145</sup> Two years later South Carolina implemented the Beachfront Management Act.<sup>146</sup> The Act temporarily prohibited Lucas from constructing any permanent structures on his property because his lots were part of a subdivision adjacent to an "inlet erosion zone"<sup>147</sup> where the beaches and dunes served as a storm barrier, protected South Carolina's shoreline from erosion, and were a habitat to many animal and plant species.<sup>148</sup> Lucas filed a regulatory takings claim in the South Carolina Court of Common Pleas, arguing that the "complete extinguishment of his property's value entitled him to compensation regardless of whether the [South Carolina] legislature had acted in furtherance of legitimate police power objectives."<sup>149</sup> The trial court agreed that the Act's temporary ban of construction on Lucas's lot constituted a taking under the Fifth Amendment.<sup>150</sup> The South Carolina Supreme Court reversed, finding that the Act prevented "serious public harm" by preserving South Carolina's beaches.<sup>151</sup>

In the majority opinion for the U.S. Supreme Court, Justice Scalia showed his suspicion of state governments, stating that

regulations that leave the owner of land without economically beneficial or productive options for its use—typically, as here, by requiring land to be left

142. *Id.* at 850-51.

143. *Id.* at 852.

144. 505 U.S. 1003 (1992).

145. *Id.* at 1006-07.

146. *Id.* at 1007.

147. *Id.* at 1007, 1009 n.1. The regulation only prevented building permanent structures on the property from 1988 to 1990. *Id.* at 1036 (Blackmun, J., dissenting).

148. *Id.* at 1022, 1022 n.10 (majority opinion).

149. *Id.* at 1009.

150. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1009 (1992).

151. *Id.* 1009-10.

substantially in its natural state—carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm.<sup>152</sup>

Referring to property rights as an individual's bundle of sticks,<sup>153</sup> Justice Scalia maintained that it is per se unconstitutional for a state to impose a regulation on a landowner's property that completely wipes out the value of the property.<sup>154</sup> When a regulation totally deprives the landowner of all economic benefit from his property, a state may only defeat the takings claim by proving that a "logically antecedent inquiry into the nature of the owner's estate shows that the [landowner's] proscribed use interests were not part of his title to begin with."<sup>155</sup> Thus the majority opinion held that the regulation must constitute a background principle "of the [s]tate's law of property and nuisance."<sup>156</sup>

To demonstrate the concept of background principles, Justice Scalia explained that a state should not compensate a lakebed owner who is denied a permit to fill his land when the landfilling would flood his neighbors' property.<sup>157</sup> The Court held that a "total taking" examination

entail[s] (as the application of state nuisance law ordinarily entails) analysis of, among other things, the degree of harm to public lands and resources, or adjacent private property, posed by the claimant's proposed activities, the social value of the claimant's activities and their suitability to the locality in question, and the relative ease with which the alleged harm can be avoided through measures taken by the claimant and the government.<sup>158</sup>

However, despite the fact that Lucas conceded that the "beach/dune area of South Carolina's shores is an extremely valuable public resource[,] that the erection of new construction . . . [would] contribute to [its] erosion and destruction[,] and that discouraging new construction in close proximity to the beach/dune

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152. *Id.* at 1018.

153. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1027 (1992).

154. *Id.* at 1029.

155. *Id.* at 1027.

156. *Id.* at 1029.

157. *Id.* 1029.

158. *Id.* at 1030-31.

area [was] necessary to prevent a great public harm,"<sup>159</sup> and despite the fact that the ban on construction on Lucas's property was *temporary*, the Court found that South Carolina had to prove on remand that its background principles of property and nuisance law forbade Lucas's plans for construction on his beachfront lots.<sup>160</sup>

Justice Blackmun's and Justice Stevens's dissents focused on how the majority's ruling was not a natural outgrowth of regulatory takings jurisprudence. Justice Blackmun argued that restricting the types of regulations that states may enforce against existing property owners to common law nuisances unjustly narrowed holdings in *Mugler*<sup>161</sup> and *Hadacheck*.<sup>162, 163</sup> Likewise, Justice Stevens stated that the majority's holding was too narrow and rigid because it required states to compensate all total regulatory takings unless the disputed regulation duplicated the effects of state nuisance law.<sup>164</sup>

## 2. Many State Courts Recognize Public Property Rights

Although the Supreme Court has consistently favored private property rights over public property rights, few private owners have succeeded in regulatory takings cases to the detriment of public interests in state courts. Most recent state court cases where private owners were victorious involved disputes over public access easements along private property to provide rights of way to public trust lands.<sup>165</sup> These cases have arisen in coastal states in recent years as a result of some state legislatures' attempts to expand public rights in private property to preserve beaches and public access to them. For example, in *Matthews v. Bay Head Improvement Ass'n*,<sup>166</sup> the New Jersey Supreme Court held that the public trust doctrine extended to dry-sand beach areas for the purposes of accessing and using beaches.<sup>167</sup> Similarly, in *Stevens v. City of Cannon Beach*,<sup>168</sup> the Oregon Supreme Court specifically ruled that custom constituted a background principle of state law under *Lucas*, upholding the state's refusal of a permit to construct

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159. *Id.* at 1022 (quoting *Lucas v. S.C. Coastal Council*, 304 S.C. 376, 382-83 (1991)).

160. *Id.* at 1031-32.

161. 123 U.S. 623 (1887).

162. 239 U.S. 394 (1915).

163. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1048 (1992) (Blackmun, J., dissenting).

164. *Id.* at 1063 (Stevens, J., dissenting).

165. *See, e.g.*, *Nat'l Ass'n of Home Builders v. N.J. Dept. of Env'tl. Prot.*, 64 F. Supp. 2d 354 (D. N.J. 1999); *Purdie v. Attorney Gen.*, 732 A.2d 442 (N.H. 1999).

166. 471 A.2d 355, 365 (N.J. 1984).

167. *Id.* at 365.

168. 854 P.2d 449 (Or. 1993).

a seawall because it would infringe the public's rights by blocking access to a beach.<sup>169</sup>

Moreover, the fall-out from recent Supreme Court regulatory takings decisions, such as *Lucas*, highlights the Court's discord with state courts and the limitations of the justices' view of property rights as only the individual's "bundle of sticks." Although Justice Scalia meant to restrict or deprive states of any defense of "total takings" regulations through the holding in *Lucas*, courts have taken an expansive view of this ruling. Some state courts have held that regulations based on state nuisance law, the public trust doctrine, and customary law constitute background principles under *Lucas*, even though the majority opinion in that case narrowly focused on the complete wipeout of property value and defined only common law regulations as background principles.<sup>170</sup> Furthermore, the background principles exception has been used in physical occupation cases and in "Penn Central-type regulatory cases where less than total economic deprivation has occurred."<sup>171</sup> Consequently, the *Lucas* background principles exception is now a threshold question, an inquiry that state defendants in regulatory takings disputes favor because courts consider background principles early on in litigation,<sup>172</sup> which decreases litigation costs. The background principles exception is an affirmative defense, though, and states must raise this argument and convince courts that their regulations qualify under *Lucas*.

### 3. Continued Resistance from Justices Scalia and O'Connor

Perhaps the reason that the Supreme Court ignored the possibility of public rights in private property is that justices are increasingly persuaded by the resistance of Justices Scalia and O'Connor to the idea of property rights as a web of interests or a bundle in a community-based resource. Justice O'Connor, joined by Justices Scalia and Stevens, dissented in *Phillips Petroleum Co.* in 1988, where the majority of the Court held that "[s]tates have the authority to define the limits of the lands held in public trust and to recognize private rights in such lands as they see fit."<sup>173</sup> They argued that the majority's ruling would "disrupt the settled expect-

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169. *Id.* at 460.

170. For example, the courts in Washington and South Carolina have specifically held that the public trust doctrine constitutes a background principle under *Lucas*. Robert Meltz, *The Past is Prologue*, 81 A.L.I. 163, 173 (2005). In addition, the Oregon Supreme Court held that customary law constitutes a background principle under *Lucas*. See *Stevens v. City of Cannon Beach*, 854 P.2d 449, 456-57 (Or. 1993).

171. Blumm & Ritchie, *supra* note 77, at 326.

172. See *id.* at 321.

173. *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 475 (1988).



tations of landowners . . . in every coastal [s]tate.”<sup>174</sup> Moreover, the dissent angrily contended that the majority opinion extended public trust rights to “tidal, non-navigable waters including bodies remote and only indirectly connected to the ocean or navigable tidal waters,”<sup>175</sup> such as coastal wetlands. Expressing their distaste for state wetlands protection under the public trust doctrine, the dissenting justices claimed that “the magnitude of the problem is suggested by the fact that more than [nine] million acres have been classified as fresh or saline coastal wetlands.”<sup>176</sup>

Similarly, dissenting from the Court’s denial of certiorari in *Stevens* in 1994, Justice Scalia, joined by Justice O’Connor, argued that a state cannot deny constitutional rights to property owners:

[J]ust as a State may not deny rights protected under the federal constitution through pretextual procedural rulings, neither may it do so by invoking nonexistent rules of state substantive law. Our opinion in *Lucas*, for example, would be a nullity if anything that a state court chooses to denominate “background law”[—]regardless of whether it is really such[—] could eliminate property rights. “[A] State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all.” . . . [I]f it cannot fairly be said that an Oregon doctrine of custom deprived Cannon Beach property owners of their rights to exclude others from the dry sand, then the decision now before us has effected an uncompensated taking.<sup>177</sup>

These statements, coupled with Justice Scalia’s blatant distrust of state legislatures’ treatment of property rights in *Lucas*, strongly suggest that at least some U.S. Supreme Court justices are not making room in the individual’s bundle of sticks for important public property rights. In fact, Professor Sax argues that the Court “had an opportunity to rewrite the rules of property”<sup>178</sup> to

174. *Id.* at 485 (O’Connor, J., dissenting).

175. Callies, *supra* note 76, at 490 (discussing *Phillips Petroleum Co.*, 484 U.S. at 490-91).

176. *Phillips Petroleum Co.*, 484 U.S. at 494.

177. *Stevens v. City of Cannon Beach*, 510 U.S. 1207, 1209-10 (1994) (Scalia, J., dissenting) (citations omitted).

178. Robert H. Cutting, “*One Man’s Ceilin’ Is Another Man’s Floor*”: *Property Rights as the Double-Edged Sword*, 31 ENVTL. L. 819, 837 (2001) (discussing Joseph L. Sax, *Property Rights and the Economy of Nature: Understanding Lucas v. South Carolina Coastal Council*, 45 STAN. L. REV. 1433, 1446 (1993)).

include the public trust doctrine and other public rights in *Lucas* but chose to favor private property rights instead.<sup>179</sup>

Moreover, although these justices are quick to argue that states are taking away rights, they do not see state regulations as conferring rights on other citizens and private owners. For example, in *Lucas*, the landowner admitted that the temporary regulation of his property prevented a great public harm and, when discussing background principles, Justice Scalia even argued that a state should not compensate a landowner for denying him a permit to conduct activity that would harm others' lands.<sup>180</sup> However, Justice Scalia and other members of the majority opined that South Carolina's regulation in that case could constitute a regulatory taking.<sup>181</sup> Therefore, it seems that most of the U.S. Supreme Court has forgotten or completely disregarded the justifications of many property laws, especially nuisance laws, where one landowner's rights are limited to the extent that they infringe on others' property rights or to the extent that they cause a public harm. *Palazzolo* further exemplifies this disregard for public property rights, which is out-of-sync with state court rulings protecting these rights.<sup>182</sup>

#### IV. PALAZZOLO V. RHODE ISLAND: AN EXAMPLE OF THE U.S. SUPREME COURT'S DISREGARD FOR PUBLIC PROPERTY RIGHTS

In 1959, Anthony Palazzolo bought a one-half interest in seventy-four lots adjacent to Winnapaug Pond in Rhode Island.<sup>183</sup> This interest was transferred to Shore Gardens, Inc. (SGI), a corporation of which Palazzolo was president.<sup>184</sup> One year later, Palazzolo bought out his business partner and became the sole shareholder of SGI.<sup>185</sup> From 1962 to 1963, Palazzolo filed two applications on behalf of SGI to the Rhode Island Department of Natural Resources, Division of Harbors and Rivers (DHR), to

179. *Id.*

180. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1029 (1982).

181. *Id.* at 1032.

182. Compare *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), with *Pub. Access Shoreline Haw. v. Haw. Planning Comm'n*, 903 P.2d 1246, 1269 (1995), and *Matthews v. Bay Head Improvement Ass'n*, 471 A.2d 355, 364 (N.J. 1984) ("To say that the public trust doctrine entitles the public to swim in the ocean . . . without assuring the public of a feasible access route would seriously impinge on, if not effectively eliminate, the rights of the public trust doctrine."), and *Oregon ex rel. Thornton v. Hay*, 462 P.2d 671, 673 (Or. 1969) ("state has an equitable right to protect the public in the enjoyment of [public property] rights").

183 *Palazzolo v. Coastal Res. Mgmt. Council*, No. C.A. 88-0297, 1997 WL 1526546, at \*1 (R.I. Super. Ct. Oct. 24, 1997).

184. *Id.*

185. David E. Cole, *Analytical Chronology of Palazzolo v. Rhode Island*, 30 B.C. ENVTL. AFF. L. REV. 171, 173 (2002).

“dredge Winnapaug Pond”<sup>186</sup> and to use the dredge to fill eighteen acres of coastal marshland on the property so that SGI could commercially develop the land.<sup>187</sup> DHR denied these applications for lack of information and because of sewage problems,<sup>188</sup> and SGI did not appeal the ruling.

In 1965, Rhode Island passed a law granting DHR the “authority to regulate the filling of coastal wetlands.”<sup>189</sup> The following year, SGI again applied to the DHR for a permit to dredge Winnapaug Pond for commercial development, but the DHR denied this application “to protect and preserve the coastal wetlands of the state.”<sup>190</sup> A few years later, SGI purchased more land in the area of Winnepaug Pond.<sup>191</sup>

In 1971, the Rhode Island Coastal Resources Management Council (“Council”) started regulating Rhode Island’s coastal wetlands and implemented a plan prohibiting the filling of those wetlands.<sup>192</sup> After SGI’s corporate charter was revoked in 1978, Palazzolo became the owner of the property in question.<sup>193</sup> Then, fifteen years after DHR denied his 1966 application,<sup>194</sup> from 1983 to 1985, Palazzolo filed applications with the Council identical to the previous applications to dredge Winnapaug Pond and fill the tidal marshlands on the property.<sup>195</sup> The Council denied all of these applications, but Palazzolo only appealed one of its decisions.<sup>196</sup> While this appeal was pending, he filed an inverse condemnation action and claimed that the Council’s rejection of his applications constituted a complete wipeout of his property’s value under *Lucas*.<sup>197</sup>

### A. Trial Court Decision

In 1997, the Rhode Island Superior Court held that the Council’s regulation of Palazzolo’s property was constitutional.<sup>198</sup> It found that Palazzolo did not suffer a complete wipeout because several witnesses testified that some of his property was developable and that parts of the property were worth more than

186. *Palazzolo*, 1997 WL 1526546, at \*1.

187. *Cole*, *supra* note 185, at 174.

188. *Id.*

189. *Id.* at 175.

190. *Id.*

191. *Id.* at 176.

192. *Palazzolo v. Coastal Res. Mgmt. Council*, No. C.A. 88-0297, 1997 WL 1526546, at \*1 (R.I. Super. Ct. Oct. 24, 1997).

193. *Cole*, *supra* note 185, at 178. The charter was revoked for failure to pay taxes. *Id.*

194. Thomas J. Koffer, *What to “Take” from Palazzolo and Tahoe-Sierra: A Temporary Loss for Property Rights*, 21 VA. ENVTL. L.J. 503, 509 (2003).

195. *Palazzolo*, 1997 WL 1526546, at \*2.

196. *Palazzolo v. State ex rel. Tavares*, 746 A.2d 707, 709 (R.I. 2000).

197. *Id.* at 711.

198. *Palazzolo*, 1997 WL 1526546, at \*5-7.

\$200,000.<sup>199</sup> Additionally, the court contended that filling the coastal marshland on Palazzolo's property would result in a twelve percent loss of salt marshes feeding into Winnapaug Pond, which would be detrimental to the wildlife in that area and create toxic levels of nitrate in the public's ground water.<sup>200</sup> Therefore, the court held that even if it had found the Council's regulation of Palazzolo's property constituted a complete wipeout, it still would have denied his action because filling the wetlands would amount to a public nuisance.<sup>201</sup>

Finally, the court held that Palazzolo did not have any investment-backed expectations under *Penn Central Transportation Co.*<sup>202</sup> The court stated that, because there were wetlands regulations in place by the DHR before the Council took over regulation of coastal wetlands, Palazzolo knew that he could not fill the marshlands on his property.<sup>203</sup> Therefore, he could not have had any investment-backed expectations for the parts of his property containing marshlands.<sup>204</sup>

### *B. Rhode Island Supreme Court Decision*

In 2000, the Rhode Island Supreme Court found that Palazzolo's regulatory takings claim was not ripe for review because Palazzolo did not exhaust his available administrative remedies.<sup>205</sup> The court further found that his claim was not ripe for review because he asked for compensation based on plans to build a seventy-four lot subdivision.<sup>206</sup> These subdivision plans were never the subject of a permit application and thus were never rejected by the Council under its wetlands regulations.<sup>207</sup>

Rejecting the claim on ripeness, the court did not reach many of the issues raised in amicus curiae, including arguments that the state owned the wetlands that Palazzolo sought to fill under the public trust doctrine.<sup>208</sup> However, the court affirmed the trial court's ruling that Palazzolo did not suffer a complete wipeout under *Lucas*.<sup>209</sup> It also affirmed the trial court's finding that Palazzolo did not have any investment-backed expectations for the

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199. *Id.* at \*5.

200. *Id.*

201. *Id.*

202. *Id.* at \*6.

203. *Id.* at \*4-6.

204. *Id.* at \*6.

205. *Palazzolo v. State ex rel. Tavares*, 746 A.2d 707, 714 (R.I. 2000).

206. *Id.*

207. *Id.* at 714.

208. See Brief of Defendant-Appellees, *Palazzolo v. State ex rel. Tavares*, 746 A.2d 707 (R.I. 2000) (No. 98-333A), 1999 WL 34749043 at \*11, \*13.

209. *Palazzolo*, 746 A.2d at 715.

development of the coastal marshlands on his property under *Penn Central Transportation Co.* because development of property not containing coastal marshlands would increase the worth of Palazzolo's land to about \$200,000.<sup>210</sup> Furthermore, the court held that because the wetlands regulations were in place before ownership of the property transferred from SGI to Palazzolo, the regulations constituted a background principle under *Lucas* and barred Palazzolo from bringing a regulatory takings claim against Rhode Island.<sup>211</sup>

### *C. U.S. Supreme Court Decision*

#### *1. Majority Decision and Concurring Opinions*

The U.S. Supreme Court held that Palazzolo could challenge Rhode Island's regulation of his property even though the Council's wetlands regulations were in effect before he became the owner of the property. Refusing to see Rhode Island's wetlands regulations as background principles of state property law under *Lucas*, the Court did away with the notice rule,<sup>212</sup> stating that if all transfers of titles in property after a law passed barred owners from bringing regulatory takings claims then a "[s]tate would be allowed, in effect, to put an expiration date on the Takings Clause."<sup>213</sup> Justice Kennedy contended that "a regulation that otherwise would be unconstitutional absent compensation is not transformed into a background principle of the [s]tate's law by mere virtue of the passage of title."<sup>214</sup> The majority opinion also stated that Palazzolo did not suffer a complete wipeout of his property's value under *Lucas*.<sup>215</sup> However, the Court remanded the case to the Rhode Island Supreme Court for a determination under *Penn Central Transportation Co.* of whether any investment-backed expectations existed in the property with the regulations in place.<sup>216</sup>

Although the majority opinion did not specify whether the remand court should consider the wetlands regulations when determining the reasonableness of Palazzolo's investment-backed expectations, the concurring and dissenting opinions disagreed on this issue. Surprisingly, in light of joining Justice Scalia's dissent in

210. *Id.* at 715-16.

211. *Id.*

212. See *supra* Part I.B.1.; see also Koffer, *supra* note 194, at 507 (noting that "[t]he Court's treatment of the notice rule is . . . reflective of the notion that the Court typically favors property rights").

213. Palazzolo v. Rhode Island, 533 U.S. 606, 627 (2001).

214. *Id.* at 629-30.

215. *Id.* at 630.

216. *Id.* at 632.

*Stevens* and authoring the dissent in *Phillips Petroleum Co.*, Justice O'Connor's concurrence maintained that the wetlands regulations should be considered in determining the expectations.<sup>217</sup> Justice Scalia's concurrence, on the other hand, stated that the wetlands regulations should have no bearing on the *Penn Central Transportation Co.* analysis.<sup>218</sup> Justice Stevens concurred that the case was ripe for review but dissented from the majority's decision finding a taking.<sup>219</sup> He argued that Palazzolo did not have standing to bring a regulatory takings claim against Rhode Island because he did not lose any rights after he purchased the property.<sup>220</sup> Conversely, Justices Ginsburg, Souter, and Breyer dissented from the majority opinion, arguing that the case was not ripe for review.<sup>221</sup>

In the majority opinion, Justice Kennedy did not even mention the possibility of public rights in Palazzolo's property. "To be fair, the issue was not properly before the Court because it had not been a basis for the Rhode Island Supreme Court's decision . . . . But the Supreme Court could have recognized at least that the issue was central to the determination of the case on remand."<sup>222</sup> In fact, this issue was presented to the Court in *amicus curiae*,<sup>223</sup> so none of the justices may claim that they were not aware of the possibility of public rights in this case.

Moreover, it seems that the majority decision attempted to close the door to any analysis of public rights in Palazzolo's property as a background principle under *Lucas*. The Court held "that for a regulation to become part of the background principles of a parcel's property rights there must be something more objective than one individual's purchase after the transfer of title."<sup>224</sup> Discussing what constituted an objective factor, Justice Kennedy cited a passage from *Lucas*, stating that "[t]he 'total taking' inquiry we require today will ordinarily entail . . . analysis of, among other things, the degree of harm to public lands and resources . . . ."<sup>225</sup> However, he did not "articulate any criteria for what would make a regulation part of the background principles of a state's property laws"<sup>226</sup> and contended that the Court had "no occasion to consider

217. *Id.* at 635-36 (O'Connor, J., concurring).

218. *Id.* at 636-37 (Scalia, J., concurring).

219. *Id.* at 638 (Stevens, J., concurring in part, dissenting in part).

220. *Id.* at 641-42.

221. *Id.* at 645-55 (Ginsburg, J., dissenting).

222. COLE, *supra* note 15, at 169.

223. *See, e.g.*, Brief of the Nat'l Conference of State Legislatures et. al. as Amici Curiae in Support of Respondents, *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001) (No. 99-2047), 2001 WL 15623 at \*23-25.

224. Drew, *supra* note 39, at 426.

225. *Palazzolo*, 533 U.S. 606, 630 (2001) (citing *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1029-30 (1992)).

226. Drew, *supra* note 39, at 426.

the precise circumstances” in that case.<sup>227</sup> By not considering the possibility that the public owned the coastal marshlands on Palazzolo’s property under the public trust doctrine, Justice Kennedy and the majority of the Court did not see the public trust doctrine as constituting a background principle under *Lucas* that could have defeated Palazzolo’s takings claim.

The Court also did not consider whether filling the coastal marshlands would constitute a public nuisance. Justice Kennedy stated that the question of whether a state law “can limit all economic use of property”<sup>228</sup> depends on factors, “such as the nature of the land use proscribed”<sup>229</sup> and the “degree of harm to public lands and resources.”<sup>230</sup> However, the Court completely ignored findings by the Rhode Island Supreme Court and the Rhode Island Superior Court that filling the wetlands on Palazzolo’s property would amount to a public nuisance because it would eliminate several bird and plant species from the community, “destroy the natural shoreline protection,”<sup>231</sup> and “pose severe risks to the public drinking water supplies.”<sup>232</sup> In fact, the majority opinion did not “mention . . . the critical role wetlands and coastal property play in preserving the environment” and was “devoid of any discussion regarding the adverse environmental implications of Palazzolo’s application to fill his wetlands.”<sup>233</sup> Therefore, although the Court held in *Lucas* that nuisance laws already in place upon transfer of title constitute background principles and bar a landowner from recovering compensation for a taking,<sup>234</sup> the Court in this case ignored public rights in shoreline protection, public rights in clean drinking water, and Rhode Island’s nuisance laws as a background principle prohibiting Palazzolo from recovery.

## 2. Justice Scalia’s Concurrence

Justice Scalia claimed, in his five paragraph concurrence, that if Rhode Island’s regulations were allowed without compensating Palazzolo, then Rhode Island would receive a windfall.<sup>235</sup> Comparing *Palazzolo* to a situation in which a sly real estate developer purchases land from a naïve landowner who believes an unconstitutional government regulation is valid, he stated that

227. *Palazzolo*, 533 U.S. at 629.

228. *Id.* at 630.

229. *Id.*

230. *Id.*

231. Koffer, *supra* note 194, at 511.

232. *Id.*

233. *Id.* at 510.

234. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1029 (1992).

235. *Palazzolo v. Rhode Island*, 533 U.S. 606, 636-37 (2001) (Scalia, J., concurring).

there is nothing to be said for giving [a windfall] to the government[—]which not only did not lose something it owned, but is both the cause of the miscarriage of “fairness” and the only one of the three parties involved in the miscarriage (government, naïve original owner, and sharp real estate developer) which acted unlawfully[—]indeed unconstitutionally.<sup>236</sup>

Justice Scalia then called Rhode Island a “thief clothed with the indicia of title” in regulating Palazzolo’s property without compensation.<sup>237</sup>

But was this really a windfall for Rhode Island? Councils and associations of state governors and legislatures argued as *amicus curiae* that Rhode Island owned the coastal marshlands in dispute in trust for the public under Rhode Island law, which predated the wetlands regulations and Palazzolo’s ownership of the property.<sup>238</sup> If Rhode Island owned the land to begin with, then regulating the marshlands without compensating Palazzolo would not constitute a windfall to the government. In fact, on remand, the Rhode Island Superior Court determined almost the exact opposite of what Justice Scalia argued—that Rhode Island owned the coastal marshlands in trust for the public and did not owe Palazzolo a dime.<sup>239</sup>

### 3. Justice Stevens’s Dissent

Justice Stevens’s dissent may indicate that public rights were at stake in *Palazzolo*.<sup>240</sup> Justice Stevens stated that “[w]hether either [Palazzolo] or his predecessors in title ever owned such an interest, and if so, when it was acquired by the [s]tate, are questions of state law.”<sup>241</sup> Because public rights in navigable waters are controlled by state law, it is possible that Justice Stevens was trying to indicate what the lower court should consider on remand.<sup>242</sup> Nevertheless, this is the only statement by Justice Stevens that can be construed as recognition of the conflict between public and private property rights; his subsequent statements only discuss the ripeness and standing issues of Palazzolo’s claim. In fact, al-

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236. *Id.*

237. *Id.* at 637.

238. See Brief of the Nat’l Conference of State Legislatures et. al, *supra* note 223, at \*23-25.

239. *Palazzolo v. State*, No. WM 88-0297, 2005 WL 1645974, at \*7, \*15 (R.I. Super. Ct. July 5, 2005).

240. See COLE, *supra* note 15, at 170.

241. *Palazzolo v. Rhode Island*, 533 U.S. 606, 645 (2001) (Stevens, J., dissenting).

242. COLE, *supra* note 15, at 170.



though Justice Stevens argued that Palazzolo did not have standing to file suit against Rhode Island,<sup>243</sup> he ignored the possibility that Palazzolo may not have had standing to bring a regulatory takings claim against Rhode Island if the state owned the coastal marshlands in question under the public trust doctrine. Therefore, it is unclear whether Justice Stevens identified the public rights at stake in *Palazzolo*. Even if he did, not bringing the issue to the forefront of the Court's discussion shows the lack of the Court's interest in protecting public rights in property.

#### *D. Decision on Remand*

The U.S. Supreme Court remanded *Palazzolo* to the Rhode Island Supreme Court for a determination of Palazzolo's investment-backed expectations under *Penn Central Transportation Co.*<sup>244</sup> The Rhode Island Supreme Court remanded the case to the superior court to determine Palazzolo's expectations and the extent of Palazzolo's title in the property in question.<sup>245</sup> The state supreme court, perhaps taking a hint from Justice Stevens's dissent, required the state and Palazzolo's counsel to submit memoranda commenting on the need for a property survey to determine which of Palazzolo's lands were below the mean high tide line of Winnepaug Pond and arguing for or against application of the public trust doctrine to the investment-backed expectations analysis.<sup>246</sup>

The superior court held that filling the wetlands on Palazzolo's property would constitute a public nuisance because it would contaminate the public's water supply and have detrimental effects on wildlife in the area.<sup>247</sup> Stating that a "public nuisance is an unreasonable interference with a right common to the general public,"<sup>248</sup> the court held that Rhode Island's nuisance law constituted a background principle under *Lucas* and thus barred Palazzolo from compensation for a regulatory taking.<sup>249</sup>

The court further held that Rhode Island, under the public trust doctrine, owned the wetlands on Palazzolo's property that were below the mean high tide line, which constituted about half of the land that Palazzolo owned.<sup>250</sup> The court noted that even Palazzolo's attorney admitted during the 1997 trial that Palazzolo's

243. See *Palazzolo*, 533 U.S. at 640-45 (Stevens, J., dissenting).

244. *Id.* at 616 (majority opinion).

245. *Palazzolo v. State ex rel. Tavares*, 785 A.2d 561, 561 (R.I. 2001).

246. *Id.*

247. *Palazzolo v. State*, No. WM 88-0297, 2005 WL 1645974, at \*5 (R.I. Super. Ct. July 5, 2005).

248. *Id.* at \*4.

249. *Id.* at \*5.

250. See *id.* at \*2.

property was subject to the public trust doctrine.<sup>251</sup> Therefore, the court stated that Rhode Island's public trust laws dictated that Palazzolo and SGI never owned the coastal marshlands on the property in question and therefore never had a right to fill the marshlands because the land belonged to the public.<sup>252</sup>

Finally, the court found that Palazzolo's investment-backed expectations were met.<sup>253</sup> Contending that state permission to fill wetlands was required "long before [Palazzolo] acquired a property interest in the parcel in question,"<sup>254</sup> the court held that almost no development of the properties surrounding Palazzolo's was present<sup>255</sup> and that it would be unrealistic to assume that he would receive approval for a large subdivision.<sup>256</sup> The court also stated that Palazzolo benefited from the regulations on his property because even his real estate expert admitted that building a subdivision on the marshlands instead of a single family residence would decrease the property value.<sup>257</sup> Consequently, the court held that Palazzolo's proposed development plans "were not part of the 'bundle of rights' acquired when he . . . obtained title to the . . . parcel,"<sup>258</sup> that filling the marshlands would interfere with public rights by creating a public nuisance, and that the public owned half of the land in the parcel under the public trust doctrine.<sup>259</sup>

#### V. THE U.S. SUPREME COURT SHOULD ADJUDICATE PUBLIC RIGHTS IN PRIVATE PROPERTY WHEN DECIDING REGULATORY TAKINGS CASES

It could be argued that Rhode Island's lawyers are to blame for the U.S. Supreme Court's disregard of the public trust doctrine's relevance in *Palazzolo*. Indeed, those lawyers did not persuade the Rhode Island Superior Court or Supreme Court to specifically rule that Rhode Island owned the wetlands in question under the public trust doctrine. However, both of those courts ruled in favor of Rhode Island's wetlands regulations on other public rights grounds—nuisance law, one of the only acceptable background principles according to Justice Scalia.<sup>260</sup> Therefore, the U.S. Su-

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251. *Id.* at \*6 n.34.

252. *Id.* at \*7. The court theorized that Palazzolo's business partner realized the land was subject to the public trust doctrine and that many state approvals were required to develop the land, and because of this, he sold his shares in SGI to Palazzolo. *Id.* at \*12-13.

253. *Id.* at \*15.

254. *Id.* at \*2 n.18.

255. *Id.* at \*3.

256. *Id.* at \*3 n.29.

257. *Id.* at \*11 n.64.

258. *Id.* at \*14.

259. *Id.* at \*13-14.

260. *See Lucas v. S.C. Coastal Comm'n*, 505 U.S. 1003, 1029-31 (1992).

preme Court should have at least recognized that public rights were at stake in *Palazzolo*, whether they protected those rights or not.

Moreover, *Palazzolo* was not the only regulatory takings case where the Court ignored public property rights, only to find that the state court on remand denied compensation to the private owner based on those rights. In *McQueen v. South Carolina Coastal Council*,<sup>261</sup> another dispute over a landowner's ability to fill wetlands on his property, the U.S. Supreme Court vacated and remanded the South Carolina Supreme Court's opinion in light of *Palazzolo*.<sup>262</sup> The South Carolina Supreme Court had previously held that the owner had no investment-backed expectations in his property because wetland regulations were in place when the owner purchased the property.<sup>263</sup> On remand, that same court held that South Carolina owned the wetlands in trust for the public and that the landowner never owned the wetlands he sought to fill.<sup>264</sup>

#### *A. Public Property Rights are Worthy of Protection in Regulatory Takings Disputes*

What the U.S. Supreme Court justices' opinions in *Palazzolo* and the remand decisions in *Palazzolo* and *McQueen* suggest is that public rights are no longer part of the Supreme Court's modern regulatory takings jurisprudence and that this is out-of-step with state court takings decisions. Because private property rights—the individual's “bundle of sticks”—are the main focus of the Supreme Court, public rights are an afterthought. They are only given effect on remand, perhaps when the private owner has run out of money and can no longer afford to appeal state court decisions allowing the government to assert public rights in their property.<sup>265</sup>

However, public property rights are important and should at least be considered by the Supreme Court before granting private property owners compensation in regulatory takings decisions. In fact, nearly thirty-three percent of all public trust lands are held by private owners.<sup>266</sup> If the Court does not give effect to public rights in these lands, it will deny all citizens rights guaranteed to them since the Revolutionary War.<sup>267</sup> Furthermore, public property

261. 533 U.S. 943 (2001).

262. *Id.* at 943.

263. *McQueen v. S.C. Coastal Council*, 530 S.E.2d 628, 634-35 (S.C. 2000).

264. *McQueen v. S.C. Coastal Council*, 580 S.E.2d 116, 120 (S.C. 2003).

265. For example, the Rhode Island Superior Court's ruling on remand was not appealed by the landowner in *Palazzolo*.

266. Smith II & Sweeney, *supra* note 79, at 332.

267. *See supra* Part II.B., n.76.

rights under customary law, nuisance law, and the public trust doctrine are a useful vehicle for natural resource and wildlife preservation, flood prevention, and water quality control.<sup>268</sup> They also provide the basis for public access to America's beaches and state prevention of beach privatization.<sup>269</sup> Not recognizing these public property rights would severely limit the ability of states to prevent public harm by preempting floods, water contamination, and the depletion of natural resources.

*B. Reintegrating Consideration of Public Property Rights into U.S. Supreme Court Regulatory Takings Jurisprudence*

The *Palazzolo* remand decision is a reminder to the U.S. Supreme Court that the public has rights in private property where land meets water and that nothing in the U.S. Constitution states that private property owners should automatically win regulatory takings cases.<sup>270</sup> States are attempting to make room for public rights in the private owner's bundle of sticks, seeing property more as a web of interests than isolated parcels that have no effect on each other. In fact, "[i]n many, if not most, takings cases, the government is not just imposing on private property rights but attempting to vindicate public property rights, for which no compensation should be required."<sup>271</sup>

The lack of recognition of public property rights by the Supreme Court is a serious problem. The Court must change the way it thinks about property rights and must reintegrate a consideration of public interests into its regulatory takings jurisprudence to ensure that public property rights are given their full effect. Thus, before deciding to grant certiorari to a regulatory takings dispute, the Supreme Court should consider whether the landowner claiming a regulatory taking owns the land in the first place. This inquiry necessarily requires consideration of the state's public trust laws. If it is determined that the claimant does not own the land in question then the Court should defer to state law unless the state has unconstitutionally abused its power under the public trust doctrine. If the Court determines that the claimant owns the land in question and grants certiorari, the Court should consider whether sources of public rights, such as state customary law or

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268. See, e.g., *Palazzolo v. State*, No. WM 88-0297, 2005 WL 1645974, at \*12-15 (R.I. Super. Ct. July 5, 2005).

269. See *Matthews v. Bay Head Improvement Ass'n*, 471 A.2d 355, 365 (N.J. 1984).

270 If a landowner has no claim to the disputed property to begin with, "the Fifth Amendment's Takings Clause affords him no protection because he cannot claim a property right which he never possessed." Nussbaum, *supra* note 4, at 521.

271. COLE, *supra* note 15, at 166.

nuisance law, are background principles under *Lucas*, barring the landowner from compensation. If the regulation does not constitute a background principle, then the court should consider whether any public rights apply to the *Penn Central Transportation Co.* investment-backed expectations analysis. If public property rights are relevant in those circumstances, the Court should defer to state court decisions regarding those rights. Using this method, public property rights in regulatory takings disputes will not be overlooked by the Court and litigation costs will decrease because public rights issues will come to the forefront of any court's consideration, saving money for taxpayers and private owners.

#### VI. LOOKING TO THE FUTURE: WILL THE U.S. SUPREME COURT ENFORCE PUBLIC PROPERTY RIGHTS?

"Before 1986, in its nearly 200 years of deciding cases, the Supreme Court found only four instances in which a law or regulation amounted to a 'regulatory taking.' Then, in the first ten years of William H. Rehnquist's tenure as Chief Justice, the Court found four more."<sup>272</sup> This trend favoring private property rights did not end with Justice Rehnquist's death. Indeed, Chief Justice Roberts recently concurred with Justice Scalia's plurality opinion in *Rapanos v. United States*,<sup>273</sup> which sought to limit the definition of "navigable waters" under the Clean Water Act in a federal dispute over a landowner's ability to fill wetlands on his property.<sup>274</sup>

Therefore, persuading the U.S. Supreme Court to make room in the individual's bundle of sticks for public rights in private property is an arduous task and will require great efforts by state courts and attorneys. Despite Justice O'Connor's recent retirement from the bench, Justice Scalia remains particularly resistant to public property rights and will probably continue to insist that private property rights should win out over any public interests. Thus, states must convince other members of the Court that an "ad hoc, factual [inquiry]"<sup>275</sup> into the circumstances of each case requires a consideration of public rights in private property. State defense attorneys must have knowledge of state public trust laws, must research state customs, and must persuade state courts to rule in favor of public property rights on those grounds. Moreover,

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272. *Morris*, *supra* note 118, at 1023 (2003); *see also* *Cutting*, *supra* note 178, at 824 (arguing that in the past twelve years the U.S. Supreme Court has "underscored the sanctity of private property lines").

273. 547 U.S. 715 (2006).

274. *Id.* at 730-34 (Scalia, J., plurality opinion).

275. *Penn Cent. Trans. Co. v. New York*, 438 U.S. 104, 124 (1978).

state courts ought to clearly indicate where public property rights exist when writing opinions on regulatory takings disputes.

Whether states are successful in convincing the U.S. Supreme Court to recognize public property rights may be difficult to determine. The Court could support public interests by denying certiorari to a regulatory takings dispute where a state supreme court upholds a regulation according to the public trust doctrine, state customary law, or state nuisance law. Perhaps a better chance at testing the Court's consideration of public property rights will come in a future regulatory takings case where a private owner claims that the state is unconstitutionally expanding public rights. If certiorari is granted in one of those cases, as in *Palazzolo*, the Court will have an opportunity to define whether the public trust doctrine and other state laws constitute background principles under *Lucas*.

## VII. CONCLUSION

In many recent regulatory takings cases, private beachfront property owners have begun to fight state impositions of public beach access easements on their property in exchange for construction permits. For example, some regulatory takings cases "in southern California involve easements that were required by the State as a condition for building along the coastline in the 1980s."<sup>276</sup> Only now is the California Coastal Commission enforcing these easements, and private property owners are taking the state agency to court.<sup>277</sup> However, California is not alone. "From Maine to Miami, and Long Island Sound to Puget Sound, the fight taking place in [California] is repeating itself throughout the country. Most of these lawsuits concern the issue of beach access, and many involve the use of the [p]ublic [t]rust [d]octrine."<sup>278</sup> If any of these cases makes it to the U.S. Supreme Court, public property rights advocates and state governments must fight to ensure that the Court does not pass by another opportunity to recognize the importance of public rights in property where lands meets water.

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276. Morris, *supra* note 118, at 1016.

277. *Id.* at 1016; see generally Robert Garcia & Erica Flores Baltodano, *Free the Beach! Public Access, Equal Justice, and the California Coast*, 2 STAN. J. CIV. RTS. & CIV. LIBERTIES 143 (2005). One of these cases, *Malibu v. California Coastal Commission*, was recently dropped by entertainment mogul David Geffen and the city of Malibu after almost four years of litigation. 27 Cal. Rptr. 3d 501 (Cal. Ct. App. 2005).

278. Morris, *supra* note 118, at 1017.

# TORT-BASED CLIMATE CHANGE LITIGATION AND THE POLITICAL QUESTION DOCTRINE

AMELIA THORPE\*

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## I. INTRODUCTION

The political question doctrine has been revived in tort-based climate change cases. Four actions have now been heard in U.S. courts seeking relief for the nuisance of greenhouse gas emissions leading to global warming, and three have been dismissed as non-justiciable political questions. With an appeal and a fifth case now pending, this Article contends that there are strong legal grounds on which the appellants should succeed in overturning the political question bar.

In his 1962 opinion for the U.S. Supreme Court in *Baker v. Carr*, Justice Brennan summarized the political question doctrine.<sup>1</sup> Noting that the attributes of the doctrine “in various settings, diverge, combine, appear, and disappear in seeming disorderliness,” Justice Brennan reviewed the cases in which it had been considered.<sup>2</sup> From this, he derived six formulations that, if “inextricable” from the case, make dismissal on the basis of the political question doctrine appropriate:<sup>3</sup>

[1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy de-

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1. *Baker v. Carr*, 369 U.S. 186 (1962). After discussing the doctrine, Justice Brennan found that it did not apply to the case before the Court; allegations that a state apportionment statute violated the Equal Protection Clause were found to be justiciable. *Id.* at 228-32.

2. *Id.* at 210.

3. *Id.* at 217.

termination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of the government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.<sup>4</sup>

While Justice Brennan's opinion remains the most comprehensive judicial discussion of the political question doctrine, it achieved more in longevity than in clarity. His formulations did not succeed in resolving the disorderliness of the doctrine. Commentators continue to disagree about its wisdom, its rationale, its scope and even its existence.<sup>5</sup> Advocates of the doctrine at its most expansive promote it as a prudential doctrine, allowing the courts to avoid controversial issues. For example, Alexander Bickel saw it as a means to maintain the legitimacy of the courts and to guard against judicial activism: the courts could avoid legitimating bad laws without compromising principle by refusing to reach the merits in controversial cases.<sup>6</sup> This is an extreme position, however, as most commentators argue that its role should be reduced. Many advocate a "classical" version that ties the doctrine to the text of the Constitution and is to be used by the courts to avoid only those issues that the Constitution has committed for determination by another agency of government and not the courts.<sup>7</sup> Other commentators go further, arguing that the doctrine is unconstitutional in any form and should be abolished altogether.<sup>8</sup>

Within the courts, the doctrine is similarly uncertain. References to it have been infrequent and inconsistent.<sup>9</sup> Almost forty

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4. *Id.*

5. See, e.g., THE POLITICAL QUESTION DOCTRINE AND THE SUPREME COURT OF THE UNITED STATES (Nada Mourtada-Sabbah & Bruce E. Cain eds., 2007).

6. See ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 183-98 (1962).

7. See, e.g., Rachel E. Barkow, *More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237 (2002); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

8. See, e.g., Erwin Chemerinsky, *Who Should Be the Authoritative Interpreter of the Constitution? Why There Should Not Be a Political Question Doctrine*, in THE POLITICAL QUESTION DOCTRINE AND THE SUPREME COURT OF THE UNITED STATES 181-98 (Nada Mourtada-Sabbah & Bruce E. Cain eds., 2007); Martin H. Redish, *Judicial Review and the "Political Question"*, 79 NW. U. L. REV. 1031 (1984).

9. See, e.g., Mark Tushnet, *Law and Prudence in the Law of Justiciability: The Transformation and Disappearance of the Political Question Doctrine*, in THE POLITICAL QUESTION DOCTRINE AND THE SUPREME COURT OF THE UNITED STATES 47-74 (Nada Mourtada-Sabbah & Bruce E. Cain eds., 2007); Barkow, *supra* note 7.



years after *Baker v. Carr*, *Nixon v. United States* was only the second case to be dismissed by the Supreme Court on political question grounds.<sup>10</sup> The Court did not even discuss the doctrine in the 2000 presidential election cases.<sup>11</sup> Application of the doctrine is also subject to some doubt: in applying the *Baker* test, the *Nixon* Court noted that Justice Brennan's categories are more discrete in theory than in practice and that they often collapse into each other.<sup>12</sup>

This uncertainty is evident in the tort-based climate change cases. Five courts have now heard four actions seeking relief for the nuisance of greenhouse gas emissions: in three, the actions were dismissed on political question grounds, yet in the other two the doctrine was not mentioned.

The first claim for climate change under public nuisance, *Connecticut v. American Electric Power Co.*, was filed in July 2004 and decided in 2005.<sup>13</sup> Various states and non-profit land trusts brought an action under public nuisance against six electricity companies alleging that their emissions of greenhouse gases contributed to the nuisance of global warming.<sup>14</sup> The plaintiffs sued both on their own behalf to protect state-owned property, to which they alleged global warming will cause irreparable harm in places such as the hardwood forests of the Adirondack Park in New York, and as *parens patriae* on behalf of their citizens and residents, alleging global warming threatens public health, safety and well-being.<sup>15</sup> The plaintiffs sought an order holding the defendants jointly and severally liable for their contributions to global warming and enjoining them to abate their contributions by capping emissions of carbon dioxide and then reducing those emissions by a specified percentage each year for at least a decade.<sup>16</sup> The district court dismissed the suit under the political question doctrine, noting Congress's awareness of the global warming problem and its decision not to impose any formal limits on emissions, as well as the current administration's international negotiations.<sup>17</sup> Having

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10. *Nixon v. United States*, 506 U.S. 224, 228-29 (1993); Barkow, *supra* note 7, at 271-73.

11. Barkow, *supra* note 7, at 273-77.

12. *Nixon*, 506 U.S. at 228-29.

13. 406 F. Supp. 2d 265 (S.D.N.Y. 2005). *American Electric* was heard together with *Open Space Institute v. American Electric Power Co.*, in which a parallel claim was brought by a group of land trusts. *Id.*

14. *Id.* at 268. Plaintiffs were the states of Connecticut, New York, California, Iowa, New Jersey, Rhode Island, Vermont and Wisconsin; the City of New York and the Open Space Institute, Inc.; the Open Space Conservancy, Inc.; and the Audubon Society of New Hampshire. Defendants were American Electric Power Company, Inc.; American Electric Power Service Corporation; the Southern Company; Tennessee Valley Authority; Xcel Energy, Inc.; and Cinergy Corporation. *Id.* at 267.

15. *Id.* at 268.

16. *Id.* at 270.

17. *Id.* at 274.

commenced her opinion with a description of the constitutional system of checks and balances and its requirement that political questions be decided by political branches accountable to the people,<sup>18</sup> Judge Preska concluded that the matter was unsuitable for judicial resolution without an initial policy determination.<sup>19</sup> The plaintiffs' appeal is pending before the Second Circuit.

In the second climate change claim under public nuisance, *Korsinsky v. U.S. Environmental Protection Agency*, a New York resident brought an action against state and federal environmental agencies in 2005.<sup>20</sup> Claiming that he was particularly vulnerable to environmental pollution due to sinus-related diseases and that he developed a mental sickness from learning of the danger of pollution, the plaintiff alleged that the agencies' emissions and their failure to implement "practical, feasible and economically viable options" to eliminate carbon dioxide emissions contributed to the nuisance of global warming.<sup>21</sup> The plaintiff sought an order holding the agencies jointly and severally liable for their contributions to global warming and enjoining them from contributing further to global warming by eliminating their emissions of carbon dioxide and implementing an invention proposed by the plaintiff.<sup>22</sup> The District Court dismissed the case for lack of jurisdiction, finding the alleged harms insufficient to confer standing.<sup>23</sup> While Judge Buchwald noted that "the vast majority of this discussion appears to have been copied verbatim from the complaint in [the] separate case," *American Electric*, he did not refer to the political question doctrine in deciding *Korsinsky*.<sup>24</sup> On appeal, the Second Circuit affirmed the dismissal for lack of subject matter jurisdiction.<sup>25</sup>

The third action to reach the courts was *Comer v. Nationwide Mutual Insurance Co.*, in which owners of properties damaged in Hurricane Katrina brought a class action against insurers, mortgage lenders, chemical companies and oil companies.<sup>26</sup> The plaintiffs alleged that the insurers and mortgage lenders breached their obligations to them as insureds and mortgagees and that the chemical and oil companies caused damage to their properties through

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18. *Id.* at 267.

19. *Id.* at 273.

20. *Korsinsky v. U.S. Env'tl. Prot. Agency*, No. 05 Civ. 859(NRB), 2005 WL 2414744 (S.D.N.Y. Sept. 29, 2005). Defendants were the U.S. Environmental Protection Agency, the New York State Department of Environmental Conservation and the New York City Department of Environmental Protection. *Id.*

21. *Id.* at \*1-2.

22. *Id.* at \*1.

23. *Id.* at \*2-3.

24. *Id.* at \*1 n.2.

25. *Korsinsky v. U.S. Env'tl. Prot. Agency*, No. 05-6802-cv, 2006 WL 2334976, at \*1 (2d Cir. Aug. 10, 2006).

26. No. 1:05 CV 436 LTD RHW, 2006 WL 1066645, at \*1 (S.D. Miss. Feb. 23, 2006).

actions that have contributed to global warming.<sup>27</sup> In view of the different theories of recovery underlying the claims against the insurers and lenders compared with those against the chemical and oil companies, the Court granted the plaintiffs leave to file an amended complaint to clarify their claims but denied the plaintiffs' motion for leave as to the insurance and mortgage companies.<sup>28</sup> Judge Senter commented on the prospects for such claims, noting probable issues with proving causation, but did not discuss the political question doctrine.<sup>29</sup>

The plaintiffs' amended complaint added coal companies as defendants and, in addition to the nuisance claim, alleged unjust enrichment, civil conspiracy, aiding and abetting, trespass, negligence, fraudulent misrepresentation and concealment.<sup>30</sup> The plaintiffs sought compensatory, hedonic and punitive damages: namely, loss of property; loss of the use and enjoyment of their property; loss of business and/or income; past, present and future clean-up expenses; disruption of the normal course of their lives; loss of loved ones; mental anguish and emotional distress; and personal injury.<sup>31</sup> At the hearing, the district court granted the defendants' motion to dismiss for lack of standing and on political question grounds.<sup>32</sup> Judge Guirola noted that many states were adopting legislation to respond to global warming and that this was the appropriate venue for the issue.<sup>33</sup> He also noted that his decision would likely be reviewed by an appellate court and that such review would be desirable prior to the expenditure of what he anticipated would be very high discovery costs.<sup>34</sup>

The most recent decision, *California v. General Motors Corp.*, came down in September 2007.<sup>35</sup> Suing in its quasi-sovereign, proprietary and *parens patriae* capacities, the plaintiff sought monetary damages and a declaration of liability for future monetary

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27. *Id.* at \*1.

28. *Id.* at \*3-4.

29. *Id.* at \*3.

30. Third Amended Class Action Complaint, ¶¶ 21-41, *Comer v. Murphy Oil, U.S.A.*, No. 1:05-cv-00436-LTS-RHW, 2006 WL 1474089 (S.D. Miss. Apr. 19, 2006).

31. *Id.* ¶ 40.

32. Transcript of Hearing on Defendants' Motion to Dismiss at 40-41, *Comer v. Murphy Oil, U.S.A.*, No. 1:05-CV-436-LG-RHW (S.D. Miss. Aug. 30, 2007) (on file with author); Order Granting Defendants' Motion to Dismiss at 1, *Comer v. Murphy Oil, U.S.A.*, No. 1:05-CV-436-LG-RHW (S.D. Miss. Aug. 30, 2007) (providing no further reasons for granting the motion, stating only that the decision was made "[f]or the reasons stated into the record at hearing."), available at [http://www.arnoldporter.com/resources/documents/Comer\\_v\\_MurphyOilUSA.pdf](http://www.arnoldporter.com/resources/documents/Comer_v_MurphyOilUSA.pdf).

33. Transcript of Hearing on Defendants' Motion to Dismiss at 36-39, *Comer*, No. 1:05-CV-436-LG-RHW (on file with author).

34. *Id.*

35. Order Granting Defendants' Motion to Dismiss, *California v. Gen. Motors Corp.*, No. C06-05755 MJJ, 2007 WL 2726871 (N.D. Cal. Sept. 17, 2007).

damages from six motor vehicle manufacturers for their contributions to the public nuisance of global warming.<sup>36</sup> Judge Jenkins dismissed the action, following Judge Preska's decision in *American Electric* in which it was found that the case raised a non-justiciable political question.<sup>37</sup>

The latest action, *Native Village of Kivalina v. Exxon Mobil Corp.*,<sup>38</sup> is scheduled for hearing in December 2008.<sup>39</sup> It was brought by an Inuit village against one coal, nine oil and fourteen energy companies.<sup>40</sup> The plaintiffs alleged that the defendants' emissions contribute to the nuisance of global warming, causing special injury to their village in the form of an imminent threat of permanent destruction through storm damage and erosion.<sup>41</sup> The plaintiffs claimed damages to cover the cost of relocating the village.<sup>42</sup> The plaintiffs also asserted civil conspiracy and concert of action claims for certain defendants' participation in conspiratorial and other actions intended to further the defendants' abilities to contribute to global warming.<sup>43</sup> The political question doctrine was neither discussed in the complaint nor in the defendants' motion to dismiss.<sup>44</sup>

The significance of these decisions for the political question doctrine is unclear. None of the opinions discussed the fact that the doctrine was decisive in some cases yet ignored in others. Neither Judge Senter in *Comer* nor Judge Buchwald in *Korsinsky* mentioned the political question doctrine, leaving no guide as to why or whether those courts determined that it did not apply.<sup>45</sup> Given the fact that *American Electric* had been decided, this silence is somewhat surprising, particularly given Judge Buchwald's recognition

36. Complaint for Damages and Declaratory Judgment, *California v. Gen. Motors Corp.*, No. 06CV05755, 2006 WL 2726547 (N.D. Cal. Sept. 20, 2006). The defendants were General Motors Corporation; Toyota Motor North America, Incorporated; Ford Motor Company; Honda North America; Chrysler Motors Corporation; and Nissan North America, Inc. *Id.*

37. Order Granting Defendants' Motion to Dismiss, *Gen. Motors*, 2007 WL 2726871, at \*17.

38. Order Re: Case Management Conference, No. C 08-01138 SBA, 2008 WL 2951742 (C.D. Cal. May 16, 2008).

39. PointofLaw.com, Forum: Kavalina Update, <http://www.pointoflaw.com/archives/2008/07/kivalina-update.php> (last visited Feb. 24, 2009).

40. Complaint for Damages and Demand for Jury Trial, *Native Village of Kivalina v. Exxon Mobil Corp.*, No. C 08-01138 SBA (C.D. Cal. Feb. 26, 2008), available at <http://climatelaw.org/cases/country/us/kivalina/Kivalina%20Complaint.pdf>.

41. *Id.* at 1-2.

42. *Id.* at 1.

43. *Id.*

44. See *id.*; Notice of Motion and Motion of Certain Oil Company Defendants to Dismiss Plaintiffs' Complaint Pursuant to Fed. R. Civ. P. 12(b)(6), No. C 08-01138 SBA (N.D. Cal. June 30, 2008), available at <http://www.pawalaw.com/assets/docs/motion-to-dismiss-by-oil-co.pdf>.

45. *Comer v. Nationwide Mutual Ins. Co.*, No. 1:05 CV 436 LTD RHW, 2006 WL 1066645 (S.D. Miss. Feb. 23, 2006); *Korsinsky v. U.S. Envtl. Prot. Agency*, No. 05 Civ. 859(NRB), 2005 WL 2414744 (S.D.N.Y. Sept. 29, 2005).

that much of Mr. Korsinsky's complaint was taken from the *American Electric* brief.<sup>46</sup> In *General Motors*, Judge Jenkins similarly made no effort to distinguish *Korsinsky*; he relied on *American Electric* without mentioning the *Korsinsky* decision.<sup>47</sup> More significantly, neither Judge Preska nor Judge Jenkins referred to the considerable debate on the political question doctrine or its increasingly infrequent use by the Supreme Court.<sup>48</sup> Other than a recognition by Judge Jenkins that there is some fluidity between the six *Baker* categories,<sup>49</sup> there was no suggestion that the doctrine is uncertain or in decline, much less that its revival by those courts may be controversial.

It is thus arguable that the district courts' findings that the political question doctrine presents a bar to tort-based climate change litigation were not well-considered. The doctrine was perhaps welcomed with little question as a means to avoid reaching the merits in such high-profile, controversial cases. With *American Electric* soon to be heard before the Second Circuit, that court is likely to consider the applicability of the doctrine to such actions with greater scrutiny. There are strong grounds on which Judge Preska's opinion on the political question doctrine should be overturned. In line with this assertion, the omission of the political question doctrine from the *Kivalina* submissions is appropriate and should be maintained when this case is heard in court.

This Article will critically consider the grounds on which the political question doctrine was found to apply in *American Electric*, *Comer* and *General Motors*. It will begin with the third *Baker* test, raised first and relied on most by the courts. It will argue that the courts' analysis of this test essentially relies on the reasoning applied in the "regulation through litigation" critique that emerged in response to the tobacco litigation. It will contend that this critique is flawed with respect to that litigation, that it is no more successful when applied to climate change and, therefore, that the finding of non-justiciability on this ground should not be sustained.

Second, the Article will consider the more recent analysis of the first and second *Baker* tests in *General Motors* and the related reasoning on the third *Baker* test in *Comer*. It will argue that this analysis is inconsistent with tort doctrine and thus potentially problematic for many less controversial tort cases. It will suggest that, taken to its logical conclusion, such reasoning could eviscerate the tort system, taking the political question doctrine well be-

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46. *Korinsky*, 2005 WL 2414744, at \*1 n.2.

47. See Order Granting Defendants' Motion to Dismiss, *California v. Gen. Motors Corp.*, No. C06-05755 MJJ, 2007 WL 2726871 (N.D. Cal. Sept. 17, 2007).

48. See *id.*; *Connecticut v. Am. Elec. Power Co.*, 406 F. Supp. 2d 265 (S.D.N.Y. 2005).

49. Order Granting Defendants' Motion to Dismiss, *Gen. Motors*, 2007 WL 2726871, at \*6.

yond the role envisaged for it by even its strongest advocates. Finding no reasonable ground on which the political question doctrine may apply to bar tort-based climate change litigation, the Article will conclude that this bar should be overturned when *American Electric* reaches the Second Circuit.

## II. THE THIRD *BAKER* TEST AND REGULATION THROUGH LITIGATION

The third *Baker* factor was decisive in *American Electric*, *Comer* and *General Motors*. All three judges found it impossible to decide the cases before them without “an initial policy determination of a kind clearly for nonjudicial discretion.”<sup>50</sup> Judge Preska explained:

The scope and magnitude of the relief Plaintiffs seek reveals the *transcendently legislative nature of this litigation*. Plaintiffs ask this Court to cap carbon dioxide emissions and mandate annual reductions of an as-yet-unspecified percentage. Such relief would, at a minimum, require this Court to: (1) determine the appropriate level at which to cap the carbon dioxide emissions of these Defendants; (2) determine the appropriate percentage reduction to impose upon Defendants; (3) create a schedule to implement those reductions; (4) determine and balance the implications of such relief on the United States’ ongoing negotiations with other nations concerning global climate change; (5) assess and measure available alternative energy resources; and (6) determine and balance the implications of such relief on the United States’ energy sufficiency and thus its national security[—]all without an “initial policy determination” having been made by the elected branches.<sup>51</sup>

In *American Electric*, Judge Preska’s finding that the pollution as public nuisance cases cited by the plaintiff were inapplicable as precedents followed from her characterization of the relief requested as the regulation of greenhouse gas emissions. On this analysis, Judge Preska found that the court could not simply assess whether and to what extent the defendant had harmed the plaintiff as a basis from which to fashion appropriate relief. Rather, the court would need to consider all of the issues associated

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50. *Baker v. Carr*, 369 U.S. 186, 217 (1962).

51. *Am. Elec. Power Co.*, 406 F. Supp. 2d at 272-73 (emphasis added) (citation omitted).

with global warming, making policy determinations that would have implications for “[v]irtually every sector of the US economy” as well as foreign policy.<sup>52</sup> Judge Preska emphasized the fact that Congress had considered climate change and specifically refused to impose limits on carbon dioxide emissions.<sup>53</sup> She also cited several statements made earlier by the U.S. Environmental Protection Agency (EPA), including a submission that “[u]nilateral [regulation of carbon dioxide emissions in the United States] could also weaken U.S. efforts to persuade key developing countries to reduce the [greenhouse gas] intensity of their economies.”<sup>54</sup> Judge Preska did not discuss the declaratory relief also sought by the plaintiffs, nor did she consider the court’s discretion to award damages in lieu of an injunction.<sup>55</sup>

While Judge Guirola cited the third *Baker* test in *Comer*, his reasoning relates more to the second test. In a very brief explanation delivered at the hearing, he found that a decision on the merits would require the court to develop standards to assess whether the defendants’ conduct was unreasonable; that this would require the court to balance economic, environmental, foreign policy and national security interests; and that such balancing was a matter of policy for the executive and legislative branches of government.<sup>56</sup> The discussion of the second *Baker* test in the following section is thus more relevant to Judge Guirola’s decision.

Judge Jenkins’ much lengthier decision in *General Motors* followed Judge Preska’s argument, citing both her opinion and the EPA statements to which she referred. He noted that the plaintiffs in *General Motors* sought equitable relief rather than damages, but he found this irrelevant to his analysis.<sup>57</sup> Like Judge Preska,

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52. *Id.* at 273 (citation omitted).

53. *Id.* at 274 (“The explicit statements of Congress and the Executive on the issue of global climate change in general and their specific refusal to impose *the limits on carbon dioxide emissions Plaintiffs now seek to impose by judicial fiat* confirm that making the ‘initial policy determination[s]’ addressing global climate change is an undertaking for the political branches.” (emphasis added)).

54. *Id.* at 273 (citation omitted).

55. *See id.*

56. Transcript of Hearing on Defendants’ Motion to Dismiss at 40, *Comer v. Murphy Oil, U.S.A.*, No. 1:05-CV-436-LG-RHW (S.D. Miss. Aug. 30, 2007) (on file with the author) (“It is clear from the complaint and clear from the arguments here today that what you are asking this Court to do is what *Baker versus Carr* told me not to do, and that is to balance economic, environmental, foreign policy, and national security interest and make an initial policy determination of a kind which is clearly nonjudicial. Adjudication of the plaintiffs’ claims in this case would necessitate the formulation of standards dictating, for example, the amount of greenhouse gas emissions that would be excessive and the scientific and policy reasons behind those standards. These policy decisions are best left to the executive and to the legislative branches of the government, who are not only in the best position to make those decisions but are constitutionally empowered to do so.”).

57. Order Granting Defendants’ Motion to Dismiss, *California v. Gen. Motors Corp.*, No. C06-05755 MJJ, 2007 WL 2726871, at \*8 (N.D. Cal. Sept. 17, 2007). Judge Jenkins

Judges Jenkins and Guirola did not discuss whether the declaratory relief also sought by the plaintiffs might avoid the political question bar on this ground.<sup>58</sup> This section will examine Judge Preska's reasoning, arguing that it fails to justify dismissal of either case as a non-justiciable political question.

In her characterization of the relief sought as "transcendentally legislative," Judge Preska recalls the "regulation through litigation" critique.<sup>59</sup> Similar parallels are evident in Judge Jenkins' opinion, as he referenced both Judge Preska's opinion and statements she cited from the EPA regarding the dangers of "unilateral regulation" and imposing greenhouse gas regulation "by judicial fiat."<sup>60</sup> Although these theoretical underpinnings were not expressed in either decision, neither Judge Jenkins nor Judge Preska supported their application of the third *Baker* factor by much more than "regulation through litigation" type reasoning.<sup>61</sup> Judges Preska and Jenkins may thus be aligned with the many commentators outside the courts who have explicitly used this critique to attack tort-based climate change litigation.<sup>62</sup>

Such association does not strengthen these decisions. Upon analysis, the "regulation through litigation" critique is unpersuasive regarding even the tobacco litigation in response to which it developed. It is similarly unconvincing when applied to climate change actions. Operation of the third *Baker* test as a bar to climate change actions in public nuisance cannot be sustained on these grounds.

The "regulation through litigation" critique emerged in response to the tobacco litigation, particularly the Master Settlement Agreement (MSA), by which the plaintiffs secured not merely record damages but a proportion of cigarette sales for twenty-five years (widely described as a de facto system of taxation), limits on advertising, contributions to research, and programs to reduce teen smoking.<sup>63</sup> The plaintiffs' success in obtaining the MSA has

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stated that, in either case, the Court would need to determine what level of emissions would be unreasonable. *Id.* This is contradicted by the Restatement, however, which states that reasonableness is determined by reference to its effects on the rights of the public rather than the nature of the defendants' conduct. RESTATEMENT (SECOND) OF TORTS § 821B(1) (1979).

58. See Order Granting Defendants' Motion to Dismiss, *Gen. Motors*, 2007 WL 2726871 (Order of Judge Jenkins); Transcript of Hearing on Defendants' Motion to Dismiss, *Comer*, No. 1:05-CV-436-LG-RHW (on file with author) (hearing conducted by Judge Guirola).

59. *Connecticut v. Am. Elec. Power Co.*, 406 F. Supp. 2d 265, 272 (S.D.N.Y. 2005).

60. Order Granting Defendants' Motion to Dismiss, *Gen. Motors*, 2007 WL 2726871, at \*7.

61. *Id.* at \*6-13; *Am. Elec. Power*, 406 F. Supp. 2d at 272.

62. See, e.g., Joni Hersch & W. Kip Viscusi, *Allocating Responsibility for the Failure of Global Warming Policies*, 155 U. PA. L. REV. 1657 (2007).

63. W. Kip Viscusi, *A Postmortem on the Cigarette Settlement*, 29 CUMB. L. REV. 523, 538 (1999).



since led to additional tobacco actions as well as tort actions for products such as firearms, breast implants, lead-based paint and fast food. The “regulation through litigation”<sup>64</sup> critique emerged among commentators who saw this agreement as taking the judicial process beyond its constitutional role, usurping the proper function of the legislature and unfairly penalizing unpopular industries.<sup>65</sup> W. Kip Viscusi, who was directly involved in the litigation and has since written extensively on the subject, has been a key proponent of this critique. Viscusi argues that the tobacco litigation and the lawsuits it has encouraged represent a new, undesirable genre of litigation in which the courts are taking on broad policy problems better left to legislatures.<sup>66</sup> In contrast to the transparency and accountability offered by the legislative process, critics argue, this litigation generates bad regulation that favours lawyers and interest groups.<sup>67</sup> More fundamentally, the process itself is claimed to be undesirable, providing a means to bypass Congress and legislative procedure.<sup>68</sup>

These arguments are not convincing. The suggestion that court-created policy will generally be inferior to that produced by the legislature is contradicted by a number of studies.<sup>69</sup> These

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64. The coining of this phrase is frequently attributed to Robert B. Reich. See Robert B. Reich, *Regulation is Out, Litigation is In*, USA TODAY, Feb. 11, 1999, at 15A.

65. See, e.g., Robert A. Levy, *Taxation Through Litigation*, in POLITICS, TAXATION, AND THE RULE OF LAW: THE POWER TO TAX IN CONSTITUTIONAL PERSPECTIVE 145-66 (Donald P. Racherer & Richard E. Wagner eds., 2002); Michael I. Krauss, *Regulation Masquerading as Judgment: Chaos Masquerading as Tort Law*, 71 MISS. L.J. 631 (2001); Arthur B. LaFrance, *Tobacco Litigation: Smoke, Mirrors and Public Policy*, 26 AM. J.L. & MED. 187 (2000); Jeff Reh, *Social Issue Litigation and the Route Around Democracy*, 37 HARV. J. ON LEGIS. 515 (2000); Linda A. Willett, *Litigation as an Alternative to Regulation: Problems Created by Follow-On Lawsuits with Multiple Outcomes*, 18 GEO. J. LEGAL ETHICS 1477 (2005); Michael DeBow, *Restraining State Attorneys General, Curbing Government Lawsuit Abuse*, POLY ANALYSIS, May 10, 2002, available at [http://www.cato.org/pub\\_display.php?pub\\_id=1296](http://www.cato.org/pub_display.php?pub_id=1296).

66. W. Kip Viscusi, *The Governmental Composition of the Insurance Costs of Smoking*, 42 J.L. & ECON. 575 (1999).

67. DeBow, *supra* note 65, at 1.

68. The Center for Regulatory Effectiveness defines regulation by litigation as a process in which

private parties and Federal agencies seek to use litigation to bypass Congress and the regulatory process established by Congress in the Administrative Procedure Act. When a regulatory policy goal cannot be achieved legislatively or through the issuance of rules and regulations, private parties and Federal agencies have, on many occasions, sought to shift the power to tax and regulate businesses into the courts and out of the hands of our legislative representatives, thus avoiding open legislative procedures, public participation, and administrative due process.

Center for Regulatory Effectiveness, *What Is Regulation by Litigation?*, <http://www.thecre.com/regbylit/about.html> (last visited Feb. 24, 2009).

69. In a general review of the literature relating to judicial capacity, one author suggests that courts are in fact capable of resolving complex questions of social policy and that

studies have shown that judicial solutions are not necessarily any less sensitive to complex policy issues than legislative solutions.<sup>70</sup> The different point of view offered by judges may in fact be a useful counterpart to experts. Further, since issues of expertise and bias may be raised regarding legislators and administrators as well as judges, some participation by all three branches in the resolution of major policy issues may be desirable.<sup>71</sup> Judicial contributions may thus be valuable both to broaden discussions and to keep them in check.

The “regulation through litigation” critique also ignores the ability of the political branches to override both negotiated settlements and judicial orders with legislation. While there may be political costs involved in overriding judicial orders with legislation, the long history of tort law in prompting regulation in un- and under-regulated areas reduces these substantially.<sup>72</sup>

The distinction between litigation that complements regulation and litigation that replaces it is also unpersuasive; even critics of the process recognize that regulation and litigation have never been entirely separate. Viscusi accepts that legal actions may create complementary incentives—for example, by transferring income to injured parties to address damages incurred or by highlighting gaps in the regulatory framework, inducing agencies to introduce or increase regulation<sup>73</sup>—yet he suggests that certain remedies create a line beyond which litigation ceases to complement the legislative process.<sup>74</sup> However, the courts’ frequent use of equitable jurisdiction to grant non-standard remedies makes the terms of the MSA seem different only in degree, if at all. The bright line implied by the “regulation through litigation” critique is difficult to discern.

More fundamentally, the form of relief is less significant than Viscusi suggests. While damages awards may be differentiated in leaving defendants greater flexibility than injunctive relief, the

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arguments for reduced judicial involvement in policy decisions cannot be supported on empirical grounds. Gregory F. Intocchia, *Reassessing Judicial Capacity to Resolve Complex Questions of Social Policy*, 11 J. LEGAL STUD. 127, 144-45 (2002). In his analysis of the litigation over firearms, another author contrasted the blunt legislative solution with judicial solutions demonstrating “a high level of sensitivity to the complexity of the policy issues presented.” Allen Rostron, *Lawyers, Guns, & Money: The Rise and Fall of Tort Litigation Against the Firearms Industry*, 46 SANTA CLARA L. REV. 481, 509-10 (2006) (book review).

70. Rostron, *supra* note 69, at 509-10.

71. See LETTIE M. WENNER, *THE ENVIRONMENTAL DECADE IN COURT* 176-77 (1982) (arguing that, like the executive and legislative branches, the judicial branch should also play a role in environmental policymaking).

72. STEPHEN J. CARROLL ET AL., *ASBESTOS LITIGATION* 130 (2005).

73. W. KIP VISCUSI, *Overview*, in *REGULATION THROUGH LITIGATION* 2-3 (W. Kip Viscusi ed., 2002).

74. *Id.* at 5-6.

distinction is highly fact-dependent. Further, even damages awards granted within the court process can exert a regulatory effect.<sup>75</sup> The possibility of damages provides many incentives: namely, for manufacturers to invest in safer product designs, for employers to provide safe working environments and for property owners to avoid or limit activities which may adversely impact upon their neighbours.<sup>76</sup> As Eric Posner argues:

This claim that there is a special class of troubling “regulation by litigation” cases will strike lawyers as odd. Tort law is a form of regulation, and always has been. Manufacturers know that when they design products they will be held liable under tort law if they choose an unreasonably dangerous design. Judicial decisions *ex post* will often have the effect of creating regulation-like commands—for instance, do not design a car that explodes if rear-ended at low speeds—but the policy here is to give manufacturers an *ex ante* incentive to invest in safety. There is nothing new about regulation by litigation, and one suspects that Viscusi does not understand this basic point.<sup>77</sup>

The line between litigation that complements regulation and litigation that replaces it is not merely faint, but non-existent.

The “regulation through litigation” critique is thus better understood as one related to judicial competence more generally. While accepting that the courts may be appropriate venues for questions such as whether a manufacturer produced a defective product that harmed a particular individual, this critique claims that the technical complexity required for judgments concerning overall market outcomes necessitates a level of expertise not found in the courts.<sup>78</sup> Proponents of the “regulation through litigation” critique note that the adversarial process means that courts see only the evidence presented by parties to the dispute, which is tailored toward winning the case rather than full consideration of issues relevant to public policy.<sup>79</sup> Litigation is said to preclude participation by the public and to impose excessive costs on indus-

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75. Eric A. Posner, *Tobacco Regulation or Litigation?*, 70 U. CHI. L. REV. 1141, 1155 (2003) (book review).

76. *Id.*

77. *Id.*

78. Viscusi, *supra* note 63, at 544-45.

79. Willett, *supra* note 65, at 1486.

try.<sup>80</sup> Such critics claim that, by suing corporations in tort as a solution to perceived social problems, government lawyers subvert both legal institutions (particularly the constitutional separation of powers) and the rule of law.<sup>81</sup> This is said to enable the political branches to pass legislative responsibility to judges, thus escaping accountability for potentially unpopular decisions themselves.<sup>82</sup>

This critique of judicial competence requires a high level of faith in the political branches of government. It fails to understand much of the legislation and litigation processes as they occur in practice and ignores other analyses suggesting that participation, transparency and accountability are often lacking in both the formation and the implementation of legislation.<sup>83</sup> Concerns about the lack of participation by and ignorance among voters about lawsuits imply that the public not only participates in elections, but does so based on an informed understanding of candidates' policies.<sup>84</sup> Similarly, the concerns raised by Robert Levy regarding the costs to industry of the litigation process discount the expenditure regularly made by businesses in political lobbying.<sup>85</sup> Viscusi's concerns regarding judicial vulnerability to interest groups seem particularly incongruous given the lobbying power of the tobacco industry.<sup>86</sup> Similarly, it is difficult to conceive of the oil industry as a weak or vulnerable group.

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80. DeBow, *supra* note 65; Levy, *supra* note 65, at 145.

81. See, e.g., Levy, *supra* note 65, at 145; Krauss, *supra* note 65; Willett, *supra* note 65; DeBow, *supra* note 65.

82. Levy, *supra* note 65, at 145, 162; see also Rogan Kersh & James A. Morone, *Obesity, Courts, and the New Politics of Public Health*, 30 J. HEALTH POL. POL'Y & L. 839, 861 (2005).

83. Interest group theory, for example, claims that all the participants in the political process act to further their self-interest and that legislation is subject to supply and demand like any other commodity. Thus, legislators prioritize re-election chances over the public interest, voters similarly prioritize their personal well-being over the public interest, and legislators and agencies supply regulatory results to those voters and interest groups demanding them with the highest bids. See, e.g., William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875 (1975); Sam Peltzman, *Toward a More General Theory of Regulation*, 19 J.L. & ECON. 211 (1976); George Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971); see also Thomas O. McGarity, *Regulation and Litigation: Complementary Tools for Environmental Protection*, 30 COLUM. J. ENVTL. L. 371, 373 (2005) (Arguing, through an analysis of regulation of MTBE, a gasoline additive, that "despite the existence of a highly developed and evolving federal regulatory regime, a robust state tort law regime is necessary to hold companies accountable for harms they cause and to fairly distribute the resulting losses. Tort law corrects for a regulatory system that is too easily controlled by the very interests that it is supposed to be controlling.").

84. DeBow, *supra* note 65, at 11.

85. Levy, *supra* note 65, at 145. In the first half of 1998 alone, tobacco companies spent \$43 million lobbying Congress. Press Release, Public Citizen, Big Tobacco Lobbying Costs \$81,000 Per Member of Congress in First Half of 1998; Industry Blows Away Previous Record (Oct. 29, 1998), <http://www.commondreams.org/pressreleases/Oct98/102998b.htm>.

86. Eric A. Posner, *supra* note 75, at 1155 (suggesting that this "turns traditional public choice theory on its head").

The institutional differences on which arguments for differing judicial and legislative capacity are based may also be questioned.<sup>87</sup> Like judges, legislators are also generalists and are required to confront a wide array of issues with incomplete information.<sup>88</sup> Legislators are limited in their ability to set agendas, having to address issues on which the public demands action, and in their ability to supervise the implementation of their policies.<sup>89</sup> Legislators are also limited in resources, with the result that the choice is often not between the courts or some other institution addressing a problem, but between judicial intervention and governmental inaction.<sup>90</sup> G. Alan Tarr thus argues that the distinctive features of adjudication—particularly the need to provide reasoned justifications and its isolation from political parties—may in fact make judges better policy-makers.<sup>91</sup> While his conclusion is extreme, Tarr's arguments demonstrate that the issue is not as simple as Viscusi suggests.

In attempting to set limits on the proper role of the courts, the “regulation through litigation” critique echoes the work of scholars such as Lon Fuller and Donald Horowitz.<sup>92</sup> Following an analysis of adjudication to reveal a core of presentation by parties of proofs and reasoned arguments, Fuller claimed that “polycentric” problems, such as allocation of resources, were unsuitable for adjudication and thus non-justiciable matters for political resolution.<sup>93</sup> Like Fuller, Horowitz asserted inherent limits to judicial capacity.<sup>94</sup> Horowitz argued that the courts offer “a poor format for the weighing of alternatives and the calculation of costs,” but that their value is tied to this distinctive contribution and would be lost if they were re-tooled to be more responsive to policy determinations.<sup>95</sup>

Both Fuller's and Horowitz's analyses imply a view of the judicial process that is poorly matched with practice. While Fuller did acknowledge that courts do stray beyond the “proper” limits of adjudication, particularly in the field of administrative law, Abram

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87. See G. ALAN TARR, *JUDICIAL PROCESS AND JUDICIAL POLICYMAKING* 298 (3d ed. 2003).

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. Lon Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 395 (1978) (internal quotation marks omitted). Fuller used the analogy of a spider's web to explain these multi-centered problems: a pull on any one strand will create a different complicated pattern of tensions. *Id.*

93. *Id.*

94. Horowitz focused on the piecemeal character of adjudication: its emphasis on individual litigants' cases and its inability to judge how representative these cases are; its reliance on formal rather than behavioral materials; its remedial rather than preventative focus; and its failure to look beyond the first order consequences of remedies. DONALD L. HOROWITZ, *THE COURTS AND SOCIAL POLICY* 35-45 (1977).

95. *Id.* at 257.

Chayes has since demonstrated that such straying is more the norm than the exception.<sup>96</sup> The “pure” model of adjudication presented by Fuller and Horowitz and implied by Viscusi fails to explain the fact that courts increasingly make use of social science data and public policy analysis, grant injunctive remedies, hear multi-party litigation, actively supervise the implementation of decisions after disputes are declared resolved and apply broad principles prospectively with potential impacts on individuals not involved in litigation.<sup>97</sup>

Even in the cases where judges do not employ such techniques, claims that the judiciary is not involved in policy-making are unconvincing. The role of judges in interpreting legal rules, filling gaps and resolving conflicts or ambiguities, makes the regulation-litigation dichotomy difficult to sustain.<sup>98</sup> As Fuller acknowledged, the system of precedent means that cases will affect other disputes with quite different facts to be decided in the future, with the result that all cases display elements of polycentricity.<sup>99</sup> At least to some degree, “regulation through litigation” is unavoidable.

Like its predecessors, such as Fuller’s analysis, the “regulation through litigation” critique’s endeavour to delineate the boundaries of judicial competence has not succeeded. The lines suggested are neither coherent nor sustainable and thus appear more like disagreement with the substance of the particular decisions than coherent critiques. As such, they themselves may be critiqued as unconstitutional, limiting the ability of the courts to provide a check on the power of the other branches.

Given the failure by proponents of the “regulation through litigation” critique to isolate what exactly constitutes this undesirable, unconstitutional litigation, the use of similar reasoning to critique or dismiss the climate change actions is unconvincing. The fact that interest groups have had such an influence on the climate change debate to date makes the questioning of this critique all the more imperative; litigation provides a valuable complement to decision-making by the other branches, and this role should not be curtailed without compelling reasons.

Judge Preska’s characterization of *American Electric* as “transcendentally legislative” and an attempt to “impose [an emissions regulation system] . . . by judicial fiat” is insufficient for a finding that the case represents a non-justiciable political question.<sup>100</sup> Her

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96. Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).

97. *Id.*

98. See DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION 28-31 (1997).

99. Fuller, *supra* note 92, at 398.

100. *Connecticut v. Am. Elec. Power Co.*, 406 F. Supp. 2d 265, 272-73 (S.D.N.Y. 2005).

suggestion that the court could only fashion remedies by asking the sort of questions legislators would pose is unsupported by legal doctrine. As in all tort actions, the court need only look at whether and to what extent the defendant's actions were harming the plaintiff. If such harm is evident, the court may then order an injunction as necessary to abate the harm.

Alternatively, if the court found that the defendant's emissions were harming the plaintiff but that an injunction was impracticable, the court could exercise its discretion to award damages in lieu of an injunction,<sup>101</sup> or it could grant declaratory relief.<sup>102</sup> There are many precedents in which the Supreme Court has decided complex interstate nuisance cases on the merits;<sup>103</sup> tort-based climate change cases need not involve the courts in the type of political balancing suggested by Judges Preska and Jenkins. That neither Judge Preska nor Judge Jenkins discussed their discretion regarding remedies—despite the plaintiffs in both actions requesting declaratory as well as injunctive relief—supports a reading of their application of the political question doctrine as poorly considered.

Further, to suggest that no injunction could ever be granted to enjoin greenhouse gas emissions is problematic. It may be that such injunctions are unlikely to be granted; that is, damages are more appropriate in the majority of cases. Nevertheless, in a really egregious case, perhaps very large scale or deliberate emissions, it is conceivable that an injunction could be a suitable remedy. By raising the political question doctrine, however, Judge Jenkins suggests that there is no threshold beyond which emissions should be constrained. *General Motors*, and perhaps many other nuisance-based climate change actions, may fail on the merits, but there is no need to rule out the possibility of injunctive relief as inherently political.

With little in *American Electric*, *Comer* and *General Motors* other than reasoning reminiscent of the “regulation through litigation” critique to support application of the third *Baker* factor, the finding of non-justiciability on this ground is difficult to sustain. The plaintiffs' requests for injunctive relief are insufficient to render the cases non-justiciable: the courts may avoid structured eq-

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101. *Boomer v. Atl. Cement Co.*, 257 N.E.2d 870, 874 (N.Y. 1970).

102. *Oneida Indian Nation of N.Y. v. New York*, 691 F.2d 1070, 1082 (2d Cir. 1982) (stating that “[e]ven were [sic] no other relief appropriate, the request for declaratory relief would alone render the claims justiciable”).

103. *New Jersey v. City of New York*, 283 U.S. 473, 476 (1931) (noting New Jersey's claim that garbage from New York City was polluting New Jersey's beaches); *Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 236 (1907) (noting the claim by Georgia that industry in Tennessee desist from emitting sulfur dioxide harming Georgia's agriculture); *Missouri v. Illinois*, 200 U.S. 496, 517 (1906) (noting the claim by Missouri that sewage discharges from Chicago had polluted the Mississippi River).

uitable awards by granting damages or declaratory relief, while even the order of an injunction would not render the cases significantly different from other cases not challenged by Viscusi and others. The need to make an “initial policy determination of a kind clearly for nonjudicial discretion” is by no means evident;<sup>104</sup> the third *Baker* factor should not preclude reaching the merits in the nuisance-based climate change litigation to date.

### III. THE FIRST AND SECOND *BAKER* TESTS AND TORT DOCTRINE

Although the third *Baker* test was decisive, other factors were also relevant to the decisions in *American Electric*, *Comer* and *General Motors*. Judge Preska stated that “several of these indicia” formed the basis for her finding that *American Electric* raised a non-justiciable political question, although she did not discuss the other five.<sup>105</sup> Judge Guirola referred only to the third *Baker* test, but in basing this on the need for the political branches to develop standards of reasonableness, he implicated the second *Baker* test.<sup>106</sup> Judge Jenkins’ discussion was more extensive; he found that *General Motors* failed three of the *Baker* tests and addressed these directly.<sup>107</sup> He cited much of Judge Preska’s opinion on the third *Baker* test, adding little to her analysis on this point, then went on to explain how *General Motors* also failed both the first and second *Baker* tests.<sup>108</sup> This section will examine how Judge Jenkins’ analysis of *General Motors* fits with the first and second *Baker* tests and Judge Guirola’s reasoning on the third test, demonstrating how such reasoning fails to justify dismissal of *Comer* or *General Motors* as a non-justiciable political question against any of these tests.<sup>109</sup>

Judge Jenkins found that *General Motors* failed the first *Baker* test—“a textually demonstrable constitutional commitment of the

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104. *Baker v. Carr*, 369 U.S. 186, 217 (1962).

105. *Connecticut v. Am. Elec. Power Co.*, 406 F. Supp. 2d 265, 272 (S.D.N.Y. 2005).

106. Transcript of Hearing on Defendants’ Motion to Dismiss at 39-40, *Comer v. Murphy Oil, U.S.A.*, No. 1:05-CV-00436-LG-RHW (S.D. Miss. Aug. 30, 2007) (on file with author) (stating that “this is a case in which the plaintiffs directly ask this Court to attribute fault to these defendants under standards that as of yet do not exist” and finding that global warming is “a debate which simply has no place in the court, until such time as Congress enacts legislation which sets appropriate standards by which this Court can measure conduct, whether it be reasonable or unreasonable, and, more important, develops standards by which a group of people, we call them juries, can adjudicate facts and apply the law, these standards, and judge whether conduct crosses the line between reasonable and legal conduct and unreasonable or tortious conduct”).

107. Order Granting Defendants’ Motion to Dismiss, *California v. Gen. Motors Corp.*, No. C06-05755 MJJ, 2007 WL 2726871, at \*6-16 (N.D. Cal. Sept. 17, 2007).

108. *Id.* at \*13-16.

109. Given the brevity of Judge Guirola’s reasoning, this section will focus on Judge Jenkins’ opinion in *General Motors*.



issue to a coordinate political department”—by implicating the political branches’ interstate commerce and foreign policy powers.<sup>110</sup> The commerce clause was implicated by the fact that a damages award would potentially impose burdens on automakers in other states “for doing nothing more than lawfully engaging in their respective spheres of commerce.”<sup>111</sup> Judge Jenkins found that foreign powers were implicated by the fact that the political branches had chosen not to regulate greenhouse gas emissions, supposedly as a strategy to get developing countries to do so.<sup>112</sup> Foreign policy powers were also implicated by the fact that the defendants lawfully sell their automobiles outside of the United States.<sup>113</sup>

Judge Jenkins found that *General Motors* failed the second *Baker* test—“a lack of judicially discoverable and manageable standards” for resolving the case<sup>114</sup>—since it involved multiple worldwide sources of climate change and a very wide range of national and international policy issues.<sup>115</sup> Judge Jenkins distinguished the cases cited by the plaintiff as simple trans-boundary nuisance cases involving identifiable external sources, “none of [which] implicates a comparable number of national and international policy issues.”<sup>116</sup> Thus, these cases provided the Court no legal standards to determine what constitutes an unreasonable emission of a substance unfamiliar to the courts, such as carbon dioxide.<sup>117</sup> Further, he found that the climate change harms at issue were caused by pollution both within and well beyond the state of California, and thus the scale of damages requested in *General Motors* was “unprecedented.”<sup>118</sup>

Just as Judge Preska failed to find a convincing justification for her decision that the third *Baker* test required dismissal, Judge Jenkins’ reasoning does not stand up to scrutiny either. On both tests, his analysis is unpersuasive in two key respects. First, he overstated the importance of factors that should not be determinative: remedies and political deliberations on foreign policy. Second, he ignored basic features of torts, producing an opinion that could

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110. Order Granting Defendants’ Motion to Dismiss, *Gen. Motors*, 2007 WL 2726871, at \*6, \*13-14.

111. *Id.* at \*14. It also relies on arguments raised by the EPA and rejected by the Supreme Court in *Massachusetts v. U.S. Environmental Protection Agency*. See *infra* notes 126-28.

112. Order Granting Defendants’ Motion to Dismiss, *Gen. Motors*, 2007 WL 2726871, at \*14.

113. *Id.*

114. *Baker v. Carr*, 369 U.S. 186, 217 (1962).

115. Order Granting Defendants’ Motion to Dismiss, *Gen. Motors*, 2007 WL 2726871, at \*16.

116. *Id.* at \*15.

117. *Id.*

118. *Id.*

potentially bring other, less controversial parts of the tort system within the scope of the political question doctrine.

Judge Jenkins frequently referred to the form of relief in his analysis of the *Baker* factors, but remedies do not strengthen his arguments. His application of the first *Baker* test involved both a mischaracterization of the particular relief sought and of its importance. His finding of non-justiciability on this ground involved a description of the case as one seeking a “unilateral commitment to reducing . . . emissions”<sup>119</sup> and “imposing mandatory unilateral restrictions on domestic manufacturers.”<sup>120</sup> This description is both incorrect and irrelevant: the plaintiff’s action for damages for harm caused by a particular group of companies is far removed from a regulatory system and, as argued in the previous section, the “regulation through litigation” critique that this characterization implies is not persuasive. Further, Judge Jenkins ignored the courts’ discretion to order remedies other than those requested, yet this alone could have resolved his concerns. Judge Jenkins also ignored the political branches’ discretion to correct judicial orders with legislation.

Judge Jenkins’ treatment of remedies in his application of the second *Baker* test is also problematic. First, his findings on the significance of remedies to the applicability of precedent are inconsistent. In applying the third *Baker* test, he held that the form of relief was irrelevant to whether *American Electric* was an applicable precedent; yet, for this first *Baker* test, he found remedies sufficient to render the nuisance precedents cited by the plaintiff inapplicable.<sup>121</sup> Second, his suggestion that dismissal is necessary where the damages requested are very large is neither persuasive nor supported by precedent. As the Second Circuit noted in its assessment of justiciability in *Oneida Indian Nation of New York v. New York*, the relief requested in *Baker v. Carr* was itself substantial.<sup>122</sup> The Second Circuit explained that it “[knew] of no principle of law that would relate the availability of judicial relief inversely to the gravity of the wrong sought to be redressed. Rather, the courts have in numerous contexts treated as justiciable claims that resulted in wide-ranging and ‘disruptive’ remedies.”<sup>123</sup>

As this analysis suggests, Judge Jenkins’ implication that the largest wrongs are not justiciable is at odds not only with precedent but with logic and justice in suggesting that the courts should be unavailable when the harms in question are most severe. Fur-

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119. *Id.* at \*14.

120. *Id.*

121. *Id.* at \*14; *cf. id.* at \*8.

122. *Oneida Indian Nation of N.Y. v. New York*, 691 F.2d 1070, 1083 (2d Cir. 1982).

123. *Id.*

ther, Judge Jenkins again ignored the courts' discretion to award relief other than that specifically requested by the plaintiffs.

The significance of remedies is much less than that implied by Judge Jenkins: that the plaintiff requested a particular form of relief does not provide justification for dismissal of the case as a non-justiciable political question. *If* the plaintiff passed other threshold tests such as standing, *and if* the plaintiff did succeed on the merits, *and if* the court granted the remedies requested by plaintiff, *and if* the resultant order did conflict with foreign policy, then the political branches retain legislative power to correct the situation, as in all tort cases.

Judge Jenkins also overstated the importance of possible implications for foreign policy, setting a very broad definition of the political actions sufficient to preclude judicial attention. For the first *Baker* test, the fact that the political branches had "deliberately elected to refrain" from regulating greenhouse gas emissions was sufficient to render the case a non-justiciable political question;<sup>124</sup> his finding that an incomparable number of foreign policy issues were implicated was important to the second *Baker* test.<sup>125</sup> Such deference goes well beyond the requirements of the political question doctrine. With respect to climate change, it was expressly rejected by the Supreme Court just months earlier in *Massachusetts v. United States Environmental Protection Agency*.<sup>126</sup> The Court rejected suggestions that congressional deliberations, actions and inactions could be read as a command not to regulate greenhouse gas emissions.<sup>127</sup> It also dismissed the EPA's "laundry list of reasons not to regulate," which include factors very similar to those cited by the defendant in *General Motors*, such as possible interference with the President's ability to encourage developing countries to regulate greenhouse gas emissions.<sup>128</sup> The Court made it clear that neither the novelty nor the enormity of climate change warranted any alteration to the constitutional distribution of powers between the branches.

Judge Jenkins' discussions of remedies and foreign policy deliberations do little to support his finding that *General Motors* fails the first and second *Baker* tests for justiciability: neither issue is sufficient to require dismissal of the case as a political question. The remaining elements of his discussion of these two tests are even more problematic. Judge Jenkins suggests an inflexible, con-

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124. Order Granting Defendants' Motion to Dismiss, *Gen. Motors*, 2007 WL 2726871, at \*14.

125. *Id.*

126. *Massachusetts v. U.S. Env'tl. Prot. Agency*, 127 S.Ct. 1438 (2007).

127. *Id.* at 1460.

128. *Id.* at 1462-63.

strained tort system that cannot develop if it would burden interstate or international commerce and cannot develop if the facts are complex. Since Judge Jenkins made no effort to distinguish *General Motors* from established cases in tort, the faults he found in that case could also be relevant to many less controversial tort actions. Such reasoning seems to require a major contraction of the tort system, well beyond the scope of the political question doctrine.

Judge Jenkins' analysis of the first *Baker* test suggests that a tort action that involves interstate or international commerce should be dismissed as a non-justiciable political question. This suggestion is inconsistent with tort doctrine. The fact that a defendant had been engaging in interstate commerce, undertaking an action not proscribed by law, has not previously required the dismissal of actions in tort. On the contrary, tort law has a long history of application in unregulated areas.<sup>129</sup> Expanding the reach of the law beyond existing prohibitions could be understood as the defining characteristic of the field. As Edward White explained, torts are intricately linked with public opinion: social perception dictates which injuries taking place in an area of life are worthy of redress.<sup>130</sup> As this perception shifts over time, activities that may once have been lawful may come to attract liability in tort.<sup>131</sup> Judge Jenkins' reasoning is at odds with this, suggesting a much more static legal system. The implication of his decision is that there is no room for torts to grow, that any action not formally proscribed by law is in fact protected by it, regardless of its consequences.

In suggesting that involvement in lawful commerce should require dismissal of tort actions, Judge Jenkins' discussion of the first *Baker* test could apply equally to many established cases in nuisance and in torts more generally. Two key cases in nuisance, *Boomer v. Atlantic Cement Co.* and *Spur Industries, Inc. v. Del E. Webb Development Co.*, both involved companies producing items for sale in lawful interstate commerce.<sup>132</sup> Both courts expressly noted this in their decisions, applying a "balance of conveniences" test to weigh the interests of the parties.<sup>133</sup> Remedies were modi-

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129. See CARROLL ET AL., *supra* note 72.

130. G. EDWARD WHITE, TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY 336 (Expanded ed. 2003) ("The classes of persons perceived to be deserving of compensation have changed over time, and the doctrinal orientation of tort law has reflected those changes. It seems as quixotic to imagine that tort law will contract to a series of efforts to seek individualized justice between two parties as it is to imagine that the ethos of injury in America will remain constant.").

131. See *id.*

132. *Boomer v. Atl. Cement Co.*, 257 N.E.2d 870, 871-72 (N.Y. 1970) (private nuisance claim regarding a cement plant); *Spur Indus., Inc. v. Del E. Webb Dev. Co.*, 494 P.2d 700, 701 (Ariz. 1972) (public nuisance claim involving a cattle feedlot).

133. *Spur Indus.*, 494 P.2d at 706; *Boomer*, 257 N.E.2d at 871.

fied in view of these interests, but neither court suggested that the actions before them were unsuitable for judicial resolution.<sup>134</sup> Many negligence actions involve business practices, and products liability cases invariably involve products lawfully produced and sold in lawful interstate and international commerce. The drug companies ordered to pay damages in *Sindell v. Abbott Laboratories*, for example, had produced and sold diethylstilbestrol (DES) lawfully around the world.<sup>135</sup>

Similarly, the fact that a tort action involves conduct for which the courts have not previously determined standards of reasonableness is not sufficient to render it a non-justiciable political question. In suggesting that it should, Judge Jenkins' analysis of the reasonableness standard for the second *Baker* test is at odds with tort doctrine. In suggesting that *Comer* could not be decided without a prior political formulation of reasonableness standards, Judge Guirola's reasoning on the third *Baker* factor is similarly flawed.

Reasonableness, like the tort system as a whole, has developed over time. As new types of harm become apparent, courts determine appropriate measures by which to assess them, relying on expert testimony and scientific studies to establish what is reasonable. Many older cases, particularly toxic torts or nuisance-based pollution cases, have been decided with much less scientific data than currently available on climate change.<sup>136</sup> In *Georgia v. Tennessee Copper Co.*, for example, the Supreme Court used scientific evidence to assess the reasonableness of the impact of emissions of sulfur dioxide from the Tennessee Copper Company on agriculture in Georgia.<sup>137</sup> The Court noted that this science was far from complete but found no bar to justiciability in that case.<sup>138</sup> Given the wealth of scientific information now available on greenhouse gases and climate change, the dismissal of *Comer* and *General Motors* for a lack of standards to assess reasonableness suggests that the political question doctrine could require the dismissal of many less controversial cases in the future.

Judge Jenkins' application of the first and second *Baker* tests is both unpersuasive and doctrinally problematic. The weight he accorded to the form of relief requested and to the implications of ac-

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134. *See Spur Indus.*, 494 P.2d 700; *Boomer*, 257 N.E.2d 870.

135. 607 P.2d 924, 925 (Cal. 1980).

136. *See, e.g.*, Intergovernmental Panel on Climate Change, CLIMATE CHANGE 2007: SYNTHESIS REPORT (2007).

137. 237 U.S. 474, 475-78 (1915).

138. *Id.* at 477 ("The evidence does not disclose with accuracy the volume or true character of the fumes which are being given off daily from the works of either company. . . . It is impossible from the record to ascertain with certainty the reduction in the sulphur content of emitted gases necessary to render the territory of Georgia immune from injury therefrom . . .").

tions by the political branches was much greater than required. Further, Judge Jenkins' and Judge Guirola's failure to distinguish *General Motors* and *Comer*, respectively, from other established cases set a precedent with such wide scope that it could potentially eviscerate the tort system. Such consequences would be surprising: even the strongest advocates of the political question doctrine do not suggest that it should have such an impact. Judge Jenkins' and Judge Guirola's failure to discuss this potential suggests that their analyses were not well-considered. Like Judge Preska's analysis of the third *Baker* test, these decisions on the political question doctrine are unlikely to survive appellate review.

If tort-based climate change actions did overcome the political question doctrine bar, they would still face many hurdles. As many commentators have noted, standing and causation will be major issues.<sup>139</sup> Further, with numerous climate-related bills before Congress and many states passing climate laws, legislation may preempt or at least reduce the need for such actions. If tort-based climate change actions did overcome such hurdles to reach the courts, however, they could potentially be among the more successful elements of the system.

Both the wrongful conduct involved in greenhouse gas emissions and the harms that result are fundamentally different from those involved in more established torts. As such, they may be more successful with respect to both corrective justice and deterrence, goals that the system proclaims but does not always further.<sup>140</sup> Unlike negligence actions where liability may arise from a

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139. See, e.g., Myles R. Allen & Richard Lord, *The Blame Game: Who Will Pay for the Damaging Consequences of Climate Change?*, 432 NATURE 551 (2004); Blake R. Bertagna, "Standing" Up for the Environment: The Ability of Plaintiffs to Establish Legal Standing to Redress Injuries Caused by Global Warming, 2006 BYU L. REV. 415 (2006); Kirsten H. Engel, *Harmonizing Regulatory and Litigation Approaches to Climate Change Mitigation: Incorporating Tradable Emissions Offsets into Common Law Remedies*, 155 U. PA. L. REV. 1563 (2007); David A. Grossman, *Warming Up to a Not-So-Radical Idea: Tort-Based Climate Change Litigation*, 28 COLUM. J. ENVTL. L. 1 (2003); Benjamin P. Harper, *Climate Change Litigation: The Federal Common Law of Interstate Nuisance and Federalism Concerns*, 40 GA. L. REV. 661 (2006); Bradford C. Mank, *Standing and Global Warming: Is Injury to All Injury to None?*, 35 ENVTL. L. 1 (2005); Thomas W. Merrill, *Global Warming as a Public Nuisance*, 30 COLUM. J. ENVTL. L. 293 (2005).

140. Tort theory suggests that court-imposed liability promotes corrective justice between the parties while also exerting a wider deterrent effect, thus reducing the cost of accidents. In practice, however, both of these functions are weakened by the haphazard way in which the tort system operates. Deterrence is hampered by the fact that tort liability is triggered not by risky behavior, but by the eventuation of such risks, regardless of the relative potential for harm of the behavior involved. Given that the line between injuries caused by negligence and those caused by natural misfortune is fine, luck plays a disproportionate role in determining those who cause injury from those whose actions have no consequences. Corrective justice is also problematic if considered beyond the parties to the case. Fairness suggests that most compensation should go to those most harmed, and liability to those most culpable. The tort system, however, prioritizes victims according to the way in which their injury was caused (the wrongdoing of the defendant), rather than their need, and sets

small, inadvertent action, the emission of greenhouse gases does not occur unintentionally so that culpability is distanced from luck. While it could be argued that when the defendants commenced the conduct leading to greenhouse gas emissions they were unaware of its harmful impact, the link between greenhouse gas emissions and global climate change has been well-publicized since at least 1990, when the Intergovernmental Panel on Climate Change (IPCC) released its first report. Further, in contrast to, say, torts involving workplace safety, where many businesses may engage in similarly risky practices with no adverse consequences, all greenhouse gas emissions contribute to climate change.<sup>141</sup> The relevance of luck is further reduced by the fact that greater emissions lead directly to greater climate change, so that greater wrongdoing translates directly to greater liability.

Tort-based climate change litigation could also help to further corrective justice and deterrence in a broader sense. In much the same way that Jon Hanson argued that the cigarette industry's manipulation of market risk perceptions heightened consumer demand and should thus be reflected in liability for injuries suffered by consumers making apparently informed choices,<sup>142</sup> torts may be an appropriate response to the fossil fuel industry's role in the climate debate.<sup>143</sup> Tort-based climate change litigation may be valuable in increasing public discussions around climate change,

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the level of damages payable according to the particular circumstances of the injured person rather than the culpability of the defendant. See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 52 (5th ed. 1984); Gregory C. Keating, *Distributive and Corrective Justice in the Tort Law of Accidents*, 74 S. CAL. L. REV. 193 (2000).

141. While it is arguable that the greenhouse gases produced by a single emitter do not in themselves cause climate change, their contribution is sufficient for liability so that all emissions can for legal purposes be treated as having essentially the same effect. See RESTATEMENT (SECOND) OF TORTS § 840E (“[T]he fact that other persons contribute to a nuisance is not a bar to the defendant's liability for his own contribution.”); KEETON ET AL., *supra* note 140, § 52 (“Pollution of a stream to even a slight extent becomes unreasonable when similar pollution by others makes the condition of the stream approach the danger point.”) (cited in Matthew F. Pawa & Benjamin A. Krass, *Global Warming as a Public Nuisance: Connecticut v. American Electric Power*, 16 FORDHAM ENVTL. L. REV. 407, 450 n.158 (2005)).

142. Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: Some Evidence of Market Manipulation*, 112 HARV. L. REV. 1420 (1999); see also Jon Hanson & David Yosifon, *The Situation: An Introduction to the Situational Character, Critical Realism, Power Economics, and Deep Capture*, 152 U. PA. L. REV. 129 (2003).

143. Reports suggest that industry has played a major role in shaping White House policy, paying large sums of money to scientists to critique the findings of the IPCC in an attempt to influence both policy and public opinion. See ROSS GELBSPAN, BOILING POINT: HOW POLITICIANS, BIG OIL AND COAL, JOURNALISTS, AND ACTIVISTS HAVE FUELED THE CLIMATE CRISIS--AND WHAT WE CAN DO TO AVERT DISASTER 51-53 (2004); John H. Cushman Jr., *Intense Lobbying Against Global Warming Treaty*, N.Y. TIMES, Dec. 7, 1997, at A28; Juliet Eilperin, *AEI Critiques of Warming Questioned: Think Tank Defends Money Offers to Challenge Climate Report*, WASH. POST, Feb. 5, 2007, at A04; Reuters, U.S.: Democrats Say White House Again Cozy with Big Oil (June 17, 2005), <http://www.warprofiteers.com/article.php?id=12446>.

enhancing the democratic process by providing venues for new voices. Litigation may also play a valuable role in shaping the nature of the debate. As David Hunter argues, litigation has already helped to focus attention on specific victims facing threats from climate change, which in turn has increased the political will to address climate change both internationally and nationally and has increased the debate regarding questions of compensation and adaptation.<sup>144</sup>

#### IV. CONCLUSION

The reasoning used in *American Electric*, *Comer* and *General Motors* to justify dismissal of those cases as non-justiciable political questions is unconvincing. The remedies requested by the plaintiffs do not require dismissal of their actions, considering both their lack of substantive significance and the courts' discretion to grant alternative remedies. The fact that the defendants were engaged in lawful commerce is similarly no bar to justiciability, given the tort system's long history of expanding the reach of the law to create new prohibitions in line with public perceptions. This continual development and adaptation means that the need to adapt standards of reasonableness in view of current science is also no ground for dismissal. The fact that Congress has declined to regulate greenhouse gas emissions or that the President is negotiating to obtain commitments on climate change from other countries is similarly no bar to judicial consideration of harm caused by the emissions of greenhouse gases both caused and felt in the United States. Thus, neither the grounds raised by Judge Preska nor those added by Judges Guirola and Jenkins are sufficient for a finding that any of the *Baker* tests were not satisfied; all three decisions are unpersuasive.

The precedents set by these decisions raise additional concerns. Judge Preska's apparent application of the "regulation through litigation" critique relied on incoherent lines and unstated assumptions, leaving a poor guide for future decisions. Judge Guirola's and Judge Jenkins' reasoning could potentially eviscerate the tort system, taking the political question doctrine well beyond the role envisaged for it by even its strongest advocates. Regardless of whether these actions should succeed on the merits or even pass other threshold questions such as standing, the political question bar should be overturned on appeal. All three judicial ap-

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144. David B. Hunter, *The Implications of Climate Change Litigation for International Environmental Law-Making 2-4* (American University, WCL Research Paper No. 2008-14, 2007), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1005345](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1005345).



plications of the doctrine have been unpersuasive and, more significantly, undesirable in a substantive sense.

These problems are heightened by the lack of attention to the uncertainties in political question doctrine theory and the inconsistencies in its application. Given the Supreme Court's failure to consider the doctrine in the overtly political *Bush v. Gore* case,<sup>145</sup> its use by these courts seems incongruous. That none of the judges acknowledged that use of the doctrine is declining—much less that its revival may be controversial—suggests that their decisions were not based on considered legal reasoning. *American Electric, Comer* and *General Motors* are thus flawed not only in their failure to justify their application of the *Baker* indicia to require dismissal but also in their failure to explain the relevance of the political question doctrine in a broader sense. In deciding the *American Electric* appeal, the Second Circuit is likely to consider the political question doctrine with greater scrutiny. Judge Preska's reasoning is unpersuasive; her opinion should be overturned. The political question doctrine should cease to present a bar to judicial resolution of *American Electric*, and it should not be raised in *Kivalina*.

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145. See *Bush v. Gore*, 531 U.S. 1060 (2000).



**CHINA'S *DING ZI HU*, THE UNITED STATES'S *KELO*, AND  
SINGAPORE'S EN-BLOC PROCESS: A NEW MODEL FOR  
ECONOMIC DEVELOPMENT EMINENT DOMAIN  
FROM A GIVINGS PERSPECTIVE**

JIANLIN CHEN\*

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## I. INTRODUCTION

Legal issues concerning property rights have been in the spotlight recently. In the United States, the Supreme Court's decision in *Kelo v. City of New London*<sup>1</sup> allowed the use of the government's eminent domain power for economic development by a private developer. This decision "has spawned a swarm of federal and state legislative initiatives [attempting] to curtail [such] condemnation for transfer to private parties."<sup>2</sup> On the other side of the Pacific, the enactment and implementation of the long awaited Property Law<sup>3</sup> in China coincided with the dramatic *ding zi hu*<sup>4</sup> holdout

1. *Kelo v. City of New London*, 545 U.S. 469 (2005).

2. James J. Kelly, Jr., "We Shall Not Be Moved": *Urban Communities, Eminent Domain and the Socioeconomics of Just Compensation*, 80 ST. JOHN'S L. REV. 923, 926 (2006); see also Jane B. Baron, *Winding Toward the Heart of the Takings Muddle: Kelo, Lingle, and Public Discourse About Private Property*, 34 FORDHAM URB. L.J. 613, 630-31 (2007); Nicole Stelle Garnett, *The Neglected Political Economy of Eminent Domain*, 105 MICH. L. REV. 101, 103 (2006); Timothy Sandefur, *The "Backlash" So Far: Will Americans Get Meaningful Eminent Domain Reform?*, 2006 MICH. ST. L. REV. 709, 711-12 (2006).

3. Property Law (promulgated by the Standing Comm. Nat'l People's Cong., Mar. 16, 2007, effective Oct. 1, 2007) LAWINFOCHINA (last visited Feb. 24, 2009) (P.R.C.).

4. *Ding zi hu* literally translates to "nail household." The origin of this term is unclear. However, it figuratively describes the situation where a citizen holdout is like a stuck

against government sanctioned land acquisition by private developers in Chongqing.<sup>5</sup> Further down the globe, Singapore passed an amendment in September 2007 to regulate and refine the country's en-bloc process.<sup>6</sup> Under this en-bloc process, private developers wanting to buy a strata-title development, such as a flat or a condominium, may compulsorily acquire the property of those who object to the sale if a certain majority percentage<sup>7</sup> of the owners in the strata-title development agree to the sale. The government's purpose is to allow plots of land "to reali[z]e their full development potential" and to allow rejuvenation of urban development.<sup>8</sup>

There is a recurring theme in the legal issues faced by these three jurisdictions. Should there be a circumvention of the sacred notion of private property rights (in particular the right of alienation of others) for the benefit of another private party, such as a private developer, in the name of economic development? Criticisms abound for such takings of private property, especially in China and the United States.<sup>9</sup> Common considerations in this discussion include undercompensation of the owners of acquired property<sup>10</sup> and rent-seeking by the would-be beneficiaries of the takings under public choice theory.<sup>11</sup> There are numerous reform proposals about restricting such perceived abuse of the eminent domain power.<sup>12</sup> However, this predominant focus on the taking aspect of the problem is misplaced and incomplete. It is also somewhat surprising that, having identified the danger of rent-seeking as "a mobilized, well-connected minority [that] can exert more political influence than a numerically superior but

nail which simply refuses to budge. See Jin Lin Ke, Comment, *Lun "ding zi hu"* [Comment on "Ding Zi Hu"], 11 WEI SHI 95, 95 (2003) (P.R.C.).

5. Zhang Zhi Zhong, *Bu jie shou fa ting pan jue gua qi he biao yu Chongqing ding zi hu gei zheng fu chu nan ti* [Refused to Obey Court's Order, Hoisting Flag and Banner - Ding Zi Hu in Chongqing Giving Government a Difficult Problem], LIANHE ZAOBAO (Sing.), Mar. 23, 2007.

6. Land Titles (Strata) (Amendment) Bill, Parliament No. 11, Sess. No. 1, Vol. No. 83, Sitting No. 13, col. 1994 (Sept. 20, 2007) (Sing.) [hereinafter Land Titles (Strata) Amendment Debate 2007] (on file with author).

7. There must be an 80% or 90% majority depending on the age of the property. Land Titles (Strata) Act, 1999, ch. 158, § 84A(1) (Sing.).

8. Land Titles (Strata) (Amendment) Bill, Parliament No. 9, Sess. No. 1, Vol. No. 69, Sitting No. 4, col. 601 (July 31, 1998) (Sing.) [hereinafter Land Titles (Strata) Amendment Debate 1998] (on file with author) (testimony of Minister of State for Law, Associate Professor Ho Peng Kee).

9. See *infra* Parts II.C.5, III.A.

10. Charles E. Cohen, *Eminent Domain After Kelo v. City of New London: An Argument for Banning Economic Development Takings*, 29 HARV. J.L. & PUB. POL'Y 491, 536-40 (2006); Garnett, *supra* note 2, at 104.

11. Garnett, *supra* note 2, at 139; Donald J. Kochan, "Public Use" and the Independent Judiciary: Condemnation in an Interest-Group Perspective, 3 TEX. REV. L. & POL. 49, 83-87 (1998).

12. See, e.g., Cohen, *supra* note 10, at 559-60; Sandefur, *supra* note 2, at 757, 766.

unorganized or apathetic majority,”<sup>13</sup> little is said to tackle this aspect of the problem. Merely increasing the cost or difficulty of the exercise of eminent domain only decreases the attractiveness of eminent domain as a tool of rent-seeking. It neither eliminates the incentive for abuse when the benefit sufficiently outweighs the increased cost nor does anything to reduce the rent-seeking behavior.<sup>14</sup>

The givings jurisprudence conceived by Abraham Bell and Gideon Parchomovsky<sup>15</sup> and developed and applied by Wallace Wang and the author in the context of China’s split share reform<sup>16</sup> provides a more complete perspective of eminent domain for the economic development issue. Givings jurisprudence focuses on the giving aspect of the equation: it advocates that the beneficiary of the government’s actions shall pay for the benefits and that the victims of the government’s actions shall be entitled to compensation.<sup>17</sup> Similarly, not only shall care be taken to ensure proper compensation for owners whose properties are compulsorily acquired, but equal emphasis shall be placed on ensuring that private developers are not unjustly enriched in the process. It is only through ensuring that private developers are not unjustly enriched by government actions that rent-seeking behavior and manipulation can be eliminated. Moreover, where takings and givings are intimately linked, as in the case of economic development through eminent domain by private developers, “a requirement of efficiency principles and a demand of corrective justice [would dictate] that the compensation or charge should be made directly between the parties.”<sup>18</sup> Yet, as the application of the givings jurisprudence in the context of China’s split share reform demonstrates, the objectives of efficiency and corrective justice require a novel departure from the traditional takings and givings jurisprudence through the injection of “property rule protection for the right to compensation,” and thus the “incorporation of the private bargaining condi-

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13. Christopher Serkin, *Big Differences for Small Governments: Local Governments and the Takings Clause*, 81 N.Y.U. L. REV. 1624, 1637 (2006).

14. Rent-seeking is where power-holders utilize such power to create artificial property rights that generate flow of income to themselves; arguably legal, this process can be regulated and authorized by law. Howard Dick, *Why Law Reform Fails – Indonesia’s Anti-Corruption Reforms*, in LAW REFORM IN DEVELOPING AND TRANSITIONAL STATES 42, 46-47 (Tim Lindsey ed., 2007). Another way of conceptualizing rent-seeking is where politicians accept gifts or benefits in exchange for exercising the power to benefit the provider of the gifts or benefits. Bruce L. Benson & Fred S. McChesney, *Corruption*, in THE ELGAR COMPANION TO THE ECONOMICS OF PROPERTY RIGHTS 328, 335 (Enrico Colmbatto ed., 2004).

15. Abraham Bell & Gideon Parchomovsky, *Givings*, 111 YALE L.J. 547 (2001).

16. Wallace Wen-Yeu Wang & Jian-Lin Chen, *Bargaining for Compensation in the Shadow of Regulatory Giving: The Case of Stock Trading Rights Reform in China*, 20 CO-LUM. J. ASIAN L. 298 (2006).

17. See *infra* Part III.C.

18. Wallace Wen-Yeu Wang & Jian-Lin Chen, *supra* note 16, at 335; see Bell & Parchomovsky, *supra* note 15, at 601.

tion infuses an element of private law into the essentially public nature” of government takings.<sup>19</sup> Under this refined givings doctrine, the givings beneficiaries (private developers) would be required to obtain majority consent from the takings victims (owners of acquired property) before eminent domain may be exercised.<sup>20</sup>

Armed with this givings perspective, this Article engages in a comparative study of the controversial exercise of eminent domain power for economic development in China, the United States, and Singapore, and it proposes a new model that seeks to achieve better compensation for takings victims and eliminate the incentive for private developers to abuse the eminent domain process. The Singapore en-bloc process is visited as an example of a fresh approach towards economic development eminent domain, as it not only adheres to the givings jurisprudence alluded to above but also offers a novel solution towards charging for givings in situations where takings and givings are intimately linked.

Part II discusses the social background and the current legal framework of China’s land acquisition process. The rampant undercompensation and corruption that contribute to the *ding zi hu* phenomenon are identified. Part III proceeds to examine economic development eminent domain in the United States. The *Kelo* decision is discussed together with the public choice theory and issues of undercompensation. The deficiencies in the current academic discussions, which focus only on the takings aspect of the equation, are also highlighted. Lastly, tackling the unaddressed issue of rent-seeking by takings beneficiaries, the givings jurisprudence is introduced and its merits are analyzed. Part IV examines the Singapore en-bloc process and highlights its novel approach. This process includes private developers directly covering the entire cost of the land acquisition, the conditional nature of the eminent domain process, and the injection of some property rule protection into the otherwise liability rule protection of eminent domain. The deficiencies of the Singapore en-bloc process are also identified, and in particular, the issue of who should bear the transaction costs of a failed en-bloc process is thoroughly discussed.

Part V explains the merits of Singapore’s novel approach. First, judgment of whether to pursue an economic development project is now placed on private developers and property owners instead of legislators. Second, since the cost of land acquisition is borne by private developers, a more comprehensive internalization of cost and a reduction in rent-seeking is achieved. Third, the problem of undercompensation is reduced because the property rule protection

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19. Wallace Wen-Yeu Wang & Jian-Lin Chen, *supra* note 16, at 354.

20. *Id.*

allows a substantial portion of the property's subjective value to be captured. Fourth, various procedural safeguards and checks by an administrative intermediary help ensure a more structured and transparent process. Indeed, economic analysis confirms that the Singapore en-bloc process is an efficient method of facilitating socially efficient transactions.

Currently, the Singapore en-bloc process is only applicable to strata-title property. In Part VI, a new model, drawing on the merits of the Singapore en-bloc process with necessary improvements and modifications, is proposed for general economic development eminent domain. Under this model, the acquiring party has to negotiate with the property owners and secure majority consent before eminent domain may be exercised over the dissenting owners. A third-party government body ensures proper conduct in the negotiation process and possesses the power to order additional compensation for any peculiar circumstances of the dissenting owners. The transaction cost issue highlighted in Part IV is resolved with the requirement that the acquiring party pay the transaction costs of the property owner regardless of the outcome of the eminent domain process. A step-by-step table is included to provide a framework for the practical application of this model. While this new model is designed with China in mind, given China's more compelling need for economic development, its applicability to the United States is noted as well.

## II. CHINA: THE *DING ZI HU* SAGA AND THE PROPERTY LAW

### *A. Background*

The use of eminent domain for economic development is rampant in China. Compelled by the rapidly developing economy, there is an impetus to undertake "large-scale urban renewal project[s] with the aim of encouraging private development and new infrastructure."<sup>21</sup> "Due to unmanageable rapid growth, however, the State must prioritize economic expansion at the expense of many citizens displaced by the necessary development."<sup>22</sup> This trend is reinforced by the Chinese government's belief that the country's developing nature necessitates more state intervention "to ensure rapid industrialization and catch up with the advanced

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21. Theresa H. Wang, Comment, *Trading the People's Homes for the People's Olympics: The Property Regime in China*, 15 PAC. RIM L. & POL'Y J. 599, 600 (2006); see Pamela N. Phan, *Enriching the Land or the Political Elite? Lessons from China on Democratization of the Urban Renewal Process*, 14 PAC. RIM L. & POL'Y J. 607, 608 (2005).

22. Wang, *supra* note 21, at 616.



economies.”<sup>23</sup> The result is massive urban renewal and countless displaced residents.<sup>24</sup>

### *B. Legal Framework*

In 2004, Article 13 of the Chinese Constitution was amended to give constitutional protection to private property rights.<sup>25</sup> It provides that “[t]he state may, for the public interest, expropriate or take over private property of citizens for public use, and pay compensation in accordance with the law.”<sup>26</sup> This protection is also echoed in Article 2 of the Land Administration Law, which was amended after the aforementioned constitutional amendment.<sup>27</sup> A comparison with the language of the Fifth Amendment of the United States Constitution, “nor shall private property be taken for public use, without just compensation,”<sup>28</sup> immediately reveals the distinction between the more broadly defined “public interest” under Chinese law vis-à-vis the United States’s “public use.”<sup>29</sup> More glaringly, however, the Chinese Constitution merely mentions compensation without any requirement that it be just. This ambiguity with regard to compensation is somewhat alleviated by the 2007 enactment and implementation of the Property Law, which provides in Article 42 that

it is necessary to make compensation for demolition and relocation according to law and safeguard the legitimate rights and interests of the owners of the real properties expropriated; as for the expropriation of the individuals’ residential houses, it is necessary to safeguard the housing conditions of the owners of the houses expropriated.<sup>30</sup>

However, there is still room to argue whether just compensation is legally required.

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23. Phan, *supra* note 21, at 613.

24. Wu Xin Hui, *Dong qian hu dong nu le* [Displaced Household Gets Angry], LIANHE ZAOBAO (Sing.), Apr. 9, 2007.

25. XIAN FA [Constitution] art. 13 (2004), translated in LAWINFOCHINA (last visited Feb. 24, 2009) (P.R.C.).

26. *Id.*

27. Land Administration Law (promulgated by Standing Comm. Nat’l People’s Cong., Aug. 29, 1998, effective Jan. 1, 1999, revised Aug. 28, 2004), art. 2, translated in LAWINFOCHINA (last visited Feb. 24, 2009) (P.R.C.).

28. U.S. CONST. amend. V.

29. See *infra* Part II.C.2.

30. Property Law (promulgated by the Standing Comm. Nat’l People’s Cong., Mar. 16, 2007, effective Oct. 1, 2007), art. 42, translated in LAWINFOCHINA (last visited Feb. 24, 2009) (P.R.C.).

For urban housing, the legal requirement is that the acquiring party must negotiate with the property owner to reach an agreement as to the amount of compensation, location of replacement housing, and other relevant matters.<sup>31</sup> This may give the appearance of a property rule protection for the property owner. However, this notion is easily dispelled by the provision, which allows the acquiring party to simply apply for an administrative determination regarding the acquisition and then proceed with the acquisition when no private agreement can be reached with the property owner.<sup>32</sup> What is revealing is that after the administrative determination has been made, the property owner's appeal to a people's court does not suspend or even temporarily halt the acquisition process.<sup>33</sup> In truth, "[t]here is no way . . . to challenge the underlying eviction *ex ante*, only the compensation amount *ex post*."<sup>34</sup>

### C. The Current State of Takings

#### 1. Improper Procedures and Limited Judicial Redress

The process by which land is actually acquired frequently leaves much to be desired. There is often very little notice before the date of the eviction.<sup>35</sup> Forceful and abusive methods of eviction are also not uncommon. These methods can include using violence, shutting off electricity or water, dangerous demolition practices, and surprise demolition while the owners are not at home.<sup>36</sup> Indeed, the most common complaint by the owners of acquired property is not the acquisition per se, but rather the process of acquisition.<sup>37</sup>

Judicial recourse is limited. People's Courts only allow an appeal after all "the proscribed adjudication remedies are exhausted."<sup>38</sup> In practice, this effectively limits the availability of judicial recourse since "[m]ost complaints and negotiations are already stifled in the administrative stage . . . and usually with massive disappointment on the part of the [property owner]."<sup>39</sup> Indeed,

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31. Regulation on the Dismantlement of Urban Houses (promulgated by St. Council, June 13, 2001, effective Nov. 1, 2001), art. 13, *translated in* LAWINFOCHINA (last visited Feb. 24, 2009) (P.R.C.).

32. *Id.* at art. 16.

33. *Id.*

34. Wang, *supra* note 21, at 608.

35. Phan, *supra* note 21, at 630-31.

36. Wu Xin Hui, *supra* note 24; Phan, *supra* note 21, at 608; Wang, *supra* note 21, at 608.

37. Wu Xin Hui, *supra* note 24; Phan, *supra* note 21, at 645-46.

38. Wang, *supra* note 21, at 609; see Regulation on the Dismantlement of Urban Houses (promulgated by St. Council, June 13, 2001, effective Nov. 1, 2001), art. 16, *translated in* LAWINFOCHINA (last visited Feb. 24, 2009) (P.R.C.).

39. Wang, *supra* note 21, at 609.

attempts to seek redress with the central government in Beijing have sometimes been forcefully obstructed at the local level.<sup>40</sup> In addition, there is “a general reluctance by Chinese courts to exercise jurisdiction . . . due to pressures from local officials.”<sup>41</sup> A serious institutional defect exists whereby the local courts depend “on local governments for funding and control . . . in staffing.”<sup>42</sup> The new constitutional protection provides little practical recourse since “[t]he Chinese judiciary has yet to recognize a claim based on constitutionally based rights.”<sup>43</sup>

## 2. A Broad Definition of Public Interest

In practice, land acquired through the eminent domain process in China is often allocated to private developers for development into commercial property.<sup>44</sup> Public interest has been given a wide meaning, allowing acquired land to be built into “new luxury condominiums, shopping malls, and commercial office buildings.”<sup>45</sup> It appears that the public interest requirement is satisfied as long as the acquisition is within the scope of the government’s urban planning.<sup>46</sup> Indeed, prior to the 2004 amendments, the original Law of Land Administration did not even include a public interest requirement.<sup>47</sup> Chinese legal scholar Zhu Yan commented that while the new Property Law does not provide a clear definition of public interest, construction of commercial buildings by private developers is unlikely to satisfy this requirement.<sup>48</sup> Wang Quan Di opined that the key is not to formulate a substantive definition but rather to regulate the manner in which government authorities define public interest.<sup>49</sup> There is also the inclination that whether

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40. See, e.g., Phan, *supra* note 21, at 608; Wang, *supra* note 21, at 610.

41. Phan, *supra* note 21, at 634.

42. Chris X. Lin, *A Quiet Revolution: An Overview of China’s Judicial Reform*, 4 ASIAN-PAC. L. & POL’Y J. 255, 295 (2003).

43. Wang, *supra* note 21, at 610; see Wallace Wen-Yeu Wang & Jian-Lin Chen, *supra* note 16, at 324.

44. Wang, *supra* note 21, at 600; Li Xiao-yu, *Wo guo ji ti du di zheng shuo zhi du de fa lv si kao* [Legal Speculation on Collective Land Expropriation System in Our Country], 139 GUANGDONG DIANSHI DAXUE XUEBAO (ZHEXUE SHEHUI KEXUE BAN) [J. RADIO & TV U. (PHIL. & SOC. SCI.)] 82, 83 (2006) (P.R.C.).

45. Wang, *supra* note 21, at 607.

46. Li Xiao-yu, *supra* note 44, at 83.

47. Law of Land Administration (promulgated by Standing Comm. Nat’l People’s Cong., Dec. 27, 1998, effective Jan. 1, 1999), translated in LAWINFOCHINA (last visited Feb. 24, 2009) (P.R.C.).

48. Zhang Zhi Zhong, *supra* note 5.

49. Yang Jin Zhi, “Gong gong li yi” li fa: xu yan fang zheng shou cai qian zai “gong” ji “si” [“Public Interest” Enactment: Special Care to Prevent Acquisition and Relocation for “Private” Purposes in the Name of “Public Interest”] (June 28, 2007), available at <http://www.chinalawinfo.com/fzdt/xwnr.asp?id=19499>.

an acquisition project conforms to public interest should be determined by public opinion.<sup>50</sup>

The issue should not be whether economic development by private developers qualifies as public interest but rather whether public interest has been manipulated to advance a solely private interest. It is worth noting that in the United States “[e]minent domain was an important nineteenth-century economic development tool, used to redistribute economic and political power and wealth.”<sup>51</sup> During the same period, “the creation of an infrastructure for a growing national economy intensified the taking of land for canals, private mills and railroads”<sup>52</sup> as “the ‘public interest’ of economic prosperity overrode individual rights.”<sup>53</sup> “American government [attempted] to ‘release energy’ by encouraging private developers to make the best use of land.”<sup>54</sup> China’s economy is at a similar stage of development. There remains a very strong public interest in economic development because the standard of living remains low for much of China’s population. The focus should be on preventing abuse and corruption by private developers and not on a blanket stipulation that commercial projects by private developers do not qualify as a public interest.

### 3. *Severe Undercompensation and Ding Zi Hu*

In China, prior to the implementation of the Property Law, there was no express provision that addressed whether compensation had to be just. Although the Property Law suggests just compensation be paid, in actual practice, undercompensation is still severe since owners often receive only a small portion of the resale market price from the government.<sup>55</sup> Compensation is calculated based on the actual value of the house without including the value of the underlying land, which is often greater given that its prime location is the reason for the acquisition.<sup>56</sup>

The lack of any legal provision for just compensation is made worse by the lack of proper judicial recourse,<sup>57</sup> which means that administrative authorities and local governments become their

50. *Id.*; Wu Xin Hui, *supra* note 24.

51. David Schultz, *What’s Yours Can Be Mine: Are There Any Private Takings After Kelo v. City of New London?*, 24 UCLA J. ENVTL. L. & POL’Y 195, 200 (2006); *see* Cohen, *supra* note 10, at 506-07.

52. Kelly, Jr., *supra* note 2, at 934.

53. Wang, *supra* note 21, at 611.

54. *Id.* at 612.

55. Chen Ping, *Tu di zheng yong fa lv zhi du de wan shan* [The Improvement on the Legal System of Land Requisition], 19(6) LESHAN SHIFAN XUEYAN XUEBAO [J. OF LESHAN TCHRS C.] 70, 72 (2004) (P.R.C.).

56. Wu Xin Hui, *supra* note 24.

57. *See supra* Part II.C.1.

own judges on the level of appropriate compensation. Given the practice of local governments to reap huge profits by acquiring land at a low cost and then selling at a high price,<sup>58</sup> there is a strong incentive for undercompensation absent any countervailing forces. Indeed, compensation is often awarded at either extreme in China. In most cases, the acquisition authorities have the necessary administrative power and media control to achieve compulsory evictions without any redress for the property owner. On the other hand, if a property owner somehow remains persistent and possesses or acquires the capability to hold out—thereby becoming a *ding zi hu*—a high level of compensation can be demanded.<sup>59</sup> This holdout capability is closely linked with the extent of media's limelight and may allow extremely high levels of compensation to be obtained.<sup>60</sup> Indeed, there is an increasing awareness by *ding zi hu* on how to utilize and manipulate the media to achieve their aim.<sup>61</sup> The Chongqing *ding zi hu*, who have captured nationwide and international media attention, have a propensity for the theatrical.<sup>62</sup> While there are sometimes attempts by the government to impose media blackouts,<sup>63</sup> these attempts are increasingly circumvented by the internet media.<sup>64</sup>

It may be tempting to view these *ding zi hu* sympathetically as citizens fighting for their rights in the face of an oppressive government abusing its powers. However, it is also worth noting that *ding zi hu* demands border on unreasonable at times.<sup>65</sup> The fact that those owners who move out later often get more compensation than those who move out earlier has provided a strong incentive for owners to attempt to hold out as *ding zi hu*.<sup>66</sup> A more struc-

58. Chen Ping, *supra* note 55, at 73.

59. Hu Jing Guang & Wang Xie, *Wo guo cheng shi fang hu cha qian zhong de ruo gan fa lv wen ti - yi Beijing jiuqian qiao cha qian an wei li* [Legal Problems in China Urban Acquisition - Example from Beijing Jiuqianqiao Acquisition] (2007), available at [http://article.chinalawinfo.com/article/user/article\\_display.asp?ArticleID=40475](http://article.chinalawinfo.com/article/user/article_display.asp?ArticleID=40475).

60. *Shou li zhong guo "zui gui ding zi hu" huo pei qian wan yuan ren min bi* [First Case of "Most Expensive 'Dingzi Hu'" in China Gets Over Ten Million RMB as Compensation], LIANHE ZAobao, Oct. 1, 2007 (Sing.) [hereinafter *Most Expensive Dingzi Hu*] (indicating that the owner who held out got an estimate of 12 million RMB in compensation in the end and then bought replacement housing nearby for slightly over 1 million RMB).

61. Wu Xin Hui, *supra* note 24.

62. See Zhang Zhi Zhong, *supra* note 5 (describing how one *ding zi hu* hoisted a flag, put up a banner with a quote from the Constitution, and performed martial arts).

63. Phan, *supra* note 21, at 634.

64. Zhang Zhi Zhong, *supra* note 5 (noting that a *ding zi hu* demanded over six million RMB in addition to a replacement house that was in same location, had the same floor area, and faced the same direction as the old house); *Bao dao "ding zi hu" gong ming ji zhe shou qu chou lao bei cao feng* [Civilian Reporter of "Dingzihu" Mocked for Accepting Payment], LIANHE ZAobao, Nov. 13, 2007 (Sing.).

65. Ye Peng Fei, *Hu qingtao: yao an wu quan fa wei hu ming zai quan* [Hu Qing Tao: Uphold Rights of Residential Property in Accordance with Property Rights Law], LIANHE ZAobao, Mar. 26, 2007 (Sing.).

66. Wu Xin Hui, *supra* note 24. In an acquisition in Shanghai during 2006, those who

tured and transparent acquisition process is necessary to tackle this *ding zi hu* phenomenon. This is the greatest problem currently facing China, as explained in the next section.

#### 4. Corruption and Lack of Transparency

Corruption in the land acquisition process in China is rampant. “As the beneficiaries of fees and other costs paid by developers, these [administrative] boards are often biased” in favor of private developers in determining the level of compensation.<sup>67</sup> Local governments are often driven by strong financial and political reasons to liberally acquire land in order to attract non-public investments for economic development.<sup>68</sup> This gives rise to a disturbing and unhealthy partnership between these local governments and “business interest groups such as real estate developers.”<sup>69</sup> Private developers satisfy the government’s quest for gross domestic product (GDP) growth while obtaining huge profits from cheap land, all at the expense of the residents whose land is acquired at a bargain value.<sup>70</sup> Developers are not willing to negotiate deals with residents since, as developers, they have the ability to manipulate administrative and governmental bodies into getting the land at a low cost.<sup>71</sup>

There is a lack of transparency in the eminent domain process, with many behind-the-scenes illegal transactions taking place.<sup>72</sup> In order to obtain land, developers must often bribe authorities at all relevant levels of government.<sup>73</sup> Under the current structure, many levels and organs of government have the power to acquire land, which provides many possible avenues for rent-seeking behavior and the abuse of power.<sup>74</sup> There has been “little progress to address this crippling issue” of corruption, notwithstanding that it “has been a problem in all transitional governments.”<sup>75</sup> Efforts and directions by top-level officials often have little effect, with prob-

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moved out earlier were compensated 104,000 RMB, while those who moved out later received 150,000 RMB. *Id.*

67. Wang, *supra* note 21, at 609.

68. Phan, *supra* note 21, at 616-18.

69. *Id.* at 619.

70. Li Xiao-yu, *supra* note 44, at 83.

71. Phan, *supra* note 21, at 619.

72. Chen Ping, *supra* note 55, at 72.

73. *Guo jia tu di fu zong du cha gan changchun: tu di ying fa de fu bai shi dang qian fu bai zhong diang* [National Land Vice-Commissioner Gan Changchun: Corruption Arising from Land Is the Currently the Predominant Corruption], LIANHE ZAobao, Sept. 18, 2007 (Sing.) [hereinafter *Land Corruption*].

74. Chen Ping, *supra* note 55, at 72.

75. Wang, *supra* note 21, at 622.

lems of corruption rampant at the lower levels.<sup>76</sup> Indeed, China's National Land Vice-Commissioner recently commented that corruption relating to land acquisition is currently China's most prominent corruption problem.<sup>77</sup>

### 5. *The Need for Reform*

The problems of undercompensation and corruption have resulted in a lack of trust between the government and the people.<sup>78</sup> Protests and social strife over land acquisitions have become increasingly common,<sup>79</sup> indicating the compelling need for reform.<sup>80</sup> Moreover, international pressure on China to advance property rights is mounting.<sup>81</sup> China has ratified the International Covenant on Economic, Social and Cultural Rights, which frowns upon forced eviction, especially without due process and adequate compensation.<sup>82</sup> There is a reform proposal that suggests the use of people's jurors in eminent domain procedures to ensure "a more transparent, equitable legal system."<sup>83</sup> There are also suggestions "to strengthen 'organizational-based' rules" to counter "pro-growth coalitions" of local governments and developers.<sup>84</sup> There is reform in the Zhejiang Province, where property valuation is based on a value chosen by the parties or from an official board.<sup>85</sup> However, the common deficiency found in these reform suggestions and proposals is their failure to deal with the givings aspect of the problem: namely, there exists a huge incentive driving private developers to abuse the land acquisition process. Given the existence of severe corruption, the failure to address this aspect of the problem is telling and will be elaborated below.<sup>86</sup>

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76. Li Qi Hong, *Guangdong li "he xie she hui" you duo yuan?* [How Far Is Guangdong from "Harmonious Society?"], LIANHE ZAobao, Jan. 1, 2007 (Sing.) (indicating that strict requirements directed by top-level officials failed to prevent the numerous disputes arising out of land acquisition).

77. *Land Corruption*, *supra* note 73.

78. *Guangdong foshan zheng di nao jiu fen qian ming jing cha jin chun qi zhong tu* [Land Acquisition Dispute at Guangdong Foshan – Conflict When Thousands of Police Entered Village], LIANHE ZAobao, Jan 20, 2007 (Sing.).

79. *See, e.g., id.* (describing how villagers banded together to protect their land in Guangdong).

80. Wang, *supra* note 21, at 625.

81. *Id.* at 623-24.

82. Phan, *supra* note 21, at 637.

83. Wang, *supra* note 21, at 625-26.

84. Phan, *supra* note 21, at 646.

85. Wu Xin Hui, *supra* note 24.

86. *See infra* Part III.C.1.

### III. THE UNITED STATES: *KELO* AND ECONOMIC DEVELOPMENT EMINENT DOMAIN

#### A. *The Kelo Decision and Economic Development Eminent Domain in the United States*

Given the existing extensive academic discussion of the facts and holding of *Kelo v. City of New London*,<sup>87</sup> a brief summary will suffice here. The case is a typical example of the use of eminent domain for economic development. The City of New London was targeted for economic redevelopment in light of years of economic decline and increased unemployment rates.<sup>88</sup> Unemployment in New London was almost twice that of the state rate.<sup>89</sup> The city's poverty rate was also double the rate of the State of Connecticut.<sup>90</sup> A redevelopment plan, which included a hotel, restaurants, shopping, marinas, new residences, "research and development office space," and park support, was proposed by the private nonprofit entity New London Development Corporation (NLDC) and approved by the city council.<sup>91</sup> The purpose of the plan was to create jobs, generate tax revenue, provide recreational destinations, and revitalize downtown New London.<sup>92</sup> Authority to acquire the necessary land in the city's name through the use of eminent domain was granted to the NLDC.<sup>93</sup> Given the nature of the redevelopment plan, some of the acquired land was to be leased to private developers.<sup>94</sup> A small fraction of owners whose land was within the designated development site (the nine petitioners in *Kelo* owned fifteen out of the 115 private parcels to be acquired) opposed the sale.<sup>95</sup> The United States Supreme Court, by a bare five-to-four majority,<sup>96</sup> held that the use of eminent domain to take unblighted property<sup>97</sup> pursuant to a development plan for economic rejuvenation was not contrary to the Takings Clause of the Fifth Amendment.<sup>98</sup> The existence of a comprehensive development plan de-

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87. *E.g.*, Baron, *supra* note 2, at 619-20; Cohen, *supra* note 10, at 492-93, 496; Jennie C. Nolon, Note, *Kelo's Wake: In Search of a Proportional Benefit*, 24 PACE ENVTL. L. REV. 271, 272-73, 277-79 (2007); Schultz, *supra* note 51, at 218-23; Jonathan Michels, Comment, *Kelo v. City of New London: Is the Response to Curb the Effect of the Supreme Court Decision Going Too Far?*, 37 SETON HALL L. REV. 527, 527, 535-40 (2007).

88. *Kelo v. City of New London*, 545 U.S. 469, 473 (2005).

89. *Id.*

90. Nolon, *supra* note 87, at 277.

91. *Kelo*, 545 U.S. at 473-75.

92. *Id.* at 474-75.

93. *Id.* at 475.

94. *Id.* at 476 n.4.

95. *Id.* at 474-75.

96. *Id.* at 470.

97. *Id.* at 475.

98. *Id.* at 489-90.



signed to enhance public welfare<sup>99</sup> distinguished this case from the prohibited scenarios where private land is taken to confer “a private benefit on a particular private party” or where public purpose is as a mere pretext “to bestow a private benefit.”<sup>100</sup>

There was a strong public response after the decision.<sup>101</sup> The possible glimmer of hope in the decision’s emphasis on comprehensive development plans<sup>102</sup> failed to avert the public outrage. “[A]lmost ninety percent of Americans express[ed] disapproval of the [type of] governmental takings . . . permitted by . . . *Kelo*.”<sup>103</sup> The post-*Kelo* “political momentum clearly favors the widespread adoption of the substantive restrictions on eminent domain that the Supreme Court refused to endorse,”<sup>104</sup> “spawn[ing] a swarm of federal and state legislative initiatives to curtail condemnation for transfer to private parties.”<sup>105</sup> *Kelo* was also heavily criticized by scholars,<sup>106</sup> with only scant support for the majority decision.<sup>107</sup> Nonetheless, an examination of jurisprudential history reveals that economic development was already an accepted goal of the use of eminent domain power prior to *Kelo*.<sup>108</sup> Truthfully, the result in *Kelo* was almost inevitable given prior case law,<sup>109</sup> and the “decision was correct as a matter of law.”<sup>110</sup> Indeed, because of the relaxation of the public use test by courts in past cases, “municipalities [had] become increasingly bold in their use of eminent domain.”<sup>111</sup> In fact, there have even been instances where municipal governments noticeably appeared to favor a particular private party through the use of eminent domain.<sup>112</sup> Moreover, eminent domain has also been exercised “under the guise of clearing away

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99. *Id.* at 484.

100. *Id.* at 477-78.

101. Baron, *supra* note 2, at 630-32; Nolon, *supra* note 87, at 278-79; Sandefur, *supra* note 2, at 711.

102. *Kelo*, 545 U.S. at 484-89; see Schultz, *supra* note 51, at 223.

103. Michels, *supra* note 87, at 553.

104. Garnett, *supra* note 2, at 149.

105. Kelly, Jr., *supra* note 2, at 926; see Baron, *supra* note 2, at 630-31; Sandefur, *supra* note 2, at 711-12.

106. See Baron, *supra* note 2, at 615-16; Cohen, *supra* note 10, at 498; Sandefur, *supra* note 2, at 777.

107. See Michels, *supra* note 87, at 558-60 (opining that the surge of legislative responses may too harshly restrict eminent domain, which is an essential power of the government and may be necessary for some economic development); Schultz, *supra* note 51, at 234 (discussing the existence of a new test of comprehensive plan as saving grace).

108. Schultz, *supra* note 51, at 197.

109. Baron, *supra* note 2, at 621; Sandefur, *supra* note 2, at 726.

110. Cohen, *supra* note 10, at 496.

111. Benjamin D. Cramer, Note, *Eminent Domain for Private Development – An Irrational Basis for the Erosion of Property Rights*, 55 CASE W. RES. L. REV. 409, 415 (2004).

112. See *id.* at 416-17; Sara B. Falls, Note, *Waking a Sleeping Giant: Revisiting the Public Use Debate Twenty-Five Years After Hawaii Housing Authority v. Midkiff*, 44 WASH. BURN L.J. 355, 364-66 (2005) (favoring a BMW dealership over a Mitsubishi dealership and favoring Costco Wholesale Corporation over 99 Cents Only Stores).

'blight.'"<sup>113</sup> It is fair to say that the abuses of eminent domain power to benefit private parties are rife in the United States.<sup>114</sup>

### *B. Criticisms of Economic Development Eminent Domain*

#### *1. Public Choice Theory*

The first of the two main criticisms of eminent domain for economic development rests upon public choice theory. "According to public choice theory, a mobilized, well-connected minority can exert more political influence than a numerically superior but unorganized or apathetic majority . . ." <sup>115</sup> This "breakdown of the democratic process [is] among the most potent criticisms of . . . economic development takings."<sup>116</sup> The use of eminent domain to acquire land for development is highly beneficial to private developers because it dispenses with the need to negotiate with land owners thus lowering transaction costs.<sup>117</sup> There is also "an incentive for the legislative body to seek favor from organized interest groups in order to raise money and gain votes."<sup>118</sup> The government also obtains the right to brag about redevelopment and renewal while "redevelopment officials benefit from projects through increased funding and the opportunity to be involved in future projects."<sup>119</sup> All this comes, unfortunately, at the expense of the owners of the acquired property and the general public.<sup>120</sup>

"The economically rational taxpayer will have little incentive to combat any one piece of legislation" or government expenditure.<sup>121</sup> Even if a private property owner is directly affected, "the existence of compensation . . . decreases his incentive to invest in fighting the condemnation."<sup>122</sup> In any case, the private property owner is inevitably dwarfed by the more politically influential and powerful special interests.<sup>123</sup> "[I]nterest groups are also quite effective at controlling the flow of information . . . , thereby encouraging positive reaction . . . [and] deterring opposition."<sup>124</sup> Given that the compensation paid for a condemnation is usually borne by the taxpayers generally, the special interest groups' influence is actually

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113. Cramer, *supra* note 111, at 417.

114. Falls, *supra* note 112, at 356; *see* Sandefur, *supra* note 2, at 725.

115. Serkin, *supra* note 13, at 1637.

116. Cohen, *supra* note 10, at 546.

117. Cramer, *supra* note 111, at 418.

118. *Id.* at 419.

119. Sandefur, *supra* note 2, at 770.

120. Cramer, *supra* note 111, at 419.

121. Kochan, *supra* note 11, at 81.

122. *Id.* at 82; *see* Serkin, *supra* note 13, at 1639.

123. Kochan, *supra* note 11, at 82.

124. *Id.* at 81; *see* Sandefur, *supra* note 2, at 771.

increased.<sup>125</sup> Moreover, the concentrated nature of the benefit to the private developer means that the interest group has a much higher incentive to lobby the government for the benefit in comparison to the private property owner's incentive to fight it.<sup>126</sup> This incentive is exacerbated by the fact that the interest groups often bear little or none of the cost of the acquisition, which can lead to over-reliance on such measures.<sup>127</sup> “[T]he redistributive nature of [this] rent-seeking behavior [may] be regarded as immoral, [but] it is also unproductive and inefficient.”<sup>128</sup>

## 2. Undercompensation

The provision for just compensation is sometimes used to justify the taking of property.<sup>129</sup> However, U.S. “courts have not pretended that fair market value” will compensate “for all losses [suffered] as a result of the taking.”<sup>130</sup> Indeed, undercompensation is often cited as an important criticism of the eminent domain process.<sup>131</sup> Undercompensation causes inefficiency where the full cost of the *taking* is not internalized.<sup>132</sup>

Undercompensation occurs because “relocation expenses, goodwill associated with a business’s location, or the cost of replacing the condemned property” are not factored into the fair market value.<sup>133</sup> “[T]he amount of money that the landowner will need to purchase a comparable property as a replacement” is not factored into the current market value.<sup>134</sup> Significant losses result when displaced residents “are unable to secure comparably affordable replacement housing.”<sup>135</sup> This will “work to the particular detriment of small business owners,” who may not be able to reopen at all or fail at their new location.<sup>136</sup> Also, the current market value may not account for “[s]urpluses . . . from an owner’s singular appreciation from his property.”<sup>137</sup> While “[s]ome owners’ valuation may be so idiosyncratic as to be unintelligible,” others may reflect

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125. Serkin, *supra* note 13, at 1639.

126. Sandefur, *supra* note 2, at 771; Daniel B. Kelly, *The “Public Use” Requirement in Eminent Domain Law: A Rationale Based on Secret Purchases and Private Influence*, 92 CORNELL L. REV. 1, 34-37 (2006).

127. Kelly, *supra* note 126, at 37-39.

128. Kochan, *supra* note 11, at 83 (footnote omitted).

129. Cohen, *supra* note 10, at 536.

130. Kelly, Jr., *supra* note 2, at 940.

131. Garnett, *supra* note 2, at 104; *see, e.g.*, Cohen, *supra* note 10, at 536-40.

132. Cohen, *supra* note 10, at 541-42; *see* Serkin, *supra* note 13, at 1634.

133. Garnett, *supra* note 2, at 106; *see* Cohen, *supra* note 10, at 538.

134. Cramer, *supra* note 111, at 430.

135. Garnett, *supra* note 2, at 106.

136. *Id.*

137. Kelly, Jr., *supra* note 2, at 952.

actual “unique needs,” such as a wheelchair-bound owner with an easily accessible home.<sup>138</sup> “[T]he market price will not reflect” these surpluses given that “less sensitive buyers are so much more numerous.”<sup>139</sup> Another aspect of loss arises from the fact that eminent domain prevents an owner from benefiting from any potential value of the property that is likely to incur after the transfer.<sup>140</sup>

A sentimental attachment to the property may also cause the subjective value of that property to be higher than its fair market value.<sup>141</sup> This sentimental value includes the way property “becomes inextricably intertwined with an owner’s personhood.”<sup>142</sup> There is also a subjective loss arising out of the separation from neighbors and community support.<sup>143</sup> “[C]ommunities are valuable to people,” as “vast ethnographic literature” and “common experience” show.<sup>144</sup> “[N]o cash award can qualify as ‘just compensation’” for the deprivation of one’s home and community.<sup>145</sup> “Empirical research in the fields of cognitive psychology and behavioral economics has shown widespread tendencies among all sorts of property owners to hold on to their entitlements.”<sup>146</sup> “[S]tudies have explored both the [negative] physiological and psychological effects of the sudden loss of home and community due to condemnation.”<sup>147</sup> The sudden removal from one’s neighborhood is seen as “a threat to the community member’s sense of self” and personal “emotional ecosystem.”<sup>148</sup>

The eminent domain process also causes “dignitary harms,” whereby property “[o]wners may feel unsettled and vulnerable.”<sup>149</sup> Because these dignitary harms result “from the nature of the government’s action, rather than from the owner’s subjective attachment,” they are exacerbated where eminent domain is used to advance economic development.<sup>150</sup> “First, owners may be offended by the government’s implicit suggestion that the current use of their property is less than socially optimal and that some other private owner would put it to a ‘better’ use.”<sup>151</sup> “Second, property owners

138. *Id.*

139. *Id.*

140. See Cohen, *supra* note 10, at 539.

141. Garnett, *supra* note 2, at 108.

142. *Id.*; see Serkin, *supra* note 13, at 1656.

143. Garnett, *supra* note 2, at 108-09.

144. Gideon Parchomovsky & Peter Siegelman, *Selling Mayberry: Communities and Individuals in Law and Economics*, 92 CAL. L. REV. 75, 81 (2004); see Garnett, *supra* note 2, at 108-09.

145. Kelly, Jr., *supra* note 2, at 928.

146. *Id.* at 954.

147. *Id.* at 958-59.

148. *Id.* at 961.

149. Garnett, *supra* note 2, at 109 (internal quotation marks omitted).

150. *Id.* at 109-10.

151. *Id.* at 110.

also may feel that the government has treated them unfairly vis-à-vis others whose property was not taken.”<sup>152</sup> “The very regulations that produce social goods can impose hugely inefficient demoralization costs on individuals.”<sup>153</sup>

It is worth noting that takers of property operate in ways that “may minimize . . . the risk of undercompensation.”<sup>154</sup> “Takers are most likely to avoid a property” which has “a high subjective value, [is] important to a cohesive community,” or has “politically powerful owners.”<sup>155</sup> The fear of unwanted and potentially damaging political opposition reduces the risk of undercompensation.<sup>156</sup> However, echoing the rent-seeking abuse in the public choice theory, “political outsiders, including racial minorities and the poor, who are not attached to cohesive communities,” remain particularly vulnerable.<sup>157</sup> Indeed, “some [socially weak] groups are disproportionately targets of ‘redevelopment’ efforts.”<sup>158</sup>

### 3. Reform Proposals

Reform proposals abound in an attempt to tackle the perceived inadequacies of the current regime. “Some commentators have noted that the [suggested] payment of cash premiums can deter government from overusing condemnation against owners who suffer uncompensatable losses.”<sup>159</sup> However, more money may not be the answer to reducing the risk of abuse of the eminent domain power<sup>160</sup> given that government actors are motivated by political as well as monetary costs.<sup>161</sup> It is also inconsistent with the language of the Fifth Amendment because “just compensation without a public use limitation” does not satisfy its requirements.<sup>162</sup>

Several state legislatures, in response to *Kelo*, have enacted restrictions on use of eminent domain for subsequent transfers to or acquisitions by private parties.<sup>163</sup> Charles Cohen has suggested banning eminent domain for economic development altogether.<sup>164</sup>

152. *Id.*

153. Baron, *supra* note 2, at 647.

154. Garnett, *supra* note 2, at 121.

155. *Id.* at 118.

156. *Id.* at 111.

157. *Id.* at 120.

158. Baron, *supra* note 2, at 631; *see also* Garnett, *supra* note 2, at 107 (explaining that African Americans are “frequently targeted for displacement”).

159. Kelly, Jr., *supra* note 2, at 941.

160. Garnett, *supra* note 2, at 137.

161. *See* Serkin, *supra* note 13, at 1640.

162. Cramer, *supra* note 111, at 430.

163. *See generally* Sandefur, *supra* note 2, at 757, 760, 763 (discussing state reform laws that have enacted such restrictions).

164. Cohen, *supra* note 10, at 498.

His main justifications are that abusive captures by interest groups may lead to injustice and that inefficiency results when the failure to internalize costs leads to undercompensation.<sup>165</sup> However, a complete ban ignores the necessity of economic development domain, especially in a developing or ailing economy.<sup>166</sup> Eminent domain has also proved indispensable “throughout history to clean up ‘miserable and disreputable housing conditions’ which may ‘suffocate the spirit by reducing the people who live there to the status of cattle.’”<sup>167</sup>

Donald Kochan suggests allowing the marketplace to “craft[ ] private-order solutions to the problem of holdouts” because overusing the power of eminent domain will stifle such innovation aimed at reducing transaction costs.<sup>168</sup> Echoing the spirit of a private-order solution is Daniel Kelly, who has suggested “using secret buying agents . . . to avoid the holdout problem” and thus render eminent domain unnecessary for private transfers.<sup>169</sup> The use of a private buying agent serves as “a market test that prevents . . . socially undesirable projects”<sup>170</sup>—projects that are possible under eminent domain due to the overestimation of the project’s benefits or the underestimation of the costs of the taking.<sup>171</sup> However, there is a possibility of a negative backlash if the true principal becomes known.<sup>172</sup> Therefore, eminent domain may have to remain as a fallback option if the identity of the true principal is leaked out. James Kelly has suggested that “community members’ legal rights of long-term residency in their current homes should not be subject to eminent domain pursuant to a required redevelopment plan until the majority of them have approved the plan.”<sup>173</sup>

### *C. Dealing with Rent-Seeking and Undercompensation: A Givings Perspective*

#### *1. An Overlooked Aspect of the Equation: (Unjust) Benefits to Private Developers*

The proposed reforms discussed in the previous section all seek to protect private property owners from abuses of the eminent domain process. These proposed reforms also try to increase the cost

165. *Id.* at 546-47.

166. *See supra* Part II.C.2.

167. Michels, *supra* note 87, at 558 (quoting *Berman v. Parker*, 348 U.S. 26, 32 (1954)).

168. Kochan, *supra* note 11, at 88-89.

169. Kelly, *supra* note 126, at 20-21.

170. *Id.* at 30.

171. *Id.* at 28.

172. *Id.* at 47.

173. Kelly, Jr., *supra* note 2, at 929.

or difficulty of using eminent domain, which will help deter the abuse of eminent domain by rent-seeking interest groups. However, given the widespread acknowledgement of the danger of rent-seeking by interest groups, it is surprising that little Chinese and United States academic discussion is directed at tackling this problem, which is arguably at the root of eminent domain abuse. Merely increasing the cost or difficulty of the exercise of eminent domain only decreases the attractiveness of eminent domain as a tool of rent-seeking. It neither eliminates the incentive for abuse when the benefit sufficiently outweighs the increased cost nor does anything to prevent the rent-seeking behavior. Only through ensuring that private developers are not unjustly enriched by government action—in this instance, eminent domain—can rent-seeking behavior and manipulation be eliminated. This is where the givings jurisprudence becomes notable.

## 2. *The Importance and Relevance of Givings*

“[T]he takings doctrine . . . focuses on identifying those diminutions of property caused by the government action that must be compensated . . .”<sup>174</sup> On the other hand, the “givings doctrine seeks to determine under what circumstances beneficiaries of government actions must be charged for received benefits.”<sup>175</sup> “Compared to the extensive and in-depth literature on takings doctrine, givings has only recently been given the attention it deserves. It was not until December 2001 that the first attempt to present a coherent theory was attempted by Abraham Bell and Gideon Parchomovsky.”<sup>176</sup> It was then developed and applied by Wallace Wang and the author in the context of China’s split share reform.<sup>177</sup> In spite of this lack of scholarly attention, the importance of the doctrine is not diminished.<sup>178</sup>

“First, there is an inextricable relationship between takings and givings. This is not only relevant in the context of developing a coherent takings doctrine but also in the practical world where government givings or takings are likely to be accompanied by some other corresponding takings or givings.”<sup>179</sup> Having used the power of eminent domain to take private property from private

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174. Wallace Wen-Yeu Wang & Jian-Lin Chen, *supra* note 16, at 327.

175. *Id.*

176. *Id.*

177. *See id.*

178. *Id.* at 327.

179. *Id.* at 327-28 (footnotes omitted); *see* Bell & Parchomovsky, *supra* note 15, at 552, 565.

owners in the name of economic development, the government generally transfers that property to a private developer—the taker.<sup>180</sup>

Second, relative wealth is affected by both givings and takings. The sole focus on the diminutions of absolute wealth under the current takings doctrine fails to take into account the importance and relevance of relative wealth. “Both affect the poverty gap, which should be an important social and economical consideration in any government action.”<sup>181</sup>

“Third, the risk of abuse and other political vices such as corruption and favoritism from unfettered takings applies equally, if not more, to unfettered givings. This is because ‘givings may produce winners without identifiable losers, making it an attractive policy tool.’”<sup>182</sup> Even if a private property owner is directly affected by the taking, there is still an imbalance of actual power and influence, which severely limits opposition towards rent-seeking behavior.<sup>183</sup> Moreover, the presence of compensation means that the burden is dispersedly distributed among taxpayers, allowing private developers’ interest groups greater leverage in abusing eminent domain for huge benefits.

“Fourth, givings, like takings, raise great concerns of fairness and efficiency.”<sup>184</sup> Just as undercompensation causes inefficiency where the full cost of a taking is not internalized,<sup>185</sup> “[u]naccounted givings result in positive externalities that would, if not internalized, create fiscal illusion.”<sup>186</sup> In addition, “it is inequitable to bestow a benefit upon some people that, in all fairness and justice, should be given to the public as a whole.”<sup>187</sup> It is clearly unfair for the government to discriminatorily “allocate benefits on the basis of one’s ability to exploit the political system.”<sup>188</sup>

### 3. *Charging Givings (I): Should a Charge Be Imposed?*

The previous section explains the importance of the givings jurisprudence. However, not every giving by the government should be levied with a charge. Four criteria have been proposed by Bell &

180. See *supra* Parts II.C.2., III.A.

181. Wallace Wen-Yeu Wang & Jian-Lin Chen, *supra* note 16, at 328 (footnote omitted); see Bell & Parchomovsky, *supra* note 15, at 552.

182. Wallace Wen-Yeu Wang & Jian-Lin Chen, *supra* note 16, at 328 (footnote omitted) (quoting Bell & Parchomovsky, *supra* note 15, at 574-75).

183. See *supra* Part III.B.1.

184. Wallace Wen-Yeu Wang & Jian-Lin Chen, *supra* note 16, at 330 (footnote omitted); see also Bell & Parchomovsky, *supra* note 14, at 553.

185. See *supra* Part III.B.2.

186. Wallace Wen-Yeu Wang & Jian-Lin Chen, *supra* note 16, at 330; see Bell & Parchomovsky, *supra* note 15, at 554.

187. Bell & Parchomovsky, *supra* note 15, at 554.

188. *Id.* at 578.



Parchomovsky to identify whether a chargeable giving has occurred and, if one is found, what the appropriate form of charge collection should be for that giving.<sup>189</sup> The first two criteria are reversibility of the act and the identifiability of the recipients; they help identify situations where a charge should be imposed on the benefit's recipients.<sup>190</sup> The final two criteria are proximity of the act to a taking and the refusability of the benefit; both are relevant in determining the appropriate manner to levy the charge.<sup>191</sup>

The scenario of a private developer getting land from the government, whether through eminent domain or otherwise, satisfies the first two criteria and thus a charge should be imposed on the private developer. "Under the reversibility of the act criterion, bestowing a benefit is more likely to be considered a chargeable giving when it could be characterized as a taking if reversed."<sup>192</sup> Since the taking of land demands compensation, developers should not be able to acquire land for free. Similarly, there can be no issue with the identifiability of the recipients because private developers are clearly beneficiaries of the land transfer. Thus, common logic would dictate that a fair charge should be imposed on private developers. However, occasions where private developers acquire land through eminent domain practically for free are unfortunately common.<sup>193</sup> This discussion on the importance of charging givings only reinforces the fundamental failure of the traditional takings approach in dealing with the issue of uncompensated givings and the resulting corruption and rent-seeking behavior.

The fourth criterion, refusability of the benefit, represents "a straightforward and commonly accepted principle of law that one should not be forced to accept benefits against their will."<sup>194</sup> Thus, it poses no conceptual difficulty for imposing a charge on private developers since they would merely be paying for the land they wish to acquire.

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189. Wallace Wen-Yeu Wang & Jian-Lin Chen, *supra* note 16, at 331; see Bell & Parchomovsky, *supra* note 15, at 590-604.

190. Wallace Wen-Yeu Wang & Jian-Lin Chen, *supra* note 16, at 331; see Bell & Parchomovsky, *supra* note 15, at 590-604.

191. Wallace Wen-Yeu Wang & Jian-Lin Chen, *supra* note 16, at 331; see Bell & Parchomovsky, *supra* note 15, at 590-604.

192. Wallace Wen-Yeu Wang & Jian-Lin Chen, *supra* note 16, at 331; see Bell & Parchomovsky, *supra* note 15, at 591.

193. See Kelly, *supra* note 126, at 39; Phan, *supra* note 21, at 623-24, 640.

194. Wallace Wen-Yeu Wang & Jian-Lin Chen, *supra* note 16, at 336; see Bell & Parchomovsky, *supra* note 15, at 601.

#### 4. Charging Givings (II): How Should It Be Charged?

The third criterion is particularly interesting. Having concluded that a charge should be imposed on a private developer for the benefit arising out of the land acquisition, “[t]he proximity of the giving to a taking is relevant in deciding when and how to assess” and impose the charge.<sup>195</sup> Given that a giving is usually associated with a taking, especially so in the present context of land acquisition for the benefit of private developers, the assessment of a charge should “take into account any takings simultaneously incurred by the benefit recipients” to “fully capture the benefits of efficiency and fairness” of charging the giving.<sup>196</sup>

Also, there are situations where “the taking or giving may be so intimately linked that it is both a requirement of efficiency principles and a demand of corrective justice that the compensation or charge should be made directly between the parties.”<sup>197</sup> Greater efficiency is achieved when transaction costs are reduced as “the largely unnecessary intermediary role of the government” is done away with.<sup>198</sup> Corruption arising out of this intermediary role is also reduced.<sup>199</sup> Corrective justice is also better served where the persons who benefit from the taking directly compensate the victims of the taking.<sup>200</sup> Indeed, “dignitary harms” arising out of takings are aggravated by the nature of the private taking.<sup>201</sup> Additional dignitary harm arises “because the private beneficiaries frequently receive a windfall from the transaction,” with the owner not receiving a share since “the fair market value determination is made *before* the condemnation.”<sup>202</sup> Likewise, takings victims may not benefit from the economic development because of their displacement, unlike with the more traditional takings for public benefit and use.<sup>203</sup> A sense of injustice is further exacerbated by the perception that it is the “rich and powerful interests profiting at the expense of ordinary property owners.”<sup>204</sup> For example, in

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195. Wallace Wen-Yeu Wang & Jian-Lin Chen, *supra* note 16, at 334; see Bell & Parchomovsky, *supra* note 15, at 596.

196. Wallace Wen-Yeu Wang & Jian-Lin Chen, *supra* note 16, at 334; see Bell & Parchomovsky, *supra* note 15, at 599.

197. Wallace Wen-Yeu Wang & Jian-Lin Chen, *supra* note 16, at 335; see Bell & Parchomovsky, *supra* note 15, at 601.

198. Wallace Wen-Yeu Wang & Jian-Lin Chen, *supra* note 16, at 335-36; see Bell & Parchomovsky, *supra* note 15, at 600.

199. See *supra* Part II.C.4.

200. Bell & Parchomovsky, *supra* note 15, at 600; Wallace Wen-Yeu Wang & Jian-Lin Chen, *supra* note 16, at 335-36.

201. Garnett, *supra* note 2, at 109 (internal quotation marks omitted).

202. *Id.* at 145.

203. *Id.*

204. Cohen, *supra* note 10, at 549.

Kansas, despite receiving 125% of the market value as compensation, homeowners were nevertheless angered by the sale because “the government took their property to build a privately owned racetrack.”<sup>205</sup>

Thus, in our context of land acquisition for private developers, there is a strong case for arguing that private developers should pay directly to the land owners whose lands they are forcefully acquiring. However, Bell and Parchomovsky “only provided the example of government-mediated private takings” to show how “the charge should be made directly between the parties.”<sup>206</sup> A government-mediated private taking occurs where when a private party forcefully acquires property from a private owner by paying the latter compensation in an amount determined by a government intermediary.<sup>207</sup> This process would be an improvement from the current takings regime since the money used to compensate the takings victims would come from the private developers instead of taxpayers. Paying from their own pocket reduces private developers’ incentive for rent-seeking and helps internalize the cost of a taking. However, since a government intermediary is needed to assess the charge under this model, efficiency, corruption and rent-seeking problems associated with such an intermediary are still present.<sup>208</sup> This private-bargaining model is currently employed in China,<sup>209</sup> but it does little to prevent corruption relating to land acquisition from being the most serious corruption problem in China.<sup>210</sup>

Next, the Singapore en-bloc process is examined as an example of a fresh approach towards economic development eminent domain that not only adheres to the givings jurisprudence alluded to above but also provides a novel solution towards charging of givings in situations where takings and givings are intimately linked.

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205. Falls, *supra* note 112, at 364.

206. Wallace Wen-Yeu Wang & Jian-Lin Chen, *supra* note 16, at 353; see Bell & Parchomovsky, *supra* note 15, at 599-600.

207. Bell & Parchomovsky, *supra* note 15, at 599-600.

208. See Wallace Wen-Yeu Wang & Jian-Lin Chen, *supra* note 16, at 353.

209. Regulation on the Dismantlement of Urban Houses (promulgated by St. Council, June 13, 2001, effective Nov. 1, 2001), art. 13, translated in LAWINFOCHINA (last visited Feb. 24, 2009) (P.R.C.); see also *Most Expensive Dingzi Hu*, *supra* note 60 (indicating that it is the private developers who are paying the compensation).

210. *Land Corruption*, *supra* note 73.

## IV. SINGAPORE: THE EN-BLOC PROCESS

*A. Background*

En-bloc sale is where owners of a strata-title development—namely a flat or condominium—collectively sell their entire property development (hence the term “en-bloc sale”). The first en-bloc sale took place in 1994.<sup>211</sup> It was the result of a re-zoning exercise by Singapore’s Urban Redevelopment Authority in 1993 to optimize land use.<sup>212</sup> Higher plot ratio—an increase in the allowable density of strata developments—was granted to locations near mass transit stations or prime downtown areas to maximize land usage.<sup>213</sup> This type of rezoning to a higher plot ratio is often deemed as hitting a jackpot since the potential value of land increases significantly as more units with larger areas are allowed to be built on the same plot of land.<sup>214</sup> However, the high profits can only materialize when the owners band together and sell the property as a whole to a developer, who can then redevelop the land for more intensive use.<sup>215</sup> At times, the increase in land use may be more than 100%.<sup>216</sup> The owners are able to capture a significant portion of the benefit of this redevelopment. A minimum of 50% above market value is necessary to tempt the owner, with anything less than a 30% premium providing no interest to sell.<sup>217</sup>

Given the nature of the transaction, which requires the unanimous consent of the owners to sell the property en-bloc, holdout is inevitably a common problem. The success rate of en-bloc sales is low, with only three out of ten en-bloc sales succeeding.<sup>218</sup> Owners may

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211. Lea Wee, *Owners Sign Deal for Collective Sale of Cosy Mansions*, STRAITS TIMES (Sing.), Sept. 23, 1994, at 3.

212. Tan Hsueh Yun, *Have En-bloc Sales Lost Original Aim and Become a Money Game?*, STRAITS TIMES (Sing.), Sept. 20, 1997, at 60; Tan Hsueh Yun & Pang Gek Choo, *Analysts Feel Developers May Not Bite and Owners May Still Not Sell*, STRAITS TIMES (Sing.), Nov. 21, 2007, at 56.

213. Tan Su Yen, *Hitting the En Bloc Jackpot*, BUS. TIMES (Sing.), Oct. 3, 1995, at 8.

214. *Id.*

215. Tan Hsueh Yun & Pang Gek Choo, *supra* note 212.

216. Uma Shankari, *Heiwa Court Sold for \$11 Million; Elmira Heights Also up for Collective Sale for \$326m*, BUS. TIMES (Sing.), Feb. 22, 2007 (increasing from twelve to twenty-seven units); Uma Shankari, *Hoi Hup Buys Killiney Rd En Bloc Site for \$115m; It Can Develop a Condo With 75 Units of 1,500 sq ft Each*, BUS. TIMES (Sing.), Apr. 25, 2007 (increasing from forty-four to seventy-five units); Tan Dawn Wei, *They Don't Even Own the Land They're Fighting Over*, STRAITS TIMES (Sing.), May 20, 2007 (increasing the number of units by more than double).

217. Tan Su Yen, *Getting to the Nitty-Gritty of an En Bloc Sale*, BUS. TIMES (Sing.), Oct. 3, 1995, at 8.

218. *Why Some Say No to Million-Dollar Windfall*, STRAITS TIMES (Sing.), Sept. 20, 1997, at 60; Tan Su Yen, *supra* note 217.

hold out for a variety of reasons, but it is hard to dispel the suspicion that strategic holdout for more money is common.<sup>219</sup>

The failure of en-bloc sales to go through clearly defeats the original government's intention of re-zoning to allow for more intensive land use. Individual owners of a strata-title development are clearly unable to increase the intensity of land use on their own while developers cannot tear down the existing building and redevelop if there is just one owner who refuses to sell. Given that Singapore is an extremely compact island,<sup>220</sup> a land economist has opined the necessity of Singapore redeveloping.<sup>221</sup> Indeed, Singapore's high population density of 6,369 people per square kilometer<sup>222</sup> dictates the compelling need for land use optimization.

### B. Legislative Debate

In 1997, four years after the re-zoning exercise took place and in light of the appeals from frustrated owners whose en-bloc sale efforts were thwarted by a very small minority,<sup>223</sup> the relevant law was amended to facilitate en-bloc sale. The primary purpose is to help plots of land realize their full development potential and to create more housing units on these prime lands.<sup>224</sup> This facilitation is pursuant to an overall development plan to facilitate the redevelopment of land for more intensified use.<sup>225</sup> There is also the secondary benefit of allowing rejuvenation of urban development.<sup>226</sup> All these benefits are particularly necessary in Singapore where land is scarce.<sup>227</sup>

The key amendment to facilitate en-bloc sale is the dispensation of unanimous consent. After the amendments, the private developers can compel the objecting owners to sell if the private developers have obtained a certain level of consent from the other owners. If the property is less than ten years old, 90% approval of

219. Tan Sai Siong, *Iron Out the Wrinkles First*, STRAITS TIMES (Sing.), Dec. 8, 1997, at 51. Two property owners held out and received and additional \$1 million. *Id.*

220. SING. DEPT OF STATISTICS, YEARBOOK OF STATISTICS SINGAPORE 2007, at 9 (2007) (on file with author) (noting that Singapore has a land area of only 704 square kilometers).

221. Tan Hsueh Yun, *supra* note 212.

222. SING. DEPT OF STATISTICS, *supra* note 220, at 9.

223. En-Bloc Sales in Private Condominiums, Parliament No. 9, Sess. No. 1, Vol. No. 68, Sitting No: 3, col. 1829-30 (Feb. 19, 1997) (Sing.) (on file with author) (testimony of Minister of State for Law, Associate Professor Ho Peng Kee).

224. Land Titles (Strata) Amendment Debate 1998, Parliament No. 9, Sess. No. 1, Vol. No. 69, Sitting No. 4, col. 610 (July 31, 1998) (Sing.) (on file with author) (testimony of Minister of State for Law, Associate Professor Ho Peng Kee).

225. *Id.* at col. 614 (testimony of Mr. Chuang Shaw Peng).

226. *Id.* at col. 631 (testimony of Minister of State for Law, Associate Professor Ho Peng Kee).

227. *Id.*

the owners is required.<sup>228</sup> Conversely, if the property is more than ten years old, only 80% approval is needed.<sup>229</sup>

This is clearly an erosion of the absolute nature of property rights. Indeed, there were concerns about property rights during the parliamentary debate.<sup>230</sup> It was also raised in Parliament that this proposed compulsory acquisition of the minority objecting owners' property is unlike the traditional land acquisition for public interest—such as the building of infrastructural facilities like roads, airports, and rail lines—but only on economic grounds.<sup>231</sup> There were concerns that minority owners may not be adequately compensated due to subjective value and relocation costs.<sup>232</sup>

In the end, these reservations were counter-veiled by the public interest element in en-bloc sale given the need for redevelopment in land-scarce Singapore.<sup>233</sup> Whatever the reason for remaining in a home, there was a need to ensure that the overriding interests of society at large were met.<sup>234</sup> It was not possible to accommodate all the reasons for not wanting to sell, especially if the reasons were sentimental or subjective.<sup>235</sup> Moreover, the principle of majority rule is evident in other areas of shared social and corporate life in Singapore,<sup>236</sup> where sociocultural values place society above self.<sup>237</sup> This ostensibly less individualistic outlook of society is considered to be a key survival value for Singapore.<sup>238</sup>

228. Land Titles (Strata) Act, 1999, ch. 158, § 84A(1)(a) (Sing.).

229. *Id.* § 84A(1)(b).

230. *E.g.*, Land Titles (Strata) Amendment Debate 1998, Parliament No. 9, Sess. No. 1, Vol. No. 69, Sitting No. 4, cols. 608-11 (July 31, 1998) (Sing.) (on file with author) (testimony of Associate Professor Chin Tet Yung); *id.* at cols. 614-16 (testimony of Mr. Simon S.C. Tay).

231. *Id.* at col. 608 (testimony of Associate Professor Chin Tet Yung); Land Titles (Strata) (Amendment) Bill (As reported from Select Committee), Parliament No. 9, Sess. No. 1, Vol. No. 70, Sitting No: 12, col. 1336 (May 4, 1999) (Sing.) (on file with author) (testimony of Mr. Simon S.C. Tay).

232. *E.g.*, Land Titles (Strata) Amendment Debate 1998, Parliament No. 9, Sess. No. 1, Vol. No. 69, Sitting No. 4, cols. 608-11 (July 31, 1998) (Sing.) (on file with author) (testimony of Associate Professor Chin Tet Yung); *id.* at cols. 616-19 (testimony of Mr. Zulkifli Bin Baharudin); *id.* at cols. 624-28 (testimony of Mr. Simon S.C. Tay); *id.* at cols. 614-16 (testimony of Mr. Chuang Shaw Peng).

233. *Id.* (testimony of Minister of State for Law, Associate Professor Ho Peng Kee).

234. *Id.* (testimony of Mr. Chng Hee Kok).

235. Head R – Ministry of Law, Parliament No. 11, Sess. No. 1, Vol. No. 82, Sitting No: 14, col. 2338 (Mar. 3, 2007) (Sing.) (testimony of Deputy Prime Minister and Minister for Law, Professor S. Jayakumar).

236. Land Titles (Strata) Amendment Debate 1998, Parliament No. 9, Sess. No. 1, Vol. No. 69, Sitting No. 4, cols. 608-11 (July 31, 1998) (Sing.) (on file with author) (testimony of Minister of State for Law, Associate Professor Ho Peng Kee).

237. *Id.* at 611-13 (testimony of Mr. Lew Syn Pau).

238. See MICHAEL HILL & LIAN KWEN, THE POLITICS OF NATION BUILDING AND CITIZENSHIP IN SINGAPORE 217 (1995) (“In January 1991 the government’s White Paper on Shared Values was issued, containing five components: 1) Nation before community and society above self; 2) Family as the basic unit of society; 3) Regard and community support for the individual; 4) Consensus instead of contention; and 5) Racial and religious harmony.”)

*C. Legal Framework*

The chief characteristic of the Singapore en-bloc process is that a private developer can acquire the whole property without seeking the unanimous consent of the existing property owners. In line with the parliamentary objective of urban renewal, the level of consent required is pegged to the age of the property. If the property is less than ten years old, owner approval must not be "less than 90% of the share values and not less than 90% of the total area of all the lots."<sup>239</sup> If the property is more than ten years, then only 80% approval is needed.<sup>240</sup>

Whether a property is ripe for en-bloc sale and redevelopment is not a decision of the government. Rather, it is up to the owners to decide after taking into account numerous factors.<sup>241</sup> The en-bloc process is initiated through the formation of collective sale committee by the owners to facilitate the approval seeking and sale process. To ensure transparency and proper conduct, there are various procedural requirements to which the en-bloc process must adhere.<sup>242</sup> Procedural safeguards include the following: a statutory declaration of interest and relationship between the purchaser and owners;<sup>243</sup> a valuation report by an independent valuer on the valuation of the property and the proposed method of distributing proceeds;<sup>244</sup> a time limit of one year to complete the process, starting when the agreement is first signed by an owner;<sup>245</sup> a requirement that the owners sign in the presence of a lawyer;<sup>246</sup> a five-day cooling-off period;<sup>247</sup> the appointment of the sale committee through a general meeting;<sup>248</sup> a declaration of interest of the members of the sale committee with the property developer, property consultant, marketing agent or legal firm;<sup>249</sup> and a requirement that the sale committee keep records of the proceedings.<sup>250</sup>

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239. Land Titles (Strata) Act, 1999, ch. 158, § 84A(1)(a) (Sing.).

240. *Id.* § 84A(1)(b).

241. Land Titles (Strata) Amendment Debate 1998, Parliament No. 9, Sess. No. 1, Vol. No. 69, Sitting No. 4, cols. 601-02 (July 31, 1998) (Sing.) (on file with author) (testimony of Minister of State for Law, Associate Professor Ho Peng Kee).

242. *See* Land Titles (Strata) Act, First, Second & Third Schedules (Sing.).

243. *Id.* at First Schedule § 1(d)(iii).

244. *Id.* at First Schedule §§ 1(d)(vi), 1(d)(vii).

245. *Id.* at First Schedule § 1A.

246. *Id.* at First Schedule § 1C. Sections 1C-G explain the legal terms and liabilities to address the concerns of the owner. Land Titles (Strata) Amendment Debate 2007, *supra* note 6, at col. 1994 (testimony of Deputy Prime Minister and Minister for Law, Professor S. Jayakumar).

247. Land Titles (Strata) Act, First Schedule § 1E (Sing.).

248. *Id.* § 84A(1A)(a).

249. *Id.* at Third Schedule § 2.

250. *Id.* at Third Schedule § 9.

An owner who does not wish to sell, despite the requisite majority having agreed, is not left without remedy. An objecting owner has twenty-one days to file an objection to the Strata Titles Board.<sup>251</sup> No fee is required and lawyer representation is not required.<sup>252</sup> The Strata Titles Board, an administrative body set pursuant to the Building Maintenance and Strata Management Act 2004,<sup>253</sup> has various significant powers. These powers include mediating any matter arising from the application to invoke collective sale,<sup>254</sup> calling for a valuation report or other report,<sup>255</sup> and imposing such conditions as it may be deemed fair and reasonable in approving the sale.<sup>256</sup> Acting as mediator is an important role of the Strata Titles Board, which is expected to resolve many of the objections.<sup>257</sup>

“[T]he Strata Titles Board is not a mere rubber stamp which approves” the sale when the required majority is attained.<sup>258</sup> The Strata Titles Board cannot approve the sale if any objector will incur a financial loss.<sup>259</sup> Financial loss is defined as a situation where the proceeds of a sale for his property are less than the price the owner paid for the property.<sup>260</sup> However, financial loss does not include situations where the owner’s net gain from the sale of his lot will be less than the other owners.<sup>261</sup> Non-compliance with the procedural requirements is a ground for rejecting the application if the non-compliance prejudiced the interest of any person.<sup>262</sup> The Strata Titles Board can block the sale if the transaction is not in good faith after considering the sale price, the method of distributing the proceeds of sale, and the relationship of the purchaser with any of the subsidiary owners.<sup>263</sup>

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251. *Id.* § 84A(4).

252. *En Bloc Sales (Recourse for Unhappy Residents)*, Parliament No. 11, Sess. No. 1, Vol. No. 83, Sitting No. 9, col. 1326 (Aug. 27, 2007) (Sing.) (on file with author) (testimony of Deputy Prime Minister and Minister for Law, Professor S. Jayakumar).

253. *Building Maintenance and Strata Management Act 2004* (Act 47 of 2004), 2004, ch. 30C, §§ 89-120 (Sing.).

254. *Land Titles (Strata) Act* § 84A(5)(a).

255. *Id.* § 84A(5)(b).

256. *Id.* § 84A(5)(c).

257. *Land Titles (Strata) Amendment Debate 1998*, Parliament No. 9, Sess. No. 1, Vol. No. 69, Sitting No. 4, cols. 604-05 (July 31, 1998) (Sing.) (on file with author) (testimony of Minister of State for Law, Associate Professor Ho Peng Kee).

258. *En-Bloc Property Sale Committees (Measures to Ensure Transparency)*, Parliament No. 11, Sess. No. 1, Vol. No. 83, Sitting No. 6, col. 875 (May 22, 2007) (Sing.) (on file with author) (testimony of Senior Minister of State for Law, Associate Professor Ho Peng Kee).

259. *Land Titles (Strata) Act* § 84A(7).

260. *Id.* § 84A(8)(a).

261. *Id.* § 84A(8)(b).

262. *Id.* § 84A(7C).

263. *Id.* § 84A(9)(a)(i)(A)-(C).



The Strata Titles Board may also, with the consent of the collective sale committee, include an order that the proceeds of the sale for any lot be increased if it would be just and equitable to do so.<sup>264</sup> “This sum shall not exceed the aggregate sum of 0.25% of the proceeds of the sale for each lot or \$2,000, whichever is higher.”<sup>265</sup> If the collective sale committee refuses, the Strata Titles Board can refuse to approve the sale.<sup>266</sup>

Once the Strata Titles Board approves the sale after dismissing any objections, the objecting owners must produce their certificates of title to the selling party.<sup>267</sup> Appeal to the court is possible, but only on points of law or where there is alleged irregularity in the process.<sup>268</sup>

#### *D. En-Bloc in Practice*

Since the implementation of these amendments, the success rate of the en-bloc sales has increased from less than 33% to the present 65% to 75%.<sup>269</sup> The fact that the private developers have to directly bargain with the property owners has resulted in solutions to cater to special needs. These include unit-to-unit exchange in new development<sup>270</sup> or simply offering substantially more money after failure of the first round.<sup>271</sup> A premium between 60% and 100% above market value remains common.<sup>272</sup>

264. *Id.* § 84A(7A).

265. *Id.* § 84A(7B).

266. *Id.* § 84A(9)(b).

267. *Id.* § 84B(4).

268. Building Maintenance and Strata Management Act 2004 (Act 47 of 2004), 2004, ch. 30C, §98(1) (Sing.) (“No appeal shall lie to the High Court against an order made by a Board under this Part or the Land Titles (Strata) Act (Cap. 158) except on a point of law.”). The Singapore courts have given “error of law” a wide interpretation that includes answering oneself and answering the wrong question, taking irrelevant considerations into account, or committing an error in admitting evidence. *Ng Swee Lang v. Sassoon Samuel Bernard*, [2007] SGHC 190, ¶18, ¶27 (Sing.); Land Titles (Strata) Amendment Debate 1998, Parliament No. 9, Sess. No. 1, Vol. No. 69, Sitting No. 4, col. 605 (July 31, 1998) (Sing.) (on file with author) (testimony of Minister of State for Law, Associate Professor Ho Peng Kee).

269. Arthur Sim, *Failure Rate Hits 25-35% for En Bloc Deals: Some Think the Rising Price of Replacement Homes Could Be One Reason for the Figures Last Year*, BUS. TIMES (Sing.), Feb. 22, 2007; Tan Dawn Wei, *supra* note 216.

270. Tan Dawn Wei, *supra* note 216.

271. *See, e.g.*, Nur Dianah Suhaimi, *\$550k Extra Lure for Second En-Bloc Attempt; Two Months After First Try, It Is Estimated That Largest Pine Grove Unit Will Get a Minimum \$1.75 Million*, STRAITS TIMES (Sing.), May 13, 2007 (extra \$550,000 offered above initial offer of \$1.2 million when only 50% of owners agreed in the first round).

272. Fiona Chan, *\$835M: Condo in Holland Road Area Sets New En Bloc Sale Record*, STRAITS TIMES (Sing.), Apr. 28, 2007 (premium of more than double); Carolyn Quek, *140-Unit Estate Sold but One Won't Move; Buyer City Developments Planning Legal Action Against 63-Year-Old Who Is Uncontactable Now*, STRAITS TIMES (Sing.), June 4, 2007 (60% to 90% premium); Kalpana Rashiwala, *Sing Hldgs Inks Deal to Buy Hillcourt Apts for \$361m*, BUS. TIMES (Sing.), Mar. 23, 2007 (60% premium); Uma Shankari, *supra* note 216 (70% premium); Joyce Teo, *Anderson 18 Owners to Get \$6.75m Each from Condo Sale*,

The en-bloc process in Singapore is not without its costs and critics. Undercompensation remains a big concern, notwithstanding the substantial premium over market price. Relocation costs are key issues and sometimes account for a sale not going through despite the huge profit potential.<sup>273</sup> Historical values are also not factored into the commercial value.<sup>274</sup> Precious architectural heritage and memories are also at risk of being ignored and lost in the en-bloc fever.<sup>275</sup> There is the disruption of community, especially for the elderly.<sup>276</sup> There is also the greater effect on society as a whole through reinforcing the notion of Singapore being “a society in perpetual motion.”<sup>277</sup>

Criticisms are directed at the possible abuses by serial “en-blocers” who buy property with an en-bloc mentality and then push hard for it.<sup>278</sup> Ugly scenes between neighbors who want to sell and those who do not are not uncommon.<sup>279</sup> Objections to the Strata Title Board have also increased recently.<sup>280</sup> Fortunately, the reliance on and adherence to legal recourses has so far averted the dramatic and violent *ding zi hu* holdout experienced in China.<sup>281</sup>

### *E. Recommendations for the Singapore En-Bloc Process*

The various criticisms and complaints of the Singapore en-bloc process prompted the Singapore parliament to amend the relevant law again in September 2007. This was to “address the concerns of owners over the lack of clarity, transparency and safeguards in the current” en-bloc process.<sup>282</sup> Indeed, many of the procedural safe-

STRAITS TIMES (Sing.), Mar. 6, 2007 (98.5% premium); Tan Dawn Wei, *supra* note 216 (offer of \$1.37 million made when market price was only \$770,000).

273. See, e.g., Fiona Chan & Joyce Teo, *En Bloc Blues; En Bloc Blues Are Not a New Phenomenon, Property Players Say, but They Are Being Sung Louder Now Simply Because They Are Being Played on More Channels*, STRAITS TIMES (Sing.), June 16, 2007; Melissa Sim, *\$2.3m In En Bloc Sale but Some Are Not Happy; Reason: Finding a Comparable Property to Replace the One Sold Will Now Cost a Whole Lot More*, STRAITS TIMES (Sing.), May 6, 2007; Joyce Teo, *Pine Grove Owners Reject Big En Bloc Offer; Many Fear They Will Have to Downgrade to Smaller Flats Despite \$1.2m Payout*, STRAITS TIMES (Sing.), Apr. 18, 2007.

274. See Arthur Sim, *Place Older Buildings' Heritage Along With Commercial Value; Professional Body Urges Reviews to Aid Conservation*, BUS. TIMES (Sing.), May 5, 2007.

275. Jeremy Au Yong, *'What Are They Doing to My Buildings?'*, STRAITS TIMES (Sing.), Sept. 14, 2007.

276. Peh Shing Huei & Keith Lin, *This Is My Home, or Maybe Not*, STRAITS TIMES (Sing.), June 16, 2007.

277. *Id.*

278. Tan Dawn Wei, *En Bloc Investors or Just Vultures?; Traders Who Sniff Out Old Units and Push Hard for Collective Sale Stir Up Mixed Emotions Among Residents*, STRAITS TIMES (Sing.), May 27, 2007.

279. Tan Dawn Wei, *supra* note 216.

280. Chan & Teo, *supra* note 273.

281. See Quek, *supra* note 272. The article points out where one owner just refused to hand over but without any *ding zi hu* style of dramatic holdout. *Id.*

282. Land Titles (Strata) Amendment Debate 2007, Parliament No. 11, Sess. No. 1,

guards discussed in Part IV.C.,<sup>283</sup> together with the Strata Titles Board's power to grant additional compensation, were initially introduced by this 2007 amendment.

The introduction of these amendments affirmed the validity of the criticisms and need for reform. The transparency and proper conduct of the en-bloc process is crucial to the success of the en-bloc process. The objectives of the en-bloc process may be defeated by the abuse of certain owners who might seek to advance their own interests at the expense of others. The power to order additional compensation is also particularly useful in mitigating any undercompensation that may arise from the peculiar circumstances of individual owners. The short history of these new amendments prevents in-depth evaluation of their actual effectiveness. Nonetheless, while most of the new procedural safeguards help to improve the transparency and proper conduct of the en-bloc process, it is always pertinent to consider the costs associated with these procedural safeguards. In particular, the professional services under the independent valuer and lawyer requirements are likely to be substantial.<sup>284</sup> This raises the crucial problem of who should bear these costs if the en-bloc process does not succeed. Currently, these costs could be borne by a management fund,<sup>285</sup> which in essence means that they are borne by all the owners.<sup>286</sup> This is true regardless of whether the owners are even remotely interested in initiating the en-bloc process in the first place, and therefore, this apportionment of costs provides room for abuse by those owners who are keen to seek out the en-bloc process for their own interest.<sup>287</sup>

Thus, before conducting any en-bloc process, including the appointment of the collective sale committee,<sup>288</sup> there should be an

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Vol. No. 83, Sitting No. 13, col. 1994 (Sept. 20, 2007) (Sing.) (on file with author) (testimony of Deputy Prime Minister and Minister for Law, Professor S. Jayakumar).

283. In particular, these procedural safeguards are the need for an independent valuer, the signing of the agreement in the presence of a lawyer, the five-day cooling-off period, and the appointment of a sale committee through general meeting. *See supra* notes 242-50 and accompanying text.

284. The lawyer fees are set to increase between 50% and 200%, while the valuer report can cost between seventy and two hundred United States dollars per owner. Fiona Chan, *Rising Cost of Going En Bloc Adds to Cooler Market*, STRAITS TIMES (Sing.), Feb. 9, 2008.

285. Joyce Teo, *Selling En Bloc: New Rules will Help Improve Process*, STRAITS TIMES (Sing.), Sept. 2, 2007. Teo identifies that there was uncertainty prior to amendment of whether the sale committee can use the management fund. *Id.* However, careful observation indicates that the issue was not addressed or reflected in the actual amendments and legislative debate.

286. Building Maintenance and Strata Management Act 2004 (Act 47 of 2004), 2004, ch. 30C, § 38(2)(a) (Sing.).

287. Tan Dawn Wei, *supra* note 278.

288. The parliamentary intention behind this requirement is that there can be only one sale committee per development at any time; it is not aimed at the possible abuse of the management fund. Parliament No. 11, Sess. No. 1, Vol. No. 83, Sitting No. 13, col. 1994

owners meeting to decide whether there should be an attempt at an en-bloc process at all. If at least 75% of the owners vote in favor,<sup>289</sup> then management funds may be used to cover the cost of the en-bloc process. If less than 75% of the owners are in favor, then any fees or costs incurred in the subsequent en-bloc process are borne by the owners who nevertheless voted in favor of the en-bloc. The incurred fees or costs are reimbursed to these “interested owners” only if the en-bloc process succeeds in the end. This prevents management funds from being unfairly utilized by a minority while leaving open the possibility for a potentially good deal to be explored and pursued. In the new model proposed in Part VI, this issue of transaction cost is resolved by making the acquiring party pay.

Another possible deficiency is the presence of externalities. As discussed in Part V, the en-bloc process allows efficient deals to be concluded between private developers and property owners. However, social costs and benefits are inevitably not taken into account. This includes historical values, which are not factored into the commercial value.<sup>290</sup> Another significant social cost is that of environmental pollution arising out of the demolition and construction inherent in the redevelopment process.<sup>291</sup> These costs are borne by the surrounding owners but do not affect the parties of the en-bloc process. The increased anxiety for other property owners who want to see their residence as a home and not a mere commodity is also impossible to quantify, but it is nonetheless cause for concern.<sup>292</sup> The significance of these social costs is recognizable; Singapore’s compelling need for redevelopment and land use optimization outweighs these social costs. However, the en-bloc process should be revised regularly to keep up with changing social and economic conditions. The en-bloc process should be correspondingly restricted if the social benefits no longer outweigh the social costs imposed.<sup>293</sup>

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(Sept. 20, 2007) (Sing.) (on file with author) (testimony of Deputy Prime Minister and Minister for Law, Professor S. Jayakumar).

289. Seventy-five percent is the level of consent needed for a special resolution. Building Maintenance and Strata Management Act 2004 (Act 47 of 2004), 2004, ch. 30C, § 2(3)(b) (Sing.). It is also necessary for decisions involving major expenditures, such as whether to provide additional facilities or improvements to the common property. *Id.* § 29(1)(d).

290. Sim, *supra* note 274.

291. Melissa Sim & Debbie Yong, *Storeys of Dust and Noise: Homes and Businesses Surrounded by En Bloc Constructions Bemoan the Physical Discomfort and Additional Costs They Bring*, STRAITS TIMES (Sing.), Sept. 2, 2007.

292. Linda Lim, *Can Money Ease Loss of Memories?*, STRAITS TIMES (Sing.), June 21, 2007; Peh Shing Huei & Keith Lin, *supra* note 276.

293. For example, when the growth rate of Singapore’s population becomes stagnant and/or aged, the necessity of redevelopment decreases with less demand for new housing, and the social costs increase since elders are most adversely affected in the en-bloc process.

*F. The Nature of the En-Bloc Sale:  
A Collective Sale or a Disguised Private Taking?*

At first blush, the en-bloc process bears little resemblance to economic development eminent domain: property owners decide when to put up their property for redevelopment; the sale process is conducted by a collective sale committee appointed by the property owners; private developers have to bargain directly with the property owners through the collective sale committee to procure their consent; and the price of purchase is determined by both parties and paid for by the private developers. All of these characteristics point toward a traditional private sale and purchase process rather than eminent domain.

However, closer examination reveals that private developers are indeed exercising eminent domain powers. Having obtained the required level of consent, private developers are able to compel the remaining objecting owners to sell their property. Indeed, this characteristic, fundamental to eminent domain (the ability to succumb to the veto nature of property rights), has been recognized during parliamentary debate. Concerns about this departure from traditional public use eminent domain has also been raised in parliamentary debate, though it was overcome by the perceived public interest in the legislative objective of optimal land use and urban renewal. The en-bloc process is still a form of eminent domain whose purpose is no different than the typical economic development eminent domain.

Nonetheless, there are important departures in Singapore's en-bloc process from traditional economic development eminent domain in the United States and China. First, in accordance with the efficiency and fairness arising from requiring a beneficiary of a government giving to pay a fair charge,<sup>294</sup> private developers in Singapore's en-bloc process have to foot the bill of the acquisition and cannot acquire the land on the cheap as in China and the United States.<sup>295</sup> Second, Singapore's en-bloc process brings the acquiring party and the acquired party directly together to negotiate the compensation package. This not only further enhances efficiency, but also accords with corrective justice.<sup>296</sup> More importantly, Singapore's en-bloc process requires the approval of a certain level of majority consent before eminent domain can be exercised. This is not only a key distinction from the use of traditional

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294. See *supra* Part III.6.2.

295. In fact, the private developers in Singapore almost always have to pay substantially more than the "fair market value" of the property. See Rashiwala, *supra* note 272; see Teo, *supra* note 285.

296. See Chan, *supra* note 272; Tan Dawn Wei *supra* note 216; *supra* Part II.C.4.

eminent domain but also represents a significant step forward from the givings jurisprudence proposed by Bell and Parcho-movsky. The exercise of the eminent domain in Singapore's en-bloc process now becomes conditional. The condition of majority consent introduces a property rule protection—the right of veto—into what is essentially the liability rule nature of eminent domain.<sup>297</sup> Moreover, the amount of compensation to be paid is now decided by negotiations between the purchasing and acquiring parties and not a third party intermediary. In the following Part, the benefits of this novel approach are examined in greater detail.

## V. BENEFITS OF THE SINGAPORE MODEL

### *A. Private Developers Possess Better Economic Judgment than Legislators*

One of the criticisms of the *Kelo* decision is the deference given to the legislature in determining whether the public use requirement is satisfied.<sup>298</sup> The United States Supreme Court played the role of “rubber stamping” the notion advanced by the legislature, that condemnation and redevelopment by private developers is necessary for urban renewal and economic development by the government.<sup>299</sup> There are good reasons to believe that state and local governments may indeed be better placed to exercise discretion due to their proximity to the action and to the actors affected by land use planning measures.<sup>300</sup> However, the failure of many economic development efforts strongly suggests that the legislature is not a good evaluator.<sup>301</sup> *Poletown Neighborhood Council v. City of Detroit*<sup>302</sup> is illustrative of this point; the actual jobs created by the private developers for which the land was acquired fell well short of projections and may even account for less than the number of jobs destroyed by the acquisition.<sup>303</sup> The truth of the matter is that the government “[t]akers tend to respond to political incentives rather than economic ones.”<sup>304</sup> Their acumen in political decisions does not necessarily translate to and often conflicts with good economic decisions.

The en-bloc process prevents this problem by placing the economic decision of whether to commence redevelopment firmly in

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297. See *infra* Part V.C.

298. Cohen, *supra* note 10, at 550.

299. Phan, *supra* note 21, at 642.

300. Baron, *supra* note 2, at 628.

301. Garnett, *supra* note 2, at 139-40; Kochan, *supra* note 11, at 88.

302. 304 N.W.2d 455 (Mich. 1981).

303. Cohen, *supra* note 10, at 545.

304. Garnett, *supra* note 2, at 140.

the hands of the current property owners and private developers; the government simply identifies areas of possible land use optimization and then re-zones the relevant plot to allow more intense uses. It is hard to imagine anybody being better placed or having more expertise or resources than the private developers in determining the economic viability of the redevelopment. The property owners are parties at ground zero of the proposed acquisition and are thus perfectly placed to negotiate with private developers to determine whether the proposed redevelopment is more economically efficient than current usage.

*B. Better Internalization of Costs and a Reduction in Rent-Seeking*

A criticism closely related to the above process is the failure to internalize the cost of eminent domain. The private developers benefiting from the use of eminent domain often bear little or none of the cost of acquisition.<sup>305</sup> This can lead to an inefficient over-reliance on such measures.<sup>306</sup> As the *Poletown* example demonstrates, there is a huge incentive to be overly optimistic about the success of an economic development project when one does not need to bear the full cost. If private developers have to foot the bill of the land acquisition, as opposed to having the bill distributed among taxpayers, private developers will naturally be more prudent in undertaking any land acquisition.

Similarly, as discussed in Part III.B.1, rent-seeking in public choice theory is a major concern in the exercise of eminent domain for economic development. This “breakdown of the democratic process is among the most potent criticisms of . . . economic development takings.”<sup>307</sup> One of the main causes of such rent-seeking behavior is that there is “rent” to be “sought” in the use of eminent domain. The private developers can extract huge benefits from the process at the expense of the government, taxpayers, and property owners. Justice Ryan has commented that “when the private corporation to be aided by eminent domain is as large and influential as General Motors, the power of eminent domain, for all practical purposes, is in the hands of the private corporation. The municipality is merely the conduit.”<sup>308</sup> “Local governments are particularly susceptible to the resources of affluent private developers who promise more jobs and tax revenue,”<sup>309</sup> especially in China.<sup>310</sup>

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305. Kelly, *supra* note 126, at 38; see Phan, *supra* note 21, at 619.

306. Kelly, *supra* note 126, at 38.

307. Cohen, *supra* note 10, at 546.

308. *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455, 481 (Mich. 1981) (Ryan, J., dissenting).

309. Kelly, *supra* note 126, at 39.

This is where the Singapore en-bloc process nips the problem in the bud. In both the Singapore en-bloc process and traditional economic development eminent domain, the government relies on private developers to redevelop the land for more optimal land use and urban renewal. The key distinction between these processes is that in the Singapore en-bloc process private developers have to directly foot the bill of the land acquisition, unlike the current use of eminent domain in China and the United States. This ensures that private developers will not initiate any land acquisition in which they are not confident of recouping substantial acquisition costs. Moreover, without the ability to obtain a windfall through the manipulation of the eminent domain process, it is foreseeable that there would be significantly less room for rent-seeking. Indeed, it is telling that, despite not having private property rights enshrined in its constitution,<sup>311</sup> Singapore has the lowest corruption rating compared to China and the United States,<sup>312</sup> which have such constitutional rights.

Singapore's benefit of better internalization of cost and reduction of rent-seeking is further strengthened by the benefit of better compensation discussed in the next section.

### *C. Better Compensation for the Owners of Acquired Property*

As discussed in Part III.B.2, undercompensation is a key concern in eminent domain. Even compensation at fair market value does not adequately compensate losses such as subjective value, sentimental value, and dignitary harms. The owners of property are also barred from realizing the potential value of their property.

Under the Singapore en-bloc process, the owners of acquired property are able to obtain compensation at a high premium, between 60% and 100% over market value.<sup>313</sup> However, the advantage of the Singapore en-bloc process is not simply the higher-than-market value per se. Instead, it is how this higher-than-market value is arrived at that allows a more comprehensive redress of the undercompensation issue.

The Singapore en-bloc process requires a significant majority of consent before eminent domain is utilized. This consent requirement essentially gives a veto power to the property owners to re-

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310. See *supra* Part II.C.4.

311. See CONST. OF THE REP. OF SING. pt. IV (1999 rev. ed.) In particular, note the conspicuous absence of property rights protection in "Part IV Fundamental Liberties." See *id.*

312. TRANSPARENCY INT'L, GLOBAL CORRUPTION REPORT 2007, at 325-30 (2007). In a worldwide survey of 163 countries where scores range from ten being highly clean and zero being highly corrupt, Singapore comes in fifth with a score of 9.4, and the United States ranks twentieth with a score of 7.3, while China is seventieth with a score of 3.3. *Id.*

313. See *supra* note 272 and accompanying text.



ject any acquisition unless the compensation offered by the private developers is deemed adequate by the property owners. The veto power in turn allows the compensation sum to capture many of the losses that would otherwise not be captured by the use of fair market value. For example, if there is significant sentimental value and community value shared by the property owners, they can then veto the land acquisition unless a sufficiently high price is offered to compensate for this loss. Alternatively, the private developers can simply move on to other properties where owners have less sentimental value attached. Similarly, relocation costs and/or costs of procuring a replacement home are not factored into the fair market value and constitute major uncompensated losses.<sup>314</sup> In the Singapore en-bloc process, the property owners would inevitably include this factor in their consideration of whether to accept the offer or not. Indeed, the property owners have rejected high above-market value offers on the basis that the premium remains insufficient to compensate their relocation costs.<sup>315</sup> The property owners are also able to share in the profit that the private developers will enjoy from the redevelopment. Through pooling their resources together, the property owners are able to hire professional independent valuers to assess both the present and potential value of their property. The property owners' ability to veto the en-bloc process places them in a good position to bargain for some share of the potential value before giving their consent.

While dignitary harms cannot be eliminated where there is compulsion against one's will, dignitary harms are reduced in the Singapore en-bloc process. The requirement of majority consent helps make the compulsory acquisition more palatable for the objecting owners. Instead of objecting owners feeling as if the government's powers have been hijacked by a small, powerful, and wealthy interest group, they may take some comfort from the fact that the compulsory acquisition is the result of a democratic decision by their own neighbors, which by implication suggests similar social status and grouping. In the Singapore en-bloc process, there is less sense of grievance from corruption, which is a particular source of objection in the context of China.<sup>316</sup>

Of course, since only majority and not unanimous consent is required, there remains the possibility that various losses peculiar to the remaining dissenting owners remain uncompensated. This is partly mitigated by the provision of a third-party intermediary,

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314. *See supra* Part III.B.2.

315. *See supra* note 273 and accompanying text.

316. *See supra* Part II.C.5.

which can require more compensation be paid to certain objecting owners as a condition for granting the use of eminent domain against them.<sup>317</sup> Moreover, the economic analysis in the following section will demonstrate the overall efficiency.

*D. Economic Analysis: An Efficient Hybrid Property-Liability Rule*

“The property rule-liability rule dichotomy, first articulated by Guido Calabresi and A. Douglas Melamed provides a useful tool of economic analysis.”<sup>318</sup> Under the property rule, a transfer of entitlement requires the consent of its holder.<sup>319</sup> On the other hand, the removal of entitlement protected by the liability rule only requires payment of an objectively determined value.<sup>320</sup> The difference between these two rules has often been conceived “as the difference between protecting by deterrence and protecting by compensation.”<sup>321</sup>

The requirement of majority consent for the Singapore en-bloc process means that the property owners as a whole can veto the proposed redevelopment plan and land acquisition. This veto power is the departure from the traditional eminent domain in which the property owners have absolutely no say after the government has decided to exercise eminent domain. The property owners can only dispute the level of compensation and/or seek judicial review on whether the exercise of eminent domain is legally justified. Thus, one can view the majority requirement in the Singapore en-bloc process as an injection of property rule protection into an otherwise liability rule protection.

As seen in the previous sections, this use of property rule protection allows the property owners to capture a very significant part of their property’s subjective value which is otherwise not reflected in fair market value compensation. Property rule protection accords a greater respect to personal autonomy—the autonomy that is useful in protecting the subjective value of property.<sup>322</sup> The consequential private bargaining also “achieves a higher degree of efficiency by tapping into the intellectual resources of all the relevant parties.”<sup>323</sup> Similarly, doing away with the government intermediary’s assessment of compensation in the liability rule not

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317. See *supra* Part IV.C.

318. Wallace Wen-Yeu Wang & Jian-Lin Chen, *supra* note 16, at 337.

319. Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1092 (1972).

320. *Id.*

321. Ian Ayres & Paul M. Goldbart, *Correlated Values in the Theory of Property and Liability Rules*, 32 J. LEGAL STUD. 121, 121 (2003).

322. Calabresi & Melamed, *supra* note 319, at 1108.

323. Wallace Wen-Yeu Wang & Jian-Lin Chen, *supra* note 16, at 341.

only reduces the transaction costs in the form of administrative costs but also reduces the risk of corruption and rent-seeking—a particular concern in China.<sup>324</sup>

However, total reliance on the property rule is inefficient where unanimous consent is required from a large group of people, given the high costs of bargaining.<sup>325</sup> In particular, as seen through China's *ding zi hu* and various U.S. court cases on eminent domain, there is the real problem of holdout. Property owners often hold out by overstating the value of their property such that “the government might offer more than market value . . . to avoid political fallout” or litigation.<sup>326</sup> It is true that there is distinction between those who hold out for strategic reasons (the holdout arguably being inefficient) and those who hold out because they genuinely have a higher valuation of their property (the holdout arguably being efficient). However, it is often impossible to differentiate between these possibilities in the context of eminent domain.<sup>327</sup> In addition, owners may also genuinely overestimate the value of their property under the “mistaken belief that the market price would reflect their subjective value to the subconscious realization that their self-valuation may affect the ultimate price offered.”<sup>328</sup> These holdouts can sometimes impede socially useful projects.<sup>329</sup> The conventional justification of eminent domain is to overcome the holdout problem among sellers.<sup>330</sup> Indeed, the Singapore government initially left it entirely on the private parties to decide whether redevelopment should occur. The Singapore government only intervened with the provision of eminent domain powers against the minority objectors after the high failure rate of the en-bloc process threatened to derail the parliamentary objective of optimizing land use.<sup>331</sup>

Hence, having relied on the property rule protection to capture a substantial part of the property's subjective value through a majority consent requirement, efficiency is further promoted by switching to the liability rule for the remaining minority where the transaction costs become unacceptably high due to strategic holdouts. While it is inevitable that some subjective value may remain uncompensated for those genuine holdouts, this problem is mitigated by the ability of the third-party intermediary—the

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324. See *supra* Part II.C.4.

325. See Reza Dibadj, *Regulatory Givings and the Anticommons*, 64 OHIO ST. L.J. 1041, 1086 (2003).

326. Garnett, *supra* note 2, at 127.

327. See Kelly, *supra* note 126, at 19.

328. Garnett, *supra* note 2, at 127.

329. See Cohen, *supra* note 10, at 534-35.

330. Kelly, *supra* note 126, at 20.

331. See *supra* Part IV.B.

Singapore Strata Title Board—to take into account the peculiar circumstances of the minority objectors and award higher compensation where necessary.<sup>332</sup>

More importantly, the public interest and social benefits behind such economic development eminent domain cannot be disregarded. As discussed in Part II.C.2, even the United States heavily relied on eminent domain in the deepening stages of its economy. There is a compelling need for China to rapidly develop its economy to improve the living standards of her vast population. This task cannot be achieved by public investment and development alone.<sup>333</sup> Similarly, in the context of Singapore's en-bloc process, owners very seldom have the resources to redevelop the land for more optimized/intensified uses, which could be highly detrimental to the public interest in Singapore where land is extremely scarce. The hybrid property-liability rule of the Singapore en-bloc process is an efficient method of facilitating socially efficient transactions.

#### *E. A More Structured and Transparent Process*

One may point out that the current eminent domain practice in the United States and China already requires private developers to negotiate with the property owners before relying on eminent domain.<sup>334</sup> However, this practice is actually much more inefficient and more prone to abuse. Undercompensation remains a significant problem since the negotiation is conducted under the threat of eminent domain. Both the property owner and the private developer are aware that after a fair market value has been offered, any failure of negotiations or agreement has little impact on the exercise of eminent domain unless the objecting owners incur tremendous amounts of time and expense challenging the eminent domain in court. On the other hand, both parties in the Singapore en-bloc process know the importance of property owners' consent. Once a certain level of the minority has objected to the sale, the entire project is halted. Thus the property owners are able to

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332. See *supra* Part IV.C.

333. Indeed, China's public sector and state-owned enterprises were inefficient and unprofitable, which is in sharp contrast to the private sector which is doing very well. William I. Friedman, *One Country, Two Systems: The Inherent Conflict Between China's Communist Politics and Capitalist Securities Market*, 27 BROOK. J. INT'L L. 477, 477-78 (2002). Chinese reforms since 1978 have aimed to introduce market mechanisms and less state intervention to facilitate economic growth. *Id.* Hence, the private developers are serving a very crucial role in China's economic development.

334. See Cohen, *supra* note 10, at 536 (regarding the United States); *supra* Part II.B (regarding China).

consistently bargain for above-market-value compensation, which better reflects the subjective value of the property.<sup>335</sup>

Moreover, the greatest deficiency of the current practice in the United States and China is the lack of structure and transparency in the process. First, generally, the longer an owner waits to enter into agreement with a private developer the more compensation he will receive.<sup>336</sup> This tendency encourages strategic holdout and increases the transaction costs of bargaining. Second, the stark inequality in resources and bargaining power between property owners and private developers impedes the attainment of a fair and efficient agreement. Third, a significant portion of subjective value is the community externalities whose values are dependent on the community not breaking up.<sup>337</sup> The current practice in the United States and China allows the use of the “divide and conquer” tactic by enticing a portion of the community to “cash out [early] at an attractive price.”<sup>338</sup> The withdrawal of these community members in turn diminishes the value of the community for the remaining members and causes them to sell quickly before the value diminishes any further.<sup>339</sup> This is what has happened in China—remaining owners are left completely stranded in the construction site with no neighbors or amenities.<sup>340</sup> There is hardly any user value left in those circumstances, and any hold out would be pointless without any other leverage for strategic holdout.<sup>341</sup> This exploitation is both unfair and inefficient given the uncompensated loss of the community value.<sup>342</sup>

Here, the structure and transparency of the Singapore en-bloc process is extremely useful. There is no risk of unequal treatment based on the timing of the agreement, as all property owners stand and fall together. There is also the need for the majority to consent for the distribution method of the compensation, preventing unfair prejudice of a certain minority. Unfair prejudice of the minority is kept in check by requiring an independent valuer to determine the distribution method and the government intermediary’s power to block the en-bloc process if the distribution of compensation is not made in good faith.<sup>343</sup> The fact that all property owners stand and fall together prevents the exploitation tactic of “divide and con-

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335. See *supra* note 272 and accompanying text.

336. Wu Xin Hui, *supra* note 24.

337. See Parchomovsky & Siegelman, *supra* note 144, at 114.

338. *Id.* at 124.

339. *Id.*

340. Ye Peng Fei, *supra* note 65.

341. See *supra* Part II.C.3. In the case of China, that leverage is in the form of local and international media coverage. See *supra* notes 60-62 and accompanying text.

342. Parchomovsky & Siegelman, *supra* note 144, at 124.

343. See *supra* Part IV.C.

quer.” The playing field is leveled as the resources of all the property owners are pooled together in the bargaining process. The appointment of the collective sale committee to negotiate with the private developers reflects the “common way to overcome the collective action problem”; “some group members assume the role of leaders and spearhead the effort to coordinate the group.”<sup>344</sup> The agency problem is introduced<sup>345</sup> but is mitigated by the procedural guidelines, which regulate the process and the collective sale committee that must to be elected or appointed by the property owners. The agency problem is further reduced by the fact that the issue concerns each property owner intimately and substantially. Thus, there is no lack of incentive on the part of the property owners to supervise the operation of the appointed committee.

## VI. A NEW MODEL

While the above discussions confirmed the advantages of the Singapore en-bloc process over traditional eminent domain, the Singapore en-bloc process is currently only applicable to strata-title property. Landed property is excluded from the exercise of eminent domain by the private developers. Indeed, this distinction was recognized in the parliamentary debate and used to justify the amendment, since when buying a unit in a strata-title property one is only buying into the common property and not a specific land lot.<sup>346</sup> The nature of strata-title property also facilitates the en-bloc process. There is an existing management structure, for the purpose of maintaining the common property/area, and a meeting mechanism to which the en-bloc procedures, such as appointment of a collective sale committee and procurement of consent, can adapt.

This inapplicability to landed property is not particularly serious in the context of Singapore since only 5% of the Singapore households reside in landed property.<sup>347</sup> Nevertheless, there is no reason why the characteristics of the Singapore en-bloc process, which provide the efficiency and fairness advantages over the cur-

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344. Parchomovsky & Siegelman, *supra* note 144, at 130.

345. *Id.* at 131.

346. Land Titles (Strata) Amendment Debate 1998, Parliament No. 9, Sess. No. 1, Vol. No. 69, Sitting No. 4, cols. 605-06 (July 31, 1998) (Sing.) (on file with author) (testimony of Minister of State for Law, Associate Professor Ho Peng Kee).

347. LEOW BEE GEOK, CENSUS OF POPULATION 2000: HOUSEHOLDS AND HOUSING 35 (2007) (on file with author). The bulk of Singapore households (88%) reside in HDB flats (public housing). *Id.* These HDB are naturally not subjected to the en-bloc process given the fact that the government owns the land of the HDB housing estate. The HDB flats are, however, subject to the Selective En Bloc Redevelopment Scheme and the various upgrading programs for urban renewal and land use optimization. See SING. DEP'T OF STATISTICS, *supra* note 220, at 110-11.

rent economic development eminent domain practice in the United States and China, cannot be adopted for future eminent domain practices. The new model proposed below draws on these characteristics with the necessary modifications and improvements to suit the context of China. The lessons and improvements from the analysis of the Singapore en-bloc process are also incorporated. In particular, the issue of who should bear the transaction of a failed acquisition is addressed. The developing nature of China's economy dictates a greater necessity and corresponding public interest in economic development eminent domain. Nevertheless, the applicability of the new model to the United States will be discussed at the end.

*A. Stage One: Drawing up the Plot of Land for Eminent Domain*

The current Singapore en-bloc process is based on existing boundary of the strata-title development. This dispenses with the need to draw up the plot of land for eminent domain. In the new model, there is the need to identify the plot of land for economic development as per conventional eminent domain practice. In this regard, the starting stages of current practice and this new model are similar. The relevant planning authorities will conduct the necessary survey and study to identify the plot of land for economic development. It will then liaise with possible private developers on the possible development plan.

The next stage is different. Having identified the necessity of economic development and the plot of land for which eminent domain may be exercised, the next stage in the proposed model involves the assessment of uniqueness that the particular plot of land has within the development plan. This is relevant to the determination of the level of majority of consent required before eminent domain may be exercised. As seen above, the majority of consent required in the Singapore en-bloc process is tied to the age of the property, which can be seen as pegging the level of consent on the necessity of eminent domain—the older the property, the more necessary the use of eminent domain given the objective of urban renewal. Thus, if the necessity of a particular plot of land is not particularly instrumental to the development plan, the level of consent will naturally be higher to ensure the minimalization of uncompensated subjective value. On the other hand, if the particular plot of land is indispensable to the development plan, the level of majority consent should be reduced to minimize the likely

impediment of the development plan—a strategic holdout due to monopoly pricing by the owners/sellers.<sup>348</sup>

Nevertheless, the required level of consent should not fall below two-thirds for the following two reasons. First, the key advantage of injecting property rule protection is the ability to capture the subjective value of the property. This is to avoid the inefficiency of having such values uncompensated and not internalized. This advantage is likely to be diluted to an unacceptable degree if the level of consent is too low. Second, another benefit of the consent requirement is the reduction of dignitary harms. Instead of the acquired party feeling aggrieved from possible corruption or rent-seeking behavior by the rich and powerful private developers, the reliance of collective decision by the acquired party helps mitigate this perception of injustice. The requirement of a minimum of two-third majority ensures that the decision is based on a clear majority. This is particularly necessary in China where procedures may not be strictly adhered to in the initial stages of implementation. The minimum requirement of two-thirds majority can withstand a significant level of procedural defect and still ensure there is at least a majority consenting.

### *B. Stage Two: Negotiation Among Parties*

Having identified the plot of land, the next stage is the negotiation phase. This phase first involves the setting up of a committee to negotiate on behalf of the affected owners. The committee is necessary to help pool together the resources of the affected owners and overcome collective action problems. Members of the committee should be appointed by owners, and the committee should preferably be comprised of the owners themselves. Since effective negotiation requires significant resources, such as the hiring of property appraisers and lawyers, the acquiring party should be legally required to provide a certain amount of money to the committee at the onset of negotiations. This ensures that the inequality in resources does not prejudice efficient and effective negotiation. This requirement also guarantees the acquired party is not unfairly burdened with all of the transaction costs of a failed acquisition.

The committee will be tasked to negotiate with the acquirer of the land. This includes assessing the current value and potential value of the land to determine the legitimacy of the monetary offer. Another important task is to serve as a channel of feedback for the owners. The committee should collect and compile the various special requests and needs of the owners and convey them to the po-

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348. Cohen, *supra* note 10, at 534-35.



tential acquirer. This would allow the acquirer to consider offering more money or coming up with a specific package to meet those needs in order to secure their consent. A set of procedures regulating the negotiation process should be stipulated so as to ensure a fair and transparent process. These procedures should include those of the Singapore en-bloc process: a notice period, provisions for meeting management, a required quorum at meetings, and disclosure of any conflict of interest.<sup>349</sup>

Having negotiated with the committee, the acquirer will then prepare a compensation and relocation package for the approval of the owners. The current Singapore en-bloc practice does not require the approval to be sought at the same time. However, transparency of the procedure will be better assured if the owners can come together and vote on the proposal at the same time. The voting is preferably anonymous to prevent any undue influence or duress in seeking the consent. This is a concern in China given the resorts to violence and other underhanded techniques employed at times.<sup>350</sup> The turnout of the voting should not be a problem given the owners' intimate and substantial interest in the issue. The owners will vote on the whole compensation package, including the distribution methods. The amount of votes an owner is entitled would certainly be varied unless all the property of the plot is identical. As a preliminary matter, a voting share should be determined by using an equally weighted combination of the property's area and tax value—each expressed as a percentage of the entire area and tax value of the property sought to be acquired.<sup>351</sup>

Prima facie, the compensation package will have to offer a premium over existing market value in order to entice the owners to sell. This is an efficient and desirable outcome given the economic development nature of this exercise of eminent domain. As opposed to eminent domain for traditional public use purposes of public infrastructure, there must be a substantial increase in the economic value of the land after redevelopment to justify such economic development eminent domain by private developers. If the acquiring private developers are not prepared to pay a premium over the current market value of the land, then it is likely the proposed new development is not more economically viable than the current use.

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349. See *supra* Part IV.C.

350. See *supra* Part II.C.1.

351. For example, if the area of a property comprises 10% of the total plot of land sought to be acquired and the property's tax value is 5% of the total property tax value of the entire property, the owner of this property would be entitled to 7.5% of the voting shares  $((.10 + .05)/2 = .075)$ .

Looking at the other aspect of the negotiation, it would be preferable to have more than one private developer competing for the project. The competition will help ensure a more efficient and valuable deal for the owners of the acquired land. Nonetheless, competition in this regard is not strictly necessary, as the owners have the means to evaluate the adequacy of the compensation package and can still easily reject an inadequate compensation package with nothing to lose.

### *C. Stage Three: Third Party Intermediary*

If the acquiring party manages to secure the required level of consent, the next stage is to allow for redress to the objecting owners. Procedurally, it should be stipulated clearly at the outset and also during the voting that there is an avenue of redress/appeal for the objecting owners.

An administrative authority could be tasked with handling such an avenue of redress. The following key areas should be included in the board's analysis: (i) whether the negotiation and distribution methods are done in good faith; (ii) whether there is some special subjective value of the objecting owners which requires higher compensation or special arrangement; and (iii) whether the procedural requirements of the process are followed. Like the Singapore en-bloc process, the authority should have the power to mediate the objections and to order any additional compensation on account of the peculiar circumstances of the objecting owners. The authority should also refuse to grant eminent domain on the objecting owners if there is a lack of good faith or injustice in the process.

Admittedly, given the rampant corruption in China,<sup>352</sup> whether the authority is administrative or judicial in nature is possibly the weak link in the entire process. The goals of installing procedural safeguards and protecting the minority are circumvented if the board is biased. This may be mitigated by ensuring that the authority is appointed by the central government and answers directly to it. However, the danger of rent-seeking and corruption remains a constant threat without an overall structural revamp and imposition of the rule of law. Nevertheless, this is a structural deficiency, which is inevitable whenever a government intermediary is involved. The new model still goes a long way in safeguarding the interests of the acquired party through the requirement of majority consent. The acquired party is, at the very least, no longer at the whim of the acquiring party.

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352. *See supra* Part II.C.4.

TABLE A

## Step-by-Step Guide

Step 1:	Identify the plot of land for economic development
Step 2:	Assessment of the uniqueness of the property to determine the level of consent required <ul style="list-style-type: none"> <li>• the more pressing, the lower the level of consent</li> <li>• minimum level of consent should be 2/3</li> </ul>
Step 3:	Appointment of negotiating committee <ul style="list-style-type: none"> <li>• accomplished through voting by owners</li> </ul>
Step 4:	Negotiation by negotiating committee <ul style="list-style-type: none"> <li>• receive funds from acquiring party</li> <li>• engage necessary professional services (lawyers and property appraisers)</li> <li>• gather feedback from owners</li> </ul>
Step 5:	Compensation package proposed by acquiring party <ul style="list-style-type: none"> <li>• can include replacing housing</li> </ul>
Step 6:	Voting by owners <ul style="list-style-type: none"> <li>• preferably unanimous</li> <li>• number of votes based on area and value of property</li> </ul> <p><i>(Process halted if level of consent not obtained)</i></p>
Step 7:	Appeal by minority owners <ul style="list-style-type: none"> <li>• for higher compensation or complaints on the process</li> </ul> <p><i>(Process halted if bad faith or prejudice found)</i></p>
Step 8:	Acquiring party distributes compensation package and exercises eminent domain on any dissenting owners

*D. A Different Social-Cultural Perspective  
on Private Property Rights*

Charles Cohen has suggested banning eminent domain for economic development altogether; the main justifications are injustice (abusive capture by interest groups) and inefficiency (undercompensation and a failure to internalize costs).<sup>353</sup> However, as explained above, the new model premised on the Singapore en-bloc process is effective at reducing the injustice and inefficiency. More importantly, while one of the important purposes of government is to protect property rights, it is the government that defines the scope of the property rights it is supposed to protect.<sup>354</sup> Different socioeconomic circumstances will naturally require a different level and nature of property rights protection.

The concept of private property rights is deeply ingrained in the American psyche.<sup>355</sup> "Private property is precious in America."<sup>356</sup> "[A]merican people believe that property rights are invested with moral significance."<sup>357</sup> "[S]ound protection of property rights is [deemed] fundamental to all other liberties."<sup>358</sup> Americans have strong expectations about the Constitutional protection of property rights and ask with conviction, "Why me?" when property is taken.<sup>359</sup> The founders, being landowners themselves, understood the danger of a politically influential minority upsetting the distribution of property if there were an unrestricted right to seize private property.<sup>360</sup> Indeed, in early American history, many courts viewed "laws or acts which 'took from A to give to B' as the paradigmatic abuse of government authority."<sup>361</sup> Neither did "the American founders accept government as the agent for redistributing private property for 'economic development.'"<sup>362</sup>

However, this was fundamentally changed in the nineteenth-century when eminent domain became an important economic development tool.<sup>363</sup> Then, " 'public interest' of economic prosperity

353. Cohen, *supra* note 10, at 499.

354. Baron, *supra* note 2, at 649.

355. *Id.* at 654.

356. Sandefur, *supra* note 2, at 726 (quoting California Congresswoman Maxine Waters) (internal quotation marks omitted).

357. *Id.* at 711 (quoting *The Kelo Decision: Investigating Takings of Homes and Other Private Property, Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 14 (2005) (statement of Professor Thomas W. Merrill)) (internal quotation marks omitted).

358. Kochan, *supra* note 11, at 55.

359. Baron, *supra* note 2, at 647.

360. Cramer, *supra* note 111, at 410-11.

361. Sandefur, *supra* note 2, at 715. *But c.f.* Cohen, *supra* note 10, at 494 (opining that, throughout most of American history, public use is deemed to include anything that enhances public welfare).

362. Sandefur, *supra* note 2, at 773.

363. Schultz, *supra* note 51, at 200; Cohen, *supra* note 10, at 506.

overrode individual rights.”<sup>364</sup> American government attempted to “‘release energy’ by encouraging private developers to make the best use of land.”<sup>365</sup> The legislature was also eager to attract investment, often at the expense of individual property owners. The judiciary exercised extensive deference to these government takings and recognized such weakened property rights as necessary for development.<sup>366</sup>

This trend is further reinforced by the New Deal, which caused a cultural and philosophical shift in the perception of government and property rights.<sup>367</sup> Government today is responsible not only for providing traditional public goods—such as roads, schools, and parks—but it is also expected to provide jobs and health care.<sup>368</sup> U.S. courts have played their own role by “rubber stamp[ing]” the notion that condemnation and redevelopment by private developers are necessary for urban renewal and economic development by the government.<sup>369</sup> Perhaps the fact that there is already an abundance of “shopping centers, office parks, clusters of hotels, and centers of entertainment and commerce” serves as evidence that the justifications for eminent domain for such developments are weak.<sup>370</sup> Nonetheless, this history of the ever-changing perspective of property rights in the United States highlights the interwoven link with the underlying socioeconomic circumstances.

The new model premised on the Singapore en-bloc process is still a departure from the absolute private property rights. However, China has only recently constitutionally recognized private property rights. Indeed, private property rights were virtually non-existent in the communist state until twenty years ago.<sup>371</sup> Together with the developing state of China’s economy, there is a strong case for not defining private property rights in China with such absoluteness so as to exclude economic development eminent domain.

In any case, the evolutionary history of property rights in the United States suggests that the current objections against economic development eminent domain are unlikely to be based on some sacred notion of absolute property rights. Indeed, the main objections to economic development eminent domain are the injus-

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364. Wang, *supra* note 21, at 611.

365. *Id.* at 612.

366. *Id.* at 613-14.

367. Sandefur, *supra* note 2, at 772-73.

368. *Id.* at 772.

369. Phan, *supra* note 21, at 642.

370. Cramer, *supra* note 111, at 434.

371. See Frank Xianfeng Huang, *The Path to Clarity: Development of Property Rights in China*, 17 COLUM. J. ASIAN L. 191, 199-201 (2004) (giving a concise historical review of China’s legal recognition of private property rights).

tice and inefficiency arising from rent-seeking and undercompensation. If that is the case, then the proposed new model, which is demonstrated to effectively tackle the rent-seeking and undercompensation problem, is applicable to the United States as well. The lower level of corruption in the United States also means the procedural safeguards from the government third-party intermediary can be better materialized.

## VII. CONCLUSION

Economic development eminent domain by private developers does provide the dangerous potential for rent-seeking corruption and undercompensation inefficiency. However, the academic discussions in the United States and China have missed a crucial aspect of the issue by merely focusing on the takings aspect and not tackling the root cause of the problem in the givings aspect. In this regard, the givings principles espoused by Abraham Bell and Gideon Parchomovsky, which require the recipient of a government giving to pay a fair charge for the benefits received, fills the gap. This payment of a fair charge prevents the extraction of a windfall benefit from rent-seeking, tackling the root of the injustice problem. However, addressing the undercompensation issue and the accurate assessment of the charge requires a novel departure from the original givings jurisprudence<sup>372</sup> through the injection of some property rule protection into the liability rule nature of eminent domain. Here, the Singapore en-bloc process, which utilizes a hybrid property-liability rule protection, demonstrates the necessity, fairness, efficiency, and advantages of such an approach over the current economic development eminent domain practice in the United States and China. A new model based on the Singapore en-bloc process, incorporating the necessary improvements and modifications as discussed in the previous sections, would provide a more equitable and efficient eminent domain tool for China as it strives to continue its rapid economic development.

In addition, the telling fact that Singapore has the lowest corruption rating compared to China and the United States, despite not having private property rights enshrined in her Constitution,<sup>373</sup> also highlights the importance of this neglected givings jurisprudence in tackling the root of corruption and rent-seeking. Future reform proposals for eminent domain in the United States could do well to incorporate this givings jurisprudence for a more comprehensive approach to the undercompensation and rent-seeking problem.

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372. Wallace Wen-Yeu Wang & Jian-Lin Chen, *supra* note 16, at 353-55.

373. TRANSPARENCY INT'L, *supra* note 312.

## FEDERAL LAW AND LEGISLATION

LINDSAY VOIRIN\*

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## I. JUDICIAL DECISIONS

### *A. Harm to Marine Mammals Is Outweighed by National Security Concerns – Navy Will Continue Sonar Training Exercises*

*Winter v. NRDC* involved the Navy’s use of “mid-frequency active” (MFA) sonar in training exercises off the coast of Southern California.<sup>1</sup> Thirty-seven species of marine mammals, including beaked whales which are particularly susceptible to injury from active sonar, live in these waters.<sup>2</sup> Active sonar is the Navy’s most effective antisubmarine warfare technology, and antisubmarine warfare is currently considered the top war-fighting priority by the Navy’s Pacific Fleet.<sup>3</sup> Forces deploy in coordinated strike groups including a sonar operator.<sup>4</sup> The use of MFA sonar is mission-critical, and strike groups must demonstrate proficiency for deployment certification.<sup>5</sup> Admiral Gary Roughead, Chief of Naval Operations, stated that “if effective sonar training were not possible [during training exercises]-the training value of the other elements would also be degraded.”<sup>6</sup>

A five justice majority concluded that the district court abused its discretion by requiring the Navy to (1) shut down MFA sonar when a marine mammal is spotted within 2,200 yards of a sonar-emitting vessel and (2) power down MFA sonar by six decibels during “significant surface ducting conditions,” where sonar detection becomes difficult due to specific, infrequent ocean conditions.<sup>7</sup> Chief Justice Roberts, writing for the majority, further clarified that a plaintiff shall not be granted injunctive relief upon establishing a mere possibility of irreparable harm to the environment, but rather must meet the weightier burden of showing a likelihood of irreparable harm absent the grant of injunctive relief.<sup>8</sup> Accordingly, the Court reversed and vacated the preliminary injunction

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1. *Winter v. NRDC*, 129 S. Ct. 365, 370-71 (2008).  
 2. *Id.*  
 3. *Id.* at 370.  
 4. *Id.*  
 5. *Id.* at 370-71.  
 6. *Id.* at 377 (citing Pet. App. 342a).  
 7. *Id.* at 373-74.  
 8. *Id.* at 373.



that restricted the Navy's right to use MFA in antisubmarine warfare training exercises off the Southern California coast.<sup>9</sup>

Prior to commencement of any sonar training, the Department of Defense granted the Navy a two year exemption from the Marine Mammal Protection Act of 1972 (MMPA), conditioned on a set of mitigating procedures, for fourteen training exercises involving MFA sonar scheduled intermittently until January of 2009.<sup>10</sup> In February 2007, the Navy completed an environmental assessment to evaluate the environmental impact of the training exercises.<sup>11</sup> Potential physical injuries to dolphins (eight) and potential disruptions to behavioral patterns of beaked whales (274) predicted by the assessment would be mitigated through voluntary measures.<sup>12</sup> Thus the Navy determined no significant environmental impact from the training exercises and concluded that no environmental impact statement (EIS) was required under the National Environmental Policy Act of 1969 (NEPA).<sup>13</sup>

The Natural Resources Defense Council (NRDC) and other environmentalist groups alleged injury to marine mammals by the Navy's use of MFA sonar and filed suit against the Navy in the Central District of California alleging violation of the NEPA, the Endangered Species Act of 1973, and the Coastal Zone Management Act of 1972 (CZMA) for its failure to prepare an EIS.<sup>14</sup> The district court found a "demonstrated probability of success" regarding plaintiff's claims under NEPA and the CZMA, a "near certainty" of irreparable injury to the environment, and in the balancing of interests, the court concluded that environmental concerns outweigh any harm to the Navy that may occur by granting the injunction.<sup>15</sup>

The Navy filed an emergency appeal, and the Ninth Circuit stayed the injunction pending appeal.<sup>16</sup> On appeal, the Ninth Circuit affirmed, but remanded for a narrowing of the injunction to provide mitigating conditions under which the Navy could conduct

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9. *Id.*

10. *Id.* at 371 (2008). The statutory standard for takings of marine mammals is broad. See 16 U.S.C. §§ 1362(13), 1372(a) (defining the taking of a marine mammal as harassing, hunting, capturing, or killing it); see also § 1371(f)(1) (permitting the Secretary of Defense to "exempt any action or category of actions" from the MMPA if such actions are "necessary for national defense").

11. *Winter*, 129 S. Ct. at 372.

12. *Id.*

13. *Id.* Whether a federal agency must prepare an environmental impact statement hinges on an whether the activity in question significantly affects the environment. See 42 U.S.C. § 4332(2)(C) (2000). Where the agency's preliminary environmental assessment shows that an activity causes no significant environmental impact, no environmental impact statement is necessary. See 40 C.F.R §§ 1508.9(a), 1508.13 (2007).

14. *Winter*, 129 S. Ct. at 372.

15. *Id.* at 373.

16. *Id.* at 374.

its training exercises.<sup>17</sup> On remand, the district court entered a new preliminary injunction with built-in parameters for conditional use of MFA sonar.<sup>18</sup> The Navy filed notice of appeal and challenged two of the district court's six restrictions.<sup>19</sup>

The Navy then sought relief through alternative means and successfully pursued an exemption from the CZMA from the executive branch.<sup>20</sup> The President authorized the Navy's antisubmarine warfare training exercises without restriction, deeming them essential to national security.<sup>21</sup> The Council on Environmental Quality also gave the Navy permission to implement alternative arrangements to NEPA in light of "emergency circumstances," reasoning that the district court's injunction would prevent strike groups from performing at full capacity.<sup>22</sup> Thereafter, the Navy moved to vacate the district court's injunction with respect to the two appealed measures, but the district court refused to do so.<sup>23</sup> The Ninth Circuit affirmed.<sup>24</sup> The Supreme Court granted certiorari.<sup>25</sup>

In Part III(A), the Court concluded that a balancing of the interests tips strongly in favor of the Navy.<sup>26</sup> After objectifying the correct "likelihood of irreparable harm" standard to apply, Chief Justice Roberts explained that the lower courts did not give proper deference to Navy officers.<sup>27</sup> In Part III(B), the Court determined that even if the plaintiffs did suffer irreparable injury their interest is still outweighed by the public interest and by the Navy's

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17. *Id.* at 373.

18. *Id.* The mitigation measures required the Navy to adopt six measures:

(1) imposing a 12-mile 'exclusion zone' from the coastline; (2) using lookouts to conduct additional monitoring for marine mammals; (3) restricting the use of 'helicopter-dipping' sonar; (4) limiting the use of MFA sonar in geographic 'choke points'; (5) shutting down MFA sonar when a marine mammal is spotted within 2,200 yards of a vessel; and (6) powering down MFA sonar by 6 dB during significant surface ducting conditions, in which sound travels further than it otherwise would due to temperature differences in adjacent layers of water.

*Id.* (citing *Winter v. NRDC*, 530 F. Supp. 2d 1110, 1118-21 (C.D. Cal. 2008)).

19. *Id.* at 373.

20. *Id.*

21. *Id.* CZMA exemption is available for activities in the paramount interest of the United States. See 16 U.S.C. § 1456(c)(1)(B).

22. *Winter*, 129 S. Ct. at 373-74. In emergency circumstances a federal agency shall consult with the Council of Environmental Quality regarding alternative arrangements to limit immediate impacts of the emergency. See 40 C.F.R. § 1506.11.

23. *Winter*, 129 S. Ct. at 374 (citing *NRDC v. Winter*, 527 F. Supp. 2d 1216 (C.D. Cal. 2008)).

24. *Id.* (citing *NRDC v. Winter*, 518 F.3d 658 (9th Cir. 2008)).

25. *Winter*, 518 F.3d 658 (9th Cir. 2008), *cert. granted*, 77 U.S.L.W. 3018 (June 23, 2008), (No. 07-1239).

26. *Winter*, 129 S. Ct. at 379.

27. *Id.* at 374, 379.

interest in training sailors.<sup>28</sup> In Part IV, the Court concluded it unnecessary to proceed to the merits of the plaintiffs' claim.<sup>29</sup>

Justice Breyer filed a separate two-part opinion, and Justice Stevens joined in Part I.<sup>30</sup> In Part I, Justice Breyer agreed with the Court in concluding to vacate the district court's injunction to the extent that it was challenged by the Navy.<sup>31</sup> Justice Breyer diverged from the majority in Part II by concluding that mitigating conditions should remain in place until the Navy's completion of the EIS.<sup>32</sup>

In Part I, Justice Breyer first reasoned it was appropriate to vacate the injunction because the evidence was weak to justify the two additional mitigating conditions, and the Navy had made a strong case for their national security concerns.<sup>33</sup> Second, the Navy officials' affidavits persuasively showed that the year it would take to complete an EIS would seriously interfere with necessary defense training and thus pose a national security concern.<sup>34</sup> Third, in balancing the harms, the district court rejected the Naval officers' contentions that the Navy could not train under the imposed mitigating conditions without substantial harm, but it gave to explanation for doing so.<sup>35</sup> Fourth, the court of appeals's attempt to supply an explanation was described as "insufficient" by Justice Breyer, since rarity of surface ducting conditions implies necessity to train in such conditions, rather than the contrary.<sup>36</sup> Fifth, neither the court of appeals nor the district court explained why the Navy's assertions that it could not effectively carry out its training under the mitigating conditions imposed by the district court should be rejected.<sup>37</sup>

In Part II, Justice Breyer and the majority diverged on when to vacate the injunction. Justice Breyer disagreed with the majority's decision to immediately vacate the mitigating conditions imposed by the district court.<sup>38</sup> He concluded that the modifications made by the court of appeals to the two challenged measures reflected the best short-term compromise in balancing the parties' interests.<sup>39</sup> These modifications had reduced the power-down require-

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28. *Id.* at 376-78.

29. *Id.* at 381.

30. *Id.* at 383 (Breyer, J., concurring in part, concurring in the judgment in part, and dissenting in part).

31. *Id.* at 383.

32. *Id.* at 387.

33. *Id.* at 383.

34. *Id.* at 384.

35. *Id.* at 384-85.

36. *Id.* at 385.

37. *Id.* at 386.

38. *Id.* at 387.

39. *Id.* (citing *NRDC v. Winter*, 518 F.3d 704 (9th Cir. 2008)).

ment to only when sonar was being used at a “critical point in the exercise” and only necessitated shut-down of sonar during surface ducting conditions when a marine mammal was detected at five hundred meters or less.<sup>40</sup> Accordingly, Justice Breyer would have kept the modified injunction in place until the Navy completed the requisite EIS.<sup>41</sup>

Justice Ginsburg, with whom Justice Souter joined, dissented from the majority.<sup>42</sup> She concluded that the Navy must comply with NEPA and that the Navy improperly sought an exemption from the executive branch since only Congress possesses such authority.<sup>43</sup> Accordingly, she would have held that the district court properly balanced the equities and did not abuse its discretion.<sup>44</sup>

*B. Maritime Tort Liability Limited to 1:1 Ratio  
Where Conduct Is Found Reckless*

In *EXXON Shipping Co. v. Baker*, the Court determined that the Clean Water Act (CWA) does not preempt maritime law or foreclose the issue of punitive damages.<sup>45</sup> The \$5 billion in punitive damages awarded by the jury and the reduced \$2.5 billion punitive damages judgment entered by the Ninth Circuit against EXXON Shipping Co. and its owner EXXON Mobil Corp. (collectively, “EXXON”) were deemed excessive by the United States Supreme Court.<sup>46</sup> The Court held that in maritime tort suits punitive damages must not exceed a 1:1 ratio with compensatory damages.<sup>47</sup>

EXXON employee Joseph Hazelwood, with known alcohol abuse problems, was captain of the EXXON Valdez supertanker that left port March 23, 1989 and grounded on Bligh reef hours later, spilling eleven million gallons of crude oil into Prince William Sound.<sup>48</sup> Experts estimated the captain’s Blood Alcohol Level to have been 0.241 at the time of the accident.<sup>49</sup> Suit was brought against EXXON by commercial fisherman and native Alaskans for economic losses.<sup>50</sup> EXXON plead guilty to criminal violations, paid over \$1 billion to settle civil actions, and spent \$2.1 billion in clean up efforts.<sup>51</sup> All remaining civil cases were consolidated.<sup>52</sup>

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40. *Id.*

41. *Id.*

42. *Id.* at 387 (Ginsburg, J., dissenting).

43. *Id.*

44. *Id.*

45. *EXXON Shipping Co. v. Baker*, 128 S. Ct. 2605, 2616-19 (2008).

46. *Id.* at 2619-34.

47. *Id.* at 2619, 2633.

48. *Id.* at 2612-13.

49. *Id.* at 2613.

50. *Id.* at 2611.

51. *Id.*

The District Court for the District of Alaska separated the issues and tried the case in three phases. In Phase I, the jury determined that the captain was reckless and that EXXON could be held liable for punitive damages.<sup>53</sup> In Phase II, the jury awarded \$287 million in compensatory damages to the commercial fisherman.<sup>54</sup> In Phase III, the jury awarded punitive damages of \$5,000 against the captain and \$5 billion against EXXON.<sup>55</sup> On appeal, the Ninth Circuit upheld the district court's opinion, but after remanding twice for a reassessment of punitive damages, it adjusted the judgment to \$2.5 billion.<sup>56</sup> The Supreme Court granted certiorari.<sup>57</sup>

Part I of the Court's opinion discusses the abovementioned case history.<sup>58</sup> In Part II, the issue of derivative liability divided the eight sitting justices, and they accordingly left the Ninth Circuit's opinion undisturbed.<sup>59</sup>

In Part III, the Court recognized two ways to construe EXXON's argument that common law punitive damages for maritime spills are preempted by the CWA, but it declined to proceed down either path.<sup>60</sup> First, the Court rejected the view that any tort action predicated on an oil spill, such as the common law duty to protect shorelines from harm, is preempted unless expressly preserved by the CWA.<sup>61</sup> Second, the Court rejected the view that compensatory damages might still be appropriate if punitive damages are found to be precluded.<sup>62</sup>

In Part IV, the Court held that a 1:1 ratio is a fair upper limit for punitive damages in maritime cases.<sup>63</sup> Applying the new rule in Part V, the Court vacated the Ninth Circuit's decision and remanded.<sup>64</sup> The Court reasoned that the 1:1 ratio protects against the possibility of awards that are unpredictable and unnecessary.<sup>65</sup> In reaching the above conclusion, the Court considered the prevailing rule of reducing punitive damages that shock the conscience, state laws on punitive damages, the median ratios of punitive and

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52. *Id.* at 2613.

53. *Id.* at 2614.

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.* at 2611-15.

59. *Id.* at 2616.

60. *Id.* at 2618.

61. *Id.* at 2618-19 (citing 33 U.S.C. § 1321 (2000 ed. & Supp. V)).

62. *Id.* at 2619.

63. *Id.* at 2633.

64. *Id.* at 2634.

65. *Id.* at 2627-34 (finding the ratio method more appropriate than verbal formulations or monetary caps).

compensatory damages from jury trials and bench trials, predictability of liability, and three possible solutions to punitive liability in maritime cases.<sup>66</sup>

Justice Scalia, with Justice Thomas joining, filed a brief concurrence.<sup>67</sup> He concluded that the arguments put forth by petitioners were correct, but not the decisions on which they based their arguments.<sup>68</sup>

Justice Stevens joined the majority opinion except with respect to Parts IV and V, and filed an opinion concurring in part and dissenting in part.<sup>69</sup> In disagreeing with Parts IV and V, he made two main points.<sup>70</sup> First, he concluded that Congress's decision not to limit punitive damages under maritime law should not be taken as an invitation for the Court to do so.<sup>71</sup> Second, Justice Stevens found the empirical data used by the majority to support the 1:1 ratio to be problematic, and he concluded that Congress should be the one evaluating the empirical data rather than the Court.<sup>72</sup> His main contention was that the tort cases used to compile the data were from land use disputes rather than maritime.<sup>73</sup> Damages that qualify as compensatory in land use judgments are oftentimes only recoverable as punitive under maritime law.<sup>74</sup> Thus, Justice Stevens would have left undisturbed the court of appeals's decision to halve the punitive damages awarded by the jury.<sup>75</sup>

Justice Ginsburg also agreed with the Court's opinion regarding Parts I, II, and III and dissented with respect to parts IV and V, focusing on the merits of the plaintiffs' claim.<sup>76</sup> She first questioned the urgency to depart from the traditional common-law approach which allows juries to decide the amount of punitive damages.<sup>77</sup> Second, she believed the 1:1 ratio utilized by the Court lacks clarity in application.<sup>78</sup> Finally, Justice Ginsburg agreed with Justice Stevens that Congress is best situated to determine the necessity in limiting punitive damages.<sup>79</sup>

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66. *EXXON*, 128 S. Ct. at 2620-22, 2624, 2626-27, 2627-34.

67. *Id.* at 2634.

68. *Id.* at 2634 (Scalia, J., concurring in the judgment) (citing *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003)).

69. *Id.* at 2634 (Stevens, J., concurring in part, concurring in the judgment in part, and dissenting in part).

70. *Id.*

71. *Id.*

72. *Id.* at 2636-37.

73. *Id.*

74. *Id.*

75. *Id.* at 2638.

76. *Id.* at 2639 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part).

77. *Id.*

78. *Id.* at 2639.

79. *Id.*

Justice Breyer likewise filed a separate opinion agreeing with Parts I, II, and III, but disagreeing with Parts IV and V because he was unable to find “[any] reasoned basis to disagree with the Court of Appeals’ conclusion.”<sup>80</sup> Specifically, Justice Breyer did not believe a fixed rigid standard was more appropriate than the existing legal process.<sup>81</sup>

### *C. Michigan Ballast Water Permitting Requirements Determined Valid*

In *Fednav, Ltd. v. Chester*, shipping companies and shipping associations were unsuccessful in challenging Michigan’s Ballast Water Statute, which requires harboring vessels to acquire a permit and comply with practices to prevent the introduction of Aquatic Nuisance Species (ANS).<sup>82</sup>

ANS are nonindigenous species that threaten native species after their introduction into a harbor through discharge of ballast water from oceangoing vessels.<sup>83</sup> For example, the zebra mussel’s migration from Eastern European waters to the Great Lakes via ballast discharge cost the coastal communities billions of dollars in the 1990s due to its vast consumption of microorganisms which young fish rely on for food.<sup>84</sup> The National Invasive Species Act of 1996 (NISA) was enacted by Congress and implemented by the Coast Guard to regulate ballast water, but it failed to regulate vessels that declare they have no ballast on board (commonly called “NOBOBs”).<sup>85</sup> Such ships often take on ballast water after unloading cargo.<sup>86</sup> Since ANS are typically left over from a previous discharge, introduction of ANS into a harbor may occur if the newly acquired ballast water is subsequently released.<sup>87</sup> This loophole vitiated the effectiveness of federal efforts, and the introduction of ANS into the Great Lakes harbors remained a concern of bordering states.<sup>88</sup>

In 2005, Michigan legislators passed a permit requirement applicable to all vessels in Michigan ports.<sup>89</sup> Ballast water control permit applicants are required to show that any registered ocean-

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80. *Id.* at 2640 (Breyer, J., concurring in part, dissenting in part).

81. *Id.*

82. *Fednav Ltd. v. Chester*, 547 F.3d 607 (6th Cir. 2008).

83. *Id.* at 610.

84. *Id.* (citing 58 Fed. Reg. 18,330 (April 8, 1993) (codified at 33 C.F.R. pt. 151)).

85. *Id.* at 611-12; see 16 U.S.C. §§ 4701, 4711(f) (1996); see also 33 C.F.R. § 151.1502 (2004) (regulating only vessels carrying ballast water on board).

86. *Fednav*, 547 F.3d at 612.

87. *Id.* at 611-12.

88. *Id.* at 612.

89. *Id.* at 613.

going vessel will not discharge ANS or that the vessel uses approved methods to prevent discharge of ANS.<sup>90</sup> General permit compliance includes submitting general notification reports at least twenty-four hours in advance of port entry.<sup>91</sup>

A coalition of shipping companies, non-profit shipping associations, a port terminal and dock operator, and a port association brought suit in the United States District Court for the Eastern District of Michigan against the director of the Michigan Department of Environmental Quality (MDEQ), Steven Chester, and the Attorney General for the State of Michigan, Michael Cox, seeking an injunction against the statute's enforcement and challenging its constitutionality.<sup>92</sup> After holding oral arguments, the court granted the defendants' motion to dismiss.<sup>93</sup>

On appeal, the Sixth Circuit first examined whether each of the plaintiffs had standing to challenge the statute's requirements that oceangoing vessels obtain a permit (the "permit requirement") and that they employ a treatment system approved by the MDEQ as a safe and effective means of preventing the discharge of ANS (the "treatment requirement").<sup>94</sup>

The Sixth Circuit determined that each of the shipping companies had standing to challenge the permit requirement since compliance with the statute requires them to purchase a permit, constituting an injury in fact.<sup>95</sup> The shipping associations resultantly had standing to protect its members' interests since its members qualify for standing in their own right.<sup>96</sup> Nicholson Terminal and Dock Association was found to lack standing because it failed to allege that it suffered an injury-in-fact as a result of the permit requirement and instead alleged that its customers were harmed.<sup>97</sup> The court said that the Ports Association likewise lacked standing since its port facility members lack standing.<sup>98</sup>

No plaintiff had standing to challenge the treatment requirement because, rather than allege that "actual or imminent" compliance required costly installation of a treatment system, plaintiffs claimed that they do not discharge ballast waters in the State

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90. *Id.* Approved treatment methods under the Michigan Statute include hypochlorite treatment, chlorine dioxide treatment, ultraviolet light radiation treatment preceded by suspended solids removal, or deoxygenation treatment. *Id.*

91. *Id.*

92. *Id.*

93. *Id.* at 614 (citing *Fednav, Ltd. v. Chester*, 505 F. Supp. 2d 381 (E.D. Mich. 2007)).

94. *Id.* at 614.

95. *Id.* at 615.

96. *Id.*

97. *Id.* at 616.

98. *Id.*



of Michigan and that they do not discharge ballast waters containing ANS.<sup>99</sup>

In determining that federal ANS law is not preempted by Michigan's ANS statute, the court first examined whether Congress preoccupied the field of prevention of ANS introduction into the Great Lakes, in which the permit requirement falls.<sup>100</sup> The court found that Congress actually encouraged enactment of additional state ANS prevention measures by offering to help with costs.<sup>101</sup>

NISA's savings clause did, however, preserve state power to "adopt or enforce control measures" to regulate ANS.<sup>102</sup> Therefore, the court next examined whether the requirement conflicted with federal law.<sup>103</sup> Here, the court found that compliance with both Michigan's permit requirement and NISA was possible.<sup>104</sup> Moreover, NISA's purpose of "preventing unintentional introduction and dispersal of nonindigenous species into waters of the United States through ballast water management" was furthered by the Ballast Water Statute's requirement that vessel owners provide information regarding their ballast water practices to the MDEQ.<sup>105</sup>

The court next examined the alleged violation of the Dormant Commerce Clause by Michigan's Ballast Water Statute, and ultimately determined that the Commerce Clause in its dormancy could not strike down the state regulation of ANS prevention since Congress expressly contemplated and even encouraged state participation.<sup>106</sup> Lastly, the plaintiffs' substantive due process claim failed the court's rational-basis review because Michigan has a legitimate state interest in protecting its waters from the introduction of ANS species.<sup>107</sup>

#### *D. "Formula Retail" Ordinance Violates Dormant Commerce Clause*

In *Island Silver & Spice v. Islamorada*, the Eleventh Circuit Court of Appeals determined that the "formula retail" provisions of Islamorada, Florida's Township ordinance discriminated against interstate commerce by eliminating new interstate retail chains and that Islamorada failed to demonstrate a legitimate local purpose since it lacks the small town character it sought to pre-

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99. *Id.* at 617.

100. *Id.* at 619.

101. *Id.* at 621.

102. *Id.* at 619 (citing 19 U.S.C. § 4725 (1996)).

103. *Id.*

104. *Id.* at 622.

105. *Id.* at 622.

106. *Id.* at 624.

107. *Id.* at 625.

serve.<sup>108</sup> Consequently, the court found the formula retail provisions in violation of the Dormant Commerce Clause.<sup>109</sup>

The ordinance prohibited formula restaurants and restricted formula retail establishments by limiting their street level frontage and total square footage.<sup>110</sup> Island Silver and Spice, Inc. ("Island Silver") tried to sell its store property to Walgreens drug store, but Walgreens withdrew from the purchase after being unable to successfully overcome the ordinance.<sup>111</sup> Island Silver brought suit against Islamorada seeking damages, injunctive relief, and a writ of mandamus on the grounds that the ordinance's formula retail provisions violated its rights to due process, commercial speech, equal protection, privileges and immunities, the Commerce Clause, and terms of the Florida Constitution.<sup>112</sup>

The district court ruled in favor of Island Silver, granting monetary and injunctive relief and invalidating the ordinance's formula retail provisions.<sup>113</sup> The court reasoned that the provisions discriminatorily impacted interstate commerce without a legitimate state purpose and that the "putative local benefits" were outweighed by the burden on interstate commerce, thus constituting a violation of the Dormant Commerce Clause.<sup>114</sup>

On appeal, the Eleventh Circuit applied elevated scrutiny and concluded, like the district court, that Islamorada had failed to show a legitimate local purpose for enacting the ordinance.<sup>115</sup> The court applied elevated scrutiny because the formula retail provisions effectively eliminated all new interstate retailers and thus had the practical effect of "discriminating against interstate commerce."<sup>116</sup>

Islamorada's purported local purpose in enacting the township ordinance was preservation of various "small town" community characteristics.<sup>117</sup> The Eleventh Circuit agreed with the district court's conclusion that preservation of small town character is indeed a legitimate purpose, but that Islamorada had failed to demonstrate that it had any such "small town character to preserve."<sup>118</sup> For that reason, the Eleventh Circuit affirmed.<sup>119</sup>

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108. *Island Silver & Spice, Inc. v. Islamorada*, 542 F.3d 844, 846-48 (11th Cir. 2008).

109. *Id.* at 847.

110. *Id.* at 845.

111. *Id.*

112. *Id.*

113. *Id.* at 846.

114. *Id.*

115. *Id.* at 848.

116. *Id.* at 846-47.

117. *Id.* at 847.

118. *Id.*

119. *Id.* at 848.

*E. Improper Delisting of a Regulated Emissions Source  
Required Vacating Clean Air Mercury Rule*

In *New Jersey v. EPA*, the court held that the delisting of electric utility steam generating units from the list of regulated emission sources under section 112 of the Clean Air Act was unlawful.<sup>120</sup> Accordingly, the court granted the petitions and vacated the rule that removed coal and electric fired electric utility steam generating units (EGUs) from the list of sources whose emissions are regulated under section 112 and the Clean Air Mercury Rule (CAMR) regulations that set performance standards pursuant to section 111 for new coal-fired EGUs and established total mercury emissions limits.<sup>121</sup>

In March 2005, the EPA announced it was removing EGUs from the list of regulated emission sources under section 112 and that it would instead regulate the mercury emissions from coal-fired EGUs under section 111.<sup>122</sup> The EPA justified the delisting by claiming that the section 112 inclusion was not a “final agency action,” but admitted that it failed to follow the mandated delisting procedure required by section 112(c)(9).<sup>123</sup>

New Jersey and fourteen other states brought suit against the EPA for failure to comply with section 112 delisting requirements.<sup>124</sup> The court reviewed EPA’s final rules for abuse of discretion and found that the EPA had no authority to delist without taking the required steps under section 112(c)(9).<sup>125</sup> The EPA conceded that it never made the findings that section 112 requires in order to delist EGUs.<sup>126</sup>

First, the court rejected the EPA’s argument seeking deference to its interpretation of the section 112 rules and determined that the plain language of section 112(c)(9) applies to the delisting of “any source” once listed.<sup>127</sup> Second, the court rejected the EPA’s argument that it had inherent authority to remove EGUs from the section 112 list because this position would obviate any purpose for section 112(c)(9).<sup>128</sup> The court added that Congress undoubtedly limited the EPA’s discretion to remove sources from section

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120. *New Jersey v. EPA*, 517 F.3d 574, 578 (D.C. Cir. 2008); *see generally* Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685 (1977) (codified as amended in scattered sections of 42 U.S.C.)

121. *New Jersey*, 517 F.3d at 577.

122. *Id.* at 580.

123. *Id.*

124. *Id.* at 581.

125. *Id.*

126. *Id.* at 582.

127. *Id.*

128. *Id.* at 582-83.

112(c)(1) with its passage of section 112(c)(9).<sup>129</sup> Lastly, the court rejected the argument that the EPA's removal of sources from the section 112 list in the past without following the section 112(c)(9) requirements could excuse it once again for removal of a source without following such procedures.<sup>130</sup> Accordingly, the court found it necessary to vacate both the delisting rule and the new regulations. The court reasoned that because the new regulations were promulgated on the basis that EGU emissions would no longer be regulated under section 112, the new CAMR performance standards must fall.<sup>131</sup>

*F. Storm Water Discharge from Oil and Gas Construction Sites  
Not Exempt from the Clean Water Act*

In *NRDC v. EPA*, the Ninth Circuit rejected the EPA's rule interpretation of section 402(l)(2) of the Clean Water Act (CWA) as amended by section 323 of the Energy Policy Act of 2005.<sup>132</sup> The EPA interpreted section 402(l)(2)'s exemption of certain properties from storm water runoff permitting requirements to include oil, gas, and mining construction sites.<sup>133</sup> Section 402(l)(2) provides:

The Administrator *shall not require a permit* under this section, nor shall the Administrator directly or indirectly require any State to require a permit, *for discharges of storm water runoff* from mining operations or oil and gas exploration, production, processing, or treatment operations or transmission facilities, composed entirely of flows . . . *which are not contaminated* by contact with, or do not come into contact with, any overburden, raw material, intermediate products, finished product, byproduct, or waste products located on the site of such operations.<sup>134</sup>

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129. *Id.* at 583.

130. *Id.*

131. *Id.*

132. *NRDC v. EPA*, 526 F.3d 591, 593 (9th Cir. 2008).

133. *Id.* at 600. The final rule is entitled Amendments to the National Pollutant Discharge Elimination System (NPDES) Regulations for Storm Water Discharges Associated With Oil and Gas Exploration, Production, Processing, or Treatment Operations or Transmission Facilities. See 71 Fed. Reg. 33,628 (June 12, 2006) (codified at 40 C.F.R. § 122.26(a)(2)(ii)).

134. *NRDC*, 526 F.3d at 594 (emphasis added) (citing 33 U.S.C. § 1342(l)(2)).

The EPA's position prior to passage of the Energy Policy Act of 2005 was that section 402(l)(2) created an exemption only for "facilities" or "operations" to forgo storm water permitting requirements for uncontaminated runoff and that construction activities associated with an oil and gas operation were not included.<sup>135</sup> The EPA's final rule added that the Director "may not require a permit for discharges of storm water runoff from . . . field activities or operations associated with oil and gas exploration, production . . . whether or not such field activities or operations may be considered to be construction activities."<sup>136</sup> The EPA asserted that passage of the Energy Policy Act of 2005 exempted oil and gas construction activities from having to acquire permits under the National Pollutant Discharge Elimination System (NPDES).<sup>137</sup> In the past, the EPA has both explicitly and implicitly supported the permitting of storm water runoff from construction sites by publicly acknowledging the water contamination concerns associated with storm water runoff from construction sites and by implementing a two-phased approach to pollution control that allowed the EPA to target the most serious offenders.<sup>138</sup>

The NRDC petitioned the Court of Appeals for the Ninth Circuit to review directly the EPA's final rule.<sup>139</sup> The court determined that section 402(l)(2) was intended to exempt only facilities and activities that produced uncontaminated storm water runoff.<sup>140</sup> The EPA argued that a reasonable interpretation should limit the 402(l)(2) exemption to discharges not contaminated by contact with raw material, intermediate product, or finished product, since Congress intended to broaden 402(l)(2) to include all construction activities at oil and gas field operations.<sup>141</sup> Finding Congress to have been silent on the issue, the court refused to accept the EPA's proposition that storm water containing only sediment was meant to fall within the permitting exemption and found

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135. *Id.* at 596-97; see generally Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566 (1977) (codified at 33 U.S.C. §§ 1294-97, 1281(a) (2000)).

136. *NRDC*, 526 F.3d at 600.

137. *Id.* at 601.

138. *Id.* at 595-98 (citing 64 Fed. Reg. 68,722 (Dec. 8, 1999) (codified at 40 C.F.R. pts. 9, 122-24)). The storm water discharges generated from construction sites may severely compromise local water quality of rivers, lakes, ponds, and estuaries. 64 Fed. Reg. at 68,728-31; see 55 Fed. Reg. 48,033 (Nov. 16, 1990) (codified at 40 C.F.R. pts. 122-24) (announcing the Phase I Storm Water Rule's applicability to storm water runoff from construction sites which are larger than five acres); see also 40 C.F.R. 122.26(b)(15) (2006) (expanding the NPDES permitting requirements to include construction sites between one and five acres in size). "The purpose of the two-phased approach was to allow EPA and the states to focus their attention on the most serious problems first." *NRDC*, 526 F.3d at 595 n.6 (citing 133 CONG. REC. 991 (1987)).

139. *NRDC*, 526 F.3d at 601.

140. *Id.* at 596-97, 603.

141. *Id.*

that sediment is the pollutant most commonly associated with construction activity.<sup>142</sup>

The court found the EPA arbitrary and capricious in its rule interpretation due to its inconsistency in position regarding the definition of “contamination” and in the need for permitting requirements on oil and gas construction sites.<sup>143</sup> Moreover, the EPA’s failure to previously mention sediment and the absence of the word “sediment” in the CWA made the EPA’s focus on sediment unconvincing.<sup>144</sup>

The rule was vacated, and the issue was remanded for revision by the EPA.<sup>145</sup> Left unresolved was when is permitting required and how to know when storm water is contaminated by contact with the materials listed in Section 402(l)(2).

Judge Callahan dissented and concluded that the EPA’s change of position regarding the meaning of contamination was not fatal to the EPA’s rule interpretation, so long as the EPA could explain the departure from its prior view.<sup>146</sup> He reasoned that when Congress included construction activities within the CWA it reasonably could have intended to include the most common pollutant in runoff (sediment) in the promulgated exemption.<sup>147</sup>

### *G. Coal Producer Settles Pollution Lawsuit, \$20 Million in Fines*

The largest civil penalty ever assessed by the EPA for wastewater discharge permit violations under the CWA was charged against Massey Energy for repeated violation of sections 301 and 402 at its coal mines in West Virginia and Kentucky.<sup>148</sup> A \$20 million penalty levied for wastewater discharge permit violations was part of a \$30 million settlement in which Massey Energy agreed to implement a compliance program to prevent future violations, perform twenty remediation projects downstream from the company’s coal mining operations on the Little Coal River, and set aside a two hundred acre mitigation bank of land along the stream.<sup>149</sup> The EPA estimated that 380 million pounds of sediment and other pollutants will be prevented from entering U.S. waterways every year.<sup>150</sup>

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142. *Id.* at 604-06.

143. *Id.* at 607.

144. *Id.* at 606-07.

145. *Id.* at 607.

146. *Id.* at 609 (Callahan, J., dissenting).

147. *Id.* at 610.

148. Massey Energy Co. Clean Water Act Settlement, <http://www.epa.gov/compliance/resources/cases/civil/cwa/massey.html> (last visited Feb. 24, 2009); *United States v. A.T. Massey Coal Co.*, No. 2:07cv00299, 2008 WL 1744630, at \*1 (S.D. W. Va. April 9, 2008).

149. *United States v. Massey Energy Co.*, No. 2:07-00299, slip op. at 7-8, 20-21 (Jan. 17, 2008), <http://www.epa.gov/compliance/resources/decrees/civil/cwa/massey-cd.pdf>.

150. Press Release, EPA, Massey Energy to Pay Largest Civil Penalty Ever for Water

In April of 2008, the U.S. District Court for the Southern District of West Virginia entered the consent judgment after approving Massey Energy's proposed consent decree.<sup>151</sup> The consent decree resolved civil liability of Massey Energy for all CWA and NPDES violations prior to and through January 17, 2008.<sup>152</sup> The consent decree stipulated to future monitoring and attendant federal penalties for any noncompliance with the conditions set forth in the consent decree.<sup>153</sup>

During the public comment period a citizen of Sundial, West Virginia asked the United States to earmark the \$20 million to fund the building of a new local elementary school because Massey Energy built a 2.8 billion gallon coal waste impoundment directly above Sundial's public elementary school.<sup>154</sup> Although the CWA does not specify where collected funds must be paid, the United States used the Miscellaneous Receipts Act, which requires persons in possession of public money to deposit it in the Treasury, as its basis for denying the earmark request.<sup>155</sup> While the \$20 million in "public money" will be paid to the U.S. Treasury, the local communities were afforded some relief through local mitigation projects.<sup>156</sup> Here, swift state environmental enforcement action would have provided West Virginia and Kentucky the opportunity to use settlement funds for state purposes and the right to investigate future violations by Massey Energy within their jurisdiction.

## II. LEGISLATION

### *A. Food, Conservation, and Energy Act*

The Food, Conservation, and Energy Act (the "Farm Bill") governs federal agriculture programs for the next five years.<sup>157</sup> Although President Bush vetoed the bill, the House of Representatives voted on June 18, 2008 to pass the Farm Bill notwithstanding the veto.<sup>158</sup> The Farm Bill includes new and renewed agricultural subsidies for farmers, increases in food stamp benefits, funding for research grants, increased support for the production of renewable

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Permit Violations (Jan. 17, 2008), <http://yosemite.epa.gov/opa/admpress.nsf/dc57b08b5acd42bc852573c90044a9c4/6944ea38b888dd03852573d3005074ba!OpenDocument>.

151. *A.T. Massey Coal Co.*, 2008 WL 1744630, at \*6.

152. *Id.* at \*5.

153. *Id.* at \*4-5.

154. *Id.* at \*6.

155. *Id.* (citing *United States v. Smithfield Foods, Inc.*, 982 F. Supp. 373, 374 (E.D. Va. 1997)).

156. *Id.*

157. Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-246, 122 Stat. 1651 (to be codified at 7 U.S.C. § 8701).

158. 154 CONG REC. S5740 (daily ed. June 18, 2008).

fuel sources new programs and funding to support organic crops, new nutrition programs including increased funding for states to provide fresh fruits and vegetables, and new initiatives to help beginning and socially disadvantaged farmers and ranchers.

### 1. *Commodities*<sup>159</sup>

- Pulse crops—such as dry peas, lentils, and small and large chickpeas—now qualify as a commodity that is eligible for income support, although not through direct payments.<sup>160</sup> Covered commodities also include wheat, corn, grain sorghum, barley, oats, cotton, rice, soybeans, and oilseeds.<sup>161</sup>
- Dairy price support now comes in the form of set minimum prices at which the Secretary must purchase specific products, such as cheddar cheese in blocks at not less than \$1.13 per pound, butter at not less than \$1.05 per pound, and nonfat dry milk at not less than \$0.80 per pound.<sup>162</sup>
- The production of oilseeds that are genetically modified to enhance human health is subsidized from 2009-2012, subject to appropriation of authorized funds.

### 2. *Organic and Specialty Crops*<sup>163</sup>

- The Specialty Crop Block Grant Program provides funding to State Agriculture Departments for U.S. specialty crop research, marketing, and promotion.<sup>164</sup> The purpose is to encourage competitiveness of specialty crops—such as fruits, vegetables, tree nuts, and nursery crops—by funding initiatives to increase consumption, reduce costs of distribution, address environmental and conservation concerns, and develop “buy local” programs.<sup>165</sup>

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159. Food, Conservation, and Energy Act §§ 1001-1623.

160. *Id.* §§ 1001(4), 1103(a).

161. *Id.* § 1001(4).

162. *Id.* § 1501.

163. *Id.* §§ 10001-10404.

164. *Id.* § 10109.

165. 73 Fed. Reg. 11859, 11859 (March 5, 2008).



- Organic producers and those producers interested in pursuit of certification may pursue enrollment in the Conservation Stewardship Program (CSP).<sup>166</sup> The program provides farmers with land at an average cost of \$18.00 an acre per year. In addition, monetary payments are given in exchange for their adoption of conservation practices.
  - The Secretary is required to establish means for producers to initiate organic certification during CSP participation.
  - The CSP program specifications must allow for organic and specialty crop producers to participate. In addition, outreach and technical assistance must be made available to CSP participants, including organic and specialty crop participants.
- Organic producers and farmers in transition to organic production are now eligible for incentive payments under the Environmental Quality Incentives Program.<sup>167</sup> The program provides payments to producers to cover costs associated with the implementation of conservation practices on cropland, grassland, pastureland, rangeland, forestland, or agricultural land. Recouped costs may be associated with design materials, labor, equipment, installation, maintenance, training, or management.
  - Beginning or socially disadvantaged farmers or ranchers and producers of limited resources may receive increased payments, up to ninety percent of costs with up to thirty percent in advance.
  - Producers may apply to receive payments to help with the costs of organic certification or current organic production. Up to \$20,000 per year, with a maximum of \$80,000 over a six year period, is available per producer. Pay-

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166. Food, Conservation, and Energy Act § 2301(B); *see also* CSP Watersheds FY 2008, available at [http://www.nrcs.usda.gov/Programs/csp/CSP\\_2008/2008\\_pdfs/2008\\_Watersheds\\_Information\\_State\\_and\\_Watershed.pdf](http://www.nrcs.usda.gov/Programs/csp/CSP_2008/2008_pdfs/2008_Watersheds_Information_State_and_Watershed.pdf) (showing eligible program areas in each state).

167. Food, Conservation, and Energy Act § 2502.

ments received for technical assistance with organic production are not considered in grant evaluation.

### 3. *Research*<sup>168</sup>

- The National Institute of Food and Agriculture (NIFA) consolidates federal sector agricultural research. All mandatory funding shall be distributed through competitive grants.
- The Specialty Crop Research Initiative has five main focuses: (1) plant genetics and breeding to optimize crop characteristics, (2) pest and disease identification and management, (3) crop innovation, (4) production efficiency, and (5) food safety hazard control.<sup>169</sup>
- \$118 million is mandated for biomass energy crop research and development.<sup>170</sup>

### 4. *Energy*<sup>171</sup>

- Up to thirty percent of the cost of developing and building demonstration scale biorefineries for producing advanced biofuels is available.<sup>172</sup>
  - “Advanced biofuels” means fuel derived from renewed biomass other than corn kernel starch.<sup>173</sup> This includes biofuel derived from cellulose, hemicellulose, lignin, sugar, non-

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168. *Id.* §§ 7101-7529.

169. Press Release, USDA Awards More than \$28 Million in Specialty Crop Research (Oct. 8, 2008), available at [http://www.csrees.usda.gov/newsroom/news/2008news/10081\\_scri.html](http://www.csrees.usda.gov/newsroom/news/2008news/10081_scri.html). Examples of funded projects in 2008 include microbial safety of fresh produce, mechanical harvesting of blueberries, generation of genomic tools for improving blueberries, breeding cranberries for fruit-rot resistance, comprehensive automation for specialty crops, innovation to reduce thinning of fruit, sod production using bio-solids, and breeding U.S. onions to resist infection. *Id.*; see Specialty Crop Research Initiative FY 2008 Request for Applications, USDA, [http://www.csrees.usda.gov/funding/rfas/pdfs/08\\_specialty\\_crop.pdf](http://www.csrees.usda.gov/funding/rfas/pdfs/08_specialty_crop.pdf) (providing a review of the 2008 grant application); The Catalog of Federal Domestic Assistance, 10.309 Specialty Crop Research Initiative, [http://www.cfda.gov/pls/portal30/CATALOG.PROGRAM\\_TEXT\\_RPT.show](http://www.cfda.gov/pls/portal30/CATALOG.PROGRAM_TEXT_RPT.show) (last visited Feb. 24, 2009) (providing general information on obtaining specialty crop grants).

170. Food, Conservation, and Energy Act § 7207, 9008(d).

171. *Id.* §§ 9001-9003.

172. *Id.* § 9003(c)(1).

173. *Id.* § 9001(3).

corn kernel starch, and a seemingly limitless category of waste materials including “vegetative waste material, animal waste, food waste, and yard waste.”<sup>174</sup> The term also includes diesel-equivalent fuels derived from renewed biomass such as vegetable oil and animal fat, as well as biogases including landfill gas and sewage treatment gas.<sup>175</sup>

- A new tax credit is available for producers of cellulosic biofuels produced from wood, grasses, or non-edible parts of plants.<sup>176</sup> \$1.01 per gallon is available for fuel produced and used in the United States.<sup>177</sup>
- The voluntary labeling program for USDA certified biobased products is continued, and newly established guidelines preclude certain products from label qualification.<sup>178</sup> Biobased products are composed of renewable domestic agricultural material, forestry material, or feedstock.<sup>179</sup> Examples include building materials, adhesives, solvents, cleaning products, lubricants, and plastics.<sup>180</sup> Motor vehicle fuels, electricity, food, and feed may also be biobased, but do not qualify for USDA labeling.<sup>181</sup>

### 5. Nutrition

- Over \$190 million is made available each year for the next five years for the purchase of fresh fruits, vegetables, and nuts for domestic nutrition assistance programs.<sup>182</sup> The Emergency Food Assistance

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174. *Id.* § 9001(3)(B)(iii).

175. *Id.* § 9001(3)(B)(iv)-(v).

176. *Id.* § 15321.

177. *Id.* § 15321(b)(6)(B).

178. 73 Fed. Reg. 38,968 (July 8, 2008).

179. Food, Conservation, and Energy Act § 9001(4).

180. Biopreferred, <http://www.biopreferred.gov/> (last visited Feb. 24, 2008).

181. Food, Conservation, and Energy Act § 9001(4); see IRENE MARGARET XIARCHOS, USDA, OFFICE OF ENERGY POLICY & NEW USES, OVERVIEW OF THE BIOPREFERRED PROGRAM (2008), available at [http://www.biopreferred.gov/files/Overview\\_of\\_BioPreferred\\_Irene\\_Xiarchos\\_GSA\\_Expo\\_2008.pdf](http://www.biopreferred.gov/files/Overview_of_BioPreferred_Irene_Xiarchos_GSA_Expo_2008.pdf) (outlining biobased product market development, rulemaking, and item designation).

182. Food, Conservation, and Energy Act § 4201(a).

Program provides fresh fruits and vegetables for free nationwide.<sup>183</sup>

- The school gardening pilot program provides funding for five states to implement a program for low-income schools. The program supplements existing curriculum with nutrition education and hands-on vegetable gardening; the crops are used by the school and surrounding community.<sup>184</sup>
- Foreign food aid may now be donated without first determining whether the donation will reduce domestic supplies below necessary levels.<sup>185</sup>

#### 6. Conservation<sup>186</sup>

- Alfalfa, legumes, and other multi-year grasses in a rotation practice now qualify as eligible land for establishing conservation covers in the pilot Conservation Resource Program, which provides farmers with monetary assistance when they implement certain conservation measures.<sup>187</sup>
- The Chesapeake Bay Watershed Conservation Program improves water quality and quantity to restore, enhance, and preserve soil, air, and related resources in the area.<sup>188</sup>

#### 7. Beginning and Socially Disadvantaged Farmers and Ranchers<sup>189</sup>

- Five percent of CSP acres are set aside to enroll beginning farmers, and five percent are set aside for socially disadvantaged farmers. 12.77 million acres per year will be enrolled at an average cost of \$18.00 per acre per year. The program provides payments

183. Press Release, USDA, Implementation of the Food, Conservation and Energy Act of 2008 – The Emergency Food Assistance Program (July 16, 2008), <http://www.fns.usda.gov/fdd/programs/tefap/TEFAPFarmBillImplementation2008.pdf>.

184. Food, Conservation, and Energy Act § 4303.

185. *Id.* § 3003.

186. *Id.* §§ 2001-2904.

187. *Id.* § 2105.

188. *Id.* § 2605; *see also* NATIONAL RESOURCES CONSERVATION SERVICE, AT A GLANCE: CHESAPEAKE BAY WATERSHED INITIATIVE (2008), [http://www.nrcs.usda.gov/programs/farmbill/2008/pdfs/Chesapeake\\_Bay\\_At\\_a\\_Glance\\_112808rev.pdf](http://www.nrcs.usda.gov/programs/farmbill/2008/pdfs/Chesapeake_Bay_At_a_Glance_112808rev.pdf).

189. Food, Conservation, and Energy Act § 14013(A).

to producers in exchange for their adoption of conservation practices to address soil, water, or wildlife habitat.<sup>190</sup>

- The Conservation Resource Program assists in the transition of land from retiring owners to beginning or socially disadvantaged farmers or ranchers by helping with the attendant costs of making land improvements, commencing organic certification, and implementing conservation programs.
- Direct loans with a maximum down payment of less than five percent of the purchase price will be made available to low-income farmers.<sup>191</sup>

#### 8. *Livestock*<sup>192</sup>

- Mandatory arbitration provisions are now prohibited in livestock and poultry contracts.<sup>193</sup>
- The pilot Wetlands Reserve Enhancement Program allows landowners to retain grazing rights when consistent with wetland protection.<sup>194</sup>

#### 9. *Crop Insurance*<sup>195</sup>

- A new Supplemental Disaster Assistance program compensates eligible producers for the portion of losses not otherwise recoverable under crop insurance. In addition, up to \$50 million per year may be used from a trust fund to provide emergency assistance to eligible producers of livestock, honey bees, and farm raised fish.<sup>196</sup> Insurance pilot programs are devised for camelina, sesame, and grass seed producers.<sup>197</sup>

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190. 2008 Farm Bill Side-By-Side Comparison, <http://www.ers.usda.gov/FarmBill/2008/> (last visited Feb. 24, 2008).

191. Food, Conservation, and Energy Act § 5005.

192. *Id.* §§ 11001-11017.

193. *Id.* § 11005.210

194. *Id.* § 2206.

195. *Id.* §§ 12001-12091.

196. *Id.* § 12033(a)531(e).

197. *Id.* § 12025(f)-(h).

*B. Lead; Renovation, Repair, and Painting Program*

The EPA has designed a rule pursuant to section 402(c)(3) of the Toxic Substances Control Act to regulate renovations that (1) involve disturbance of lead paint and (2) are performed on “target housing” or a “child-occupied facility” (3) for compensation.<sup>198</sup> Target housing includes most houses constructed before 1978, and child-occupied facilities include buildings constructed prior to 1978 that are frequented by a child under the age of six for certain durations of time.<sup>199</sup> The program was promulgated in response to the EPA’s finding that renovations which disturb lead-based paint pose particular hazards.<sup>200</sup>

Obligations are imposed on the renovators to notify individuals at risk of exposure sixty days prior to renovations. Notice may be given by posting signs that provide information on how to obtain a copy of the pamphlet produced by the EPA entitled *Renovate Right: Important Lead Hazard Information for Families, Child Care Providers and Schools* or by providing written notice of the expected start and end dates of renovations to individuals and information on how to obtain the pamphlet.<sup>201</sup>

*C. Maritime Pollution and Prevention Act*

The legislation promulgates emissions certification standards for vessels and allows for the United States’ accession to Annex VI of the International Convention of Prevention of Air Pollution from Ships 1973, which governs pollution enforcement.<sup>202</sup> The statute governs ships within, bound for, or departing from a U.S. portyard, shipyard, U.S. internal waters, or offshore terminal when the ship is also within an emission control area, U.S. navigable waters, or a U.S. exclusive economic zone.<sup>203</sup> The Administrator shall issue Engine International Air Pollution Prevention Certificates to ships to control emissions of nitrogen oxides.<sup>204</sup>

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198. Lead; Renovation, Repair, and Painting Program, 40 C.F.R. pt. 745 (2008).

199. 73 Fed. Reg. 21692 (April 22, 2008) (codified at 40 C.F.R. pt. 745).

200. *Id.* at 21694.

201. EPA, RENOVATE RIGHT IMPORTANT LEAD HAZARD INFORMATION FOR FAMILIES, CHILD CARE PROVIDERS AND SCHOOLS (2008), <http://www.epa.gov/lead/pubs/renovaterightbrochure.pdf>.

202. Maritime Pollution and Prevention Act of 2008, Pub. L. No. 110-280, 121 Stat. 2611 (amending 33 U.S.C. §§ 1901(a), 1902-1905, 1907(f), 1908, 1909(b), 1910-1911 (2000)).

203. *Id.* § 4(D).

204. *Id.* § 5(B).

### *D. Clean Boating Act*

The counter-intuitively named Clean Boating Act amends the Clean Water Act to provide that no permit shall be required for recreational vessels' discharges which are incidental to their operation.<sup>205</sup> Recreational vessel means those vessels used for pleasure, with the exception of vessels used commercially or which carry paying customers.<sup>206</sup> The Administrator shall develop best management practices within one year to serve as environmentally responsible guidelines for recreational vessels, in lieu of permitting.<sup>207</sup> In addition, federal standards of performance must be promulgated for each management practice within one year after determination is made by the Administrator that the management practice is reasonable and practicable.<sup>208</sup>

### *E. Housing and Economic Recovery*

The comprehensive legislation enacted to address the sub-prime mortgage crisis includes section 3011, a new tax credit for first-time homebuyers that takes effect for purchases made on April 9, 2008 and lasting through June 30, 2009.<sup>209</sup> In effect, this amounts to an interest free loan that is repayable over a fifteen year period. A single taxpayer with an income of \$75,000 or less is eligible for the credit, and married couples with incomes of \$150,000 or less are eligible.<sup>210</sup> Eligible buyers may credit the lesser of ten percent of the purchase price or \$7,500.00 against their income tax payment for the year.<sup>211</sup> If the taxpayer does not have sufficient income to use the full credit, they will receive a check for the balance.<sup>212</sup> Buyers repay the credit without interest over 15 years simply through a surcharge on their annual income tax or when they resell the house if there is sufficient capital gain from the sale.<sup>213</sup> The homeowner does not have to begin making repayments until two years after claiming the credit.<sup>214</sup>

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205. Clean Boating Act of 2008, Pub. L. No. 110-288, § 2, 122 Stat. 2650 (amending 33 U.S.C. § 1342).

206. *Id.* §§ 3, 5.

207. *Id.* § 4.

208. *Id.* § 5.

209. Housing and Economic Recovery Act of 2008, Pub. L. No. 110-289, §3011, 122 Stat. 2654 (to be codified at 12 U.S.C. § 4501).

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.*

214. *Id.*

*F. Emergency Economic Stabilization Act*

The Emergency Economic Stabilization Act promotes the use of renewable energy resources as well as the use of fuels such as oil shale, tar sands, and liquid coal through the authorization of new tax credits and extension of existing tax credits.<sup>215</sup>

*1. New Tax Credits*

- Marine and hydrokinetic renewable energy production.<sup>216</sup>
- Producers of steel industry fuel are now eligible for the tax credit available to producers of energy through renewable resources.<sup>217</sup>
  - “Steel industry fuel” is defined as fuel that (1) is produced by liquefying coal waste sludge and distributing it on coal and (2) is used as a feedstock for the manufacture of coke.
- Wind turbines used to generate electricity in a residence.<sup>218</sup>
- Geothermal heat pump systems.<sup>219</sup>
- Investments in new clean renewable energy bonds for capital investment in renewable energy facilities.<sup>220</sup>
  - The authority to issue clean renewable energy bonds is extended through 2009.
- Carbon dioxide sequestration.<sup>221</sup>
  - Additional carbon energy projects, including the capture and sequestration of carbon dioxide, are authorized.

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215. Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, 122 Stat. 3765 (to be codified at 12 U.S.C. § 5201).

216. *Id.* § 102.

217. *Id.* § 108.

218. *Id.* § 104.

219. *Id.* § 104.

220. *Id.* § 107.

221. *Id.* § 115.



- Qualified plug-in electric drive motor vehicles, until 2014.<sup>222</sup>
  - The limit of such credit is based upon the gross vehicle weight rating of such vehicle.
- Alternative fuel vehicle refueling property expenditures, until 2011. Electricity is a clean burning fuel for purposes of such credit.
- Investments in qualified energy conservation bonds for capital expenditures to reduce energy consumption in public buildings, implement green community programs, develop alternative and renewable energy sources, and promote mass commuting facilities.
- The investment tax credit rate for coal gasification projects is increased to thirty percent.<sup>223</sup>
- A thirty percent investment tax credit rate for advanced coal-based generation technology projects, and the maximum credit amounts allocable for such projects is increased to \$2.55 billion.<sup>224</sup>
- A fifty percent depreciation allowance is allowed for reuse and recycling property used to collect, distribute, or recycle certain materials, including scrap, fibers, and metals.<sup>225</sup>

## 2. *Extended Tax Credits*

- Energy production facilities.<sup>226</sup>
  - Wind and refined coal facilities are provided a tax credit extension, through 2009.

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222. *Id.* § 205.

223. *Id.* § 112.

224. *Id.* § 111.

225. *Id.* § 308.

226. *Id.* § 101.

- Other renewable energy facilities including closed and open-loop biomass, solar energy, small irrigation power, landfill gas, trash combustion, and hydropower, through 2010.
- Solar energy, fuel cell, and microturbine property, through 2016.<sup>227</sup>
  - The credit limitation for fuel cell property is increased to \$1,500. The limitation on the tax credit for solar electric property is eliminated.
- Energy efficient residences, through 2016.<sup>228</sup>
- Residential energy efficiency improvements, through 2008.<sup>229</sup>
- Non-business energy property expenditures, through 2009. Eligible property includes energy-efficient biomass fuel stoves.<sup>230</sup>
  - The tax credit amounts and standards for energy efficient household appliances produced after 2007 is modified.
- Energy efficient commercial buildings, through 2013.<sup>231</sup>
  - Extends through 2012 the authority to issue tax-exempt bonds for qualified green building and sustainable design projects.<sup>232</sup>

### 3. Renewed Excise Taxes

- Coal, until the earlier of January 1, 2019, or the day after December 31, 2007 on which there is no balance of repayable advances made to the Black Lung

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227. Emergency Economic Stabilization Act § 103.

228. *Id.* § 106.

229. *Id.* § 304.

230. *Id.* § 302.

231. *Id.* § 304.

232. *Id.* § 307.

Disability Trust Fund and no unpaid interest on such advances.<sup>233</sup>

- Biodiesel and renewable diesel used as fuel.<sup>234</sup>
  - Cellulosic biofuel falls within the definition of biomass ethanol plant property for purposes of the bonus depreciation allowance.<sup>235</sup>
  - Alternative fuel and fuel mixtures, through 2009. The credit requires such fuels to include compressed or liquefied biomass gas and to meet certain carbon capture requirements.<sup>236</sup>

#### 4. Electricity Suppliers

- The energy tax credit rules were modified to allow offsets of tax credit amounts against alternative minimum tax liabilities, and public utility property now qualifies for such credit.<sup>237</sup>
- The deferral of tax on the gain on sales of transmission property by vertically-integrated electric utilities to independent transmission companies approved by the Federal Energy Regulatory Commission (FERC) is extended through 2009.<sup>238</sup>

#### 5. Oil and Gas Producers

- An exclusion is provided from the heavy truck excise tax for idling reduction devices and advanced insulation used in certain heavy trucks and trailers.<sup>239</sup>
- Taxpayers may elect to expense the costs of certain refinery property.<sup>240</sup>

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233. *Id.* § 113.

234. *Id.* § 202.

235. *Id.* § 201.

236. *Id.* § 204.

237. *Id.* § 103.

238. *Id.* § 109.

239. *Id.* § 206.

240. *Id.* § 209.

- Suspension of the taxable income limit on percentage depletion for oil and natural gas produced from marginal properties.<sup>241</sup>
- A three percent reduction in the tax deduction for income attributable to domestic production activities for taxpayers with income derived from activities related to oil, gas, or any primary products thereof is provided.<sup>242</sup>

#### 6. 2008 U.S. Disaster Victims

- Hurricane Katrina disaster areas, the Hurricane Ike disaster area, and the “Midwestern disaster area” are provided tax-exempt bond financing, the low-income housing tax credit, an increased rehabilitation tax credit, education and housing tax benefits, employee retention tax credits, and tax-exempt bond financing.<sup>243</sup>
  - “Midwestern disaster area” is an area in which a major disaster has been declared by the President, on or after May 20, 2008 and before August 1, 2008, by reason of severe storms, tornados, or flooding occurring in the following states: Arkansas, Illinois, Indiana, Iowa, Kansas, Michigan, Minnesota, Missouri, Nebraska, and Wisconsin.
  - “Hurricane Ike disaster area” is an area in Texas and Louisiana that was declared a major disaster area by the President by reason of Hurricane Ike and that was determined by the President to warrant federal assistance.

#### G. Mercury Export Ban Act

The Mercury Export Ban Act amends section 6 of the Toxic Substances Control Act to prohibit the federal government or any private individual from selling, distributing, transferring, or exporting elemental mercury after December 31, 2009.<sup>244</sup> The ban is

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241. Emergency Economic Stabilization Act § 210.

242. *Id.* § 401.

243. *Id.* § 706.

244. Mercury Export Ban Act of 2008, Pub. L. No. 110-414, 122 Stat. 4341 (amending

an effort to reduce mercury use worldwide and particularly in the developing world where products such as batteries, paint, and measuring devices often contain mercury when manufactured inexpensively.<sup>245</sup> Lower prices spur demand in developing countries, and lack of pollution controls and limited waste management infrastructure tend to cause its release.<sup>246</sup> Congress's findings show that the export ban on mercury will cause a switch to affordable mercury alternatives in the developing world.<sup>247</sup> The EPA is required to produce a report within one year on current mercury levels in products, including non-mercury alternatives that can be substituted for mercury-containing products.<sup>248</sup>

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15 U.S.C. § 2611).

245. *Id.* § 2.

246. *Id.*

247. *Id.*

248. *Id.* § 4(A).



# FLORIDA LAW AND LEGISLATION

JESSICA PULSIFER\*

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## I. FLORIDA CASE LAW

### A. *No Fifth Amendment Violation by State Beach and Shoreline Restoration*

In *Walton County v. Stop the Beach Renourishment, Inc.*, the Supreme Court of Florida determined that the Beach and Shore Preservation Act does not, on its face, deprive upland owners of littoral rights without just compensation.<sup>1</sup> After extensive destruction of several hurricanes, the Florida Department of Environmental Protection (DEP) labeled the beaches of the City of Destin

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1. *Walton County v. Stop the Beach Renourishment, Inc.*, No. SC06-1447, 2008 Fla. LEXIS 1646 (Fla. Sept. 29, 2008), *quashing* *Save Our Beaches, Inc. v. Fla. Dept. of Envtl. Prot.*, No. 1D05-4086, 2006 Fla. App. LEXIS 6244 (1st DCA Apr. 28, 2006).

and Walton County as “critically eroded beaches.”<sup>2</sup> The city and county applied for a permit to initiate a beach restoration project under the Beach and Shore Preservation Act.<sup>3</sup> Because the project required multiple permits due to the extensive studies and construction design, the city and county sought a Joint Coastal Permit and Authorization to Use Sovereign Lands (JCP), pursuant to the Act.<sup>4</sup> The application for the permit proposed dredging sand from an area in eastern Okaloosa County and moving it to the project site.<sup>5</sup> The Board of Directors for the Internal Improvement Trust Fund established an erosion control line (ECL) which, pursuant to the Act, became the boundary between publicly and privately owned land, replacing the previous boundary—the Mean High Water Line (MHWL).<sup>6</sup> Stop the Beach Renourishment, Incorporated (STBR) filed a petition challenging both the issuance of the permit and the constitutionality of the Beach and Shore Preservation Act.<sup>7</sup> In rebuttal to STBR’s claim that the government was not entitled to the JCP, the county applicant argued that it was entitled to the exception under Rule 18-21.004(3).<sup>8</sup> This exception allows a government entity to initiate beach nourishment projects without providing evidence of ownership interest as long as the project does not “unreasonably infringe on riparian rights.”<sup>9</sup> An administrative law judge decided that, even though the Act quashed two littoral rights of STBR members, section 161.191, Florida Statutes, expressly preserves the littoral rights of the upland owners; therefore, this did not qualify as an infringement under Rule 18-20014(3).<sup>10</sup> On appeal, the First District Court of Appeal found not only that the elimination of the two littoral rights qualified as an infringement but that it also constituted a taking without compensation.<sup>11</sup> The court found that the applicants must prove sufficient upland interest or else the project must continue under eminent domain proceedings as required by the Act.<sup>12</sup>

The Supreme Court of Florida found the following question of the utmost importance, rephrased from the First District Court of

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2. *Save Our Beaches, Inc. v. Fla. Dep’t of Env’tl. Prot.*, No. 1D05-4086, 2006 Fla. App. LEXIS 6244 (Fla. 1st DCA Apr. 28, 2006), *quashed sub nom.* *Walton County v. Stop the Beach Renourishment, Inc.*, No. SC06-1447/SC06-1449, 2008 Fla. LEXIS 1646 (Fla. Sept. 29, 2008).

3. *Save Our Beaches*, 2006 Fla. App. LEXIS 6244, at \*2.

4. FLA. STAT. § 161.055(1) (2008).

5. *Save Our Beaches*, 2006 Fla. App. LEXIS 6244, at \*2.

6. *Walton County*, 2008 Fla. LEXIS 1646, at \*6.

7. *Id.* at \*7.

8. *Save Our Beaches*, Fla. App. LEXIS 6244, at \*7.

9. FLA. ADMIN. CODE ANN. r. 18-21.004(3) (2008).

10. *Save our Beaches*, Fla. App. LEXIS 6244, at \*13.

11. *Id.* at \*32.

12. FLA. STAT. § 161.141 (2008).



Appeal: “On its face, does the Beach and Shore Preservation Act unconstitutionally deprive upland owners of littoral rights without just compensation?”<sup>13</sup> The court found that the Act reasonably balances the public and private interests, and therefore the Beach and Shore Preservation Act is not facially unconstitutional.<sup>14</sup> Furthermore, the court emphasized the importance of the doctrine of avulsion, which holds that hurricanes or other events do not cause the property boundary between public and private lands to change.<sup>15</sup> The party losing the land may reclaim it; in this case, the State may constitutionally reclaim the land without it being considered a taking. Furthermore, a taking does not occur simply because the upland property no longer directly contacts the water or MHWL.<sup>16</sup> The Court did not, however, decide on the credibility of the DEP issued permit: it solely upheld the constitutionality of the Beach and Shore Preservation Act.

*B. Private Property Interests Must be Considered in a  
City’s Comprehensive Development Plan*

After the CNL Hotel purchased 620 acres of land, the city adopted a comprehensive development plan.<sup>17</sup> In *CNL Resort Hotel v. City of Doral*, the hotel challenged the plan claiming it dissolved CNL’s private property rights, exacerbated urban sprawl, and was internally inconsistent.<sup>18</sup> The city asserted that the first and third claims were outside of the jurisdiction of the administrative law judge’s jurisdiction, and the claims were dismissed.<sup>19</sup> However, the Third District Court of Appeal reversed the order of the administrative law judge, finding the dismissal improper.<sup>20</sup> The court found that the state must take into consideration and protect private property rights as a part of the goals and policies of a comprehensive development plan.<sup>21</sup> Here, the CNL Hotel demonstrated an irreparable injury due to the city having limited roadway capacity.<sup>22</sup> The court clarified that the Hotel was not claiming the city took its land without proper compensation: it simply wanted

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13. *Walton County v. Stop the Beach Renourishment, Inc.*, No. SC06-1447/SC06-1449, 2008 Fla. LEXIS 1646, at \*3 (Fla. Sept. 29, 2008).

14. *Id.* at \*49.

15. *Walton County*, 2008 Fla. LEXIS 1646, at \*26-29.

16. *Id.* at \*47.

17. *CNL Resort Hotel v. City of Doral*, 991 So. 2d 417, 419 (Fla. 3d DCA 2008).

18. *Id.*

19. *Id.*

20. *Id.*

21. *CNL Resort Hotel*, 991 So. 2d at 420.

22. *Id.*

the City to consider its private property rights before sanctioning the proposed plan.<sup>23</sup>

*C. A Particularized Harm Is Not Needed to  
Challenge a Comprehensive Plan*

*Save the Homosassa River Alliance, Inc. v. Citrus County* involved a resort that owned property adjacent to the Homosassa River and applied for a permit from Citrus County to develop condominiums, amenities, retail space, and parking.<sup>24</sup> The plaintiffs filed a challenge to the granted permit, under section 163.3215(2), Florida Statutes, on the grounds that it was inconsistent with the county's comprehensive land use plan;<sup>25</sup> they were concerned about this development because of the environmentally sensitive lands and wildlife around the area. However, the trial court found that the plaintiffs did not show an adequate injury to have standing because they did not allege a particularized individual harm above the harm experienced by the general public.<sup>26</sup> On appeal, the Fifth District Court of Appeal reversed the trial court's decision, finding that the plaintiffs did in fact have standing.<sup>27</sup> The court found that the plaintiffs did show that their interests were more specific than those of the general public, as they were each directly concerned for the protection of interests that would be adversely affected by the development outside the scope of the plan.<sup>28</sup> Furthermore, the court emphasized that the purpose of the statute was not to redress a personal injury; if that were the case, a citizen would rarely ever have standing under this statute as comprehensive plans seldom uniquely harm an individual plaintiff.<sup>29</sup> Therefore, standing to challenge a county's comprehensive plan only requires a particularized interest and not a particularized harm.<sup>30</sup>

*D. Failure to Process a Nonconforming Land Use  
Permit Is Not Unconstitutional*

A property owner sued the Town of Southwest Ranches after officials determined that the town's comprehensive land use plan did not permit him to build a home on his property, claiming the

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23. *Id.* at 421.

24. *Save the Homosassa River Alliance, Inc. v. Citrus County*, No. 5D07-2545, 2008 Fla. App. LEXIS 16449, at \*1 (Fla. 5th DCA Oct. 24, 2008).

25. *Id.* at \*2.

26. *Id.* at \*14.

27. *Id.* at \*28.

28. *Id.* at \*27.

29. *Id.* at \*28.

30. *Id.*

action constituted a taking.<sup>31</sup> However, in *Southwest Ranches v. Kalam*, the court noted that it would find that the officials were merely performing their duties pursuant to the plan, unless the plaintiff was able to prove that the officials knowingly violated his property rights by refusing to allow him to develop his land.<sup>32</sup> Because the plaintiff did not meet this burden, there was no violation of due process rights. The fact that the officials acted in bad faith is immaterial, since the appellate court found that the failure to process a permit application which does not conform to the town land use plan does not violate the federal constitution.<sup>33</sup>

## II. NOTABLE FLORIDA LEGISLATION<sup>34</sup>

### A. Artificial Reefs—SB 432

The “Ships-to-Reefs” program authorizes the sinking of decommissioned U.S. Naval vessels for the creation of man-made reefs. This bill authorizes the Fish and Wildlife Conservation Commission to develop and administer a matching grant program. There are numerous benefits of this bill for the state of Florida. Not only does it restore significant coastal marine life by creating additional functioning artificial reefs, it will also help create substantial revenue for the Florida marine tourism industry.<sup>35</sup>

### B. Brownfield Redevelopment—CS/HB 527

The purpose of this legislation is partly to encourage the development of affordable housing and health care facilities on brownfield sites.<sup>36</sup> This bill expands eligibility for site rehabilitation tax credits and revises requirements for tax credits by reducing and eliminating some of the requirements for brownfield area designations and brownfield site rehabilitation agreements.<sup>37</sup> It extends tax credits to sites involving the removal of solid waste. Moreover, it establishes a tax credit for an additional twenty-five percent of total site rehabilitation costs, up to \$500,000. Requirements for tax credit applications are clarified. All applications must incorporate

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31. *Town of Sw. Ranches v. Kalam*, 980 So. 2d 1121, 1122 (Fla. 4th DCA 2008).

32. *Id.* at 1123.

33. *Id.* at 1124.

34. See Eric T. Olsen, *2008 Legislative Session Summary*, THE ENVTL. AND LAND USE L. SECT. REP. (The Fla. Bar, Tallahassee, Fla.), Aug. 2008, available at [http://www.eluls.org/2008/Reporter\\_August\\_2008/Env0808.pdf](http://www.eluls.org/2008/Reporter_August_2008/Env0808.pdf).

35. Ships to Reefs, <http://www.ships2reefs.com/displaycommon.cfm?an=1&subarticlenbr=29> (last visited Feb. 24, 2009).

36. See Olsen, *supra* note 34, at 26.

37. Fla. CS for HB 527 (2008).

supporting documents in order to be considered complete.<sup>38</sup> The bill sets up timetables and deadlines for when the applications must be complete so that they can be verified for eligibility. The bill also amends the Innocent Victims Petroleum Storage System Restoration Program to allow initial petroleum contaminated sites to remain eligible for state-funded clean up.<sup>39</sup>

### *C. Building Standards—CS/HB 697*

Though focused on construction standards, this bill has effects reaching into environmental law. It emphasizes to local governments the importance of taking into consideration energy efficiency issues in developing comprehensive plans.<sup>40</sup> Furthermore, it requires that local governments address greenhouse gas reduction strategies and urban sprawl reduction in planning future land use.<sup>41</sup> Finally, the bill establishes a schedule of increased energy performance for buildings subject to the Florida Energy Efficiency Code for Building Construction.<sup>42</sup>

### *D. Clean Ocean Act—CS/CS/SB 1094*

This bill creates the Clean Ocean Act, which requires day cruises to register with the Florida Department of Environmental Protection (DEP) annually.<sup>43</sup> This information is used by the DEP to estimate the amount the waste reasonably expected to be released by the vessel.<sup>44</sup> Not only must gambling vessels report any release of waste into coastal waters to the DEP within twenty-four hours, but they must also establish procedures for the release of waste.<sup>45</sup> Based upon DEP's calculations, the owner or operator must also arrange for an available waste management service to handle the waste.<sup>46</sup> The bill excludes traditional cruise ships from the definition of "gambling vessel."<sup>47</sup>

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38. See Olsen, *supra* note 34, at 26.

39. FLA. STAT. § 376.30715 (2008).

40. See Olsen, *supra* note 34, at 27.

41. *Id.*

42. FLA. STAT. 553.9061(1) (2008).

43. See Olsen, *supra* note 34, at 28.

44. *Id.*

45. FLA. STAT. §§ 376.25(4)(a)(1), 376.25(5) (2008).

46. FLA. STAT. § 376.25(4)(a)(2) (2008).

47. FLA. STAT. § 376.25(e) (2008).

*E. Contaminated Site Clean-Up—HB 961*

HB 961 increases the restoration cap amount for the Petroleum Participation Program and Florida Petroleum Liability and Restoration Insurance Program. The bill increases the public funding for restoration of certain petroleum contaminated sites from \$300,000 to \$400,000.<sup>48</sup> It lays out criteria that the owner or operator must fulfill in order for a site to be eligible for the additional funds.<sup>49</sup> The bill prohibits any expense reimbursement outside of those provided for in the petroleum cleanup preapproved site rehabilitation program.<sup>50</sup> Furthermore, the bill amends section 376.3072, Florida Statutes, increasing the amount of funds available under the Florida Petroleum Liability and Restoration Insurance Program.<sup>51</sup>

*F. DEP Reauthorization—CS/CS/SB 1294*

Though the purpose of this bill is to simply reauthorize the DEP, it contains many miscellaneous environmental provisions. It reorganizes authority, creating the office of Intergovernmental Programs within the DEP, and transfers some duties from DEP to the Florida Fish and Wildlife Conservation Commission.<sup>52</sup> The bill requires that drycleaning facilities display a DEP certificate of registration.<sup>53</sup> The definition of “regulated air pollutant” is expanded, and the DEP is granted specific authority to establish “data quality objectives” in laboratory training and sampling protocols.<sup>54</sup> The bill also provides a specific provision aimed at preventing the expansion of landfills into the City of Bartow by prohibiting permits for Class I landfills located adjacent to Class III landfills within the Southern Water Use Caution Area.<sup>55</sup>

*G. Energy—HB 7135*

Though this energy bill has multifaceted provisions which reach virtually every sector of Florida’s economy, it has particular importance to environmental law. The bill authorizes DEP to develop market based regulatory program to reduce greenhouse gas emissions from electric utilities by creating the Florida Climate

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48. See Olsen, *supra* note 34, at 28.

49. FLA. STAT. § 376.3072(2)(a)(1)-(4) (2008).

50. Fla. HB 961 (2008).

51. *Id.*

52. See Olsen, *supra* note 34, at 28.

53. FLA. STAT. § 376.303(1)(d) (2008).

54. See Olsen, *supra* note 34, at 29.

55. Fla. CS for CS for SB 1294(23) (2008).

Protection Act.<sup>56</sup> Moreover, it streamlines the Florida Electrical Power Plant Siting Act to facilitate the siting of low carbon emitting electrical plants and amends the Florida Energy Efficiency and Conservation Act, requiring the adoption of rules which encourage electric utilities to increase energy efficiency and demand-side renewable energy systems.<sup>57</sup> Additionally, the bill establishes a “preference” for green products and facilities in awarding state contracts.<sup>58</sup> In order to realize this preferential treatment, the bill requires development of a Florida Climate Friendly Preferred Products List to identify products that have a “clear energy efficiency or other environmental benefit over competing products.”<sup>59</sup> Furthermore, the bill creates both a schedule to increase energy efficiency in buildings subject to the Florida Energy Efficiency Code, and it requires state agencies to adopt energy efficiency rating system for all new buildings and renovations.<sup>60</sup> The bill constructs the Florida Green Government Grants Act to award stipends to local governments to assist them in achieving green standards.<sup>61</sup>

The bill also creates the Florida Renewable Fuel Standard Act, which establishes a renewable fuel standard requiring that all gasoline sold in Florida must contain at least ten percent ethanol by the year 2010.<sup>62</sup> The bill replaces the Florida Energy Commission with the Florida Energy and Climate Commission. This newly created nine member board has the authority to coordinate and implement energy policies for Florida and will advocate for energy and climate change issues.<sup>63</sup> Furthermore, the bill places the State Energy Program under the management of the Energy and Climate Commission.<sup>64</sup>

The recycling provision included in the energy bill establishes long-term recycling goal of seventy-five percent and requires the DEP to establish comprehensive recycling program that aims to achieve that goal by 2020.<sup>65</sup> The DEP must also undertake an analysis of need for different regulation of auxiliary containers, wrappings, or disposable plastic bags used by consumers to carry products from retail establishments. A report including contribu-

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56. FLA. STAT. 403.44 (2008).

57. Holland & Knight, *Eyes on Tallahassee* (June 2, 2008), <http://www.hklaw.com/id24660/PublicationId2400/ReturnId31/contentid51469/>.

58. FLA. STAT. § 377.804(4)(a) (2008).

59. *See Olsen, supra* note 34, at 31.

60. Fla. CS for HB 7135 (2008).

61. FLA. STAT. § 377.808 (2008).

62. FLA. STAT. §§ 526.201-526.207 (2008).

63. *See Olsen, supra* note 34, at 30.

64. Fla. CS for CS for SB 1294(48) (2008).

65. FLA. STAT. § 403.7032 (2008).

tions from various stakeholders is to be compiled and submitted to the legislature by February 1, 2010.<sup>66</sup> No local or state government may adopt a rule or ordinance regarding these auxiliary containers, wrappings, or disposable bags until the report has been completed and submitted.<sup>67</sup>

#### *H. Florida Forever—CS/CS/SB 542*

This bill extends the current Florida Forever Land Preservation Program for ten years and increases bonding capacity to \$5.3 billion.<sup>68</sup> It increases the scope of the current program to incorporate the protection of agricultural lands and working waterfronts from conversion to other uses.<sup>69</sup> In addition, it allows for project funding to increase working public waterfronts, among other types of public access.<sup>70</sup> The DEP is to develop computerized information of all previous acquisitions, and any Florida Forever fund recipients are to submit acquisition information to the DEP in an attempt to modernize the Act.<sup>71</sup> The bill directs the legislature to complete a debt analysis and an analysis on potential revenue sources prior to the issuance of any bonds.<sup>72</sup>

The Florida Forever Act creates incentives for public and private landowners to participate in the recovery and management of endangered and threatened species by acquiring and managing ecosystems.<sup>73</sup> The bill also authorizes the Fish and Wildlife Conservation Commission to manage lands for imperiled species.<sup>74</sup> Finally, the bill reduces funding allocations to water management districts, and changes the requirements for surplussing state lands.<sup>75</sup>

#### *I. State Parks—CS/SB 192*

This bill decriminalizes all violations of the Recreation and Parks division of the DEP, except for a few notable exceptions. The non-criminal penalties set out in the bill include fines up to \$500 and ejection from DEP owned property.<sup>76</sup> Failure to pay the penalty is a misdemeanor in the second degree. Furthermore, the

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66. See Olsen, *supra* note 34, at 32.

67. *Id.*

68. FLA. STAT. § 215.618(1) (2008).

69. See Olsen, *supra* note 34, at 26.

70. *Id.*

71. FLA. STAT. § 253.0325 (2008).

72. FLA. STAT. § 215.618(1)(b)-(c) (2008).

73. FLA. STAT. § 259.105(2)(a)(11) (2008).

74. Fla. CS for CS for SB 542 (2008).

75. See Olsen, *supra* note 34, at 27.

76. FLA. STAT. § 258.008 (2008).

bill permits DEP employees and volunteers to use golf carts and utility vehicles on public roads with speed limits of thirty-five miles per hour or less within the state park for official state purposes.<sup>77</sup>

*J. Department of Transportation—CS/CS/SB 682*

The effects of this extensive transportation bill reach into growth management and land use areas. Most significantly, the bill mandates that facilities determined to be port related industrial or commercial projects are not to be considered to be a development of regional impact.<sup>78</sup> The DRI exception is permitted as long as the projects are located within three miles of a port, and rely on the port or transportation facility.<sup>79</sup> Furthermore, the bill directs the Department of Transportation to establish a methodology recognizing significant developments that will achieve a thirty percent rate of internal capture once developed.<sup>80</sup>

*K. Wastewater Disposal—CS/CS/SB 1302*

In part, this bill is specific to South Florida, directing the South Florida Water Management District to include in its regional plan water supply development projects promoting the elimination of wastewater ocean outfalls.<sup>81</sup> Projects that do implement reuse as a means of eliminating ocean outfalls will receive priority funding consideration. The bill states that the construction of new ocean outfalls is prohibited and that the use of ocean outfalls to dispose of sanitary sewage disposal is illegal.<sup>82</sup> A reporting schedule is created for those permit holders who discharge wastewater through ocean outfalls, and the DEP shall use this information to submit a progress report to the Legislature every five years beginning in 2010.<sup>83</sup>

*L. Water quality Credit Trading—CS/HB 547*

A pilot project is authorized by CS/HB 547 allowing the DEP to adopt rules to implement a water quality trading program.<sup>84</sup> The plan is to be implemented along with the total maximum daily

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77. FLA. STAT. § 316.212 (2008).

78. *Id.*

79. *Id.*

80. *Id.*

81. See Olsen, *supra* note 34, at 29.

82. FLA. STAT. § 403.085 (2008).

83. FLA. STAT. § 403.086(f)-(g) (2008).

84. See Olsen, *supra* note 34, at 27.



loads basin management action plan (TMDL BMAP).<sup>85</sup> Within twenty-four months of its adoption, the DEP must submit a report outlining the results and recommendations for the future of the project to the Governor.<sup>86</sup>

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85. *Id.*

86. *Id.*