STRICT SCRUTINY AND EMINENT DOMAIN AFTER *KELO*

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I. INTRODUCTION

If there is a bottom rung on the ladder of constitutional rights, then it is there that property rights reside. "In fact, among all the guarantees of the Bill of Rights, only the public use limitation [on government's eminent domain power] is singled out for heavy deference to legislatures."[1] This state of affairs is one that has engendered much commentary over the years, both from those who decry its existence[2] and from others who seek to rationalize its being. Nobody argues that it is not real.

For the past three-quarters of a century, the United States Supreme Court has explicitly held that while it will review the state's infringement on some constitutional rights with the most exacting of scrutiny, alleged abrogation of Americans' property rights may be explained away by the infringer itself. The Supreme Court's

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1. James W. Ely Jr., *"Poor Relation" Once More: The Supreme Court and the Vanishing Rights of Property Owners*, 2005 CATO SUP. CT. REV. 39, 62.

2. *See generally* RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985) (criticizing the public use limitation's denigration via judicial deference to legislative will).

2005 decision in *Kelo v. City of New London* illustrated this status quo.[3] Americans were outraged by the decision,[4] wherein the Court affirmed that property could be seized from its owner and transferred to another private party if the government thought the new owner would make more profitable use of the land.[5] The Court's rationale for its decision was that in property rights cases, unlike cases focusing on virtually every other liberty in the Bill of Rights, the judiciary will accept the government's claim of constitutionality as conclusive.[6] The decision reminded Americans that if private property is taken via eminent domain by any federal agency in America, or by nearly any state or local government entity, the owner will bear the burden of proving the unconstitutionality of the action against almost impossible odds.

As a leading property-rights scholar recently noted, "[t]he Supreme Court is guilty of massive neglect in its interpretation of the takings clause."[7] This Article will chronicle how this came to be, why it is wrong, and why it matters. Part I recounts the historical developments that led to the banishment of eminent domain law, and the question of public use to the realm of *rational basis* scrutiny while other rights guaranteed by the Bill of Rights are protected with zeal by the courts. Part II examines the theoretical and philosophical arguments for and against this treatment of eminent domain law, focusing particularly on the assertion that the political process is sufficient for the protection of property against eminent domain. Part III looks at the various post-*Kelo* eminent domain reforms around the country and details why these constitutional and statutory fixes, to varying degrees, still require *strict* judicial scrutiny of takings to ensure their enforcement. Finally, this Article will conclude with a brief forecast of the chances for greater judicial protection against government takings of private property through eminent domain.[8]

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3. Kelo v. City of New London, 545 U.S. 469 (2005).

4. *See* Warren Richey, *Fracas Over Home Seizures Moves to States*, CHRISTIAN SCI. MONITOR, Dec. 15, 2005, *available at* http://www.csmonitor.com/2005/1215/p01s01-uspo.html.

5. *Kelo*, 545 U.S. 469.

6. *Id*. at 488-89.

7. RICHARD A. EPSTEIN, SUPREME NEGLECT: HOW TO REVIVE CONSTITUTIONAL PROTECTION FOR PRIVATE PROPERTY 8 (Geoffrey R. Stone ed. 2008).

8. Having outlined what this article will address, it might be useful to note that which it will not. Though governments can take property just as easily through regulation as they can via formal eminent domain actions—property is just as easily, and certainly more insidiously, taken when the state can merely regulate away its value—we largely will focus this article on "traditional" eminent domain questions of public use, necessity, and just compensation. For a thorough discussion of the historical and philosophical underpinnings of modern regulatory takings jurisprudence—including arguments for greater judicial scrutiny of certain classes of land use regulations—see Steven Geoffrey Gieseler et al., *Measure 37: Paying People for What We Take*, 36 ENVTL. L. 79 (2006).

II. FROM THE GUARDIAN OF RIGHTS TO POOR RELATION

A. Property Rights at the Founding

In order to fully examine the modern judicial relegation of property rights, it is necessary to understand where these rights were situated prior to their demotion.[9] For both historical and legal purposes—the latter especially for those who believe the original meaning of the Takings Clause should bear on its interpretation today—the crucial time is that of the drafting and ratification of the United States Constitution and its amendments.

Among the property rules adopted by early America, having been borrowed from English common law, was the principle that courts had a duty to cabin the eminent domain power by reviewing takings for the requirements of public use and just compensation.[10] King George's horrid treatment of Americans' private property was among the causes of the American Revolution that led to the founding of a new nation in the first place.[11] Once that Revolution was won, and the victors sat down to draft the document that would govern them, the primacy of property rights was readily apparent.[12] Fully half of the substantive amendments comprising the Bill of Rights dealt in one way or another with protections against the government taking, or encroaching upon, private property.

The most important of these for purposes of this Article is the Fifth Amendment, prohibiting the taking of private property unless for a public use, and upon payment of just compensation.[13] Lest there be any doubt about the philosophical basis for these restrictions' inclusion among the other rights upon which the new American liberty would be built, the author of the Amendment, James Madison, wrote in 1792 that "[g]overnment is instituted to protect property of every sort; as well that which lies in the various rights of individuals, as that which the term particularly expresses. This being the end of government, that alone is a *just* government, which *impartially* secures to every man, whatever is his *own*."[14]

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9. For a more complete recent account, see, for example, JAMES W. ELY JR., THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS 10-81 (Kermit L. Hall ed., Oxford Univ. Press 3rd ed. 2008).

10. *See, e.g.*, 1 WILLIAM BLACKSTONE, COMMENTARIES *134-35 (Wayne Morrison ed., Cavendish Publishing Limited 2001) (1765).

11. ELY, *supra* note 9, at 25-29.

12. *Id.* at 42-47.

13. U.S. CONST. amend. V.

14. JAMES MADISON, PROPERTY (MAR. 29, 1792), *reprinted in* THE FOUNDERS' CONSTITUTION CH. 16, DOC. 23 (Philip B. Kurland & Ralph Lerner eds., University of Chicago Press 1962) (1792), *available at* http://press-pubs.uchicago.edu/founders/documents/v1ch16s23.html.

Madison was asserting an important principle. It was not enough to say that it was a role of government to protect its citizens' property. More than that, he was claiming that this protection was the *only* role for a just government—that the only legitimate government undertakings were those that furthered this protection.[15]

This was a remarkable proposition on which to found a nation, but it was not a particularly novel idea. As Richard Epstein notes, the preeminence of property rights was a feature of "[t]raditional legal thinkers in both the Roman law and common-law tradition."[16] A century before Madison wrote, John Locke formulated the basic idea in his *Second Treatise of Civil Government*, which was among the political writings that most influenced the framers of the U.S. Constitution.[17] In the *Second Treatise*, Locke wrote that there were certain rights inherent to human beings—the right to property among them—that predated and predominated the institution of government. As James Ely summarizes, "the principal purpose of government was to protect these natural property rights, which Locke fused with liberty. . . . Because the ownership of property was a natural right, the powers of government were necessarily limited by its duty to safeguard property."[18] According to Locke, the right to security in one's property was not separate, or separable, from liberty. Rather, it was inherent in liberty.

Despite the founders' overt affinity for Locke, it was not a purely Lockean conception of property that informed early American views. Epstein writes, "From the beginning, private property always rested on its productive advantage, and not merely on an obscure natural law claim that property rights are necessarily 'immutable' across all times and places."[19] Epstein posits, in fact, that natural law theorists' focus on property stemmed directly from their observations that a regime of strong protections for property rights benefited both the individual and the community, and their recognition that such frameworks possessed "a real substantive unity. . .[that] conformed to a natural reason that spanned the globe."[20]

The year before America declared its independence, the colonial statesman Arthur Lee wrote that "[t]he right of property is the guardian of every other right, and to deprive a people of this, is in

15. *See id*.
16. EPSTEIN, *supra* note 7, at 1.
17. *See generally* JOHN LOCKE, LOCKE'S SECOND TREATISE OF CIVIL GOVERNMENT: AN ESSAY CONCERNING THE TRUE, ORIGINAL EXTENT, AND END OF CIVIL GOVERNMENT (Lester DeKoster ed., William B. Eerdmans Publishing Company 1978) (1689).
18. ELY, *supra* note 9, at 17
19. EPSTEIN, *supra* note 7, at 19.
20. *Id*. at 22.

fact to deprive them of their liberty."[21] Lee's sentiment, notable enough when recalled today to inspire book titles, stated nothing more than the accepted common wisdom when penned in 1775.[22] Strong legal protection for property rights was seen not just as a worthy philosophical ideal, but also as the foundation of economic and societal well-being. The architects of early American law recognized, as would modern scholars such as Benjamin Barros centuries later, that "property as an institution promotes individual freedom[] by creating a zone of individual autonomy and privacy, by distributing power, and by providing access to the resources that people need to be free."[23]

Once enshrined in the Bill of Rights, this American conception of property, encompassing both deontological and utilitarian considerations, was quick to take hold in the newly formed United States Supreme Court. Less than a decade after Madison wrote, and the states ratified, the Fifth Amendment, Supreme Court Justice William Patterson wrote for the Court "that the right of acquiring and possessing property, and having it protected, is one of the natural, inherent, and unalienable rights of man."[24] Three years later, Justice Chase wrote for the Supreme Court on the limits of government's power to take private property. Echoing Locke and Madison, Chase wrote, in *Calder v. Bull*, that:

> An ACT of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority. . . . A few instances will suffice to explain what I mean . . . . [A] law that takes property from A. and gives it to B: It is against all reason and justice, for a people to entrust a Legislature with SUCH powers; and, therefore, it cannot be presumed that they have done it.[25]

This fundamental understanding of the role of property rights in America and in American liberty did not change much as the years passed from the spirit of 1776. In 1833, for example, Supreme Court Justice Joseph Story wrote in his *Commentaries on the Constitution of the United States* that "in a free government, almost all other rights would become utterly worthless, if the gov-

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21. ARTHUR LEE, AN APPEAL TO THE JUSTICE AND INTERESTS OF THE PEOPLE OF GREAT BRITAIN, IN THE PRESENT DISPUTES WITH AMERICA BY AN OLD MEMBER OF PARLIAMENT (Robson, Angus and Co. 4th ed. 2003) (1774).

22. *See* ELY, *supra* note 9; *see also* EPSTEIN, *supra* note 7, at 1.

23. D. Benjamin Barros, *Property and Freedom*, 4 N.Y.U. J.L. & LIBERTY 36, 38 (2009).

24. Vanhorne's Lessee v. Dorrance, 2 U.S. 304, 310 (1795).

25. Calder v. Bull, 3 U.S. 386, 388 (1798).

ernment possessed an uncontrollable power over the private fortune of every citizen."[26] In a matter of decades, though, Story's description of worthless rights would move from the realm of dreaded hypothetical to something approaching reality, as a new political and legal movement came to dominate American life.

B. The Progressive Path to Footnote Four

While entire academic careers have been spent analyzing the political and legal changes that accompanied the Progressive Era and the New Deal—a level of detail that cannot be matched in these pages—a brief synopsis is necessary to understand how the American judiciary has demoted property rights from a fundamental liberty that safeguarded all others to their miserable constitutional station today. What is crucial to recognize at the outset is that this transformation was not an accident of history or the result of a string of unintended consequences. To the contrary, the relegation of property rights was among the primary aims of one of the most prominent and aggressive legal movements in American history.

As the twentieth century began, the judiciary largely maintained the respect for property rights that had been present at the nation's birth. To be sure, there was nothing like the type of absolutism critics (and, in truth, even some supporters) of the so-called *Lochner* Era[27] would purport. As Epstein, among others, has pointed out, this was a time of sustained balance in property rights law, with courts upholding increasingly frequent takings for legitimate public uses as spurred by the Industrial Revolution, but still requiring that these actions remained cabined by constitutional requirements.[28] Evidence of the courts' continued regard for property rights is found in the Supreme Court's 1897 decision in *Chicago, Burlington and Quincy Railroad Company v. Chicago*, where the Court held that just compensation was a fundamental feature of due process for property owners under the Fourteenth Amendment, thus incorporating the Fifth Amendment's eminent domain restrictions against the states.[29]

For legislators, though, it was a different story. As James Ely writes, "by 1900 the focus of lawmakers shifted markedly from the

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26. JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 664 (Ronald D. Rotunda & John E. Nowak, intro., Carolina Academic Press 1987) (1833).

27. *See generally* Lochner v. New York, 198 U.S. 45 (1905). For a more detailed summary and analysis of the case, see Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873 (1987).

28. *See* Richard A. Epstein, *Property, Speech, and the Politics of Distrust*, 59 U. CHI. L. REV. 41, 41 n.1 (1992).

29. Chicago, B. & Q. R. Co. v. Chicago, 166 U.S. 226, 239 (1897).

promotion of economic growth to its regulation."[30] Ely might have noted that the shift was not just aimed at economic growth's regulation, but also its redistribution. For the early twentieth century saw the rise of the Progressive Movement, an ideology that viewed fundamental rights as malleable constructions "created not for the good of individuals, but for the good of society," and viewed "[i]ndividual freedoms" as being "manufactured to achieve group ends."[31] And to be sure, the Progressives were not wanting for group ends they sought to achieve. Drawing on the writings of Hobbes, Nietzsche, and Rousseau for the idea that individual rights (*contra* Locke and the Founders) were creations of the State and thus revocable by the general will of the majority, as represented by the State, the Progressives set out to reshape society via the power of government.

This view was held at the very pinnacle of American government. The year 1912 saw the election of President Woodrow Wilson, who believed that "government does now whatever experience permits or the times demand," regardless of the constitutional rights violated in the process.[32] Wilson openly mocked the principles of the American founding, and "attacked those who were devoted to the principles of the Declaration of Independence."[33] He was explicit about his conception of the law and its role in defining the State's relationship to its citizens:

> No doubt a great deal of nonsense has been talked about the inalienable rights of the individual, and a great deal that was mere vague sentiment and pleasing speculation has been put forward as fundamental principle. . . . Only that is 'law' which can be executed, and the abstract rights of man are singularly difficult of execution.[34]

The leading light of Progressive jurisprudence, Justice Oliver Wendell Holmes, infamously upheld a forced sterilization plan of citizens the Virginia government decided were "feeble-minded," writing that since the "public welfare may call upon the *best* citizens for their lives," it was a lesser-included power of sorts for the government to demand any other sacrifice from the *worst* of citi-

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30. ELY, *supra* note 9, at 8.

31. LOUIS MENAND, THE METAPHYSICAL CLUB 409 (2001).

32. WOODROW WILSON, THE STATE: ELEMENTS OF HISTORICAL AND PRACTICAL POLITICS 625 (rev. ed., Boston, D.C. Heath 1900) (1898) (emphasis omitted).

33. RONALD J. PESTRITTO, WOODROW WILSON AND THE ROOTS OF MODERN LIBERALISM 122 (2005).

34. WOODROW WILSON, CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES 16 (1908).

zens.[35] Individual rights were to be entirely subordinated to the putative public good, as defined by the Legislature, with little or no judicial interference. As Justice Holmes wrote, in declining to strike down the state sterilization program, "[i]t is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind."[36]

Thus unconcerned with violating limits on legislative and executive power, for they truly felt there were none, the Progressives sought to throw off the yoke of limited powers in the judicial arena as well. These judges viewed as useless, or even counterproductive, many genres of judicial review, specifically review of actions aimed at taking private property for the putative greater good. As Justice Brandeis—likely second only to Justice Holmes in the annals of Progressive legal prominence—wrote on the matter, "in the interest of the public and in order to preserve the liberty and the property of the great majority of the citizens of a state, rights of property and the liberty of the individual must be remolded, from time to time, to meet the changing needs of society."[37]

Justice Brandeis's brief passage, written in a 1921 dissent from a Supreme Court opinion, is a nearly perfect encapsulation of the Progressive legal philosophy. Perhaps its most important feature is its appeal to the need for change in the face of a changing world, and sometimes for its own sake, a foundation of Progressive legal thought with the goal of unmooring judicial decision-making from the original text and meaning of the Constitution. Known today by both proponents and detractors as "living constitutionalism,"[38] this quintessentially Progressive idea is born out of a professed dedication to pragmatism that dismisses even the basic ideas of right and wrong as social constructions to be adjusted whenever the needs of society call for adjusting.

Another key feature of Justice Brandeis's encapsulation of Progressive thought is a conception of fundamental rights as defined by democratic processes, not as bulwarks against majoritarian preferences. Of course, the Bill of Rights entire reason for being was to insulate some basic liberties from the will of the majority. But such insulation was seen by Progressives as a nuisance standing in the way of their remolding of society. Leading Progressive Herbert Croly is matter-of-fact on this point, writing that the government must

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35. Buck v. Bell, 274 U.S. 200, 205, 207 (1927) (emphasis added).

36. *Id*. at 207.

37. Truax v. Corrigan, 257 U.S. 312, 376 (1921) (Brandeis, J., dissenting).

38. *See generally* HOWARD LEE MCBAIN, THE LIVING CONSTITUTION: A CONSIDERATION OF THE REALITIES AND LEGENDS OF OUR FUNDAMENTAL LAW (1927).

> [P]ossess the power of taking any action, which, in the opinion of a decisive majority of the people, is demanded by the public welfare. Such is not the case with the government organized under the Federal Constitution. In respect to certain fundamental provisions, which necessarily receive the most rigid interpretation on the part of the courts, it is practically unmodifiable. A very small percentage of the American people can in this respect permanently thwart the will of an enormous majority, and there can be no justification for such a condition . . . .[39]

To many, including the framers of the Constitution, this was the whole point. But to Progressives such as Wilson, Justice Holmes, Brandeis, Croly, and especially the historian Charles Beard, in his influential 1913 book *An Economic Interpretation of the Constitution*, this was of no moment, for even the Constitution itself was something to be scorned as nothing but an oppressive tool designed to allow the rich to manipulate society. The Constitution, then, was fast turning from a counter-majoritarian document into the precise opposite.[40]

Ridding the nation of the Constitution's bothersome counter-majoritarianism necessarily required a diminution of the role of the only counter-majoritarian branch of government—the judiciary. While American history to this point witnessed the regular invalidation of state actions that infringed on fundamental constitutional rights, including eminent domain actions that stepped on the right to property,[41] Progressives on the Supreme Court began to rethink the role of the courts.

Franklin Roosevelt was elected president in 1932. He brought with him the New Deal, a package of government expansion unseen to that point in American history. The growth was not just for its own sake; it had as its goal a basic redefining of the relationship between the citizen and the State. It aimed to accomplish this through the redistribution of Americans' wealth and property, via the government, from those the Progressives thought had been protected since the founding by the bourgeois Constitution into the hands of those suffering in the Great Depression. As Sandefur ob-

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39. HERBERT DAVID CROLY, THE PROMISE OF AMERICAN LIFE 35-36 (1909).

40. This ideal of a constitution embodying the will of the majority, instead of protecting against it, did not die with its proponents referenced above. *See, e.g.*, STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION (2006).

41. For a detailed list of such eminent domain decisions, see *infra* Part I(A), and Stephen J. Jones, *Trumping Eminent Domain Law: An Argument for Strict Scrutiny Analysis Under the Public Use Requirement of the Fifth Amendment*, 50 SYRACUSE L. REV. 285, 290-93 & nn.34, 49, 51, 53, 57-58, 60-63 (2000).

serves, "[t]he New Deal's leaders regarded property solely as a creation of the state, and the state could seize it, change the rules governing it, or transfer it between citizens virtually at will."[42]

With a vast majority in Congress, and the crisis of the Depression paving the way for government action of nearly any kind, the only thing standing in the way of the Progressive-inspired New Deal would have been a Supreme Court still wedded to the idea that it had a constitutional duty to invalidate laws that infringed on fundamental rights. This roadblock moved away in 1934, with the Supreme Court's decision in *Nebbia v. New York*.[43] In *Nebbia*, a New York statute set a floor for the price of milk in an effort to thwart competition facing some milk producers.[44] The law was of no benefit to the public, and violated the Due Process Rights of the unprotected producers. Under *Lochner* and its predecessors and progeny, the Court should have struck down the statute as unconstitutional.[45]

It did not. Instead—in a decision far less about New York and milk than it was about paving the way for the New Deal—the Court held that it no longer would strike down any economic regulation as violative of due process, so long as it bore a "reasonable relation" to any "legitimate" government power.[46] This was not a means-ends test; that is, even if a statute failed miserably in its aim, it still would be upheld as long as there was any rational basis for its existence.

This test, however, if applied to all laws, would have rendered the Court essentially a superfluous afterthought. This was not what the Progressives envisioned in whole, for they wished not for the courts to be read out of the system altogether; they just wanted the courts to stay out of the way of the expansive programs they favored. When it came to protecting the kinds of rights the Progressives still had some use for—namely, those that favored the parties to whom the New Dealers wished to transfer the property of those who had been hiding behind the antiquated Constitution—the courts needed the authority to step in. The Supreme Court formally re-granted itself this authority in 1938, in the case of *United States v. Carolene Products Co.*[47] In *Carolene Products*, the Court held—by way of a footnote, no less—that the rational basis test and its attendant presumption of constitutionality still

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42. TIMOTHY SANDEFUR, CORNERSTONE OF LIBERTY: PROPERTY RIGHTS IN 21ST CENTURY AMERICA 71 (2006).

43. Nebbia v. New York, 291 U.S. 502 (1934).

44. *Id*. at 507-09.

45. *See* Lochner v. New York, 198 U.S. 45 (1905).

46. *Nebbia*, 291 U.S. at 524.

47. United States v. Carolene Prods. Co., 304 U.S. 144 (1938).

would guide the Court's reluctance to interfere with laws, except where a law implicated some harm to Bill of Rights provisions designed to protect "discrete and insular minorities."[48]

With *Carolene Products* Footnote Four, the Supreme Court anticipated Orwell's *Animal Farm*[49] by nearly a decade. Regardless of whether all the protections of the Bill of Rights were viewed by the Founders as equal in importance, some rights would henceforth be deemed more equal than others. From *Carolene Products* forward to the present day, America's judiciary would interpret the Constitution as protecting a hierarchy of rights, with property rights situated squarely at the bottom.

In this new formulation, rights that comported with Footnote Four—notably excluding the right to make economic use of private property—would be deemed *fundamental rights*.[50] State actions that potentially infringed on one of these designated fundamental rights would henceforth be reviewed with heightened scrutiny—whether *strict* or *intermediate*—meaning that the Court would begin its inquiry with the presumption that the government action at issue was unconstitutional.[51] In strict scrutiny cases, dealing with rights the Court decided were fundamental, the Court would uphold a government action only if the government could prove the action was "narrowly tailored," by using the least restrictive means possible, to achieve a "compelling" government interest.[52] In intermediate scrutiny cases, now typically involving gender discrimination, the government had the burden of proving its action was "substantially related" to an "important" government interest.[53]

Under this new framework, however, *economic* rights like property rights were reviewed under a *rational basis* standard.[54] Unlike strict and intermediate scrutiny cases, rational basis review placed the burden on the citizen to show that the government had violated the Constitution.[55] To have its act upheld, the government need only show that it acted in a manner *rationally related* to a legitimate state interest. The government would not have to show that its statute or regulation *actually* furthered a legitimate state interest. Anything that could rationally be explained as such would suffice. Not surprisingly, courts have accepted almost any argument to this end, justifying the lack of judicial scrutiny with a professed deference to the legislative process conspicuously

48. *Id*. at 152 n.4.
49. GEORGE ORWELL, ANIMAL FARM (1st Amer. ed., New York, Harcourt, Brace 1946).
50. *See, e.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995).
51. *See id.* at 224.
52. *See id.* at 227.
53. *See, e.g.*, Craig v. Boren, 429 U.S. 190, 197 (1976).
54. *See* Kelo v. City of New London, 545 U.S. 469, 487-88 (2005).
55. *See id.*

absent in other constitutional cases.[56] As the *Kelo* Court put it, in a notably self-congratulatory manner, "[f]or more than a century, our public use jurisprudence has wisely eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power."[57]

At its inception this was a new rule, in form and in substance, that derived absolutely no authority from the Constitution or the Bill of Rights. Indeed, "[i]t is hard to square this subordination of property rights with either the express views of the Framers or the language of the Constitution and Bill of Rights."[58] As Ely notes, "the reduced status of property rights well served the political agenda of the New Deal,"[59] resulting in an artificial division of rights that Epstein has called "perverse and perhaps odious."[60]

This division manifested itself quickly in cases involving the taking of private property via eminent domain. As noted above, the view of property rights that predominated in early America had begun to wane at the turn of the century.[61] Still, courts had remained relatively firm in requiring a legitimate public use before allowing private property to be taken. As the New Deal took hold, however, "[t]he constitutional norm of 'public use' was increasingly equated with the more expansive concept of 'public benefit' or 'interest.'"[62] Ely notes that as early as 1949, the *Yale Law Journal* published a piece wherein "one commentator declared that the doctrine of 'public use' was virtually dead."[63]

The deathblow was officially struck in 1954, when the Supreme Court held in *Berman v. Parker* that a taking via eminent domain was constitutional even when the property was promptly handed over to a private developer for the purpose of general urban construction.[64] Using the rational basis test, the Court functionally ignored the Constitution's public-use restriction, spending more time denigrating its own role in reviewing a government's power to take property through eminent domain. Famously, the Court held that "when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive."[65] Thirty years later, in

56. *See id.*
57. *Id.* at 483.
58. Ely, *supra* note 1, at 46.
59. *Id.*
60. Richard A. Epstein, *The Indivisibility of Liberty Under the Bill of Rights*, 15 HARV. J.L. & PUB. POL'Y 35, 35 (1992).
61. Ely, *supra* note 1, at 55.
62. *Id.*
63. *Id.* (quoting Comment, *The Public Use Limitation on Eminent Domain An Advance Requiem*, 58 YALE L.J. 599 (1949)).
64. Berman v. Parker, 348 U.S. 26, 32 (1954).
65. *Id.*

Hawaii Housing Authority v. Midkiff, the Court held similarly, again deferring to the government's assertion of public use (now requiring only a "public purpose") using the rational basis test.[66] Any meaningful restriction on a government's ability to condemn private property was functionally dead at the federal level, and in most states.[67] Lost in the outrage over *Kelo* was that it said nothing new; it merely reaffirmed the way things had been for over half a century.

III. THE CASE FOR INDIVISIBLE LIBERTY[68]

A. "Seriously Awry"

"There is no substitute for judicial focus on . . . the 'large job' of determining the limits of government action."[69] This reality, when combined with the frankly brazen manner in which Progressivism quickly demoted property rights to the minor leagues of constitutional protections, has led many prominent modern jurists to amazed frustration over takings law's place in the scrutiny hierarchy. The underlying thesis of these observations is always the same: there is nothing in the text of the Constitution and the Bill of Rights, nor in the records of the men who debated and authored and ratified these documents, to recommend the striated-scrutiny framework that governs modern constitutional property law.

Writing for the Supreme Court in the 1994 regulatory takings case of *Dolan v. City of Tigard*, Chief Justice William Rehnquist commented plainly that "[w]e see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation . . . ."[70] Employing a related, yet more colorful, analogy, Judge Alex Kozinski, dissenting from a Ninth Circuit opinion in 2003, wrote that "[i]t is wrong to use some constitutional provisions as springboards for major social change while treating others like senile relatives to be cooped up in a nursing home until they quit annoying us."[71]

The most celebrated recent judicial questioning of the scrutiny system, and of eminent domain law's status within it, is Justice Clarence Thomas's dissent from the decision in *Kelo*.[72] Beginning

66. Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 241 (1984).

67. For a discussion of states varying from the federal baseline, see *infra* Part III.

68. *See* Epstein, *supra* note 60, at 35.

69. Timothy Sandefur, *A Gleeful Obituary for* Poletown Neighborhood Council v. Detroit, 28 HARV. J.L. & PUB. POL'Y 651, 670-71 (2005).

70. Dolan v. City of Tigard, 512 U.S. 374, 392 (1994).

71. Silviera v. Lockyer, 328 F.3d 567, 568 (9th Cir. 2003) (Kozinski, C.J., dissenting).

72. Kelo v. City of New London, 545 U.S. 469, 505 (2005) (Thomas, J., dissenting).

with a quote from Blackstone evidencing the importance of the public use restriction in the political philosophies of the Framers of the Constitution,[73] Justice Thomas proceeds to chronicle the history of the Takings Clause in American jurisprudence, lamenting that the *Kelo* decision "has erased . . . [it] from our Constitution."[74]

What appears to animate Justice Thomas's palpable frustration with the *Kelo* decision is the Court's admitted abdication of any serious review of the constitutional validity of the condemnation at issue. Thomas writes, "[i]n my view, it is imperative that the Court maintain absolute fidelity to the Clause's express limit on the power of the government over the individual, no less than with every other liberty expressly enumerated in the Fifth Amendment or the Bill of Rights more generally."[75] Justice Thomas notes that the Court would not defer to legislative findings of constitutionality were any other enumerated right at issue and that such has no roots whatsoever in the Constitution's text. He writes that:

> [T]here is no justification . . . for affording almost insurmountable deference to legislative conclusions that a use serves a 'public use.' . . . [I]t is most implausible that the Framers intended to defer to legislatures as to what satisfies the Public Use Clause, uniquely among all the express provisions of the Bill of Rights.[76]

Thomas furthers his dissent in even stronger words, first noting that "it is backwards" for the Court to apply strict scrutiny where "nontraditional property interests, such as welfare benefits" are at issue, while allowing legislatures a virtual free pass when it comes to real property.[77] Concluding that "[s]omething has gone seriously awry with this Court's interpretation of the Constitution,"[78] Thomas finally takes aim at *Carolene Products* and Footnote Four:

> If ever there were justification for intrusive judicial review of constitutional provisions that protect 'discrete and insular minorities,' surely that principle would apply with great force to the powerless groups and individuals the Public Use Clause protects. The deferential standard this

73. *Id*. at 505.
74. *Id*. at 506.
75. *Id*. at 507 (citations and internal quotation omitted).
76. *Id*. at 517-18.
77. *Id*. at 518 (citations omitted).
78. *Id*.

> Court has adopted for the Public Use Clause is therefore deeply perverse. It encourages 'those citizens with disproportionate influence and power in the political process, including large corporations and development firms,' to victimize the weak.[79]

Thomas's *Kelo* dissent is a nearly perfect summary of the objections to a hierarchy of levels of constitutional scrutiny with eminent domain cases stuck squarely on the bottom. His appeal to originalist analysis also highlights the fact that few proponents of that hierarchy make any attempt to square their preferences with the Constitution's text. Instead, facilitated by the divorce from Constitutional originalism and textualism effected by Progressivism's open hostility for the Constitution itself, these scholars and commentators advance arguments rooted nearly entirely in political economy.[80]

B. Public Choice and Eminent Domain

The idea that *economic liberties* like property rights are sufficiently protected by the political process, and so do not require strong judicial protection, is the lynchpin of post-Progressive rationalizations for rational basis review.[81] But, to borrow a phrase, the argument does not survive even the most cursory of scrutiny in eminent domain law. To begin, even the quite politically powerful and connected are at risk of having their property seized where government finds it convenient. In *Midkiff*, for example, the property owners whose land was taken are described by the Court as a "land oligopoly" that lorded over the State of Hawaii.[82] This wealth and influence did nothing to save the owners' property.

The impotence of even the most powerful under modern eminent domain law illustrates the folly of assertions that the political process is a sufficient guarantor of property rights. It is much worse, even, for the poor, who are virtually powerless to do anything if the government wants their property to give to someone else. This truth is revealed by any study of eminent domain statistics, and further by common sense and observation. As Professor Ilya Somin of the George Mason Law School writes in dismissing

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79. *Id*. at 521-22 (citations omitted).

80. *Contra* Steven Semeraro, *Sweet Land of Property?: The History, Symbols, Rhetoric, and Theory Behind the Ordering of the Rights to Liberty and Property in the Constitutional Lexicon*, 60 S.C. L. REV. 1 (2008) (turning to the writing of Locke and the Founders to argue on enemy ground, so to speak, that a division between property and liberty, indeed, is warranted).

81. *See, e.g.,* Kelo*,* 545 U.S. 469, 488 (2005).

82. Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 242 (1984).

the political process as a protector of property rights, nearly every one of the major modern eminent domain cases, including *Kelo* itself, involved "the poor and other politically weak groups," precisely because "most of those targeted for condemnation lack the political influence to fend for themselves effectively."[83]

Somin also observes that even were these owners able to effectively protect themselves politically, that is no reason for the judiciary to abandon them. The courts' rationale for leaving property rights to the political process is exposed as faulty, if not entirely disingenuous, by their treatment of other rights possessed by some of the most powerful entities in American life. Somin writes, for example, that:

> [T]he First Amendment's Free Speech Clause protects major media organizations such as CNN and the *New York Times* despite the fact that these firms have tremendous political influence. Nonetheless, the Court has protected the *Times* in several major First Amendment cases and has not applied a more deferential standard of review merely because the *Times* and other major media outlets can usually protect themselves in the political process.[84]

The reality of the political process is that those most likely to benefit from private economic takings, to the detriment of average property owners, are actors with the *most* political influence. In such cases, the less powerful a property owner is, the less likely it is that his constitutional rights will be validated in the political realm. The real world, therefore, demonstrates the precise opposite of the supposition underlying courts' current treatment of property rights. It is not the Silent Man who is able to convince a councilman, commissioner, mayor, or congressman to take private property and turn it over to him. Thus, detractors like Justice Thomas do have an entirely pragmatic case to make when seeking to overturn the scrutiny regime's relegation of eminent domain cases. As Thomas himself noted, it is tough to imagine a situation where Footnote Four's own rationale is more applicable than in the realm of eminent domain.[85]

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83. Ilya Somin, *Taking Property Rights Seriously? The Supreme Court and the "Poor Relation" of Constitutional Law*, U. PA. PRESS (forthcoming) (manuscript at 28-29), *available at* http://ssrn.com/abstract=1247854.

84. *Id*. at 29-30 (citation omitted).

85. *Kelo*, 545 U.S. at 521-22 (Thomas, J., dissenting).

Public choice theory, for which James Buchanan won the 1986 Nobel Prize in economics,[86] synthesizes the perspectives of the potentially targeted property owner and the private party seeking to use the government to transfer the owner's property to himself.[87] At its core an analysis of the incentives that drive both individual and collective decision-making, public choice theory explains why individual landowners are at such a disadvantage when it comes to having their interests represented by their elected officials vis-à-vis eminent domain. More than any other analytical framework, public choice theory illustrates why "[t]he idealized view of planning bodies working tirelessly for the public good badly misses" the real state of affairs,[88] which is that a government decision to take property is "a good that is bought and sold like any other."[89]

The central insight of public choice theory is that all parties involved in the legislative process are acting in their own self-interest. It rejects models of public decision-making that focus, as Buchanan and Gordon Tulloch write in their seminal work *The Calculus of Consent*, on "a mystical general will that is derived independently of the decision-making process in which the political choices made by the separate individuals are controlling."[90] Because individual wills and motives are what drive public policy, "certain rules will allow certain members of the group to use the structure to obtain differential advantage."[91] The self-interests vary according to party, with legislators affording preferential treatment to actors who can help the politician remain in office and those actors focusing their resources on the legislators who can do the most to further their own private aims.[92]

Though Buchanan and Tulloch published *The Calculus of Consent* in 1962, focus on self-interest in public policy making is considerably older. As Mancur Olson writes in his similarly influential, and like-themed, *The Logic of Collective Action*, observation that group institutions, including political bodies, are fueled by the self-interest of their individual members "goes back at least to Ar-

86. Press Release, The Royal Swedish Academy of Sciences, This Year's Economics Prize Awarded for a Synthesis of Theories of Political and Economic Decision-Making (Public Choice) (Oct. 16, 1986), *available at* http://nobelprize.org/nobel_prizes/economics/laureates/1986/press.html.

87. JAMES M. BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY (1965).

88. EPSTEIN, *supra* note 7, at 76.

89. Daniel A. Lyons, *Public Use, Public Choice, and the Urban Growth Machine: Competing Political Economies of Takings Law*, 42 U. MICH. J.L. REFORM 265, 267 (2009).

90. BUCHANAN & TULLOCH, *supra* note 87, at 12.

91. *Id*. at 13.

92. Lyons, *supra* note 89, at 276.

istotle."[93] Indeed, this insight was a main impetus for the Constitution's focus on federalism and divided powers designed to thwart the interests of any single actor at the expense of others, addressed most famously by Madison in *The Federalist No. 10*.[94]

The cycle of self-interested tradeoffs, fueled by private actors looking to capture public policy makers, is known in public choice theory as rent-seeking. As Buchanan and Tulloch explain, rent-seeking is effective for the seeker because the benefits of any government action are likely to inure to a few interested actors, while any negative externalities are diffused across the populace.[95] The transaction is rational for the beneficiary, of course, but also from the viewpoints of the public official and the public, as well. As the authors explain:

> The public officials comply because they benefit personally from the resources spent on lobbying, while the costs of the legislation are borne by the public as a whole rather than the policymakers themselves. And the taxpayers remain rationally ignorant of the transaction: in most cases, the cost of the legislation to the individual taxpayer is less than the alternative cost of researching the legislation and fighting it.[96]

As Daniel A. Lyons notes, public choice theory and its focus on rent-seeking seem "ill-suited" to explain eminent domain at first glance.[97] That a property owner will have his home or business taken in an eminent domain proceeding would appear to defy the concentrated-benefits/diffused-externalities dichotomy that underlies public choice. Yet Lyons observes two factors that mitigate this seeming lack of congruence. First, because the taking requires just compensation, the negative impacts of the taking are spread among the property owner—who is at least partially assuaged—and the "broad range of rationally ignorant taxpayers" whose funds are being used to pay for the taking.[98] More importantly, the property owner knows the odds are stacked against him politically. The owner is almost certainly a party without any political access, or his property would not have been targeted by the government to

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93. MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS 6 (17th ed. 1998) (1965).

94. James Madison, The Federalist No. 10*, in* THE FEDERALIST PAPERS 47 (Ian Shapiro ed. & intro., Yale University Press 2009).

95. BUCHANAN & TULLOCH, *supra* note 87, at 286-89.

96. Lyons, *supra* note 89, at 277.

97. *Id*. at 278.

98. *Id*.

begin with.[99] If he tries to even the odds by rallying concerned citizens, he runs into the common problems of costs and organization that daunt all collective actions.[100]

Daniel B. Kelly, writing in the *Cornell Law Review*, similarly confronts, and dismisses, claims that public choice theory is inapplicable in eminent domain cases: "Indeed, because private parties can use eminent domain to obtain a relatively concentrated benefit, these parties have an incentive to use inordinate influence to achieve their private objectives through condemnations."[101] Kelly further notes several other public choice reasons why "the broader political check against the private use of eminent domain is relatively ineffective," including that the private parties seeking the takings typically have repeat business before the political bodies, giving them advantages in the process.[102] These advantages include the experience gleaned from prior, similar efforts, as well as the reputational advantage of being known to lawmakers as actors who can be relied on to pay their rent.[103] When added to the reality that the owners of the property being taken almost never have the resources to compete with the parties seeking condemnation, even if they wanted to, public choice theory goes a long way toward explaining why the political process is so poor a protector against eminent domain for private purposes.[104]

That is not the whole explanation, though. As if the prospects of government officials being captured by developers eying one's property were not daunting enough, property owners can be squeezed from the opposite end of the spectrum as well. As William Fischel has written, the chances for an opposite, but related, scenario also leave eminent domain abuse largely unprotected by the political process.[105] Most takings of private property are effected by local governments, not those at the state or national level. But, as Fischel notes, it is at the local government level that pure majoritarian preferences are most likely to be manifest into actual policy.[106] Fischel writes, in the context of land use regulations, that:

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99. *But see* Haw. Hous. Auth. v. Midkiff, 467 U.S. 229 (1984).

100. Lyons, *supra* note 89, at 279.

101. 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 (2006).

102. *Id*. at 36.

103. Lyons, *supra* note 89, at 277-78.

104. For a classic examination of these issues in specific relation to constitutional law and the various scrutiny tests, see Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689 (1984).

105. *See* William A. Fischel, *Introduction: Utilitarian Balancing and Formalism in Takings*, 88 COLUM. L. REV. 1581 (1988).

106. *Id*. at 1582.

> Local governments are more prone to majoritarianism than other levels of government because they usually lack the electoral diversity that comes with large land area and large population and because, as derivative governments, they also lack the other constitutional checks on the will of the majority, such as bicameral legislatures and separation of powers.[107]

Because majorities of voters in a jurisdiction may well benefit from the taking of property for private economic purposes such as a shopping center or amusement park, targeted property owners are at the mercy not just of the influential special interest, but also of the voting majority as well. Under our Constitution, as drafted, the judiciary was to serve as a bulwark to protect the individual property owner from such overreaching by self-interested majorities. But as has been recounted above, America's courts long ago abandoned their counter-majoritarian role when dealing with eminent domain.[108]

IV. EMINENT DOMAIN AFTER *KELO*

*A. Post-*Kelo *Political Reforms*

The public's common wisdom after *Kelo* probably is that most states have taken steps to fix the Supreme Court's error. In a few states, this wisdom would be correct, for their legislatures, and sometimes the voters themselves, have enacted measures that offer genuine protection against eminent domain abuse. In most cases, though, the facade of reform is empty, and citizens are no better off than they were on the day *Kelo* was decided. Politicians and interest groups who see private property rights as a nuisance interfering with their plans for society largely have accomplished their goal of passing sham reforms to placate the angry masses while continuing business as usual.

Prior to the summer of 2005, eminent domain was rarely a topic of conversation among even the most politically astute of citizens. This quickly changed with the Supreme Court's decision in *Kelo*. For a time, television news programs ran stories detailing

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107. *Id*. It must be noted that only after the Michigan Supreme Court's 2004 invalidation of a private taking, see *infra* Part III, did Fischel seek to apply the greater scrutiny he argued was needed for local government land-use regulations to traditional eminent domain actions as well. *See* William A. Fischel, *The Political Economy of Public Use in Poletown: How Federal Grants Encourage Excessive Use of Eminent Domain*, 2004 MICH. ST. L. REV. 929 (2004).

108. *See supr*a notes 40-41 and accompanying text.

the public outrage over the decision. Political commentators sought property rights experts for point-counterpoint segments regarding *Kelo*, although public supporters of the decision were few.[109] Editorials and magazine articles expressed popular outrage at the idea that a person's property can be condemned and transferred to another private party for development and private profit.[110]

Opinion polls showed as much as a 90 percent public disapproval for the *Kelo* decision.[111] Shortly after the public outrage became too dominant to ignore, the United States House of Representatives passed a resolution, by an overwhelming vote of 365-33, expressing their grave disapproval regarding the majority opinion of the Supreme Court.[112] How could it have been that eminent domain used in this manner—a practice that 90 percent of Americans disagreed with and 90 percent of Congressmen (at least publically) condemned—was so prevalent in our country? Prior to *Kelo*, the answer was simple: the public largely did not know what eminent domain was, and it behooved politicians to keep it that way.

After *Kelo*, the public became all too aware of eminent domain, and the post-*Kelo* backlash was too strong for politicians to ignore. The result was the adoption of eminent domain reform in nearly every state in the country. Forty-two states have passed eminent domain reform legislation since 2005.[113] Much of this legislation, however, has resulted in little improvement in the security of private property rights. A disappointing amount of reform legislation was nothing more than disingenuous political posturing designed to quell public anger, while providing easy loopholes for governments to transfer property from one private entity to another.[114] The primary mechanism for this duplicity was the blight exception.

Under the "blight" laws of most states, the eminent domain process begins when local governments first identify a "'deteriorating' or economically underperforming neighborhood," then seek out

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109. *See* Ilya Somin, *Controlling the Grasping Hand: Economic Development Takings After Kelo*, 15 SUP. CT. ECON. REV. 183, 244-45 (2007).

110. *See, e.g.*, Paul Craig Roberts, *The Kelo Calamity*, WASHINGTON TIMES, Aug. 6, 2005, *available at* http://www.washingtontimes.com/news/2005/aug/06/20050806-095515-2565r/ (last updated Aug. 7, 2005).

111. Richey, *supra* note 4.

112. *Expressing the Grave Disapproval of the House of Representatives Regarding the Majority Opinion of the Supreme Court in the Case of Kelo et. al. v. City of New London et. al. That Nullifies the Protections of Private Property Owners in the Takings Clause of the Fifth Amendment*, H.R. Res. 340, 109th Cong. (2005).

113. *See 50 State Report Card: Tracking Eminent Domain Reform Legislation Since* Kelo, http://www.castlecoalition.org/in-dex.php?option=com_content&task=view&id=2412&Itemid=129 (last visited Mar. 11, 2011) [hereinafter *50 State Report Card*].

114. Timothy Sandefur, *The "Backlash" So Far: Will Americans Get Meaningful Eminent Domain Reform?*, 2006 MICH ST. L. REV. 709, 721-26 (2006).

a developer and offer incentives to encourage new development projects in the area.[115] Subsequently, a private consulting firm undertakes a fact-finding study whereby it investigates and files a report on whether the area in question is blighted in accordance with state law.[116]

This process is problematic for two reasons. First, the economic entanglement between the consulting firm and local government creates an incentive for the fact-finding study to forgo due diligence in favor of telling the government what it wants to hear.[117] Second, the statutory definition of *blight* in most states is so broad that literally any swath of property can fall within its scope.[118] Vague criteria such as inadequate size, incompatible use, and irregular shape create a situation where any property can be classified as blighted in order to make way for a new development with the hopes of generating higher tax revenue.

Even after the *Kelo* backlash, many of the states that enacted new eminent domain legislation failed to substantively change the level of protection for property owners, because blight exceptions remained intact.[119] Beyond blight, many states enacted legislation that sounded appealingly strong to outraged property owners, but in reality was laced with easily exploitable loopholes for local governments. For example, while Texas's new eminent domain statute[120] seems to prevent the type of private-to-private land transfers that enrage the public, in reality these transfers can be completed if the private benefit also serves a public use.[121] Other states made nothing more than symbolic efforts to placate their citizens. Missouri, for example, amended its eminent domain statute to prohibit the taking of property for solely economic development purposes, but did nothing to stop takings where any putative public purpose, no matter how remote, could be cited.[122] Likewise, Del-

115. *Id*. at 722.

116. *Id*.

117. *See id*. (describing the practice of "windshield surveys," where the hired consultant does not even leave the car in a drive-by study that results in a neighborhood being deemed blighted).

118. *See, e.g.,* Wendell E. Pritchett, *The "Public Menace" of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 YALE L. & POL'Y REV. 1 (2003).

119. According to Castle Coalition, twenty-two of the states that enacted post-*Kelo* legislation failed to create any substantive eminent domain reform. *50 State Report Card, supra* note 113.

120. The Texas statute prevents condemnations if the taking "(1) confers a private benefit on a particular private party through the use of the property; (2) is for a public use that is merely a pretext to confer a private benefit on a particular private party; or (3) is for economic development purposes, unless the economic development is a secondary purpose resulting from municipal community development or municipal urban renewal activities to eliminate an existing affirmative harm on society from slum or blighted areas. . . ." 10 TEX. GOV'T. CODE ANN. § 2206.001(b) (2005).

121. Somin, *supra* note 109, at 250-51.

122. *See* MO. ANN. STAT. § 523.271(1) (2009).

aware passed a perplexing bill that merely prevents takings that are not for a "recognized public use."[123] This standard is at best a restatement of the rule endorsed by the *Kelo* Court.[124]

Even in states that have enacted substantive eminent domain reform,[125] the legislative intent of these measures stands in constant danger of being undermined by self-interested local governments and a judiciary that has crippled itself with rational basis review. As detailed above, the political process simply is not adequate to be the sole guardian against eminent domain abuse. The failure of symbolic attempts at eminent domain reform signals an alarming degree of public ignorance regarding governmental takings and legislative unwillingness to address the problem in a meaningful way.[126] More importantly, the failure of even the most legitimate post-*Kelo* reformations is evidence of the need for judicial action.

B. Case Study: Ohio

Despite the nearly frenzied spate of post-*Kelo* political reforms, perhaps the development most hailed by legal observers seeking to cabin eminent domain abuse was not a law, but a court decision. In 2006, the Ohio Supreme Court held in the case of *Norwood v. Horney* that Ohio courts must apply heightened scrutiny when reviewing statutes that regulate the use of eminent domain powers.[127] The *Norwood* court then struck a blow against not just the specific issues of eminent domain and public use, but against the overall scrutiny framework as well. A detailed retelling of the *Norwood* story is a prime illustration of exactly why, in tangible terms, something more than rational basis review is needed to protect landowners against the labyrinthine process that often leads to abuse of the eminent domain power.

The facts of *Norwood* are not dissimilar from the dozens of other notorious eminent domain cases regularly cited by land use scholars. The city of Norwood was a once-flourishing municipality located just outside of Cincinnati.[128] Due to job loss and industry erosion, however, the city dramatically suffered both economically and aesthetically.[129] Partially responsible for the physical degrada-

123. 29 DEL. CODE § 9505(15) (2010).

124. Somin, *supra* note 109, at 248.

125. *See, e.g.,* FLA. STAT. § 73.021; FLA. STAT. § 73.014 (2010) (explicitly prohibits takings designed to eliminate blighted neighborhoods); FLA. STAT. § 73.013 (2010) (requiring a ten-year waiting period for all private to private land transfers).

126. Somin, *supra* note 109, at 260.

127. Norwood v. Horney, 853 N.E.2d 1115, 1143 (Ohio 2006).

128. *Id*. at 1123-24.

129. *Id*. at 1124.

tion of Norwood was the 1960 appropriation of neighborhood property for use in the construction of a major highway.[130] The new highway resulted in busier roads, dead-end streets, and a transformation from predominantly residential land into largely commercial properties.[131]

Joseph Horney and his wife were former residents of Norwood who owned and operated rental properties in the neighborhood.[132] After the neighborhood makeover, a private company, Rookwood Partners, began discussions with Norwood about redeveloping the Horney's neighborhood.[133] The plan was to generate revenue by acquiring private homes and businesses and replacing them with new apartments and retail space.[134]

Although Norwood initially resisted the allure of acquiring the necessary private land through eminent domain, the city began the takings process after Rookwood was unsuccessful in assembling its required parcels.[135] In order to lawfully acquire the private land through eminent domain, an urban-renewal study had to be completed in order to determine if the neighborhood was "deteriorated" or "deteriorating" as described in the Norwood Code.[136] Using funds provided by Rockwood, the very company which had an economic interest in acquiring the private property, Norwood contracted with another private entity to complete the urban-renewal study.[137] The study determined that although many homes in the neighborhood were in good condition, the neighborhood did meet the definition of "deteriorating area" as defined in the Norwood Code.[138]

After Norwood filed complaints against the property owners who refused to sell their land, a trial court determined that although the urban-renewal study committed such egregious errors as counting negative factors—those that denigrate the property and thus tilt in favor of condemnation—twice, and including factors that are not supposed to be considered, a dedication to rational basis review precluded the court from stopping Norwood's eminent domain plans.[139] Quite simply, the court was not going to second-guess a local government's eminent domain decision, no matter how flawed the government's first guess might have been.

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130. *Id.* at 1124.
131. *Id.*
132. *Id.* at 1124, n.3.
133. *Id.* at 1121.
134. *Id.* at 1124.
135. *Id.* at 1124-25.
136. *Id.* at 1125 & n.5.
137. *Id.* at 1125.
138. *Id.* at 1125 & n.5.
139. *Id.* at 1126-27.

On appeal, the Ohio Supreme Court supported the lower court's fact-finding, but overturned its decision to allow the taking to go forward.[140] The opinion cited the constraints "of prior cases, stating that judicial review of appropriations is limited and must be deferential to the municipality" as imprudent and unfair.[141] The court continued by stating that absolute deference to a city is a functionally worthless judicial standard, unsupported by legal history, practical reality, and proper respect for the role of the judiciary and the separation of powers. The court recognized that the traditional deference given to municipalities in takings cases does not preclude future courts from establishing a pattern of heightened scrutiny in certain instances,[142] and described the judiciary's function as ensuring that the legislature's exercise of power is not beyond the scope of its authority.[143]

The *Norwood* decision comported entirely with both common sense and with the concept of judicial review of eminent domain that prevailed in America until the Progressive Era. To be sure, the *Norwood* court exercised nothing like a usurping of the legislature's role; rather, the court merely fulfilled its own role as a check against unfettered majority rule. Yet so accustomed were legal observers to a rule of blind deference to government decisions to take property that the decision caused a stir, particularly among commentators philosophically sympathetic to the type of "how-did-we-get-here?" bemusement represented by Justice Thomas's dissent in *Kelo*. Ilya Somin, writing on *The Volokh Conspiracy* (the most prominent libertarian-oriented legal website on the Internet), hailed the decision as "[a] [m]ajor [v]ictory for [p]roperty [r]ights," noting that *Norwood* made Ohio the first state to require heightened scrutiny of *all* uses of eminent domain, not just those involving transfers to private parties.[144]

C. Case Study: Florida

Perhaps without realizing it, the Florida Supreme Court has come very close to making the same choice as the Ohio Supreme Court in applying something more than rational basis review to the taking of private property.

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140. *Id*. at 1136-42.
141. *Id*. at 1136.
142. *Id*. at 1137.
143. *Id*. at 1138.
144. Ilya Somin, *The Ohio Supreme Court's Decision in* Norwood v. Horney*—A Major Victory for Property* Right, VOLOKH CONSPIRACY (July 26, 2006), http://volokh.com/archives/archive_2006_07_23-2006_07_29.shtml#1153959401.

Florida's courts long ago recognized the dangers of leaving elected officials as the final arbiter of the constitutional propriety of their own eminent domain decisions.[145] The Florida Supreme Court has, on numerous occasions, noted that the power to take private property is circumscribed by the state constitution, and by statute, in order to safeguard the individual's property rights. In 1947, the court explicitly tied these restrictions on the takings power to the judiciary's role in protecting property rights, writing that eminent domain "is one of the most harsh proceedings known to the law, [and] consequently . . . a strict construction will be given against the agency asserting the power."[146]

This type of judicial energy is a regular feature of the Florida Supreme Court's jurisprudence, where a fairly robust understanding of the court's power relative to federal law is employed. The court summarized its conception of the relationship between federal and state jurisprudence in a criminal case in 1992:

> Under our federalist system of government, states may place more rigorous restraints on government intrusion than the federal charter imposes; they may not, however, place more restrictions on the fundamental rights of their citizens than the federal Constitution permits. . . . In any given state, the federal Constitution thus represents the floor for basic freedoms; the state constitution, the ceiling.[147]

Therefore, where the Florida Constitution (and, not insignificantly, the Florida Supreme Court's interpretation of it) protects a given "fundamental right" to a greater extent than does the federal Constitution (and the United States Supreme Court's interpretation of it), Florida's citizens may avail themselves of that greater protection. This, of course, is not a novel analysis of America's federalist system, but it is important both for its elucidation by a state court, in a modern era, witnessing the federal government's relentless expansion, and, for purposes of scrutiny analysis, for its explicit reference to fundamental rights.

In Florida's courts, as in federal courts, state action is subject to strict scrutiny when it "impinges upon a fundamental right ex-

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145. *See, e.g.,* Wilton v. St. Johns County, 123 So. 527, 535 (Fla. 1929); City of Lakeland v. Bunch, 293 So. 2d 66, 68 (Fla. 1974) (stating that whether a taking of private property is necessary is "ultimately a judicial question for the courts").

146. Peavy-Wilson Lumber Co. v. Brevard County, 31 So. 2d 483, 485 (Fla. 1947).

147. Traylor v. State, 596 So. 2d 957, 961-62 (Fla. 1992).

plicitly or implicitly protected by the constitution."[148] Where Florida's formulation of strict scrutiny, with respect to property rights, deviates from that of the federal judiciary is that in Florida, the right to own and be secure in one's property unquestionably and explicitly is one of the "fundamental rights" deserving the utmost judicial protection. This is because the Florida Constitution, itself, recognizes property rights, as such, in no fewer than four places. Article I, Section 2, which enumerates (and is entitled) "Basic [R]ights," declares:

> All natural persons, female and male alike, are equal before the law and have inalienable rights, among which are the right to enjoy and defend life and liberty, to pursue happiness, to be rewarded for industry, and to acquire, possess, *and protect* property.[149]

In order to ensure that the rule of law governs the abrogation of this Basic Right, Article I, Section 9, requires that "[n]o person shall be deprived of life, liberty[,] or property without due process of law . . . ."[150] Article 10, Section 6, establishes concrete limitations on the government's power to take private property: "No private property shall be taken except for a public purpose and with full compensation therefor paid to each owner . . . ."[151]

Finally, Florida has enshrined in its constitution eminent domain restrictions, including the elimination of *Kelo*-style takings of property for transfer to private parties, that likely amount to the strongest in the nation.[152]

At the confluence of these citations to property rights as crucial, basic, or fundamental to liberty and to the orderly operation of the state is a 1975 Florida Supreme Court opinion that, perhaps unintentionally, applied heightened scrutiny to a governmental eminent domain action. In the seminal case of *Baycol, Inc. v. Downtown Development Authority*, the City of Fort Lauderdale initiated eminent domain proceedings against private property owners.[153] The Florida Supreme Court, strictly reviewing the taking, looked behind the City's assertions of public purpose and necessity.[154] In undertaking this strict examination, the court found that the City's assertion of necessity—arguing that once other property

148. Perkins v. State, 576 So. 2d 1310, 1314 (Fla. 1991) (Kogan, J., specially concurring) (citation omitted).

149. FLA. CONST. art. I, § 2 (1968) (emphasis added).

150. FLA. CONST. art. I, § 9 (1998).

151. FLA. CONST. art. X, § 6(a) (2006).

152. FLA. CONST. art. X, § 6(c) (2006).

153. Baycol, Inc. v. Downtown Dev. Auth., 315 So. 2d 451, 452-53 (Fla. 1975).

154. *Id*. at 457-58.

was taken and redeveloped, the property at issue in *Baycol* would be needed for parking to service it—was insufficient to warrant the taking.[155] More importantly, the court rejected the City's claim that the property was needed for the public purposes of relieving traffic problems and upgrading public utilities.[156] Instead, the court found that the City had failed to meet its burden—crucially, the onus was on the City to prove constitutionality—and held that the true primary purpose of the action was to benefit a private developer.[157] As such, the taking failed to pass constitutional muster and was invalidated.[158]

Baycol is notable for two reasons. The first is that more than thirty years after it was decided, it still is the most widely cited case for the fundamentals of Florida's eminent domain law (though this presumably will change as Florida's post-*Kelo* eminent domain restrictions take root).[159] No decision ever has cabined its holding or the rationale the court used to reach it, let alone rejected the court's method of analysis. The second reason is that the standard of review mandated by *Baycol* tracks almost identically the traditional strict scrutiny formulation courts employ to review government acts that threaten fundamental rights.

The primary source for this overlay is Florida's recognition of security in property as a fundamental right. As noted in Part I above, the modern scrutiny framework is dictated almost entirely by the "type" of right at issue, and at that, by whether the right is one classified as "fundamental." With the federal courts' relegation of property rights to a status of something less than fundamental, strict scrutiny does not attach. But, owing to the Florida Supreme Court's conception of federalism and, most importantly, to the Florida Constitution's explicit assignment of fundamental status to certain property rights, owners with property sought for taking by eminent domain in Florida are not so handicapped.

Since the right to protect one's property in Florida is a basic right, there is no reason why the state's courts should not review the government's infringement upon this right with heightened scrutiny. The *Baycol* court appears to have recognized this, writing that "the private ownership and possession of property was one of the great rights preserved in our constitution and for which our forefathers fought and died; it must be jealously preserved within

155. *Id*.
156. *Id*. at 458-59.
157. *Id*. at 458.
158. *Id*.
159. For a recent example, see Rukab v. City of Jacksonville Beach, 811 So. 2d 727, 730-31 (Fla. 1st DCA 2002).

the reasonable limits prescribed by law."[160] This language looks to be something more than mere dicta, for the *Baycol* court backed up its pronouncement by placing the burden on the condemning agency to prove the validity of its action, thereby rejecting anything like a rational basis review.[161] This burden shifting, of course, is a key feature of traditional strict scrutiny analysis; where a fundamental right is involved, it is decidedly not the responsibility of the party challenging a state action to establish its invalidity.[162]

So too does the necessity requirement explained in *Baycol* have a distinct parallel in the "necessary and narrow" means needed to pass strict scrutiny; indeed, the two share not only the same intent—to limit as much as possible government's exercise of power that threatens guaranteed rights—but the same basic verbiage. *Baycol*'s "predominant public use" requirement reflects the "compelling government interest" that also must be proven under strict scrutiny. That is, like the *Baycol* court, courts reviewing government actions with strict scrutiny are clear that fundamental rights may be infringed upon only when the most extraordinary of public interests are at issue.

Despite this tracking of strict scrutiny analysis, neither the *Baycol* court, nor any of the various Florida appellate and trial courts that have applied its holding, ever has explicitly maintained that it was applying traditional strict scrutiny to a taking of private property. It may be that despite the Florida Supreme Court's stated adherence to a strong federalism, the court is reluctant to make official a formal change to the overall scrutiny framework that has governed in most American jurisdictions (and, chiefly, the federal ones) since the New Deal.

While some might argue that such a spelling-out would be superfluous, and that the mechanics are what matter, Florida's courts indeed would do well for themselves and for Florida's citizens to make clear what they are doing. Primarily, this step is needed because in its absence, lower courts in Florida (and even descendents of the *Baycol* court in Tallahassee) have been consistently inconsistent when it comes to following the substance of the *Baycol* framework. As discussed in Part I above, the reality of delineating scrutiny categories means that the formal test applied to a government action is nearly dispositive in determining its validity. This still holds true in Florida even after the State enacted what is generally considered the strongest eminent domain reform

160. *Baycol*, 315 So. 2d at 455.
161. *Id*. at 455, 457-59.
162. *See supra* Part I(B).

statute in the nation post-*Kelo*,[163] and later passed a constitutional amendment entrenching those reforms.[164]

While a property owner faced with the choice between an anti-*Kelo* constitutional amendment and the introduction of strict scrutiny for takings would be wise to pick the amendment to protect his property rights, two recent cases out of Florida illustrate that both are necessary for true and strong protections. Merely days after then-Governor Jeb Bush signed Florida's eminent domain reform law in 2006,[165] the City of Riviera Beach announced that it would proceed with one of the largest eminent domain projects in the nation by taking thousands of privately-owned parcels and turning them over to a developer for the building of a waterfront marina.[166] City officials were openly disdainful of the eminent domain statute, first claiming that it didn't apply to their project, and later asserting that the new law violated *their* constitutional rights to do as they saw fit within their city limits.[167]

Lawsuits filed by the Pacific Legal Foundation, the Institute for Justice, and private citizens to enforce the law did not cause the city to back off;[168] nor did Florida's enactment of the constitutional amendment prohibiting eminent domain transfers to private parties.[169] It took the eventual forced disqualification of a trial judge[170] and the voting out of office of the city council, to finally kill Riviera Beach's project.[171] Had the cases gone to trial—in the absence of a clearly defined standard of strict judicial scrutiny to enforce the new Florida laws—it is at least possible that the project may have been able to proceed. Without strict application by the judiciary, even the strongest statutes and constitutional amendments are but words on paper.

Another post-reform case that demonstrates the continuing need for Florida courts to apply a uniform standard of strict scrutiny took place in 2008. In *Christian Romany Church Ministries v. Broward County*, the county moved to take private property from a

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163. *See* FLA. STAT. §§ 73.013, 73.014 (2010).

164. *See* FLA. CONST. art. X, § 6(a)-(b) (2006).

165. Fla. HB 1567 (2006) (approved by Governor on May 11, 2006).

166. *See* Corie v. City of Riviera Beach, 954 So. 2d 68, 68-69 (Fla. 4th DCA 2007); *see also Wells v. City of Riviera Beach,* INST. FOR JUST., http://www.ij.org/index.php?option=com_content&task=view&id=964&Itemid=165 (last visited Mar. 11, 2011).

167. *See* Steven Geoffrey Gieseler, *Residents Fought For and Got Their Rights*, S. FLA. SUN-SENTINEL, May 28, 2007, *available at* http://articles.sun-sentinel.com/2007-05-28/news/0705250283_1_private-property-rights-property-owners/2.

168. *See* INST. FOR JUST., *supra* note 166.

169. *See* Gieseler, *supra* note 167.

170. *See Corie*, 954 So. 2d at 69.

171. Gieseler, *supra* note 167.

church in order to build a drug and alcohol rehabilitation center.[172] The question of public use was not at issue; the facility would be a government-run enterprise used to serve the county's residents. Because of this, Florida's post-*Kelo* reforms were of no force. Therefore, when the courts did get to the property rights question at hand—the matter of whether the entire property the county sought to condemn was necessary for the proposed project—they were left on their own. What they did both at trial and on appeal, despite the controlling precedent in *Baycol*, was defer entirely to the county's assertions of necessity in every regard, upholding the validity of the taking.[173]

Because the realm of eminent domain law encompasses more than just *Kelo*-type issues, reforms aimed at foreclosing a repetition of *Kelo* are only part of the fix needed to establish a check on government's eminent domain power. By expressly applying traditional strict scrutiny to government takings, the Florida judiciary would not only elucidate its own standards, but also put condemning authorities and property owners alike on notice regarding their respective rights and responsibilities. The most effective way to accomplish this would be for Florida's Supreme Court to finish what it started in 1975 and require the uniform application of strict scrutiny to government's use of eminent domain.

D. Other States Applying Heightened Scrutiny to Eminent Domain Actions

While the *Norwood* decision situates Ohio as the only state to explicitly apply heightened scrutiny to all of its government's eminent domain decisions, courts in several states have reviewed certain aspects of takings with something more stringent than rational basis review, even if they have not formally acknowledged such a requirement. Illinois,[174] South Carolina,[175] and Arkansas courts[176] have in recent decades looked behind government assertions of public use (or purpose) and necessity to invalidate takings.[177] None of these jurisdictions have expressly invoked heightened scrutiny, but they have nevertheless applied a level of judicial review that is surely more stringent than rational basis.

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172. Christian Romany Church Ministries v. Broward County, 980 So. 2d 1164, 1165 (Fla. 4th DCA 2008).

173. *Id*. at 1166.

174. *See* S.W. Ill. Dev. Auth. v. Nat'l. City Envtl, L.L.C., 768 N.E.2d 1 (Ill. 2002).

175. *See* Karesh v. City Council of Charleston, 247 S.E.2d 342 (S.C. 1978).

176. City of Little Rock v. Raines, 411 S.W.2d 486 (Ark. 1967).

177. For a more comprehensive list, see generally the Ohio Supreme Court's opinion in Norwood v. Horney, 853 N.E.2d 1115, 1143 (Ohio 2006).

In contrast, the supreme courts of both Delaware and Michigan have been forthright in calling for heightened scrutiny of certain eminent domain actions, including those implicating takings for predominantly private purposes, and have applied this heightened standard to invalidate eminent domain projects. The Delaware Supreme Court has explicitly held that courts in that state are to review government's assertions of public purpose with something more probing than rational basis review: "Generally, when the exercise of eminent domain results in a substantial benefit to specific and identifiable private parties, 'a court must inspect with heightened scrutiny a claim that the public interest is the predominant interest being advanced.'"[178] Thus, Delaware courts will not defer to a condemning agency's account of the public purpose to be advanced by a taking, but instead will examine the *underlying purpose* of the agency seeking the private property.[179]

In the most prominent case wherein the Supreme Court of Delaware applied this test, the Wilmington Parking Authority sought to use eminent domain to take privately owned restaurant property for construction of a 950-car parking garage.[180] While the Authority asserted that the garage was needed to rectify a shortage of public parking,[181] the court found that the primary motivation for building the garage was to afford parking space to the Gannett Corporation, a company with subsidiary offices in Wilmington on land adjacent to the restaurant.[182] Using heightened scrutiny, the court found that in return for the parking garage, the company would promise to keep its offices in the city, and would give title to the airspace over the taken property back to the city.[183] Holding that the assertion of public purpose was, at best, a secondary consideration and, at worst, a subterfuge, the court invalidated the taking as unconstitutional.[184] Without the court's application of heightened scrutiny, it is difficult to imagine that the result would have been the same.

Like Delaware's high court, the Michigan Supreme Court expressly applies heightened scrutiny to takings where the stated public purpose might prove to be merely incidental to a predominant private goal. Interestingly, the court applied heightened scrutiny both in its decision upholding the taking in *Poletown Neigh-*

178. Wilmington Parking Auth. v. Land With Improvements, 521 A.2d 227, 231 (Del. 1986) (citation omitted).
179. *Id*.
180. *Id*. at 229.
181. *Id.*
182. *Id*. at 234.
183. *Id*. at 229.
184. *Id*. at 234.

borhood Council v. Detroit[185]—resulting in one of the more notorious eminent domain opinions in recent American history—and in its opinion in *County of Wayne v. Hathcock* that overturned the holding in *Poletown* nearly a quarter-century later.[186]

In the earlier case, the entire Poletown region of the City of Detroit was literally razed at the direction of its leaders in order to make room for a new factory for General Motors. According to Sandefur, "[t]he GM project meant condemning over 1,000 properties and the homes of 3,348 people."[187] Though the metaphorical architects of the project made no effort to conceal that it was a private economic development taking, so eager were the courts to rubber stamp the project that from the start of the trial court proceeding on the injunction to stop the project to the Michigan Supreme Court's opinion upholding its denial, less than 120 days passed.[188]

The *Poletown* court paid lip service to heightened scrutiny, illustrating the perils of eminent domain proceedings even in jurisdictions that apply something more exacting than rational basis review. However, such lip service is decidedly more easy to detect when a court that claims to be applying heightened scrutiny echoes the abjectly deferential language of *Berman v. Parker*: "when a legislature speaks, the public interest has been declared in terms 'well-nigh conclusive.'"[189] As Timothy Sandefur writes in his comprehensive analysis of *Poletown* (and its undoing in *Hathcock*), "[i]t is impossible to reconcile such a statement with strict scrutiny.[190] If a legislative declaration of public benefit is 'well-nigh conclusive,' and if any benefit satisfies the public use clause, the Court's role is reduced to a mere formality, in spite of its assertions of strict scrutiny."[191]

After twenty-three years suffering widespread opprobrium for its *Poletown* decision, including open criticism by the state's lower courts, the Michigan Supreme Court agreed with Sandefur's assessment.[192] In *Hathcock*, the court's unanimous decision forsook the deference that formed the foundation of its opinion in *Poletown*, and invalidated the taking of 1300 acres of land intended for use as a private industrial park.[193] While the announced level of scrutiny was the same in the two cases, the way in

185. Poletown Neighborhood Council v. Detroit, 304 N.W.2d 455 (Mich. 1981).
186. County of Wayne v. Hathcock, 684 N.W.2d 765 (Mich. 2004).
187. Sandefur, *supra* note 69, at 653.
188. Poletown Neighborhood Council, 304 N.W.2d at 457.
189. *Id*. at 459 (quoting Berman v. Parker, 348 U.S. 26 (1954)).
190. Sandefur, *supra* note 69, at 661.
191. *Id*.(citations omitted).
192. *Id*. at 665-68.
193. County of Wayne v. Hathcock, 684 N.W.2d 765 (Mich. 2004).

which heightened review was actually employed in *Hathcock* made the difference.

V. CONCLUSION

As Epstein wrote:

> I am therefore urging not a return to some lost golden era, but the adoption of a regime for the protection of private property and economic liberties that is far more extensive and internally coherent than the patchwork of protections afforded to these interests under the Takings Clause before 1937.[194]

Proponents of strict scrutiny for eminent domain have an uphill fight.[195] They must contend with seventy-five years of judicial history that rejects their cause, a political landscape—especially at the national level—that is not friendly, and a legal academy that is largely opposed to their goals. But in addition to those already touched on in this article, they do have some points in their favor, ones that indicate that not all hope is lost. There is reason to believe that, at some levels, the post-*Kelo* era may offer opportunities to reclaim what the courts have abandoned. As noted above, *Kelo* brought the matter of eminent domain abuse to public light for the first time in American history, and caused an uproar rarely seen for any Supreme Court decision. Attempts at political reform have a better chance now than ever before, even if, as outlined above, they still are not likely to achieve meaningful results without the active support of the judiciary.

This public displeasure with eminent domain abuse can be harnessed in productive ways. Voters can enact reform initiatives themselves, or press their legislators to do so. But the realities of the political process are such that any public mobilization is largely irrelevant. Insulated as they are—federal judges serve for life, and even in states with judicial recall votes, it takes something historically egregious or even criminal for a judge to be voted out of office—public opinion means little to the judges who apply (or don't apply) scrutiny to government takings. Yet persuading these

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194. *See* Epstein, *supra* note 28, at 42.

195. Even some scholars, writing post-*Kelo*, who otherwise advocate renewed restrictions on government's eminent domain power are reluctant to argue for the application of strict scrutiny. For a most recent example, see Robert C. Bird, *Reviving Necessity in Eminent Domain*, 33 HARV. J.L. & PUB. POL'Y 239, 261-267 (2010) (arguing in the necessity context that "heightened review is [not] entirely unwarranted," but that traditional strict judicial scrutiny would "[u]nduly [i]nterfere with [l]egislative [w]ill.").

judges is of the utmost importance, even in the states where genuine post-*Kelo* reforms have been enacted. These laws will not enforce themselves.

One interesting prospect in the political realm might be an effort to persuade a state legislature to mandate that courts review eminent domain cases with strict scrutiny in a manner similar to the framework of the federal Religious Land Use and Institutionalized Persons Act (RLUIPA). In passing RLUIPA, Congress ordered the courts to review with strict scrutiny any land use regulation that inordinately burdens a person's or group's free exercise of religion.[196] Such an incremental step in theory could find favor with a legislature in a state where eminent domain reform has passed, post-*Kelo*, but where courts subsequently have failed to enforce the reform measure.

But mostly, this is an ideological battle. The Progressives—whatever one thinks of their aims—achieved their objectives by persuading and later themselves becoming powerful politicians and judges and legal theorists. Those seeking to undo the damage wrought by the Progressives must do the same. There are inklings this may be happening. There is general agreement on both the legal Left and Right that the latter has developed a more coherent judicial philosophy, and a deeper roster of practitioners of that philosophy, in recent decades.[197] As evidenced by Justice Thomas's dissent in *Kelo*, the Supreme Court has as one of its nine members a judge as forcefully dedicated to an originalist understanding of property rights, and to the abolition of the scrutiny hierarchy of rights and its relegation of property rights, as any in modern times. And as outlined in this article, several state courts already have announced or otherwise applied heightened scrutiny for takings, particularly those involving a potential private transfer. That may be only a beginning, but it demonstrates that the cause of restoring strict scrutiny for eminent domain is not necessarily a futile one.

Any effort supporting strict scrutiny for property rights is likely to provoke charges of "judicial activism." But there is an essential difference between true judicial activism—the *de facto* judicial creation of doctrine and law—and what might better be termed judicial "de-activism," or the overturning of erroneous decisions in

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196. 42 U.S.C. § 2000 (2010).

197. Consider, for example, the fears on the Left, prior to her confirmation, as to whether Justice Sotomayor was the type of "intellectual counterweight" who could serve as a balance to conservative Justices Scalia and Roberts, acknowledged by even their detractors as first-rate legal minds. *See, e.g.*, Jeffrey Rosen, *The Case Against Sotomayor*, THE NEW REPUBLIC, May 4, 2009, *available at* http://www.tnr.com/article/politics/the-case-against-sotomayor?id=45d56e6f-f497-4b19-9c63-04e10199a085 (last visited Mar. 11, 2011).

order to return to an adherence to the text of the Constitution. Epstein wryly notes that "[o]ur constitutional heritage showed no special fondness for popular democracy that operated by an unvarnished principle of majority rule."[198] The Constitution, the Bill of Rights, and the courts together establish, and themselves are among, the "complex institutional arrangements" the founders "designed to protect political minorities from the will of the majority."[199] They should be employed as such.

Finally, those seeking strict scrutiny in eminent domain cases should realize that there is no reason why they *should not* prevail. The ideological contortions necessary for scholars and judges to justify a doctrinal power-grab by a political movement some seventy-five years ago are, more often than not, obvious and rebuttable; early Progressives like Wilson and Holmes at least were forthcoming about their motives. Advocates for an indivisible liberty, at least when it comes to eminent domain, should take a page from the Progressive playbook and argue long, forcefully, and wisely, for a return of property to its status as a fundamental right.

198. EPSTEIN, *supra* note 7, at 37.
199. *Id*.

HISTORIC SIGNS, COMMERCIAL SPEECH, AND THE LIMITS OF PRESERVATION

STEPHEN R. MILLER*

The rate of obsolescence of a sign seems to be nearer to that of an automobile than that of a building.[1]

I. INTRODUCTION

In the nineteenth and early twentieth centuries, buildings were often heavily laden with storefront signs.[2] With the 1869 "development of 'hoardings,' or leased bill-posting walls," tiered displays of billboards emerged, which in turn came to be a source of legal battles over off-site general advertising signs.[3] Hoardings two- or three-levels high often encased sides, or even whole buildings, in

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1. ROBERT VENTURI ET AL., LEARNING FROM LAS VEGAS: THE FORGOTTEN SYMBOLISM OF ARCHITECTURAL FORM 34 (2000) (Massachusetts Institute of Technology 1977).

2. Diane Burant, Building Signs: A History That Defines Their Historical Significance In the Commercial Streetscape, 1900–1940, 18 (Jan. 1993) (unpublished M.A. thesis, Ball State University) (on file with the Ball State University Library).

3. George H. Kramer, Preserving Historic Signs in the Commercial Landscape: The Impact of Regulation 9-10 (Dec. 1989) (unpublished M.S. thesis, University of Oregon) (on file with the University of Oregon Library).

billboards.[4] The fight against billboards came to define how cities thought about signs, and early twentieth century City Beautiful programs typically sought to reduce or eliminate billboard advertisements.[5] Over the last century, such sign reduction regulations have garnered increasing citizen and legal support.

In the past half-century, however, historic preservation has also emerged as a force in defining the contours of the city. In that time, the scope of historic preservation has grown, and continues to grow remarkably. What was once a movement concerned primarily with landmarks and architecture has come to embrace a whole new scope of histories, including ordinary ephemera such as business signs. Once anathema, the preservation of business signs no longer in operation is now increasingly the subject of preservation advocates who are seeking to preserve a broader sense of a community's past.

The growth of historic preservation to include more ephemeral aspects of the built environment brings with it new legal questions. These efforts to retain historic signs are of particular interest because signage is never merely an aesthetic creature. Its purpose, from its origin, is to communicate a message, regardless of whether that is to propose a business transaction or to communicate a political or ideological message. The ability to reuse a sign for a different use is not as evident as with a building, as a building can often change its use without substantial alterations.

The National Park Service has consistently waffled on the question of signage. On the one hand, it has argued that historic signs[6] should be removed in order to highlight the architectural merit of buildings and to preserve the character of historic districts.[7] At the same time, the National Park Service has also embraced the retention of some signage as part of a broader definition of historic preservation that goes beyond mere landmarks and architectural significance.[8] In a technical preservation brief dedicated to historic signs, the National Park Service notes that:

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4. *Id*.

5. *Id*. at 12-13.

6. The term "historic sign" is used in this Article to designate signs listed on the National Register, as well as signs that may be eligible for, but which have not officially been listed on, the National Register.

7. H. WARD JANDL, NAT'L PARKS SERV., PRESERVATION BRIEF 11, REHABILITATING HISTORIC STOREFRONTS, *available at* http://www.nps.gov/history/HPS/tps/briefs/brief11.htm ("Removal of some signs can have a dramatic effect in improving the visual appearance of a building.").

8. MICHAEL J. AUER, NAT'L PARKS SERV., PRESERVATION BRIEF 25, THE PRESERVATION OF HISTORIC SIGNS, CONCLUSION, *available at* http://www.nps.gov/history/HPS/tps/briefs/brief25.htm.

> Historic signs once allowed buyers and sellers to communicate quickly, using images that were the medium of daily life. *Surviving historic signs have not lost their ability to speak. But their message has changed.* By communicating names, addresses, prices, products, images, and other fragments of daily life, they also bring the past to life.[9]

But the preservation of a sign, especially a historic business sign, presents unique problems for modern-day retailers. For businesses, especially retail operations, an on-site sign indicating the service or goods sold is an important part of attracting customers. A study by the U.S. Small Business Administration notes six primary functions for signs:

> 1. To develop brand equity[;] . . . . 2. To aid recall and reinforcement of other media advertising[;] . . . . 3. To prompt "impulse" purchases[;] . . . . 4. To change a purchasing decision once [a] customer is [on-site][;] . . . . 5. To promote traffic safety by notifying motorists where they are in relation to where they want to go, and assisting their entry to the premises should they decide to stop. . . . [; and] 6. To complement community aesthetic standards.[10]

Local retailers are especially beholden to signs, as these are the least-expensive means of advertising by several factors.[11] "[Q]uick-service" restaurants receive as much as 35% of their business from consumers who saw a sign,[12] while industry studies suggest that informational outdoor signage increases business an average of 15%.[13] Factors such as these make on-site business signs an important part of any business's message to consumers. Thus, signs that reference prior, no longer relevant uses can be challenging for some businesses.

Among these challenges is the fact that historic business signs typically advertised specific products, or even specific brands of products. These products may include those towards which societal norms have changed over time, such as cigarettes. For instance, imagine a children's clothing boutique that rents a commercial

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9. *Id.* (emphasis added).

10. R. James Claus & Susan L. Claus, U.S. SMALL BUS. ADMIN., SIGNS: SHOWCASING YOUR BUSINESS ON THE STREET (2001), *available at* http://www.comptonduling.com/images/pdfs/SBA%20Importance%20of%20Signs.pdf.

11. *Id.* (noting advertising cost per thousand impressions as $0.22 for an on-premise sign; $1.90 for an outdoor sign; $3.60 for newspaper; $5.90 for radio; $10.00 for television).

12. *Id.*

13. *Id.*

storefront beneath a large, elegant sign that reads "liquor" and "cigarettes." Alternatively, imagine a used car dealership that takes over a diner with a large sign that reads "Johnie's Broiler: Family Restaurant, Coffee Shop."[14] Should it matter that the historic sign does not reflect the current tenant's business and that preservation of the historic sign may, in fact, confuse or deter the clientele that the children's boutique or used car dealer wishes to attract? Similarly, historic signs can also directly dictate prejudice long after the architectural traces of that prejudice have disappeared. For instance, should a business be forced to retain historic segregation signage—such as for "Whites" and "Colored" water fountains or bathrooms—as an act of historic preservation, even though it could stigmatize the business or preserve a legacy of prejudice?[15] Can a state require a private party to retain a vestige of such a stark economic or social legacy, especially in the uniquely straightforward and unequivocal manner in which a sign operates?

The primary concern of this Article will be whether regulations that require preservation of historical signs limit the operation of present uses in a manner that constitutes compelled commercial speech under the First Amendment. This is not an easy issue to address—both commercial speech and historic preservation rest upon principles and purposes that are generally not well-defined, and even when they are defined, they are often controversial. Historic signs offer a unique situation in which to test the outer bounds of both doctrines. The forced association of business owners with historic signs can muddle or contradict a current business's advertising, or can even cause stigmatizing associations that the business would not otherwise choose. At the same time, signs can be important reminders of a community's past or fixtures of its

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14. *See* Roadside Peek, Preservation Alley: Johnie's Broiler, http://www.roadsidepeek.com/preserv/2002/johniesbroiler/index.htm (last visited Mar. 11, 2011).

15. Robert R. Weyeneth, *The Architecture of Racial Segregation: The Challenges of Preserving the Problematical Past*, 27 PUB. HISTORIAN 11, 38-39 (2005). Weyeneth states:

> In contemplating the survival of the material legacy of segregation, signage seems to have been especially evanescent. . . . Today it does not occur to many of us that [segregation] signs . . . that were disappearing in the 1960s had to come from somewhere. Some were hand-lettered, of course, but once upon a time segregation signage was a standard retail commodity widely available. As the legal foundation for segregation was steadily undermined, it became harder and harder to purchase signs that said "Colored" or "Whites Only." As an experiment, one white journalist set out in December 1961 to try to buy signs in Jacksonville, Florida. His visits to Woolworth's, Kress, Western Auto, and local hardware stores all proved fruitless. Clerk after clerk reported that the stores had returned their inventories to distributors. In this additional way—manufacturers discontinuing a line of heretofore popular merchandise—segregation signage passed further into history.

Id. (citations omitted).

physical typology, and may even subtly preserve a community's legacies—both good and bad—that might otherwise be forgotten or relegated to books.

This Article considers these implications by first reviewing commercial-speech doctrine jurisprudence, especially as applied to compelled speech of corporations, in Section II. Section III presents four methods for preserving historic signs proposed by the National Park Service. Section IV examines the last century of signage regulation. Section V reviews the purposes and findings that support historic preservation as a governmental interest. Finally, Section VI analyzes how the four approaches to preserving historic signs proposed by the National Park Service fare in light of the compelled speech case law, the purposes underpinning historic preservation, and the National Register's significance and integrity listing criteria.

II. COMMERCIAL SPEECH AS APPLIED TO HISTORIC SIGNS

There has been little discussion relating commercial speech[16] to historic preservation. The silence on this topic is likely due to historic preservation's longstanding focus on landmarks and architecturally significant buildings. Only in the past few decades, as historic preservation has followed a broader mandate, has the question of freedom of speech—in this case, a business owner's freedom of commercial speech—become relevant.[17] Given the newness of the phenomenon, there are no known cases considering the question of how commercial speech should fare in light of mandated preservation of historic signs. In the absence of such case law, this Section offers a framework for evaluating how existing commercial speech precedent would address the issue of historic signs, especially in a situation in which a governmental action (i) mandates the preservation of a historic sign that obscures or contradicts an existing business owner's own on-site business signage; or (ii) mandates preservation of a historic sign that indirectly suggests a business's association with a historic legacy that is stigmatized in current social norms.

Commercial speech is a relatively new doctrine by constitutional standards;[18] discussion of the doctrine's merits has been heated, and the outer limits of its protections have not been easily

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16. U.S. CONST. amend. I (granting a broad freedom of speech to the people of the United States).

17. *See generally infra* note 25.

18. *See infra* note 25, at 761 (first unveiling the commercial speech doctrine in 1976).

defined.[19] Despite this controversy and uncertainty, both the courts and commentators are consistent in holding that true and factual advertising of a product is protected commercial speech.[20]

The United States Supreme Court's 1975 decision in *Bigelow v. Virginia* first extended First Amendment protection to advertising.[21] In *Bigelow*, the court struck down Virginia's attempt to ban newspaper advertisements announcing the availability of New York abortions, which were illegal in Virginia but legal in New York.[22] The Court noted that:

> [T]he advertisement conveyed information of potential interest and value to a diverse audience—not only to readers possibly in need of the services offered, but also to those with a general curiosity about, or general interest in, the subject matter or the law of another State and its development, and to readers seeking reform in Virginia. . . . Thus, in this case, appellant's First Amendment interests coincided with the constitutional interests of the general public.[23]

In offering First Amendment protection, the *Bigelow* court emphasized the informational importance of the advertisements, not simply the prospect of a commercial transaction.[24] *Bigelow* led the way to the Court's 1976 decision in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.,* which formally announced the commercial speech doctrine.[25] In that case, the Court provided two distinct constitutional purposes for the commercial speech doctrine:

> Advertising . . . is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price. So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. *It is a matter of public interest that those decisions, in the aggregate, be intelligent and well*

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19. Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1, 2 (2000-2001) (stating that commercial speech is a "notoriously unstable and contentious domain of First Amendment jurisprudence").

20. *See infra* notes 21, 26, 29, 42 and accompanying text.

21. *See* Bigelow v. Virginia, 421 U.S. 809 (1975).

22. *Id.* at 311, 318, 329.

23. *Id.* at 322.

24. *Id.*

25. Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 761 (1976).

> *informed.* To this end, the free flow of commercial information is indispensable. And if it is indispensable to the proper allocation of resources in a free enterprise system, it is also *indispensable to the formation of intelligent opinions as to how that system ought to be regulated or altered.* Therefore, even if the First Amendment were thought to be primarily an instrument to enlighten public decisionmaking in a democracy, we could not say that the free flow of information does not serve that goal.[26]

Virginia State Board of Pharmacy announced two rationales for expanding free speech protection to commercial speech: commercial transactions in a free enterprise economy should be intelligent and well-informed, and regulation of the markets is better achieved when there is more information.[27] These two purposes speak to the importance of an existing business's sign as a means of communicating the existing business's proposed transaction.

The Court has further elaborated on this core protection of advertising in the commercial speech doctrine, noting that while "ambiguities may exist at the margins of the category of commercial speech"[28] and the bounds of commercial speech protected by the First Amendment are not precise, "it is clear enough that . . . advertising pure and simple . . . falls within those bounds."[29] The Court has also stated that the commercial speech doctrine rests heavily on "the 'common-sense' distinction between speech proposing a commercial transaction . . . and other varieties of speech."[30] These cases establish that a business has a constitutional right to advertising that promotes the elements of a commercial transaction at its most basic level—the product or service offered and at what price.

At the same time, such discussions do not address the more subtle issues that arise in the maintenance of a historic sign that does not propose a commercial transaction, but is maintained for the purpose of preserving a community's history or identity. Thus, while much discussion of commercial speech lingers on the definition of what constitutes "commercial speech," [31] this issue is inap-

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26. *Id.* at 765 (emphasis added) (citations omitted).
27. *Id.*
28. Edenfield v. Fane, 507 U.S. 761, 765 (1993).
29. Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio, 471 U.S. 626, 637 (1985).
30. Ohralik v. Ohio State Bar Ass'n., 436 U.S. 447, 455-56 (1978).
31. Post, *supra* note 19, at 15 (asserting that commercial speech should be defined as "the set of communicative acts about commercial subjects that conveys information of relevance to democratic decision making, but that does not itself form part of public discourse.").

posite to historic signs. The issue is not whether the existing business's advertising is commercial speech, but whether the historic sign's representations to passers-by constitute a compelled-speech act.

The Court's compelled speech jurisprudence began with questions of ideological and political speech. In *West Virginia State Board of Education v. Barnette*, the Court invalidated a state board of education resolution requiring children of a Jehovah's Witness to salute the flag in order to be allowed to attend a public school.[32] In *Wooley v. Maynard*, the Court invalidated a New Hampshire statute requiring vehicle license plates to carry the state's motto, "Live Free or Die," which was challenged by a Jehovah's Witness.[33] The Court stated that:

> [T]he right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all. . . . The right to speak and the right to refrain from speaking are complementary components of the broader concept of "individual freedom of mind."[34]

The Court also applied such limitations against compelled speech to corporations in the context of political speech.[35] In *Miami Herald Publishing Co. v. Tornillo,* the Court invalidated Florida's "right-of-reply" statute, which provided that if a newspaper assailed a candidate's character or record the candidate could demand that the newspaper print a reply of equal prominence and space.[36] The Court held that the statute interfered with the newspaper's right to speak because the statute penalized the newspaper's own expression[37] and interfered with its editorial control and judgment.[38]

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32. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

33. Wooley v. Maynard, 430 U.S. 705, 707, 717 (1977).

34. *Id.* at 714 (quoting *Barnette*, 319 U.S. at 633-634); *see also* Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 559 (1985) ("The essential thrust of the First Amendment is to prohibit improper restraints on the *voluntary* public expression of ideas . . . . There is necessarily . . . a concomitant freedom *not* to speak publicly, one which serves the same ultimate end as freedom of speech in its affirmative aspect.") (quoting Estate of Hemingway v. Random House, Inc., 23 N.Y. 2d 341, 348 (1968)).

35. *See* Pac. Gas and Elec. Co. v. Pub. Utils. Comm'n, 475 U.S. 1, 8 (1986).

36. Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 244 n.2 (1974).

37. *Id.* at 257 ("Government-enforced right of access *inescapably* 'dampens the vigor and limits the variety of public debate.'") (emphasis added).

38. *Id.* at 258 ("[T]reatment of public issues and public officials—whether fair or unfair—constitute[s] the exercise of editorial control and judgment.").

Barnette, Wooley, and *Tornillo* are indicative of one of three strands of compelled speech cases, specifically those in which the State attempts to "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."[39]

Corporations have more often been addressed in a second line of compelled commercial-speech cases, in which the doctrine has been applied less rigorously than in relation to individuals.[40] These cases typically review whether a state may require warnings on advertisements for products or services.[41] Warning laws that require true and factual statements regarding products and services have been repeatedly upheld by lower courts.[42] In *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, the United States Supreme Court upheld disciplinary action against an attorney for failing to warn potential clients in advertisements that they were liable for litigation costs even if they lost.[43] The Court announced that "an advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers."[44] The *Zauderer* Court justified this lower threshold on compelled speech for product warnings by noting that:

> The State has attempted only to prescribe what shall be orthodox in commercial advertising, and its prescription has taken the form of a requirement that appellant include in his advertising *purely factual and uncontroversial information* about the terms under which his services will be available. Because the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides . . . , appellant's constitutionally protected interest in not

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39. W. Va. State Bd. of Educ. v. Barnette , 319 U.S. 624, 642 (1943).

40. Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio, 471 U.S. 626, 651 (1985) ("[T]he interests at stake in this case are not of the same order as those discussed in *Wooley, Tornillo*, and *Barnette*.").

41. *See id.* (requiring disclaimer on attorney ads); Nat'l. Elec. Mfrs. Ass'n v. Sorrell, 272 F.3d 104, 116 (2d Cir. 2001) (upholding state requirement of warning label on mercury-containing light bulbs, and noting that "[i]nnumerable federal and state regulatory programs require the disclosure of product and other commercial information."); Entm't Software Ass'n v. Blagojevich, 469 F.3d 641, 643 (7th Cir. 2006) (warnings on sexually explicit video games); Envt'l Def. Ctr. v. U.S. E.P.A., 344 F.3d 832, 848-49 (9th Cir. 2003) (warnings regarding waste discharge into municipal sewers); Rubin v. Coors Brewing Co., 514 U.S. 476, 483 (1995) (statement of alcohol content on the label of a beer bottle).

42. *See supra* note 41.

43. *Zauderer*, 471 U.S. at 636.

44. *Id.* at 651.

> providing any particular factual information in his advertising is minimal. Thus, in virtually all our commercial speech decisions to date, we have emphasized that because *disclosure requirements* trench much more narrowly on an advertiser's interests than do flat prohibitions on speech, "warning[s] or disclaimer[s] might be appropriately required . . . in order to dissipate the possibility of *consumer confusion or deception*."[45]

And yet, even *Zauderer* does not seem to adequately address the question of historic signs. *Zauderer* affirms the Court's ongoing commitment to factual, truthful information, and extends that requirement even to the omission of a warning. However, this extension of disclosure requirements was itself based upon a concern for consumer confusion and deception.[46] By requiring the warning, the *Zauderer* Court sought to extend the reach of factual, truthful information and to better inform the public about the service offered.[47] Historic signs, however, do the exact opposite. Historic signs do not contribute to any factual or truthful understanding of the transaction that is offered; rather, they obfuscate that transaction based upon the governmental interest in historic preservation.

Thus far, perhaps the only Supreme Court case to offer guidance on this issue is *Pacific Gas and Electric Co. v. Public Utilities Commission of California* (*PG&E*).[48] In *PG&E*, the California Public Utility Commission decided that a utility provider must share the "extra space" left over in an envelope after including the bill and required notices with a citizen's utility advocacy group, because the "extra space" was the ratepayers' property.[49] The utility provider argued that it had a First Amendment right not to help spread a message with which it disagreed, and the Court agreed.[50] Relying on *Wooley* and *Tornillo*, the Court held that:

> The Commission's order forces appellant to disseminate [the citizen advocacy group's] speech in envelopes that [the utility] owns and that bear appellant's return address. Such forced association with potentially hostile views burdens the expression of views different from [the citizen's advoca-

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45. *Id*. (emphasis added) (citations omitted).
46. *See id*.
47. *See id*.
48. Pac. Gas and Elec. Co. v. Pub. Utils. Comm'n of Cal., 475 U.S. 1 (1986).
49. *Id*. at 4-6.
50. *Id*. at 4-6, 20-21.

> cy group] and risks forcing [the utility] to speak where it would prefer to remain silent.[51]

The Court went on to state:

> As the dissenting Commissioners correctly noted, . . . [the utility provider's] argument logically implies that the State may compel appellant or any other regulated business to use many different kinds of property to advance views with which the business disagrees. *"Extra space" exists not only in billing envelopes but also on billboards, bulletin boards, and sides of buildings and motor vehicles.* Under the Commission's reasoning, a State could force business proprietors of such items to use the space for the dissemination of speech the proprietor opposes. *At least where access to such fora is granted on the basis of the speakers' viewpoints, the public's ownership of the "extra space" does not nullify the First Amendment rights of the owner of the property from which that space derives.*[52]

The Court presciently notes that "extra space" exists not only in envelopes, but also on billboards, bulletin boards, and the sides of buildings.[53] The preservation of historic signs is based upon the notion that the past can be preserved in the interstices—the "extra space"—between the spaces necessary for today's commerce. Alternatively, and even more practically difficult, the preservation of historic signs is based upon the notion that the historic sign will be read by the viewer as a palimpsest—a faded image overwritten by the modern sign—that does not obscure, contradict, or otherwise interfere with the ability of the current business to convey its message. *PG&E* suggests, however, that the Court is dubious of such an "extra space" argument, not to mention a palimpsestic approach to interweaving modern and historic signage.[54]

On the other hand, *PG&E* can be distinguished in that the Court appears to limit its discussion to those instances in which there is viewpoint access granted, and thus a political or ideological overtone is permitted.[55] While the Court has not directly addressed the issue in a signage context, a ruling by the California

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51. *Id.* at 17-18.
52. *Id.* at 18 n.15 (emphasis added).
53. *See id.*
54. *See generally supra* note 48.
55. *See generally id.* at 17-18 n.5.

Supreme Court suggests that commercial speech should be considered broadly where advertising signage is concerned, and that the protections associated with commercial speech apply even where the advertisement may express some political or ideological viewpoint.[56]

Finally, it should be noted that a third line of compelled-commercial speech cases governs compelled-subsidy cases, in which individuals are not compelled to speak, but rather to subsidize a private message with which they disagree.[57] Such cases concern programs of compelled subsidization of generic advertising, typically for an agricultural or livestock product.[58] To the extent that these cases have held required subsidies to be unconstitutional, the Court does not consider them to affect the other "true" compelled-speech cases, and view them as their own distinct line of cases.[59] As such, they are not as relevant to the question of historic

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56. *See* Kasky v. Nike, Inc., 45 P.3d 243, 261-62 (Cal. 2002). In *Kasky*, the court stated:

> We now disapprove as ill-considered dicta two statements of this court in *Spiritual Psychic Science Church v. City of Azusa* . . . . There we remarked that commercial speech is speech "which has but one purpose—to advance an economic transaction," and we suggested that "an advertisement informing the public that the cherries for sale at store X were picked by union workers" would be noncommercial speech.
>
> As we have explained, the United States Supreme Court has indicated that economic motivation is relevant but not conclusive and perhaps not even necessary. The high court has never held that commercial speech must have as its only purpose the advancement of an economic transaction, and it has explained instead that commercial speech may be intermingled with noncommercial speech. An advertisement primarily intended to reach consumers and to influence them to buy the speaker's products is not exempt from the category of commercial speech because the speaker also has a secondary purpose to influence lenders, investors, or lawmakers.
>
> Nor is speech exempt from the category of commercial speech because it relates to the speaker's labor practices rather than to the price, availability, or quality of the speaker's goods. An advertisement to the public that cherries were picked by union workers is commercial speech if the speaker has a financial or commercial interest in the sale of the cherries and if the information that the cherries had been picked by union workers is likely to influence consumers to buy the speaker's cherries. Speech is commercial in its content if it is likely to influence consumers in their commercial decisions. For a significant segment of the buying public, labor practices do matter in making consumer choices.

Id. (citations omitted).

57. *See* Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 557 (2005) (noting two types of compelled-speech cases: "true 'compelled-speech' cases, in which an individual is obliged personally to express a message he disagrees with, imposed by the government; and 'compelled-subsidy' cases, in which an individual is required by the government to subsidize a message he disagrees with, expressed by a private entity.").

58. *See* U.S. v. United Foods, Inc., 533 U.S. 405 (2001); Glickman v. Wileman Bros. & Elliott, Inc., 521 U.S. 457 (1997); Gerawan Farming, Inc. v. Kawamura, 90 P.3d 1179 (Cal. 2004) (plum farmers' association).

59. *United Foods*, 533 U.S. at 416 ("Our conclusions are not inconsistent with the Court's decision in *Zauderer v. Office of Disciplinary Counsel* . . . .").

signs because such signs do not require subsidization of an advertising campaign.[60]

This review of commercial speech doctrine indicates that questions of historic signs do not fit neatly within the contours of the delineated case law, and courts have developed a varied and disparate jurisprudence with regard to different types of signs.[61] If "[e]ach method of communicating ideas is 'a law unto itself' and that law must reflect the 'differing natures, values, abuses[,] and dangers' of each method," then the historic sign will require its own jurisprudence, just as billboards and sound trucks have before them.[62] The remainder of this Article will attempt to propose an outline for that jurisprudence, including a review of historic sign regulation today, as well as a review of the governmental purposes that support such regulations.

III. METHODS FOR PRESERVING HISTORIC SIGNS

Preservation Brief Number 25, The Preservation of Historic Signs (*Preservation Brief 25*), is the National Park Service's template for documenting and preserving historic signs,[63] and is therefore the most complete and influential document on how such preservation of historic signs should occur.

Preservation Brief 25 provides that historic signs should be retained "whenever possible," and:

> [P]articularly when they are[] associated with historic figures, events or place[s]; significant as evidence of the histo-

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60. *Id*.

61. Courts have addressed a wide variety of sign issues, including signs at labor disputes (State v. DeAngelo, A.2d 1200 (N.J. 2009)); murals (Carpenter v. City of Snohomish, 2007 WL 1742161 (W.D. Wash. June 13, 2007)); whether a column of light constitutes a sign (Sutliff Enters., Inc. v. Silver Spring Twp. Zoning Hearing Bd., 933 A.2d 1079 (Pa. 2007)); lawn signs (Blum & Bellino, Inc. v. Town of Greenburgh, 872 N.Y.S.2d 172 (2009)); church signs (Trinity Assembly of God of Baltimore City, Inc. v. People's Counsel for Baltimore County, 941 A.2d 560 (Md. Ct. Spec. App. 2008)); electronic billboards (Naser Jewelers, Inc. v. City of Concord, 538 F.3d 17 (1st Cir. 2008)); favoring commercial speech over non-commercial speech (Covenant Media of S.C., LLC v. Town of Surfside Beach, 321 Fed. Appx. 251 (4th Cir. 2009)).

62. Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 501 (1981) (citing Kovacs v. Cooper, 336 U.S. 77, 97 (1949)). The *Kovacs* Court noted:

> I do not agree that, if we sustain regulations or prohibitions of sound trucks, they must therefore be valid if applied to other methods of 'communication of ideas.' The moving picture screen, the radio, the newspaper, the handbill, the sound truck and the street corner orator have differing natures, values, abuses[,] and dangers. Each, in my view, is a law unto itself, and all we are dealing with now is the sound truck.

Kovacs, 366 U.S. at 97 (Jackson, J. concurring).

63. AUER, *supra* note 8 (conclusion).

> ry of the product, business or service advertised[;] significant as reflecting the history of the building or the development of the historic district[;] . . . characteristic of a specific historic period, such as gold leaf on glass, neon, or stainless steel lettering[;] integral to the building's design or physical fabric[;] . . . outstanding examples of the signmaker's art[;] local landmarks . . . [where the sign is] recognized as popular focal point in a community[;] [or] elements important in defining the character of a district, such as marquees in a theater district.[64]

Preservation Brief 25 also provides four prescribed methods by which historic signs should be reused in their new capacity in the building.[65] First, the preferred alternative is to keep the historic sign unaltered.[66] The National Park Service prefers that the old sign be left in its historic location, although it acknowledges that, "sometimes . . . it may be necessary to move the sign elsewhere on the building to accommodate a new one."[67] The National Park Service also acknowledges that "it may be necessary to relocate new signs to avoid hiding or overwhelming historic ones, or to redesign proposed new signs so that the old ones may remain."[68] The National Park Service argues that:

> Keeping the old sign is often a good marketing strategy. It can exploit the recognition value of the old name and play upon the public's fondness for the old sign. The advertising value of an old sign can be immense. This is especially true when the sign is a community landmark.[69]

At the same time, *Preservation Brief 25* notes that "[t]he legitimate advertising needs of current tenants, however, must be recognized."[70] *Preservation Brief 25* offers no discussion of how to determine the legitimate advertising needs of current tenants.

The second approach to reusing a historic sign is "to relocate it to the interior of the building, such as in the lobby or above the bar in a restaurant."[71] The National Park Service considers this option

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64. *Id.* (retaining historic signs).
65. *See generally id.*
66. *Id.* (reusing historic signs).
67. *Id.*
68. *Id.*
69. *Id.*
70. *Id.*
71. *Id.*

to be "less preferable than keeping the sign outside the building."[72] The third approach to reusing historic signs is to modify "the sign for use with the new business."[73] The National Park Service acknowledges that "[t]his may not be possible without destroying essential features, but in some cases it can be done by changing details only."[74] If none of the other options are possible, the fourth and least favored approach is to donate the sign "to a local museum, preservation organization or other group."[75] This approach preserves the sign, but typically at an off-site location that prevents the sign from retaining or contributing to its historical context.

Thus, *Preservation Brief 25* provides for a wide range of options for historic signs—from preserving the historic sign unaltered, to removing it and placing it in a museum—that would have dramatically different results both for the current business owner and for historic preservation.[76] Determining the validity of these approaches in light of the requirements of the commercial speech doctrine requires a consideration of the governmental interests that support historic preservation.

IV. REGULATING SIGNS

The primary focus of sign regulation over the past century has been on eliminating signs, not preserving them.[77] Although some initial regulations were rejected by the courts, restrictions on signs—and especially billboards—were eventually held to be valid as exercises of the police power in preserving health and safety, and later, aesthetics.[78]

The billboard industry foresaw the coming regulation and as early as 1872 began the formation of trade groups, such as the St. Louis' International Bill Posters Organization of North America.[79] By 1909, such groups were attempting to regulate their own members and prevent them from indiscriminate posting.[80]

Nonetheless, regulation of the billboard increased commensurate with the industry's success. Initial cases, such as the 1905

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72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.* Las Vegas may well be the capital of preserving historic signs in museums. *See, e.g.,* The Neon Museum, Las Vegas, *available at* http://www.neonmuseum.org/.
76. *See supra* notes 63-75.
77. *See infra* note 79.
78. *See infra* notes 82-83.
79. *See* Kramer, *supra* note 3, at 15; *see also* AUER, *supra* note 8 (sign regulation).
80. Kramer, *supra* note 3, at 15.

case of *City of Passaic v. Paterson Bill Posting, Advertising and Sign Painting Co.*, the New Jersey Court of Errors and Appeals rejected the use of the police power to regulate billboards solely on the basis of aesthetics.[81] However, with the 1954 case of *Berman v. Parker*, the Court first acknowledged aesthetic regulation as a proper concern of the police power for regulation of land uses and generally held that "[i]t is within the power of the legislature to determine that the community should be beautiful as well as healthy . . . ."[82] Subsequent cases have relied upon aesthetics as a legitimate purpose for regulating signage.[83]

Independent of aesthetics, use of the police power to regulate signs was also justified by more traditional concerns, such as "fire control, sanitation, traffic safety," or "morality."[84] The earliest success in this regard was the 1911 case of *St. Louis Gunning Advertising Company v. City of St. Louis*,[85] in which the Supreme Court of Missouri held, as part of an enumerated parade of horribles, that billboards are "constant menaces to the public safety and welfare of the city; they endanger the public health, promote immorality, constitute hiding places and retreats for criminals and all classes of miscreants."[86] While such elaborate findings may stretch the

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81. City of Passaic v. Paterson Bill Posting, Adver. & Sign Painting Co., 287, 62 A. 267, 268 (N.J. 1905). The *Patterson* court held:

> It is probable that the enactment of . . . the ordinance was due rather to aesthetic considerations than to considerations of the public safety. No case has been cited, nor are we aware of any case which holds that a man may be deprived of his property because his tastes are not those of his neighbors. Aesthetic [sic] considerations are a matter of luxury and indulgence rather than of necessity, and it is necessity alone which justifies the exercise of the police power . . . .

Id.

82. Berman v. Parker, 348 U.S. 26, 33 (1954). The Court goes on to state: "If those who govern . . . decide that . . . [their community] . . . should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way." *Id*.

83. *See. e.g.,* Members of the City Council of L.A. v. Taxpayers for Vincent, 466 U.S. 789, 805 (1984) ("It is well settled that the state may legitimately exercise its police powers to advance esthetic values.").

84. Kramer, *supra* note 3, at 19-20.

85. St. Louis Gunning Adver. Co. v. St. Louis, 137 S.W. 929 (Mo. 1911).

86. *Id*. at 942. The *St. Louis Gunnder Advertising Co.* court stated:

> The signboards and billboards upon which this class of advertisements are displayed are constant menaces to the public safety and welfare of the city; they endanger the public health, promote immorality, constitute hiding places and retreats for criminals and all classes of miscreants. They are also inartistic and unsightly. In cases of fire they often cause their spread and constitute barriers against their extinction; and in cases of high wind, their temporary character, frail structure and broad surface, render them liable to be blown down and to fall upon and injure those who may happen to be in their vicinity. The evidence shows and common observation teaches us that the ground in the rear thereof is being constantly used as privies and dumping ground for all kinds of waste and deleterious matters, and thereby creating public nuisances and jeopardizing public health; the evidence also shows that behind these obstructions the lowest form of prostitution and other acts of immorality are frequently carried on, almost under public gaze; they offer shelter and concealment for the criminal while lying

bounds of credulity, they did provide legal justification for the regulation of billboards, and have resulted in federal regulation such as the Highway Beautification Act of 1965[87] and numerous state and local regulations of the billboard industry.[88] Despite this century-long history of sign regulation, the compelled preservation of a historic sign does not yet appear to have been addressed in a reported decision.

V. PURPOSES OF HISTORIC PRESERVATION

The modern legal justification for historic preservation—like that for the modern regulation of signage—is typically considered to derive from *Berman v. Parker*'s acceptance of using the police power for aesthetic considerations.[89] In addition to aesthetics, *Berman* provided a broad justification for use of the police powers, extending those powers beyond the typical aspects of public safety, health, and welfare.[90] However, as historic preservation has grown

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> in wait for his victim; and last, but not least, they obstruct the light, sunshine, and air, which are so conducive to health and comfort. House signs and sky signs are similar to billboards, and are used for the same purposes, except they are attached to the walls of buildings or are constructed upon the roofs thereof. They endanger the public safety only in being liable to be blown down and injure people in their fall. They also assist in the spread of fire and greatly interfere with their extinction. The amount of good contained in this class of this business is so small in comparison to the great and numerous evils incident thereto that it has caused me to wonder why some of the courts of the country have seen fit to go as far as they have in holding statutes and ordinances of this class void, which were only designed for the suppression of the evils incident thereto and not to the suppression of the business itself. While advertising, as before stated, is a legitimate and honorable business, yet the evils incident to this class of advertising are more numerous and base in character than are those incident to numerous other businesses which are considered mala in se; and which for that reason may not only be regulated and controlled, but which may be entirely suppressed for the public good under the police power of the state. My individual opinion is that this class of advertising as now conducted is not only subject to control and regulation by the police power of the state, but that it might be entirely suppressed by statute, and that, too, without offending against either the state or federal Constitution.

Id.

87. Highway Beautification Act of 1965, 23 U.S.C. § 131 (2006) (controls outdoor advertising along 306,000 miles of Federal-Aid Primary, Interstate and National Highway System (NHS) roads).

88. *See, e.g.*, Outdoor Adver. Act, CAL. BUS. & PROF. CODE §§5200-5486 (1970); City S.F. ORDINANCE NO. 263-65 (Nov. 21, 1965) (city's first sign ordinance distinguishing between on-site and off-site advertising signage).

89. Berman v. Parker, 348 U.S. 26, 33 (1954). The irony, of course, is that the *Berman* decision permitted the razing of a whole area of historic buildings for urban renewal. *Id*. at 28-30.

90. *Id*. at 32. The *Berman* Court goes on to note:

> We deal, in other words, with what traditionally has been known as the police power. An attempt to define its reach or trace its outer limits is fruitless, for each case must turn on its own facts. The definition is essentially the product of legislative determinations addressed to the purposes of government, purposes neither abstractly nor historically capable of complete definition. Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been

in scope from its consideration of architectural merit alone it is unclear whether historic preservation's purposes still fall within the broad mandates of *Berman*.[91] Consideration is due as to whether preservation's current enterprise fits within the police powers purposes on which it is traditionally seen to rest, and whether such purposes reach far enough to compel speech emanating from ephemera such as historic signs.

A. Monuments, Architecture, and Community Building

Historic preservation has long neglected its own history.[92] Where attempts to document the history have been undertaken, investigations of the movement's origin are often more in line with the particular historian's focus than with anything definitive.[93] The perceived wide berth of origins is not surprising, however, given the wide stance of the current historic preservation movement, as well as the variety of influences that now rest under its mantle.[94]

Historic preservation's history is typically divided into three distinct phases. The nineteenth century's focus was on preserving monuments as part of creating a national identity.[95] The mid-twentieth century's efforts sought to protect buildings and historic districts that possessed architectural merit from the wrecking ball

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> declared in terms well-nigh conclusive. . . . Public safety, public health, morality, peace and quiet, law and order—these are some of the more conspicuous examples of the traditional application of the police power to municipal affairs. Yet they merely illustrate the scope of the power and do not delimit it.

Id.

91. Carol M. Rose, *Preservation and Community: New Directions in the Law of Historic Preservation*, 33 STAN. L. REV. 473, 476 (1981) ("The phrase 'historic preservation' is so elastic that any sort of project can be justified—or any change vilified—in its name. In a sense, every event is 'history,' and it is a cliché among professional historians that views of 'historic significance' alter considerably with shifting social interests . . . .").

92. Max Page & Randall Mason, *Rethinking the Roots of the Historic Preservation Movement*, *in* GIVING PRESERVATION A HISTORY: HISTORIES OF HISTORIC PRESERVATION IN THE UNITED STATES 3 (Max Page & Randall Mason eds., 2004).

93. Howard L. Green, *The Social Construction of Historical Significance, in* PRESERVATION OF WHAT, FOR WHOM? A CRITICAL LOOK AT HISTORICAL SIGNIFICANCE 86 (Michael A. Tomlan ed., 1998) ("Historic preservation as we know it, though it has earlier antecedents, is a piece of the environmental conservation movement of the 1960s and 1970s . . . ."); *cf.* Barbara Shubinski, *The Mechanics of Nostalgia: The 1930s Legacy for Historic Preservation, in* PRESERVATION OF WHAT, FOR WHOM? A CRITICAL LOOK AT HISTORICAL SIGNIFICANCE 69 (Michael A. Tomlan ed., 1998) ("The groundwork laid by Boasian anthropology [in the Works Progress Administration's efforts] affected, at least indirectly, and perhaps was necessary to the very formation of preservation efforts on a federal level.").

94. *See* Rose, *supra* note 91, at 476.

95. *Id*. at 481-84.

of urban renewal.[96] The current emphasis is on preservation as a means of memorializing and advancing a community's identity.[97]

The nineteenth century American interest in preserving monuments as a means of defining a national identity was not unusual. In fact, the importance of doing so was advocated by European intellectuals of the time,[98] many of whom were engaged in the restoration[99]—or plundering[100]—of sacred ruins and antiquities to define and strengthen nationalistic identity. Many of the "monuments" preserved in America during this time memorialized important figures of the Revolutionary War. For instance, the most iconic American nineteenth century preservation effort was that of George Washington's Mount Vernon estate by the Mount Vernon Ladies Association.[101] The Association purchased the home and two hundred-acre estate with contributions solicited from women in every state, thereby saving the home from demolition and the site from development.[102]

The second phase is typically defined as that call to arms resulting from the demolition of New York's Pennsylvania Station in 1963[103] and the destruction of large swaths of inner cities in accordance with post-World War II urban renewal programs.[104] This phase saw the rise of the most visible and institutionalized aspects of the historic preservation efforts—the federal, state, and local historic preservation laws.[105]

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96. *Id.* at 484-88.

97. *Id.* at 488-92.

98. Rudy J. Koshar, *On Cults and Cultists: German Historic Preservation in the Twentieth Century*, *in* GIVING PRESERVATION A HISTORY: HISTORIES OF HISTORIC PRESERVATION IN THE UNITED STATES 45, 49 (Max Page & Randall Mason eds., 2004) (German historian Georg Dehio announced that "[w]e conserve a monument not because we consider it beautiful, but because it is a piece of our national life"); *see generally* JUKKA JOKILEHTO, A HISTORY OF ARCHITECTURAL CONSERVATION 69-100 (Andrew Oddy & Derek Linstrum eds. 1999) (2002).

99. *See* JOKILEHTO, *supra* note 98. For a consideration of modern European approaches, see Francois Quintard-Morenas, *Preservation of Historic Properties' Environs: American and French Approaches*, 36 URB. LAW. 137 (2004).

100. *See* CHRISTOPHER HITCHENS, THE PARTHENON MARBLES: THE CASE FOR REUNIFICATION (2008).

101. Page & Mason, *supra* note 92, at 6.

102. Diane Lea, *America's Preservation Ethos: A Tribute to Enduring Ideals, in* A RICHER HERITAGE: HISTORIC PRESERVATION IN THE TWENTY-FIRST CENTURY 2 (Robert E. Stipe ed., 2003); Page & Mason, *supra* note 92, at 6-7.

103. Page & Mason, *supra* note 92, at 7.

104. PETER HALL, CITIES OF TOMORROW 228-29 (2d ed. 1996) ("Using the powers to tear down slums asnd [sic] offer prime land to private developers with government subsidy, cities sought 'the blight that's right,' as Charles Abrams inimitably put it. In city after city—Philadelphia, Pittsburgh, Hartford, Boston, San Francisco—the areas that were cleared were the low-income, black sections next to the central business district . . . .").

105. *See infra* notes 106-117.

The most important of these new laws was the National Historic Preservation Act of 1966 (NHPA).[106] The NHPA became the "most far-reaching" federal regulation governing historical resources, and "expanded the National Register of Historic Places" (National Register) to include "historic properties of local and statewide significance."[107] At the time, President Johnson stated that the NHPA would "allow us . . . to take stock of the buildings and the properties that are a part of our rich history and to adequately preserve these treasures properly."[108] In the years since, more than 73,000 entries have been made to the National Register, as well as more than "11,000 . . . historic or architectural districts comprised of numerous individual buildings or sites."[109] The National Park Service estimates there are more than one million individual buildings or sites listed in the National Register.[110] Historic signs are included on National Register, such as the "Welcome to Fabulous Las Vegas" sign.[111]

At the local level, the city of Charleston, South Carolina, passed the nation's first zoning ordinance in 1931 for "the preservation and protection of historic places and areas of historic interest."[112] Although slow to gain momentum at the local level,[113] the number of local governments with historic preservation zoning ordinances rose dramatically in the middle part of the century. According to Weyeneth, "by the 1970s[,] more than two hundred American cities had enacted municipal ordinances to protect historically . . . significant private property."[114] By the 1990s, there were more than eighteen hundred such ordinances.[115] The rapid rise of local historic preservation ordinances is partly attributable to the U.S. Supreme Court's *Penn Central* decision, which upheld New York City's landmarks law that sought to prevent Penn Central's owners from building a skyscraper on top of the existing

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106. 16 U.S.C. § 470 – 470t (1966).

107. Lea, *supra* note 102, at 11 (citation omitted).

108. Green, *supra* note 93, at 86.

109. John M. Fowler, *The Federal Preservation Program, in* A RICHER HERITAGE: HISTORIC PRESERVATION IN THE TWENTY-FIRST CENTURY 42 (Robert E. Stipe ed., 2003).

110. *Id.*

111. Nat'l Parks Serv., National Register of Historic Places Registration Form, The "Welcome to Fabulous Las Vegas" Sign, Reference Number 09000284, listed 5/01/09, *available at* http://www.nps.gov/nr/listings/20090508.htm (last visited Mar. 11, 2011).

112. 1927-1931 JOURNAL OF THE CITY COUNCIL OF CHARLESTON, SOUTH CAROLINA 697-711 (1931); *see also* Robert R. Weyeneth, *Ancestral Architecture: The Early Preservation Movement in Charleston, in* GIVING PRESERVATION A HISTORY: HISTORIES OF HISTORIC PRESERVATION IN THE UNITED STATES 268 (Max Page & Randall Mason eds., 2004) (citation omitted).

113. Weyeneth, *supra* note 112, at 273.

114. *Id.*

115. *Id.* at 275 (citation omitted).

Beaux Arts Grand Central train station.[116] For the first time, *Penn Central* established that historic preservation regulations were not only a legitimate use of the police power, but also that they were not subject to compensation as a taking so long as certain parameters were met.[117]

The third phase of the historic preservation movement is typically defined as arising in the 1980s and continuing to the present. In this era, preservation is, in the words of one commentator, "search[ing] for a new mandate."[118] This era has seen the rise of an effort to be inclusive of a diverse range of histories and to embrace a historicism far beyond the preservation of monuments or architecturally significant buildings.[119] This diverse scope of preservation has as its germinal seed the expansive list of objects eligible for listing on the National Register, which includes: "districts, sites, buildings, structures, and objects . . . that have made a significant contribution to the broad patterns of our history,"[120] as well as in the listing criteria and considerations for listing criteria.[121] While this expansiveness has been in the NHPA since its

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116. Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978); *see also* Lea, *supra* note 102, at 14-15.

117. *Penn Central*, 438 U.S. at 124. The *Penn Central* Court notes:

> [T]he Court's decisions have identified several factors that have particular significance. The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. So, too, is the character of the governmental action. A "taking" may more readily be found when the interference with property can be characterized as a physical invasion by government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.

Id. (citations omitted).

118. Lea, *supra* note 102, at 18.

119. *See id*.

120. *See* Dolores Hayden, *Placemaking, Preservation and Urban History*, 41 J. ARCHITECTURAL EDUC. 45, 46 (1984); *see also* 16 U.S.C. § 470 (1966).

121. *See* 36 C.F.R. § 60.4 (2009). The Regulation states:

> The quality of significance in American history, architecture, archeology, engineering, and culture is present in districts, sites, buildings, structures, and objects that possess integrity of location, design, setting, materials, workmanship, feeling, and association and (a) that are associated with events that have made a significant contribution to the broad patterns of our history; or (b) that are associated with the lives of persons significant in our past; or (c) that embody the distinctive characteristics of a type, period, or method of construction, or that represent the work of a master, or that possess high artistic values, or that represent a significant and distinguishable entity whose components may lack individual distinction; or (d) that have yielded, or may be likely to yield, information important in prehistory or history.
>
> *Criteria considerations*. Ordinarily cemeteries, birthplaces, or graves of historical figures, properties owned by religious institutions or used for religious purposes, structures that have been moved from their original locations, reconstructed historic buildings, properties primarily commemorative in nature, and properties that have achieved significance within the past 50 years shall not be considered eligible for the National Register. However, such properties will qualify if they are integral parts of districts that do meet the criteria of [sic] if they fall within the following categories:

first passage, preservationists are now paying more attention to the non-building categories than before.

The findings for the National Register provide a broad mandate regarding the purposes of historic preservation, including cultural, educational, aesthetic, inspirational, economic, and energy benefits.[122]

Similarly, the National Trust's eight "Charleston Principles," adopted in 1990, also act as a guide for community conservation.[123]

(a) A religious property deriving primary significance from architectural or artistic distinction or historical importance; or (b) A building or structure removed from its original location but which is significant primarily for architectural value, or which is the surviving structure most importantly associated with a historic person or event; or (c) A birthplace or grave of a historical figure of outstanding importance if there is no appropriate site or building directly associated with his productive life. (d) A cemetery which derives its primary significance from graves of persons of transcendent importance, from age, from distinctive design features, or from association with historic events; or (e) A reconstructed building when accurately executed in a suitable environment and presented in a dignified manner as part of a restoration master plan, and when no other building or structure with the same association has survived; or (f) A property primarily commemorative in intent if design, age, tradition, or symbolic value has invested it with its own exceptional significance; or (g) A property achieving significance within the past 50 years if it is of exceptional importance.

Id.

122. The findings for the National Historic Preservation Act of 1966 state:

(1) the spirit and direction of the Nation are founded upon and reflected in its historic heritage; (2) the historical and cultural foundations of the Nation should be preserved as a living part of our community life and development in order to give a sense of orientation to the American people; (3) historic properties significant to the Nation's heritage are being lost or substantially altered, often inadvertently, with increasing frequency; (4) the preservation of this irreplaceable heritage is in the public interest so that its vital legacy of cultural, educational, aesthetic, inspirational, economic, and energy benefits will be maintained and enriched for future generations of Americans; (5) in the face of ever-increasing extensions of urban centers, highways, and residential, commercial, and industrial developments, the present governmental and nongovernmental historic preservation programs and activities are inadequate to insure future generations a genuine opportunity to appreciate and enjoy the rich heritage of our Nation; (6) the increased knowledge of our historic resources, the establishment of better means of identifying and administering them, and the encouragement of their preservation will improve the planning and execution of Federal and federally assisted projects and will assist economic growth and development; and (7) although the major burdens of historic preservation have been borne and major efforts initiated by private agencies and individuals, and both should continue to play a vital role, it is nevertheless necessary and appropriate for the Federal Government to accelerate its historic preservation programs and activities, to give maximum encouragement to agencies and individuals undertaking preservation by private means, and to assist State and local governments and the National Trust for Historic Preservation in the United States to expand and accelerate their historic preservation programs and activities.

16 U.S.C. § 470(b)(1)-(7).

123. The Charleston Principles were first adopted by the National Trust for Historic Preservation's National Conference in October, 1990, and were subsequently adopted by the United States Conference of Mayors in June, 1991. The Charleston Principles are as follows: 1) Identify historic places, both architectural and natural, that give the community its special character and that can aid its future well-being; 2) Adopt the preservation of historic places as a goal of planning for land use, economic development, housing for all income levels, and transportation; 3) Create organizational, regulatory, and incentive mechanisms to

The Charleston Principles include such broad provisions as "use a community's heritage to educate citizens of all ages and to build civic pride" and "recognize the cultural diversity of communities and empower a diverse constituency to acknowledge, identify, and preserve America's cultural and physical resources."[124]

Proponents of a more inclusive historic preservation effort, such as Dolores Hayden, have emphasized that the movement should "celebrate the history of their citizens' most typical activities—earning a living, raising a family, carrying on local holidays, and campaigning for economic development or better municipal services."[125] Other commentators have similarly urged that historical significance should not be a matter for the experts and historic preservation professionals, but rather enshrine the values placed on an environment by the community that lives there.[126]

This increasing focus on the community—both in shaping the procedures of historic preservation and as the end users of the process—has become dominant in the field. Yet, such inclusivity is fraught with the same questions that the explosion of histories in the latter-half of the twentieth century brought to effective narratives: whose history are we telling? Whose heroes receive prominence? Does the celebration and enshrinement of "typical activities" ennoble the quotidian at the expense of rewarding achievement? Bringing these questions to the city landscape poses additional concerns, as they must compete with the evocation of archi-

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facilitate preservation, and provide the leadership to make them work; 4) Develop revitalization strategies that capitalize on the existing value of historic residential and commercial neighborhoods and properties, and provide well-designed affordable housing without displacing existing residents; 5) Ensure that policies and decisions on community growth and development respect a community's heritage and enhance overall livability; 6) Demand excellence in design for new construction and in the stewardship of historic properties and places; 7) Use a community's heritage to educate citizens of all ages and to build civic pride; 8) Recognize the cultural diversity of communities and empower a diverse constituency to acknowledge, identify, and preserve America's cultural and physical resources. *Charleston Charms Preservationists*, 12 HISTORIC PRESERVATION NEWS 8 (December 1990); see *also* Lea, *supra* note 102, at 18.

124. *Charleston Charms Preservationists*, 12 HISTORIC PRESERVATION NEWS 8 (December 1990).

125. Hayden, *supra* note 120, at 46. Hayden notes:

> One reason for the neglect of ethnic and women's history is that landmark nominations everywhere in the United States frequently have been the province of passionate rather than dispassionate individuals—politicians seeking fame or favor, businessmen exploiting the commercial advantages of specific locations, and architectural critics establishing their own careers by promoting specific persons or styles.

Id.

126. Rose, *supra* note 91, at 533 ("A major public purpose underlying modern preservation law is the fostering of community cohesion, and ultimately, the encouragement of pluralism."); Green, *supra* note 93, at 92 ("Meaning is socially made. Historical significance is about meaning in the public realm. It is all historical, but it is not all equally historically meaningful, i.e. significant.").

tectural style and ornament, as well as urban scale and methods of living, that raise equal passions independent of preserving personal and collective identities.

B. Harmony, Tourism, and Property Values

The purposes announced by some of the most prominent historic preservation ordinances in the country speak not of health or safety, but of the more "genteel" purposes of tourism, aesthetics, and property values. The City of Charleston's historic preservation ordinance provides in part:

> In order to promote the economic and general welfare of the city and of the public generally, and to insure the harmonious, orderly and efficient growth and development of the municipality, it is deemed essential by the city council of the city that the qualities relating to the history of the city and a harmonious outward appearance of structures which preserve property values and attract tourist and residents alike be preserved . . . .[127]

The City of Alexandria, Virginia, similarly notes the importance of tourism, property values, and aesthetics as purposes of the city's historic preservation ordinance.[128]

When historic preservation is premised on such notions as tourism, property values, and aesthetics, the idea of a *harmonious* development in a historic district becomes an important requirement in support of these purposes.[129] Such a notion has become ubiquitous, and codes routinely require new development to demonstrate "appropriate[ness]" to the historic district.[130] Design guidelines are often created, as in New Orleans and Nantucket,[131] to maintain "indigenous" architectural legacies, which often evolved over hundreds of years, and are subsequently rigidly codified to prevent any further evolution.[132] This rigidity of design often accompanies the gentrification of a historic district.[133] Historic

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127. CHARLESTON, S.C., CODE § 54-230 (2003); David F. Tipson, *Putting the History Back in Historic Preservation*, 36 URB. LAW. 289, 295 (2004) (quoting CHARLESTON, S.C., CODE § 54-230).

128. *See* ALEXANDRIA, VA., CODE § 2-4-32 (1982); *see also* Tipson, *supra* note 127, at 296-97.

129. Tipson, *supra* note 127, at 295.

130. *Id*. at 299-300.

131. *Id*.

132. *Id.* at 299-301.

133. *Id.* at 309.

signs are often regulated under such requirements, including both the maintenance of historic signs, as well as the dimensions of new signs in historic districts.[134]

These "purpose" clauses are viewed by some as being in opposition to a more inclusive approach to historic preservation, which should be, as Carol Rose proposed, focused on "the fostering of community cohesion, and ultimately, the encouragement of pluralism."[135] As Rose continues, "[p]reservation law encourages a physical environment that supports community; it also provides procedures that can themselves organize a community, both by focusing the members' attention on aspects of the physical environment that can make them feel at home and by defining a smaller community's contribution to a larger."[136] Others have similarly stated that the significance of a landscape feature should be evaluated:

> [N]ot as it exists in isolation, but for its capacity to corroborate the important narratives that constitute the specific history of a community. . . . [T]he primary criterion of review would be the extent to which such alterations demolish historic fabric or obscure narratives that the community wishes to be expressed in the landscape.[137]

In this way, purposes such as harmony, appropriateness, tourism, and property values stand in opposition to a more broad-based, community-focused preservation effort.

C. The City as Masterwork

In his *Penn Central* dissent, Justice Rehnquist notes that one of the ironies of historic preservation is that "Penn Central is prevented from further developing its property basically because too good a job was done in designing and building it."[138] The *Penn Central* majority did not directly address this issue, although Joseph Sax has stated that the Court should not have shied away from recognizing the affirmative obligation of the *owner-as-steward*, because by engaging an artist to create a masterwork the owner has prevented the artist from otherwise engaging in commissions that

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134. Burant, *supra* note 2, at 67-73; Kramer, *supra* note 3, at 27-45.

135. Rose, *supra* note 91, at 533.

136. *Id.* at 533-34.

137. Tipson, *supra* note 127, at 314-15.

138. Penn Central Transp. Co. v. City of New York, 438 U.S. 103, 146 (1978) (emphasis omitted).

would have been preserved.[139] By making such an argument, Sax is in essence grafting the rule of law governing fine art, which prevents destruction of a masterwork without the artist's consent, onto the city itself.[140]

Lior Jacob Strahilevitz has responded, however, that owners of buildings must retain the ancient "right to destroy," and that "overprotection of existing buildings will result in some future buildings never getting built." [141] As Strahilevitz asserts, "[a]s society becomes increasingly hostile to the right to destroy, there is a strong possibility that the pendulum will swing too far toward overprotection of extant structures."[142] The Roman property right of "the *jus utendi fruendi abutendi*: the rights to use the principal (i.e., the property), to use the income generated by the property, or to completely consume and destroy the property,"[143] was absorbed by the prominent British legal commentator William Blackstone and was incorporated throughout much of the nation's legal history.[144] Strahilevitz cites the 1960 case of *State of Illinois ex rel. Marbro Corp. v. Ramsey*, in which an Illinois appellate court held that a "building owner was entitled to a demolition permit where the costs of repairing and maintaining a historically significant building were high and where the owner would still lose money operating the building if it were fully renovated at the public's expense."[145]

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139. JOSEPH L. SAX, PLAYING DARTS WITH A REMBRANDT: PUBLIC AND PRIVATE RIGHTS IN CULTURAL TREASURES 58 (1999). Sax states:

> The question that the [*Penn Central*] majority declined to address is whether "ordinary standards" should apply to the owner of an architectural masterwork. Justice Rehnquist deserved a reply to the paradox he had identified. Perhaps the best answer is that while the patrons (or owners) of an important work of architecture were not obliged to engage with a masterwork, having done so they have by their own voluntary act potentially made the community *worse* off than it would have been if they had never acted. It is insufficient to say that the work would not have existed without their patronage. For they have diverted the time and effort of an artist from other work he might have done, and that—in other hands—might have been better protected or made more widely accessible. In that respect, to engage with an important artist or artifact is to make oneself responsible. In perhaps an even more obvious way, those who patronize a great architect not only divert that individual from other opportunities, but put a structure upon the landscape that inevitably shapes and changes the community around it. It is hardly a purely private act.

Id.

140. *Id.* at 21-34.

141. Lior Jacob Strahilevitz, *The Right To Destroy*, 114 YALE L.J. 781, 816 n.142 (2005).

142. *Id.*

143. *Id.* at 787.

144. *Id.* at 816.

145. Illinois *ex rel.* Marbro Corp. v. Ramsey, 171 N.E.2d 246, 247-48 (Ill. App. Ct. 1960); Strahilevitz, *supra* note 141, at 816-17 (citing *Ramsey*, 171 N.E. 2d at 247-48).

Sax's proposed affirmative obligation to preserve city masterworks would seemingly create increasing uncertainty for the property owner, as its reach could ostensibly extend beyond any landmarking or designation of a building or structure, and its reach could lead to property owners being held accountable for the demolition or destruction of properties that have received no formal rating.[146]

D. City Taxidermy, the Image of the City, and the City as Palimpsest

Proponents of city development in the early twentieth century often paraded brash boosterism as visionary ideas. Architects such as Louis Sullivan could state that a skyscraper "must be every inch a proud and soaring thing, rising in sheer exultation,"[147] City Beautiful planners like Daniel Burnham could demand that one "[m]ake no little plans," as "they have no magic to stir men's blood,"[148] and modernist visionaries could implore the destruction of whole cities on the basis of a metaphor. Le Corbusier famously sought to raze central Paris because its winding roads reflected "the Pack-Donkey's Way," while the linear, modernist lines of the city he proposed reflected elements of reason.[149] This ideological

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146. Works of a master are a means of finding historical significance alone. *See* NAT'L PARK SERV., NATIONAL REGISTER BULLETIN, HOW TO APPLY THE NATIONAL REGISTER CRITERIA FOR EVALUATION 20 (1995) [hereinafter HOW TO APPLY THE NATIONAL REGISTER CRITERIA]. Sax's argument takes this one step further, however, in noting a legal obligation to preserve even prior to a determination of significance. *See* SAX, *supra* note 139.

147. Louis H. Sullivan, *The Tall Office Building Artistically Considered*, LIPPINCOTT'S MONTHLY MAGAZINE 403, AT PAR. II (Mar. 1896).

148. *See* THOMAS S. HINES, BURNHAM OF CHICAGO: ARCHITECT AND PLANNER 401 n.8 (2d ed. 2009) (1974). Hines notes:

> The origins of the 'Make No Little Plans' motto are ambiguous and difficult to document. Burnham apparently never wrote out or delivered the piece in the exact, and now famous, sequence quoted by Charles Moore in *Daniel H. Burnham, Architect, Planner of Cities,* II (Boston, 1921), 147. Moore's version, according to Daniel Burnham, Jr., was copied from the one used by Willis Polk, Burnham's San Francisco friend and junior associate, on Christmas cards that Polk sent out in 1912, following Burnham's death the previous June. Most of the statement was drawn directly from Burnham's address at the 1910 London Town Planning Conference, 'The City of the Future Under a Democratic Government,' *Transactions of the Royal Institute of British Architects* (October 1910), 368-78. Since Polk ascribed the entire statement to Burnham, the additional lines were probably drawn by Polk from conversations or correspondence with Burnham that are now lost. The entire statement is consistent with and appropriate to Burnham's views and values. Its sentiments, and frequently its phrasing, are reiterated throughout his correspondence, speeches, and published writing.

Id.

149. LE CORBUSIER, THE CITY OF TO-MORROW AND ITS PLANNING 11 (Frederick Etchells trans., Architectural Press, 3d ed. 1971) (1924). Le Corbusier states:

approach lent a moralism to razing the old parts of the city, even once described as eliminating the "cancer" of urban blight from the city.[150] Decisions such as *Berman* gave credence to these theories by expanding the police power to give cities the ability to enact these new ideas, often through vast redevelopment schemes that tore down older portions of cities.[151] Redevelopment, though, eventually engendered sustained revolts against both the racial divides such projects were premised upon and intent on fortifying,[152] and the super-block scale of the city that they were creating.[153]

Jane Jacobs was perhaps the best known figure to provide a voice for the small-scale city.[154] While Jacobs supported small-scale neighborhoods, such as New York's Greenwich Village and Boston's North End,[155] she was dubious of over-planning at this scale, even for preservation. Jacobs warned:

> When we deal with cities we are dealing with life at its most complex and intense. Because this is so, there is a basic esthetic limitation on what can be done with cities: *A city cannot be a work of art.*
>
> . . .
>
> To approach a city, or even a city neighborhood, as if it were a larger architectural problem, capable of being given order by converting it into a disciplined work of art, is to make the mistake of attempting to substitute art for life. The results of such profound confusion between art and life are neither life nor art. They are taxidermy. In its place, taxidermy can be a useful and decent craft. However, it goes too far when the specimens put on display are exhibitions of dead, stuffed cities. Like all attempts at art which get far away from the truth and which lose respect for what they

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> Man walks in a straight line because he has a goal and knows where he is going; he has made up his mind to reach some particular place and he goes straight to it. The pack-donkey meanders along, meditates a little in his scatter-brained and distracted fashion, he zigzags in order to avoid the larger stones, or to ease the climb, or to gain a little shade; he takes the line of least resistance.

Id.

150. Wendell E. Pritchett, *The "Public Menace" of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 YALE L. & POL'Y REV. 1, 18 (2003) (citing Joseph D. McGoldrick, *The Super-Block Instead of Slums*, N.Y. TIMES MAG. 54-55 (Nov. 19, 1944)).

151. *See* HALL, *supra* note 104; *see also* ROBERT HALPERN, REBUILDING THE INNER CITY: A HISTORY OF NEIGHBORHOOD INITIATIVES TO ADDRESS POVERTY IN THE UNITED STATES 57-82 (1995).

152. *See* CHESTER HARTMAN & SARAH CARNOCHAN, CITY FOR SALE: THE TRANSFORMATION OF SAN FRANCISCO 76-102 (2002).

153. *See* Joseph D. McGoldrick, *The Super-Block Instead of Slums*, N.Y. TIMES MAG. 54-55 (Nov. 19, 1944).

154. *See, e.g.,* JANE JACOBS, THE DEATH AND LIFE OF GREAT AMERICAN CITIES 3-4 (Vintage Edition 1992) (1961).

155. *Id.* at 5-10, 125, 183.

> deal with, this craft of city taxidermy becomes, in the hands of its master practitioners, continually more picky and precious. This is the only form of advance possible to it.[156]

While Jacobs' was arguably the most notable voice on this issue, Kevin Lynch was the most influential planner to lay out an alternative vision for how the city could be imagined and maintained on a small scale.[157] Lynch conducted seminal studies on how citizens of cities referenced their urban landscape, and developed a typology to convey this "image of the city" that urban citizens used to locate themselves, both spatially and personally, within the city.[158] This typology was marked by paths, edges, districts, nodes, and landmarks.[159] With landmarks, Lynch noted that "[t]here seemed to be a tendency for those more familiar with a city to rely increasingly on systems of landmarks for their guides."[160] These landmarks were:

> [U]sually a rather simply defined physical object: building, sign, store, or mountain. . . . These are the innumerable signs, store fronts, trees, doorknobs, and other urban detail, which fill in the image of most observers. They are frequently used clues of identity and even of structure, and seem to be increasingly relied upon as a journey becomes more and more familiar.[161]

In other words, landmarks such as signs became more important to citizens familiar with a locale as a means of creating an identity of the city, which was increasingly important as cities metastasized into megalopolises in which form was less evident, and therefore the ability to *read* a city became harder.[162]

Lynch, like Jacobs, realized that historic preservation played a vital role in fighting the super-block. But both Jacobs and Lynch feared that historic preservation could reach too far and obstruct the present use of the city. Lynch noted that the aim of historic preservation "should be the conservation of present value as well

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156. *Id.* at 372-73.
157. *See* KEVIN LYNCH, THE IMAGE OF THE CITY (1960).
158. *See id.*
159. *Id.* at 47-48.
160. *Id.* at 78.
161. *Id.* at 48.
162. *Id.* at 119 ("Large-scale imageable environments are rare today. Yet the spatial organization of contemporary life, the speed of movement, and the speed and scale of new construction, all make it possible and necessary to construct such environments by conscious design.").

as the maintenance of a sense of near continuity."[163] Lynch goes on to note that "[t]hings are useful to us for their actual current qualities and not for some mystic essence of time gone by"[164] and that "[h]istorical areas are not so much irreplaceable as rarely replaced."[165] In proposing a method of historic preservation, Lynch stated:

> Public agencies will be more effective in guiding change than in preventing it. In addition . . . I prefer to emphasize the creation of a sense of local continuity—the tangible presentation of historical context, one or two generations deep, in all our living space—over the saving of special things. That continuity should extend to the near future as well as the near and middle-range past. In any changing area, I propose the retention of some elements, fragments, or symbols of the immediately previous state. Elements least likely to interfere with present function would obviously be chosen, but they should be significant ones, symbolically rich or directly connected with past human behavior or conveying a sense of the total ambience of the past.[166]

Jacobs and Lynch were concerned that the small-scale city needed to be preserved, but that did not necessarily entail preservation of the city as it was in any one moment in time. Rather, both Jacobs and Lynch promoted a view of the city as an evolving creature that needed to emphasize its present use. At the same time, Lynch was especially cognizant of the importance of maintaining a sense of time in the city, and doing so in a manner that facilitated the image of the city through use of landmarks to help citizens retain legibility of their space in a megalopolis. Historic signs, such as the weather vane atop Faneuil Hall or even a broken street clock, could be valuable[167] as both a defining means of reference and a connection to the city's history.

The approach of Jacobs and Lynch was later echoed by theorists such as Andreas Huyssen, who stated that:

> After the waning of modernist fantasies about *creatio ex nihilo* and of the desire for the purity of new beginnings, we have come to read cities and buildings as palimpsests of

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163. KEVIN LYNCH, WHAT TIME IS THIS PLACE? 55 (1972).
164. *Id.*
165. *Id.* at 57.
166. *Id.* at 235.
167. *Id.* at 138 (figures 37-38).

> space, monuments as transformable and transitory, and sculpture as subject to the vicissitudes of time. Of course, the majority of buildings are not palimpsests at all. As Freud once remarked, the same space cannot possibly have two different contents. But an urban imaginary in its temporal reach may well put different things in one place: memories of what there was before, imagined alternatives to what there is. The strong marks of present space merge in the imaginary with traces of the past, erasures, losses, and heterotopias.[168]

As with the sense of time that Lynch sought, retaining the multiple eras of writing upon the palimpsestic city[169] preserves its varied meanings and gives a new depth to the experience of the present city. The historic sign contributes not only as a vestige of previous commerce, but also to the modern experience of history that grounds an individual in the city. Such an approach would argue that the government maintains an interest in a public space that retains a historic context, not only to preserve the past, but for the present experience of time and memory. While more theoretical than other, tested purposes, this is arguably more honest in its intent and potentially still within the ambit of *Berman*.

VI. APPROACHES TO PRESERVING HISTORIC SIGNS WITHIN THE FIRST AMENDMENT

Stacking the variety of public purposes supporting historic preservation ordinances—either individually or in wholesale fashion—against the Court's compelled speech analysis is unlikely to yield a dispositive answer as to whether the retention of historic signs are of a sufficient governmental interest to justify the burden they impose on current businesses. Post-*Berman* courts have clearly been lenient in upholding sign regulation and historic preservation,[170] but the limitations of preservation would likely surface

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168. ANDREAS HUYSSEN, PRESENT PASTS: URBAN PALIMPSESTS AND THE POLITICS OF MEMORY 7 (2003).

169. Felix Frankfurter has argued that constitutional analysis itself contains palimpsestic qualities. *See* Felix Frankfurter, *Mr. Justice Cardozo and Public Law*, 48 YALE L.J. 458, 486 (1939) (noting that the commerce clause is a "heavily encrusted palimpsest.").

170. For cases upholding sign regulation, see *supra* note 41; *see also* Metro Lights, L.L.C. v. City of Los Angeles, 551 F.3d 898 (9th Cir. 2009) (cert den'd, 130 S.Ct. 1014); World Wide Rush, LLC v. City of Los Angeles, 606 F.3d 676 (9th Cir. 2010). Facial challenges to historic preservation ordinances are increasingly rare, but *see* Kruse v. Town of Castle Rock, 192 P.3d 591 (Colo. 2008) (upholding historic preservation ordinance against facial and as-applied constitutional challenges). For a rare contemporary case finding a historic

where, as with historic signs, the issue of how such purposes align against compelled speech analysis is one of first impression for the courts.

In such a case, the Court would likely consider the fact-specific sign preservation scheme at issue, rather than weigh the issues in the abstract. A schematic analysis of the issues is possible by re-considering the four methods of preserving historic signs in *Preservation Brief 25*, as outlined previously,[171] in light of the public purposes of historic preservation and commercial speech interests.

A. Historic Signs Retained

Preservation Brief 25 presents two approaches for retaining a historic sign on the exterior of the building: retaining the historic sign unaltered, or modifying the historic sign for use with the new business.[172] In evaluating such a scheme, analysis must begin with two questions arising from *PG&E*: whether the historic sign's preservation is a question of "extra space" as analyzed in that case and whether preserving the historic sign is tantamount to the State compelling the current business owner to advance views with which the business owner disagrees.[173]

PG&E's discussion of "billboards" and "sides of buildings" is *dicta*, as the only issue before the Court was the use of the ratepayers' envelope. Nonetheless, the Court indicated its concern that, had it allowed the utility's adversaries to use the extra space in the envelope,[174] the concept of "extra space" could be used more broadly to justify any variety of compelled speech.[175] If the "side of [the] building[]" is a permissible measuring stick, as *PG&E* indicates,[176] then the mere fact that a property owner's signage for the current use can be accommodated and that the historic sign can also be accommodated in the extra space of the building's side is not enough. *PG&E* provides that such arguments of incidental accommodation are not persuasive in situations where the message that is being required advances a view with which the business owner would disagree.[177]

That begs the second question of *PG&E*: whether a historic sign could ever be held to advance views with which the business

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preservation ordinance facially unconstitutional, see Hanna v. City of Chicago, 388 Ill. App. 3d 909 (2009).

171. *See supra* notes 66-74 and accompanying text.

172. *See* AUER, *supra* note 8.

173. *See* Pac. Gas and Elec. Co. v. Pub. Utils. Comm'n, 475 U.S. 1 (1986).

174. *See id.* at 1, 19 n.15.

175. *See id.* at 8 n.15.

176. *See id.*

177. *See id.*

disagrees.[178] As *Preservation Brief 25* argues, "[s]urviving historic signs have not lost their ability to speak. But their message has changed." [179] The preservation argument is that the historic sign is evocative of the past only, as its original communicative function has ceased and the passerby recognizes that the sign no longer proposes a transaction or otherwise intends to communicate its message. Skepticism of such an approach on a broad scale is warranted, in part because business signage has not changed uniformly over time. Many businesses still use historic signage to actively brand their products, as is especially true of products for which nostalgia is part of the brand, such as Coca-Cola. As a result, consumers viewing a faded Coca-Cola sign against a brick building do not assume that the sign no longer proposes a transaction simply because it is old. In other words, for some historic signs the meaning does not change whatsoever, especially where the branding itself has incorporated a sense of the passage of time.

Of more direct concern is the required maintenance of historic signage that constitutes a political or ideological viewpoint. For instance, the preservation of segregation signage by a private property owner, such as "white" and "colored" bathroom signs,[180] would likely be considered compelled speech, as it associates the business with a racial ideology in a manner not easily discernible from intended racism. In such cases it is not clear that the meaning has changed at all. While preservation of such signage may have the benefit of helping to remind Americans of a difficult and troubling part of their history, requiring preservation of such signs by private businesses would likely be deemed unconstitutionally compelled speech.

More difficult questions arise when examples such as the baby clothier below a historic business sign reading "liquor and cigarettes," or the used-car dealer beneath a historic business sign advertising "Johnie's Broiler: Family Restaurant, Coffee Shop"[181] are considered. The compelled-speech doctrine case law, such as *Zauderer*, has thus far focused on the question of whether the government may require truthful and factual information to be provided by the advertiser, such as warnings on attorney advertisements.[182] However, the Court has not addressed the question of whether the government may require non-truthful and non-factual information to be retained by a business owner where the purposes, even those

178. *See id*. at 19.
179. AUER, *supra* note 8 (conclusion).
180. *See* Weyeneth, *supra* note 15 and accompanying text.
181. *See supra* note 14 and accompanying text.
182. *See supra* notes 39-45 and accompanying text.

of historic preservation articulated in the ways outlined above, remain far more diffuse than the interests of the business owner. In such cases, the retained words, however stylized, indicate particular types of transactions that are still common today. A passerby still expects to encounter stores selling liquor, cigarettes, and coffee. Furthermore, signs for such products are often highly stylized, both in their historic and present forms, and a consumer does not immediately recognize that such transactions are no longer possible where he or she sees a historic sign advertising such a vacated use. More importantly to the current business, the passerby does not immediately recognize that the products for sale are baby clothes or used cars. Therefore, the current business owners may object to the confusing language of such historic signs, even if such historic signs could otherwise be accommodated in the "extra space" of the building's side.

If preserving a historic sign were not compelled speech per se and therefore must be removed, policy should trend towards ensuring that the business owner's signage is the primary business activity communicated and proposed, and the historic sign speaks in a manner that does not propose a business transaction. This can be achieved in a number of ways, some of which are outlined in *Preservation Brief 25*.[183] One common approach is to replace lettering on a historic sign to indicate the new business, such as replacing "coffee shop" with "used cars," or "liquor and cigarettes" with "baby clothes."[184] A number of solutions are likely possible depending on the facts of the signage.

This approach would likely satisfy a number of the purposes espoused by historic preservation. By retaining the historic sign in a manner that prioritizes the present business signage, preservation avoids the trap of "city taxidermy" that worried Jacobs.[185] It also preserves the landmark quality of the historic sign as a navigational device in the city's typology, as Lynch noted,[186] while also prioritizing the present use on which Lynch insisted.[187] A hard-line approach, such as that of Sax, would likely be unsatisfied, however, arguing instead that change to the historic sign is the equivalent of painting over a corner of a masterpiece (presume, for argument, Picasso's *Les Demoiselles d'Avignon*) to give a child space to draw.[188] Similarly, those that encourage preservation for its tourist

183. *See* AUER, *supra* note 8.
184. *See id*.
185. *See* Jacobs, *supra* notes 154-156.
186. *See* Lynch, *supra* notes 157-162.
187. *See id*.
188. *See* Sax, *supra* note 139.

draw may be equally disconcerted by prioritizing the present use where the historic sign contributes to the atmosphere that is the purpose of tourism. And yet, Lynch's proposal of prioritizing present use of signage while preserving elements of the sign that are symbols of the past seems very much in line with the Court's priorities of encouraging businesses to put forth truthful, factual information while requiring the state to avoid compelling businesses to advance ideas with which they disagree. Lynch's proposal is nothing more than a typology of true and factual commercial speech permitting a city to function in its present state, all-the-while resisting the forces of nostalgia and recreated pasts—those aspects of preservation that lean indelibly toward compelled speech.

There is a complicating factor, however. While such modifications to the historic sign may meet many of the purposes of historic preservation broadly conceived, modification of the sign could very easily prevent a sign from ever becoming designated a historic resource.[189] To become listed as a historic resource on the National Register, a sign must possess both significance and integrity, as with any other building or landmark.[190] However, changing the lettering on a historic sign may be deemed to weaken that sign's integrity of materials and, unless done very carefully, could also have the potential to compromise the sign's integrity of design, workmanship, feeling, and association.[191] That represents five of the seven components of integrity,[192] and thus a sign with changed lettering may be deemed to be too compromised to be a historic resource and thus ineligible for listing on the National Register. As a result, a legal consideration of a modified historic sign under the First Amendment would still face the issue of whether to prioritize commercial speech, historic preservation's purposes, or the technical dictates of the NHPA.

B. Historic Signs Removed

Two other options are presented by *Preservation Brief 25*: removal of the sign from the site to donate it to a museum or preservation group, or relocation of the sign to the interior of the building, such as in the lobby or above the bar in a restaurant.[193] Such removal eliminates the compelled-speech dilemma—the historic sign is gone and speaks to the passerby no more. As indicated pre-

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189. *See* HOW TO APPLY THE NATIONAL REGISTER CRITERIA, *supra* note 146, at 44-49.
190. *Id.* at 44.
191. *See id.* at 44-49.
192. *See id.*

viously, a solution shy of removal is most likely available to satisfy the strictures of compelled speech. On the other hand, complete removal, even if to a museum or inside, does not meet many preservation goals.

The preservation of the historic sign in an off-site location could arguably meet the purpose of preserving the masterwork as Sax argued, but in a manner that seems to substitute form for substance. The masterwork quality of the historic sign is, in part, its reference to the cityscape in which it was placed. Community history proponents may argue that removal eliminates the very purpose of preserving the sign—its civic prominence. Lynch would argue that the sign's complete loss eliminates a typological landmark and makes the city less legible to its citizens, and those prioritizing tourism would emphasize the loss of an element in the city that makes it attractive to visitors. In short, removal to a museum or to the interior of the building would satisfy few, if any, of the preservationists' purposes. In addition, historic preservationists would likely be unsatisfied with such an approach because it would compromise the sign's integrity of feeling and association, and thus would limit the sign's ability to be listed as a historic resource on the National Register.[194]

VII. CONCLUSION

Perhaps the only approach that is not satisfied with any of the approaches in *Preservation Brief 25*[195] is that of Strahilevitz, who emphasizes the "right to destroy" property.[196] Strahilevitz's critique is important, as it illustrates the slow evolution from the unbridled ability to destroy buildings to a situation in which not only buildings, but also ephemera such as signage are the subject of government regulation.[197] Nonetheless, given the prominence of preservation in the public imagination, not to mention the broad police powers justifications put forth in *Berman*,[198] such unbridled right of destruction is unlikely to return any time soon. Rather, preservation is more likely to be reigned in as it encroaches on other rights, as has happened in recent years, where religious groups have asserted their right of religious freedom when battling preservationists in their efforts to destroy buildings they own.[199]

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193. *See* AUER, *supra* note 8, at 52-63.

194. *See* HOW TO APPLY THE NATIONAL REGISTER CRITERIA, *supra* note 146, at 44-49.

195. *See* AUER, *supra* note 8.

196. *See* Strahilevitz, *supra* note 141.

197. *See id*.

198. *See* Berman v. Parker, 348 U.S. 26 (1954).

199. *See, e.g.*, City of Boerne v. Flores, 521 U.S. 507 (1997); *see generally* Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. §§ 2000cc-1 to 2000cc-5

By considering historic signs in light of other rights, such as freedom of speech, the limits of preservation emerge in high relief. It becomes evident that even within the historic preservation movement, the question of what should be preserved remains open. However, that question is increasingly viewed as one more appropriate for public comment and public discourse. As the movement takes on a more egalitarian and democratic march, so too do its provisions reach deeper into the fabric of present-day life. The natural result of this growth will be that preservation will, in turn, bump up against other rights and freedoms held close. Whether that is freedom of speech in the commercial context, or some other right, preservation's battles in its era of democratization will not be only over its direction, but how it aligns with other, equally-valued institutions of freedom and expression.

(2000); *see also* CAL. GOV'T CODE § 25373(d) (preventing local landmarking of churches without their consent); Andie Ross, Historic Preservation: First Amendment Considerations (2005) (unpublished M.A. thesis, University of Pennsylvania) (on file with author) (reviewing historic preservation cases involving religious institutions).

CAN YOU EAT YOUR FISH & SAVE IT TOO? IMPROVING THE PROTECTION OF PIRATED MARINE SPECIES THROUGH INTERNATIONAL TRADE MEASURES

KATHERINE WEBER*

I. INTRODUCTION

Salty seas, freedom, and bejeweled treasure were once the object of piracy, but today's pirates are after a new plunder—the white gold of the frigid Southern Sea known as Patagonian toothfish (*Dissostichus eleginoides*).[1] In 2001, the *South Tomi* was captured after a two-week pursuit by three countries.[2] The vessel's crew illegally caught $800,000 worth of toothfish in Australian waters.[3] The captain's fine was the largest to date: a mere $68,000.[4] A

* J.D., 2010, Florida State University College of Law. I wish to sincerely thank Professor Randall Abate for his insight, guidance, and unwavering support.

1. The toothfish is named for its prominent canine-like teeth unusual in the Antarctic Cod family. CITES, Consideration of Proposals for Amendment of Appendices I and II, Prop. 12.39, 2.3.1, *available at* http://www.cites.org/eng/cop/12/prop/E12-P39.pdf [hereinafter CITES Amendment Consideration].

2. Mark Schulman, *Australia Asks CITES to Safeguard Toothfish,* ENVTL. NEWS SERV., Oct. 22, 2002, *available at* http://www.ens-newswire.com/ens/oct2002/2002-10-22-01.asp.

3. *Id*.

few months later, the apprehension of the Russian-flagged *Lena* and *Volga* for illegal toothfishing landed $1.3 million worth of catch between the two vessels.[5] The three-man *Lena* crew was fined no more than $50,000 each.[6] Closer to home, courts fined Antonio Vidal Pego, a Spanish fishing kingpin, for importing over 50,000 pounds of pirated toothfish into Miami, Florida.[7] Although these elusive pirates are occasionally apprehended and sanctioned, it is easy to see the allure of pirate fishing, even on merciless waves at the bottom of the world. The risk of apprehension is relatively low; the sanctions are trivial compared to the value of the catch; and the potential profits are very, very high. An undercover agent with the National Marine Fisheries Service reveals, "You can make as much money as a poacher as you can in the drug world—but it's harder to get caught."[8]

Pirate fishing is considered among the most severe problems influencing global fisheries[9] and is the single greatest threat to toothfish.[10] Illegal, unreported, and unregulated (IUU) fishing, or piracy, encompasses three separate activities. Illegal fishing involves national or foreign vessels fishing in waters under a state's jurisdiction without that state's permission or fishing an area in violation of a conservation agreement, regional fishery management organization (RFMO), or international law to which the state whose flag the vessel is flying under (flag state) is party.[11] Fishing activities that are misreported or not reported at all constitute unreported fishing.[12] Unregulated fishing occurs when a vessel either harvests fish in a RFMO area without a flag state or harvests under a flag not party to the applicable RFMO in a manner inconsistent with the RFMO's conservation measures.[13] Unregulated fishing may also occur in waters where no specific conservation measures exist, but the manner in which the fishing is conducted

4. *Id*.
5. *Id*.
6. *Id*.
7. Brian Handwerk, *Chilean Sea Bass: Back in Stores but Still in Trouble*, NAT'L GEOGRAPHIC NEWS, Nov. 28, 2006, *available at* http://news.nationalgeographic.com/news/2006/11/061128-sea-bass.html.
8. Cate Lecuyer, *Saving the Chilean Sea Bass; Beverly Man Honored for Work to Put Poachers Behind Bars*, THE SALEM NEWS, Jan. 2, 2008, *available at* http://salemnews.com/punews/local_story_002113009.
9. The Secretary-General, *Report of the Secretary-General on Oceans and the Law of the Sea, delivered to the General Assembly*, U.N. Doc. A/55/61 (Mar. 20, 2000).
10. *Last Chance Saloon?*, WWF NEWSROOM, Oct. 23, 2002, *available at* http://wwf.panda.org/wwf_news/?4142/Last-chance-saloon (last visited Mar. 11, 2011); *see also* CITES Amendment Consideration, *supra* note 1, at 2.7. IUU fishing first arose in 1993 in regards to toothfish. *Id*. at 2.4.
11. ANNA WILLOCK, A TRAFFIC REPORT, UNCHARTED WATERS: IMPLEMENTATION ISSUES AND POTENTIAL BENEFITS OF LISTING TOOTHFISH IN APPENDIX II OF CITES 11 (2002).
12. *Id*.
13. *Id*. at 12.

is inconsistent with international law.[14] The most common IUU offenses involve the use of outlawed equipment, disregarding catch quotas, and harvesting protected species.[15]

IUU fishing jeopardizes the continuing viability of the world's fish stocks by undermining conservation and management efforts designed towards sustainability.[16] The destruction of species, ecosystems, and biodiversity is fueled by an insatiable demand for the exotic—another term for threatened or endangered. As species become rarer their value on both legitimate and black markets increases to reflect this scarcity, enhancing the incentive for further theft. Pirate fishing in 2008 was valued at approximately $10 to $23 billion,[17] with single toothfish selling for $1000.[18] In fact, the illegal trade in fish and wildlife ranks in profitability only behind the black market for drugs and weapons.[19] Pirates can easily make $3 million in one season of toothfishing; the price of being caught is simply an operating cost of their business.[20] Fishing nations worldwide suffer $4 to $9 billion in losses each year due to IUU fishing.[21] The Food and Agriculture Organization of the United Nations (FAO) determined that more than 92 million tons of legally and illegally captured fish were traded in 2006.[22] Without healthy, sustainable fish populations, food sources and livelihoods are at serious risk.

Illegal, unreported, and unregulated fishing threatens commercial extinction in many marine species, including the Patagonian toothfish. Since industrial fishing began, the oceans have lost 90% of biomass in large predatory fish.[23] The FAO conservatively estimates that 75% of the world's fisheries are fully exploited,

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14. *Id.*

15. *UN-Brokered Talks Lay Groundwork for Global Treaty Combating Illegal Fishing*, UN NEWS SERV., Feb. 3, 2009.

16. CCAMLR Conservation Measure, *Combating Illegal, Unreported and Unregulated Fishing in the Convention Area by the Flag Vessels of Non-Contracting Parties*195, Res. 25/XXV (2008-2009), *available at* http://www.ccamlr.org/pu/E/e_pubs/cm/08-09/all.pdf. [hereinafter CCAMLR IUU Resolution]. IUU fishing also undermines basic personal and food safety measures, as well as labor rights.

17. This figure does not include discarded catches or unreported legal catches. FAO, Report of the Twenty-Eighth Session of the Committee of Fisheries, COFI/2009/6 (Mar. 2, 2009), *available at* ftp://ftp.fao.org/docrep/fao/meeting/015/k3898e.pdf.

18. In 2002 this was the going rate; toothfish have become more valuable as the demand has increased. Schulman, *supra* note 2.

19. U.S. DEPARTMENT. OF STATE, WILDLIFE TRAFFICKING, http://www.state.gov/g/oes/env/wlt/ (last visited Mar. 11, 2011).

20. Handwerk, *supra* note 7.

21. Beth Lumsden, *Global Network to Stop IUU Fishing*, 7 TRAFFIC N. AM. 1, (July 2008), *available at* http://www.traffic.org/regional-newsletters/traffic_report_7_1.pdf.

22. FAO, THE STATE OF WORLD FISHERIES AND AQUACULTURE - 2008 at pt. 1, tbl. 1 (2009), *available at* http://www.fao.org/docrep/011/i0250e/i0250e00.htm.

23. Daniel Pauly & Reg Watson, *Counting the Last Fish*, SCI. AM., July 2003, at 43, 47.

overexploited, or depleted.[24] While the toothfish is currently regulated by the Convention for the Conservation of Antarctic Marine Living Resources' (CCAMLR) Commission,[25] illegal fishing is still thriving, and the world is running out of fish. CCAMLR believes that "the continuation of IUU fishing could reduce toothfish stocks to levels from which they cannot recover."[26]

This Comment proposes that listing marine species in the Convention on International Trade in Endangered Species of Fauna and Flora (CITES), beginning with the toothfish, is the best response to combat persistent IUU fishing and protect the world's quickly depleting marine species populations. CITES is capable of complementing CCAMLR, the existing toothfish RFMO, both in theory and practice without significant amendments to either regime. The underlying rationale behind this proposal rests on the awareness that as less pirated fish are permitted to infiltrate international trade, less fish will be harvested in this uncontrolled manner.

Part I of this Comment introduces the Patagonian toothfish, also known as "white gold" within fishing circles.[27] Fueled by an insatiable demand for the fish, the pursuit of this Southern Sea treasure by pirates engaging in illegal, unreported and unregulated fishing is the most significant threat to the survival of the toothfish. Part II explores the current conservation regime governing the toothfish, highlighting its management framework. Both the strengths and the serious limitations of CCAMLR are then examined in terms of IUU threats to toothfish. Additional binding and voluntary responses to piracy on both an international and domestic levels are also reviewed.

Part III examines the Convention on International Trade in Endangered Species, an essential international treaty within the potential global trade response to piracy. CITES is a well-established, comprehensive regime with the ability to complement CCAMLR while addressing the limitations of the regional fisheries management organization. Specifically, the sturgeon's inclusion within CITES is evaluated with respect to the success of listing a commercially important marine species. Part IV crafts the proposed response of a working, complementary CCAMLR-CITES re-

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24. FAO, THE STATE OF WORLD FISHERIES AND AQUACULTURE 2006 29, *available at* http://www.fao.org/docrep/009/a0699e/a0699e00.HTM; *see also* CoP14, Ministerial Round Table: Chair's Report, CoP14 Inf. 62, 5, no. 19 (June 3-15, 2007) (reiterating this point).

25. Convention on the Conservation of Antarctic Marine Living Resources, May 20, 1980, 33 U.S.T. 3476 [hereinafter CCAMLR].

26. FAO, IMPLEMENTATION OF THE INTERNATIONAL PLAN OF ACTION TO PREVENT, DETER, AND ELIMINATE ILLEGAL, UNREPORTED AND UNREGULATED FISHING 2 n.5 (2002), *available at* ftp://ftp.fao.org/docrep/fao/005/y3536e/y3536e00.pdf.

27. Schulman, *supra* note 2.

lationship. After consideration of CITES' three appendices, Appendix II is determined to be the most applicable to the Patagonian toothfish. The benefits of such a listing focusing primarily on jurisdiction in regards to CCAMLR's limitations are appraised. A relationship between the two legal regimes requires pragmatic implementation regarding the import of the toothfish and documentation. Furthermore, there are important implications, such as internationalizing an aspect of the Antarctic, in this working relationship's practice that are analyzed.

As the world harvests its way down the food chain, depleting one fish stock after another, international cooperation in the sustainability of marine species is no longer just desirable but imperative. The Patagonian toothfish, with its natural susceptibility to overfishing, current management by an innovative RFMO, and its involvement with international trade, is ideal for the examination of a commercially exploited, high-seas fish species. The inclusion of the toothfish within CITES Appendix II may not only rescue this valuable species from the piracy driving its overexploitation but may exemplify the advantages of and the ability to address the illegal trade which threatens marine species through a complementary CITES-CCAMLR, or other RFMO, relationship.

II. THE PATAGONIAN TOOTHFISH: "WHITE GOLD"

Deep in the Southern Sea near and around Antarctica is a seven-foot, prehistoric-looking creature likened to a German shepherd and named Bon Appétit Magazine's Dish of the Year in 2001: the toothfish cleverly marketed as Chilean sea bass.[28] Unrelated to actual sea bass, toothfish evolved from benthic fish lacking swim bladders that help fish float.[29] When feeding at higher altitudes became desirable, the direct predecessors to the toothfish developed the fats that are secreted into the flesh as a floating mechanism.[30] This adaptation created the ideal combination of a "deep-tissue marinade" within the heavily muscled toothfish for chefs who praise the firm, oil-rich flesh.[31] The heavy demand in specialty markets and white table-clothed restaurants for the versatile, palate-pleasing fish so forgiving of over-cooking by harried chefs soon had prices soaring at up to $28 per pound in the 200-pound fish.[32]

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28. There are in fact two types of toothfish: Patagonian and Antarctic. This paper focuses on Patagonian toothfish which constitutes 90-95% of the annual catch of the two species. CITES Amendment Consideration, *supra* note 1, at 3.2. Both toothfish are sold as Chilean sea bass. *Id.*

29. Paul Greenberg, *The Catch*, N.Y. TIMES, Oct. 23, 2005, at 60.

30. *Id.*

31. *Id.*

32. Handwerk, *supra* note 7.

If you have ever eaten Chilean sea bass within the United States, there is a 50% chance that you ate illegally harvested toothfish.[33] Unfortunately, the Patagonian toothfish is fast becoming a victim of its own popularity.[34] Despite its rapid depletion, the combination of the high demand for this all-but-forbidden dish and the discretionary income of the toothfish's leading consumers—the United States, Japan, and the European Union[35]—encourages IUU fishing. After being hooked on tentacle-like long lines trailing behind fishing vessels, the majority of toothfish is frozen and shipped weeks to months after its catch.[36]

Toothfish are naturally susceptible to overexploitation due to their longevity, fecundity, and size. This large fish grows very slowly during its fifty-year life span and may not reach sexual maturity until it is twelve years old within the vast seas where catch enforcement is low and irregular.[37] In 2000, over 16,000 tons of toothfish were caught legally in Antarctic waters with an estimated 32,000 tons illegally harvested.[38] As the population shrinks and

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33. *Chilean Seabass Blacklisted in the U.S. as a "Health Risk,"* MERCOPRESS, Aug. 13, 2007, http://en.mercopress.com/2007/08/13/chilean-seabass-blacklisted-in-the-us-as-a-health-risk [hereinafter *Chilean Seabass Blacklisted*] (last visited Mar. 11, 2011). Sustainably harvested toothfish certified by the Marine Stewardship Council (MSC) from a South Georgia fishery may be purchased at Whole Foods Market grocery chain. The fishery accounts for ten percent of the legal toothfish trade. Handwerk, *supra* note 7.

34. *See generally* Alice Cascorbi, *Chilean Seabass*, SEAFOOD WATCH SEAFOOD REPORT (Nov. 13, 2006), *available at* http://www.montereybayaquarium.org/cr/cr_seafoodwatch/content/media/MBA_SeafoodWatch_ChileanSeabassReport.pdf.

35. Chilean Sea Bass Frequently Asked Questions, Fact Sheet by the U.S. Depts. of Commerce & State, *available at* http://www.nmfs.noaa.gov/sfa/PartnershipsCommunications/tradecommercial/documents/chile.pdf [hereinafter Chilean Sea Bass FAQ].

36. *Chilean Seabass Blacklisted*, *supra* note 33.

37. DRAFT REPORT TO THE FIRST INTERNATIONAL MEETING ON THE ESTABLISHMENT OF THE SOUTH PACIFIC REGIONAL FISHERIES MANAGEMENT ORGANISATION: SPECIES PROFILE FOR PATAGONIAN TOOTHFISH 3.4, http://www.southpacificrfmo.org/assets/Science/patagonian%20toothfish%20draft.pdf.

The by-catch of hundreds of thousands of seabirds, including twenty species of endangered albatrosses, from fishing lines is another cause for concern in IUU fishing. *Last Chance Saloon*, *supra* note 10. The toothfish are caught on lines of baited hooks like tentacles off a central line for up to 80 km behind the vessel. *Chilean Seabass Blacklisted*, *supra* note 32. Seabirds dive for the baited hooks and drown. *Id*. In 1992, CCAMLR established a Working Group on the Incidental Mortality Arising from Longline Fishing (WG-IMALF), modified in 2001 to include mortality associated with trawl fishing. CCAMLR, Incidental Mortality, http://www.ccamlr.org/pu/E/sc/imaf/ie-intro.htm (last visited Mar. 11, 2011). Other species are damaged such as those that feed on toothfish, including sperm whales and elephant seals. *Last Chance Saloon*, *supra* note 10.

38. Mary Lack, *Continuing CCAMLR's Fight Against IUU Fishing for Toothfish*, WWF AUSTRALIA AND TRAFFIC INTERNATIONAL (2008), *available at* http://www.trafficj.org/publication/08-Continuing_CCAMLRs_Fight.pdf [hereinafter *Continuing CCAMLR's Fight*].

Illegal harvest may be determined by calculating the recorded international trade in toothfish and then deducting the toothfish catch reported. Errors still remain as some fish are reported as being legally caught (i.e. on the high seas) when in fact they were not and other fish may be dumped overboard when a vessel is being pursued for suspected illegal fishing. Other IUU figures may be determined by extrapolating upon the total catch from apprehended vessels based on the number of sighted IUU vessels but these figures are even

more juvenile toothfish are caught, the low reproduction rate is cut even further. With illegal fishing taking younger and greater numbers of fish than sustainably possible, the species is on a path to a very grim and short existence.

III. CONVENTION FOR THE CONSERVATION OF ANTARCTIC MARINE LIVING RESOURCES

The Patagonian toothfish is currently managed in its Antarctic waters by the Convention for the Conservation of Antarctic Marine Living Resources, a Regional Fisheries Management Organization.[39] CCAMLR came into force in 1982 under the Antarctic Treaty System, pursuant to Article IX of the 1959 Antarctic Treaty,[40] with the original intent of protecting krill from overfishing.[41] CCAMLR's mission is to conserve living marine resources within waters south of the 60˚ S. Latitude line and within the Antarctic Convergence through research and conservation measures.[42] The Antarctic Convergence forms where fresh, cold water meets warmer, saltier waters and warmer marine species are biologically separated from colder species, thus forming a natural boundary.[43]

The Commission is the implementing body of CCAMLR, which researches catch statistics,[44] adopts conservation measures, and assists member compliance through publications such as inspection manuals and instructions on avoiding by-catch.[45] CCAMLR's Commission is comprised of member states engaged in Southern Ocean fishing and/or scientific research.[46] Currently, there are twenty-five member states, including the United States,[47] which

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less precise. The study, "Continuing CCAMLR's Fight Against IUU Fishing For Toothfish," reported an estimated IUU catch of 17% as seen in trade between 2004 to 2007 compared to CCAMLR's estimated 10% of total IUU landings. *Id.*

39. CCAMLR, *supra* note 25.

40. Antarctic Treaty System Website, (Dec. 1, 1959), *available at* http://www.ats.aq/documents/ats/treaty_original.pdf (last visited Mar. 11, 2011). *See* Convention on the Conservation of Antarctic Marine Living Resources Convention Website, http://www.ccamlr.org (last visited Mar. 11, 2011) [hereinafter CCAMLR Convention Website].

41. CCAMLR Convention Website, *supra* note 40.

42. *Id*. See Appendix I for map of CCAMLR-regulated area.

43. *Id.*

44. A key component of the framework is a reference document known as a Fishery Plan. Each Plan provides a comprehensive summary of information on a fishery, including the regulatory requirements (i.e. harvest controls, notification requirements, a research and fishery operations plan, and a data collection plan) and fishing activities (e.g. catch and effort).

45. CCAMLR, *supra* note 25, at art. IX.

46. *Id*. at art. VII(2), XXIX.

47. The United States implements CCAMLR through the Antarctic Marine Living Resources Convention (AMLR) which sets out how the representative to the Commission will be appointed and vote, scientific contributions in the Antarctic, as well as civil and criminal penalties ($10k max and $50k max or 10 years in prison, respectively) and enforcement (Coast Guard). 16 U.S.C. § 2431, *et seq*.

form the Commission, and nine other acceding states that are limited to observer status. The Scientific Committee consists of Commission member representatives who make harvesting recommendations to the Commission based on the collection, study, and exchange of data on both target and dependent species' populations.[48] The Standing Committee on Implementation and Compliance (SCIC) provides information and recommendations to the Commission concerning compliance, implementation, and scientific observation.[49]

CCAMLR manages its marine resources with two approaches: an ecosystem approach and a precautionary approach. This holistic, ecosystem approach to managing species sets CCAMLR apart from many other multilateral fishery conventions.[50] Ecosystem considerations take into account all ecological relationships between species and their marine environment in harvesting and restoration decisionmaking by the Commission. The precautionary approach to marine resource management is derived from the precautionary principle of the Rio Declaration.[51] This approach ensures that a lack of scientific certainty is not used as a tool to delay conservation measures and is particularly valuable as IUU data is often difficult to establish. In fact, even in light of existing uncertainties, the "greater the possible harm, the more rigorous the requirements of alertness, precaution and effort."[52] "Rational use," or sustainability, is an important element within its goal of conservation, as well.[53]

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48. CCAMLR, *supra* note 25, at arts. XIV, XV. The data that CCAMLR's Scientific Committee relies upon is derived from site sampling by inspectors designated by Commission members, CDS and VMS information, and party reports. These parties receive their data from the fishing vessels themselves who misreport in order to maximize their catch without repercussions.

49. CCAMLR Convention Website, *supra* note 40, at Standing Committee on Implementation and Compliance (SCIC) Terms of Reference and Organisation of Work, CCAMLR-XXI (5.16).

50. More fisheries are adopting both the ecosystem and precautionary approaches after CCAMLR's example.

51. Principle 15 states: "In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation." United Nations Conference on Environment and Development, June 3-14, 1992, *Rio Declaration on Environment and Development*, U.N. Doc. A./CONF.151/26 (Aug. 12, 1992) [hereinafter *Rio Declaration*].

52. David Freestone, *The Precautionary Principle*, in INTERNATIONAL LAW AND GLOBAL CLIMATE CHANGE 21, 31 (Robin Churchill & David Freestone eds., 1991).

53. CCAMLR Convention Website, *supra* note 40, at the Text of the Convention on the Conservation of Antarctic Marine Living Resources, art. II.

A. Strengths of CCAMLR

After pirate fishing decimated important South African fisheries, international concern prompted CCAMLR to take a stronger stance on IUU fishing.[54] The measures implemented by CCAMLR consist of fishing regulations, a catch documentation scheme, vessel monitoring, and at-sea and/or port inspections of vessels.[55] Member states to CCAMLR must monitor their flagged vessels and prosecute any violations that occur under their flag.[56] The contracting parties to CCAMLR issue fishing licenses for specific Convention waters which record information such as the vessel operator and owner, the fishing method, and even a photo of the vessel.[57] This vessel "white list" is posted on CCAMLR's website for public access.[58] Regulations include total allowable catch limits (TACs) of toothfish in certain areas, as well as by-catch limits, gear specifications, area restrictions, and catch reports.[59] TACs are determined annually by the Commission based on recommendations by the Scientific Committee, which receives data from the Working Group on Fish Stock Assessment (WG-FSA).[60] However, information on IUU fishing, such as the catch weight harvested from a fishery, is not taken into account when setting the TAC.[61] Fisheries are officially closed once the maximum catch limit is caught, rather than dividing the area's limit among interested parties.

The catch documentation scheme (CDS) is a cornerstone of CCAMLR, and perhaps one of its most innovative tools, taking effect on May 7, 2000.[62] The CDS requires documentation that travels with the fish much like a passport, verifying the legality of a catch's origin, from "hook to cook."[63] Without a *Dissostichus* catch document (DCD) validated by the vessel's flag state, landings and transshipments in CDS-participating ports are not possible.[64] Unfortunately, many CDS port states do not require much more than the DCD although they are encouraged to verify the catch's origin through additional proof as well, particularly when the validating flag state is purportedly engaged in IUU fishing itself. The United States requires the catch document to be in electronic form and

54. *Last Chance Saloon*, *supra* note 10.
55. CCAMLR Convention Website, *supra* note 40.
56. *Id.*
57. *Continuing CCAMLR's Fight*, *supra* note 38, at 21.
58. *Id.*
59. CCAMLR Convention Website, *supra* note 40.
60. WILLOCK, *supra* note 11, at 22.
61. *Id.*
62. CITES Amendment Consideration, *supra* note 1, at 4.3.1.
63. Author created this phrase to demonstrate the length of tracking that is completed (from harvest to consumption).
64. *Continuing CCAMLR's Fight*, *supra* note 38, at 22.

will not accept paper-based documents, which are more easily manipulated.[65] The United States further requests a valid dealer permit be issued by the National Oceanic and Atmospheric Administration (NOAA).[66]

The combination of a DCD and a permit has greatly increased the difficulty to import illegally caught toothfish into the United States for consumption as Chilean sea bass.[67] However, pirated fish still enter the United States, which prompted savvy restaurateurs and chefs to either boycott the fish altogether or require proper documentation themselves from their fish brokers concerning the catch's origins.[68] The DCD determines the identity of both fishing vessels and the beneficial owner of the catch, the locations and dates of fishing activities, and the type and weight of fish caught.[69] The catch document also records landings and any at-sea transshipments, allowing the detection of how fish are infiltrating the legal marketplace.[70] This system is especially valuable for stock evaluation and to states that lack enforcement capability for vessels that fail to report their catch accurately.

When a vessel flagged by a CCAMLR member catches toothfish, the Flag State issues a DCD under the CDS and verifies through the vessel monitoring system (VMS) discussed below that the vessel was authorized to fish that location for toothfish.[71] The Flag State then submits a copy of the DCD to CCAMLR's Secretariat for record-keeping.[72] The Port State, if a CCAMLR member, will then verify that that the DCD matches the actual catch to be landed and may request VMS information to do so.[73] Once satisfied that the catch is valid, the Port Authority issues a certificate of landing.[74] The state exporting the fish then records the type and weight of the catch.[75] Each export of that catch is accompanied by a copy of the original DCD.[76] The export authority validates the

65. *Antarctic—New Regulations Support the Conservation of Toothfish and Seals*, NOAA NEWSROOM, Aug. 28, 2007, *available at* http://www.illegal-fishing.info/item_single.php?item=news&item_id=1885&approach_id=12.

66. Chilean Sea Bass FAQ, *supra* note 35.

67. *Id.*

68. The National Environmental Trust (NET) "recruited chefs, restaurants, fish markets, and grocery stores across the country for their 'Take a Pass on Chilean Sea Bass' campaign" in 2001. Handwerk, *supra* note 7.

69. M. Lack & G. Sant, *Patagonian Toothfish: Are Conservation and Trade Measures Working?*, 19 TRAFFIC BULL. 1, 9 (2001), *available at* http://www.traffic.org/species-reports/traffic_species_fish13.pdf; *see also* CCAMLR Conservation Measure 10-05, at §8 (2008), *available at* http://www.ccamlr.org/pu/e/cds/10-05-2008.pdf.

70. CCAMLR Conservation Measure 10-05, *supra* note 69, at §8(vi).

71. WILLOCK, *supra* note 11, at 8, fig. 2.

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

export and conveys to the Flag State the details of the importer, which the flag state then electronically conveys to CCAMLR.[77] The importing country then transmits a copy of the DCD to the Secretariat once more.[78] This comprehensive conservation measure tracks the toothfish until it reaches its final destination.

The vessel monitoring system of CCAMLR developed as a response to the persistence of IUU fishing despite other conservation measures implemented by the Commission.[79] The satellite-linked VMS became very useful for the continuous tracking of fishing vessels' speed, direction, and location, particularly on the remote waters of the sea where surveillance and enforcement are difficult.[80] Without VMS, the detection of illegal fishing is conducted by aerial and marine patrols, which are limited in area coverage and by weather conditions.[81] France and Australia each have marine surveillance patrols intended to detect and apprehend IUU vessels fishing within their EEZs; however, these patrols are very expensive.[82] The VMS equipment is relatively inexpensive, often at just 1% of the total aerial or marine surveillance cost,[83] but VMS can only monitor activities of vessels fitted for the equipment. Through VMS, near real-time signals are transmitted from the vessel to the flag state's fisheries monitoring center that transmits to the vessel monitoring center located at CCAMLR headquarters.[84] The VMS archives records on a tape or floppy disk. VMS ensures vessels are only in areas they are authorized to fish and are reporting their catch origins accurately.[85] Vessel monitoring also allows the Commission to anticipate overfishing by combining vessel positions with species-specific fishing license locations and catch reports.[86]

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77. *Id.*

78. *Id.*

79. CCAMLR, ILLEGAL, UNREGULATED AND UNREPORTED FISHING IN THE CONVENTION AREA, ¶¶ 5.5 to 5.15, http://www.ccamlr.org/pu/e/e_pubs/cr/98/i5.pdf.

80. CCAMLR, CONSERVATION MEASURE 10-04 1, annex 10-04A (2007), http://www.ccamlr.org/pu/e/e_pubs/cm/07-08/10-04.pdf.

81. CCAMLR, REPORT OF THE STANDING COMMITTEE ON OBSERVATION AND INSPECTION (SCOI) ¶¶ 2.13 to 2.15, http://www.ccamlr.org/pu/e/e_pubs/cr/02/a5.pdf; CCAMLR, REPORT OF THE TWENTY-FIRST MEETING OF THE COMMISSION ¶ 14.10 (2002), http://www.ccamlr.org/pu/e/e_pubs/cr/02/all.pdf; General Introduction, CCAMLR, http://www.ccamlr.org/pu/e/gen-intro.htm (last visited Mar. 11, 2011).

82. WILLOCK, *supra* note 11, at 13.

83. SeaWatch.org, Vessel Monitoring System, http://www.seawatch.org/solution/vms_position_paper.php (last visited Mar. 11, 2011).

84. Illegal, Unregulated and Unreported Fishing, CCAMLR, http://www.ccamlr.org/Pu/e/sc/fish-monit/iuu-intro.htm (last visited Mar. 11, 2011).

85. CCAMLR Convention Website, *supra* note 40, at IUU Introduction. The VMS monitors speed, which detects whether the vessel was sailing through the waters at a rate amenable to fishing or only to travel.

86. CCAMRL, RESOLUTION 12/XVI: AUTOMATED SATELLITE-LINKED VESSEL MONITORING SYSTEMS 1, http://www.ccamlr.org/pu/E/e_pubs/cm/97-98/res12-XVI.pdf.

Confidentiality of the data is vitally important to ensure states' acceptance of this measure.[87]

Finally, CCAMLR parties encourage port state and at-sea inspection of both researching and harvesting vessels. Port states are required to inspect catches to ensure the harvest landed matches the catch documentation.[88] This check assists flag states in promoting their vessels' compliance with fishery conservation and management measures. If IUU fishing has occurred, the vessel is prohibited from landing or transshipping the catch at that port.[89] At-sea inspections may be conducted by member state observers and inspectors designated by the Commission.[90] Inspectors may inspect the catch, fishing gear, and vessel data, in addition to taking photographs or video footage of any alleged violation.[91] Every inspection outcome whether at sea or in port is reported to the Secretariat of CCAMLR.[92]

CCAMLR maintains an IUU Vessel List, or blacklist, which includes a vessel's current and previous names, current and previous flags, ownership history, illegal activities, and the dates of the incidents, among other information.[93] This database of vessels engaged in IUU fishing allows for the verification of vessels before licensing, such as the identification of the pirate ship *Corvus*, with eight previous names and four previous flags.[94] The blacklist may be used to deny port access and unloading abilities to vessels previously associated with IUU fishing either as fishing or transport vessels.[95] A blacklist of fishing masters may be even more effective since they simply hop from boat to boat and crew to crew. Some member states, such as Russia, refuse to list boats fishing under their flag such as the *Lena* and *Volga*, although both were apprehended for IUU fishing.[96] Other ship owners take the prosecuting governments to court in an effort to prevent the report of their ac-

87. *Argentina Blocks Fishing Tracking Plan*, ABC NEWS, Nov. 7, 2003, *available at* http://www.abc.net.au/news/stories/2003/11/07/984910.htm; *see also Continuing CCAMLR's Fight*, *supra* note 38, at 22.

88. CCAMLR Conservation Measure 10-05, *supra* note 69, at §§ 2, 13.

89. *Id.* at § 4.

90. CCAMLR, *supra* note 25, at art. XXIV, §2(a).

91. CCAMLR Convention Website, *supra* note 40, at Text of the CCAMLR System of Inspection, art. VI(d), *available at* http://www.ccamlr.org/pu/E/e_pubs/bd/pt9.pdf.

92. CCAMLR, *supra* note 25, at art. XXI.

93. *See* CCAMLR Convention Website, *supra* note 40*, at* www.ccamlr.org/pu/e/sc/fish-monit/iuu-list-09.pdf (for the combined IUU Vessel Lists adopted between 2003 and 2009).

94. *Id.*

95. *Antarctic Fishing Pirates Identified*, NEW ZEALAND HERALD, July 8, 2008, *available at* http://www.nzherald.co.nz/nz/news/print.cfm?c_id=1&objectid=10520.

96. *France, Australia Join Forces against Toothfish Pirates*, ENVTL. NEWS SERV., Nov. 24, 2003, *available at* http://www.ens-newswire.com/ens/nov2003/2003-11-24-03.asp.

tivities to CCAMLR and prevent the listing of their vessels on the IUU blacklist.[97]

B. Limitations of CCAMLR

The primary limitations of CCAMLR that prevent the virtual elimination of piracy are its membership, geographic coverage, decision-making process, and enforcement. Even the decrease from 39% to 20% of the pirated catch within the total catch from 2000/2001 to 2005/2006 may or may not be largely the result of CCAMLR's efforts.[98] In fact, the 2005/2006 IUU catch actually rose to 20% from about 17% in 2003/2004.[99] The overall cut in pirated catches may instead be attributed to a depletion of toothfish stocks, incomplete data and misreporting, or more ships sailing under flags not party to CCAMLR, thus not subject to the same regulations such as the CDS.[100] Although CCAMLR has implemented controls such as the CDS and VMS, piracy continues to deplete the Patagonian Toothfish, just as the marbled rockcod and the mackerel icefish were fished to commercial extinction.[101]

One of the more significant limitations of CCAMLR is its limited membership base. While thirty-four states are party to CCAMLR,[102] not all states involved with the toothfish are parties. In 2000, only 40% of the countries engaged in Patagonian toothfish trade were parties to CCAMLR.[103] This inadequate membership undermines the effectiveness of conservation measures. Non-member fishing nations such as Costa Rica, Belize, Venezuela, and

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97. *Antarctic Fishing Pirates Identified*, *supra* note 95.

98. EUROPA Press Release: Questions and Answers on IUU Fishing (Oct. 17, 2007), http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/07/412&format=HTML&aged=1&language=EN&guiLanguage=en. The 1996/1997 IUU catch was 72.4% suggesting CCAMLR has had an effect on IUU fishing overall.

99. *Id.*

100. The Republic of Seychelles and the Republic of Singapore have voluntarily implemented CDS. List of Parties Implementing the Catch Documentation Scheme, CCAMLR-XXVII, Commission Report (2008), at §§9.1-9.2, *available at* http://www.ccamlr.org/pu/e/e_pubs/cr/08/all.pdf.

101. Schulman, *supra* note 1.

102. CCAMLR Commission Members: Argentina, Australia, Belgium, Brazil, Chile, People's Republic of China, the European Community, France, Germany, India, Italy, Japan, Republic of Korea, Namibia, New Zealand, Norway, Poland, Russia, South Africa, Spain, Sweden, the Ukraine, the United Kingdom, the United States, and Uruguay. Acceding states: Bulgaria, Canada, Cook Islands, Finland, Greece, Mauritius, Netherlands, Peru, and Vanuatu. CCAMLR Convention Website, *supra* note 40, *available at* http://www.ccamlr.org/pu/e/e_pubs/cr/08/a1.pdf.

103. *See* Lack & Sant, *supra* note 69, at 10. The trade study found twenty-three of the fifty-six countries trading Patagonian Toothfish were members to CCAMLR or members' territories.

Honduras[104] are known as "flags of convenience" (FOC) nations; generally, vessels are registered to and fly the flag of their country of ownership.[105] However, a vessel may fly the flag of a country other than that in which it is owned so long as there is a genuine link between the vessel and the state.[106] FOCs allow fishing vessels to still be flagged without being subject to CCAMLR's more stringent conservation and management controls because the flag state monitoring the vessel is not party to the agreement.[107] Port states that are not members to CCAMLR, such as Kenya or Mozambique,[108] are also utilized by pirates looking to land their catch without much regulation. Once the catch is landed in a port with few controls, it is sold to overseas markets where unsuspecting consumers support the chain of illicit transactions.

The geographic coverage of CCAMLR further hinders its ability to protect the toothfish. CCAMLR concedes that "[t]he vast size and inhospitable conditions of the Southern Ocean make it extremely difficult for Member States to enforce or police CCAMLR measures to combat IUU fishing." Even where patrolling is available, it simply pushes IUU fishing to other unpatrolled areas within the 35 million square kilometer area.[109] CCAMLR's provisions apply to the Convention Area's high seas, which constitute more than 90% of CCAMLR's waters.[110] The island territories within CCAMLR's waters are all subject to the jurisdiction of CCAMLR members.[111] While the Convention acknowledges the right of the states to exercise jurisdiction up to 200 nautical miles out from the islands,[112] the states generally only implement CCAMLR's conservation measures in their territories.[113] Toothfish waters under na-

104. *Id.* at 11, tbl.4. The Republic of Seychelles also is not party to CCAMLR and is listed as flagging IUU vessels on the Blacklist; however, Seychelles does implement the CDS voluntarily.

105. *Last Chance Saloon*, *supra* note 10.

106. United Nations Conference on the Law of the Sea, Dec. 10, 1982, 21 I.L.M 1245 (entered into force Nov. 16, 1994), at part VII, sec. 1, art. 91(1) [hereinafter UNCLOS]. Vessels flying more than one flag may be considered to be without nationality and a flag may not be changed during voyage. UNCLOS, part VII, sec. 1, art. 92.

107. *Last Chance Saloon*, *supra* note 10. FOCs also offer lower registration fees and lower taxes or none at all.

108. Both countries are party to CITES. Convention on International Trade of Endangered Species of Wild Fauna and Flora website at Alphabetical Parties, http://www.cites.org [hereinafter CITES Convention Website].

109. *Last Chance Saloon*, *supra* note 10.

110. WILLOCK, *supra* note 11, at 9.

111. *Id.* The islands include: Kerguelen and Crozet Islands of France, Bouvet Island of Norway, Prince Edward Islands of South Africa, and the Heard and McDonald Islands of Australia.

112. CCAMLR, *supra* note 25, art. IV(2)(b); *see also* WILLOCK, *supra* note 11, at 9.

113. WILLOCK, *supra* note 11, at 9.

tional jurisdiction that lie outside of the CCAMLR area[114] also generally apply CCAMLR's measures as the states are all contracting parties.[115]

CCAMLR's reach does not include the high seas outside the Convention Area. In fact, these seas are not subject to the conservation measures or controls of any specific regime such as a RFMO. Only four percent of toothfish can be found beyond CCAMLR in the high seas, but many catches still claim to originate there.[116] High seas catches originating outside of CCAMLR avoid regulations such as TACs due to the lack of authority over those waters, but are still considered legally caught, gaining access to the toothfish market.[117] Many illegally caught hauls from other CCAMLR or national waters are misreported as originating in these outside high seas and thus obtain validation despite their piracy.[118] While an extension of the Convention area has been discussed, the rationale is diluted by this misreporting of catches actually originating in the Convention area.[119]

The decision-making process of the Commission also has a detrimental effect on toothfish protection. The Commission makes decisions on conservation and management measures by consensus. One Commission member can veto a measure, creating a very slow response time to significant problems concerning Antarctic marine species. Furthermore, members can opt-out of new conservation measures within ninety days of the measures' approval.[120] However, the consensus decision-making does offer more assurance that the parties will follow these unanimous measures. Parties are also required to report on the compliance and conservation measures they implement. CCAMLR's membership may be a shortcoming in relation to the enactment of conservation measures as many fishing nations have an interest in continued fishing further along the scale towards exploitation rather than conservation.[121]

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114. These include Macquarie Island of Australia, the Falkland/Malvinas Islands, Argentina's EEZ and Chile's EEZ. *Id.* at 10.

115. *Id.*

116. Lighthouse Foundation, The Case of the Patagonian Toothfish, http://www.lighthouse-foundation.org/index.php?id=92&L=1 (last visited Mar. 11, 2011); WILLOCK, *supra* note 11, at 10.

117. WILLOCK, *supra* note 11, at 12.

118. *Id.*

119. *Id.* at 10.

120. This approach is rarely used because of the consensus voting system. CCAMLR, *supra* note 25, at art. IX(6)(c).

121. Membership may also be a positive aspect of CCAMLR in that each and every member has a genuine interest in the conservation of the marine species as opposed to agreements such as the International Convention for the Regulation of Whaling (ICW) in which any state may become party and participate in the voting process.

Finally, enforcement methods fall short of the ideal protection for toothfish. Enforcement is implemented by member states and cooperating non-parties. Flag states monitor the activities of vessels they license, coastal states control activities in their national jurisdiction, and port states control landings and transshipments of catches as well as validate DCDs.[122] Market states should ensure imported toothfish are accompanied by a DCD, and national states can manage their citizens' fishing activities.[123] However, CCAMLR lacks compliance measures should a party fail to enforce the Convention's measures.

Although members must try to monitor and enforce compliance, they may not have the financial capability, manpower, or expertise to do so and may be further hindered by corruption within their enforcement system.[124] Where a flag state does not correctly verify a catch and a port state does not require proof relating to the validated catch, illegal catches may be laundered within the CDS.[125] Many illegal ships are owned by a primary company, which registers another company under their control as the official ship owner. Confidentiality laws in many countries prohibit company officials from disclosing beneficial ownership (the primary owner) information. Thus, even where enforcement and sanctions are available, it is difficult to establish definitive ownership over a vessel. For example, the pirate ship *Elqui* was apprehended, dynamited, and fined.[126] Since the owners of the ship could not be traced, the $400,000 fine remains unpaid.[127] The beneficial owners of such ships simply hire another captain, crew, and can even rent vessels to continue their lucrative and damaging piracy.

The isolation and size of the Southern Sea around Antarctica has made control of IUU fishing a challenge that cannot be conquered without stronger international measures. As one Australian reporter stated: "The vagaries surrounding sovereignty of the world's oceans provide ideal grounds for those who operate without sovereignty. Asian-based financiers can use Russian-flagged ves-

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122. WILLOCK, *supra* note 11, at 9.

123. *Id.* at 9. For example, "Japan requires Japanese fishers to obtain Government approval before working aboard foreign-registered tuna vessels." *Id.* at 12. These requirements may face legal and constitutional barriers though. *Id.*

124. The UN FAO is appealing for $1 million to aid developing countries in denying port measures with regards to IUU fishing vessels through an increase in funding and expertise with workshops for "port inspectors, fisheries authorities, legal experts, foreign affairs officials and customs officers." *More Funding Needed to Fight Illegal Fishing – UN Agency*, UN NEWS SERV., June 24, 2008, *available at* http://www.un.org/apps/news/story.asp?NewsID=29757&Cr=Fishing&Crl.

125. WILLOCK, *supra* note 11, at 12.

126. Greenberg, *supra* note 29.

127. *Id.* Members are required to report to CCAMLR the sanctions imposed on violating vessels sailing under their state's flag. CCAMLR, *supra* note 25, at art. XX.

sels, Spanish fishing expertise and Chinese slave labour to attack regions where compliance is little more than theoretical."[128]

C. Additional Agreements Addressing Illegal, Unreported and Unregulated Fishing

In addition to CCAMLR's efforts to control IUU fishing, other organizations and international bodies have attempted to address marine piracy. The 1982 United Nations Convention on the Law of the Sea (UNCLOS) is a comprehensive legal regime encompassing all aspects of marine activity.[129] Entering into force in 1994 and currently with 160 signatories,[130] UNCLOS establishes state sovereignty over certain waters as well as the rights of states fishing outside these territories[131] in maintaining the customary idea of freedom of the high seas, including the freedom of fishing. Concurrently, UNCLOS encourages the conservation of marine species beyond states' exclusive economic zones and promotes cooperation between states in this goal.[132] The overexploitation of the world's fish population in the 1980s resulted in a series of conferences led by the United Nations in an effort to address overfishing on the high seas consistent with UNCLOS.[133] Yet even with UNCLOS's leadership in this resolution, specific provisions of UNCLOS hinder CCAMLR's efforts to combat IUU fishing regarding Patagonian toothfish.

In 1995, the United Nations adopted an agreement concerning the conservation and management of straddling and highly migratory fish stocks, the Fish Stocks Agreement, which entered into force on December 11, 2001.[134] The Fish Stocks Agreement is a binding instrument intended to ensure the long-term sustainability of stocks straddling a coastal state's EEZ and the high seas, as

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128. *The Toothfish Pirates,* AUSTRALIAN BROADCASTING CORP., Sept. 30, 2002, *available at* http://www.abc.net.au/4corners/stories/s689740.htm.

129. *See generally* UNCLOS, *supra* note 106.

130. United Nations, Oceans and Law of the Sea, Chronological Lists of Ratifications Of, Accessions and Successions to the Convention and the Related Agreements as of 08 January 2010, http://www.un.org/Depts/los/reference_files/chronological_lists_of_ratification s.htm [hereinafter UNCLOS Agreements].

131. UNCLOS determines "high seas" to mean any waters not included in an exclusive economic zone (EEZ), in a state's territorial sea, or in a state's internal waters. It also excludes an archipelagic state's archipelagic waters. Preamble to the United Nations Convention on the Law of the Sea, pt. VI, at sec. 1, art. 86, *available at* http://www.un.org/Depts/los/convention_agreements/texts/unclos/part7.htm. In regards to the Antarctic, high seas include adjacent waters to territorial claims.

132. UNCLOS, *supra* note 106, at art. 64.

133. *See generally Rio Declaration*, *supra* note 51.

134. Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982, Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, U.N. Doc. A/CONF.164/37, 34 I.L.M. 1542 (1995) [hereinafter Fish Stocks Treaty].

well as highly migratory stocks that swim over large distances involving both EEZs and high seas.[135] As of early 2010, all CCAMLR members except Chile and Peru had signed or ratified the Fish Stocks Agreement, which has seventy-seven signatories total.[136] The Agreement expands upon the UNCLOS principle promoting cooperation between states to ensure conservation of fish within and beyond the EEZ.[137] Coastal and island nations, as well as distant-water nations fishing in adjacent high seas, must cooperate in managing fish stocks.[138]

Innovative measures taken by parties to the Agreement include the use of the precautionary approach[139] and sharing data on fishing activities that historically is not available to other states.[140] Importantly, the Agreement prohibits unqualified members from accessing high seas fishing.[141] States are also discouraged from authorizing vessels to harvest fish unless that state is party to the RFMO managing the particular stock. To ensure parties comply with the Fish Stocks Agreement's management measures, a vessel is permitted to board and inspect another vessel on the high seas provided both vessels are party to the Agreement.[142] Where a serious violation such as the use of prohibited fishing gear occurs, the boarded vessel may be escorted to port.[143]

In 2006, the Fish Stocks Agreement Review Conference found that even with the Agreement, having port and market states take concrete measures to prevent illegally caught fish from entering their markets would be a significant step in battling IUU fishing.[144] The Fish Stocks Agreement unfortunately suffers from similar shortcomings as other fishery management regimes like reli-

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135. *Id.* at art. 5.

136. Status of the United Nations Convention on the Law of the Sea, of the Agreement relating to the Implementation of Part XI of the Convention and of the Agreement for the implementation of the provisions of the Convention relating to the conservation and management of straddling fish stocks and highly migratory fish stocks (Jan. 1, 2010), *available at* http://www.un.org/Depts/los/reference_files/status2010.pdf; *see also* UNCLOS Agreements, *supra* note 121.

137. The United Nations Agreement for the Implementation of the Provisions of the United States Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (in force as from 11 December 2001) Overview, United Nations, http://www.un.org/Depts/los/convention_agreements/convention_overview_fish_stocks.htm (last visited Mar. 11, 2011).

138. Fish Stocks Treaty, *supra* note 134, at art. 8(1).

139. *Id.* at art. 6.

140. Parties must report to the RFMO information on catch and research on stocks and their environment. *Id.* at Ann. I, art. 3(2).

141. *Id.* at pt. III, art. 8.

142. *Id.* at art. 21(1).

143. *Id.* at art. 21(8). "Serious violation" is defined by Article 21(11). *Id.* at art. 21(11).

144. United Nations Press Conference on Fish Stocks Agreement Review (May 26, 2006), *available at* http://www.un.org/News/briefings/docs/2006/060526_Fish_Stocks.doc.htm.

ance on flag state enforcement and a lack of some major fishing states' memberships.[145] While toothfish are not considered highly migratory, they are located within the high seas and may straddle some areas.

Even with the larger measures that UNCLOS promotes to achieve the conservation of marine resources within the high seas, certain provisions of the Convention are in conflict with efforts to tackle IUU fishing particularly in regards to Patagonian Toothfish. UNCLOS Article 73 prohibits coastal states from including imprisonment of captain and crew as a penalty for fishing violations without an agreement between the concerned states.[146] The captain may determine that the vessel being held by the enforcing state is not worth the trial, especially in light of the value of the catch, and will leave the vessel behind in order to begin lucrative pirating activities once more. The loss is merely an infrequent operating cost to pirates.

UNCLOS Article 73(2) further requires states to promptly release a vessel confiscated for suspected use in IUU fishing in the state's EEZ upon the bond payment for the vessel.[147] The International Tribunal for the Law of the Sea (ITLOS) determined in the 2002 *Volga* case that the bond for the prompt release of a vessel must be reasonable.[148] Ultimately, the value of the *Volga*, its fuel and lubricants, and fishing gear determined the bond's value.[149] ITLOS refused to endorse a "good behavior bond," but acknowledged that the Tribunal "understands the international concerns about [IUU] fishing and appreciates the . . . measures taken by States . . . to deal with the problem."[150] If the state refuses to promptly release the vessel, ITLOS may be called upon to enforce this provision.[151] Once the vessel is released, it disappears to be repainted, reflagged, and re-crewed.[152] France is circumventing these escapes by issuing very quick judgments in alleged IUU fishing cases so as not to allow enough time for enforcement of the release provision. The policy behind the release requirement is found

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145. *See* Fish Stocks Treaty, *supra* note 134, at art. 8.

146. *Id.*

147. UNCLOS, *supra* note 106, at art. 73(2).

148. *The Volga Case (Russian Federation v. Australia),* International Tribunal for the Law of the Sea [hereinafter ITLOS website] (Dec. 23, 2002), at ¶77, http://www.itlos.org/start2_en.html (follow "Proceedings and Judgments" hyperlink; then follow "List of Cases" hyperlink).

149. *Id.* at ¶73.

150. *Id.* at ¶¶68, 80.

151. ITLOS is comprised of twenty-one experts elected as judges. ITLOS website, *supra* note 148, at General Information: Judges.

152. Dissenting Judge Anderson stated that a good behavior bond is justified in circumstances where there is "a clear risk of the *Volga* re-joining [its] fleet immediately or shortly after its release." *The Volga Case*, *supra* note 148, at ¶¶ 2, 22(b).

in UNCLOS Article 292.[153] The release was designed to promote fairness to each State party by releasing the vessel and crew of the flag State while securing a court appearance for the detaining State.[154] However, this policy was implemented when vessels generally sailed under the same state as their ownership.[155] Today, most pirates fly a different flag so the reasoning that the state would effectively handle action against the vessel is on a crumbling foundation. Some scholars believe this release provision requires reevaluation in light of its aid to criminals in its present form.[156]

The Food and Agriculture Organization's International Plan of Action to Prevent, Deter, and Eliminate IUU Fishing (IPOA-IUU or Plan) is an international measure that applies to all states, entities, and fishermen.[157] As a response to IUU fishing concerns, the FAO-IUU recommends seventy-five voluntary but comprehensive measures for states ranging from national legislation prohibiting trade in IUU products[158] to internationally agreed-upon market-related measures.[159] The Plan calls on states to take all available measures to ensure the citizens subject to the state's jurisdiction do not support or engage in IUU fishing.[160] Sanctions in prosecution of vessel operators or owners should be severe and may include monetary fines, vessel and gear confiscation, and denial of future licenses.

One example of a domestic law applied extraterritorially to combat wildlife trafficking is the Captive Wildlife Safety Act.[161] The Act, better known as the Lacey Act, is the first federal law in the United States to address national wildlife protection.[162] As Robert Anderson concluded, the Lacey Act "is arguably [the] nation's most effective tool in the fight against an illegal wildlife

153. UNCLOS, *supra* note 106, at art. 292.

154. *See e.g.,* The "Volga" Case (Russian Federation v. Australia), International Tribunal for the Law of the Sea, http://www.itlos.org/start2_en.html (last visited Mar. 11, 2011).

155. INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA, THE "VOLGA" CASE: DISSENTING OPINION OF JUDGE *AD HOC* SHEARER ¶ 19, http://www.itlos.org/case_documents/2002/document_en_220.pdf.

156. Michael White & Stephen Knight, *ITLOS and the "Volga" Case: The Russian Federation v. Australia*, 17 MLAANZ J. 39, 51-52 (2003), *available at* http://www.austlii.edu.au/au/journals/ANZMLJ/2003%20/3.pdf/cgi-bin/download.cgi/download/au/journals/ANZMLJ/2003/3.pdf.

157. FAO, INTERNATIONAL PLAN OF ACTION TO PREVENT, DETER AND ELIMINATE ILLEGAL, UNREPORTED AND UNREGULATED FISHING ¶ 66 (2001), http://www.fao.org/docrep/003/y1224e/y1224e00.HTM [hereinafter IPOA-IUU].

158. *Id.*

159. Kevin W. Riddle, *Illegal, Unreported, and Unregulated Fishing: Is International Cooperation Contagious?*, 37 OCEAN DEV. & INT'L LAW 265, 269 (2006).

160. IPOA-IUU*, supra* note 158, at ¶66.

161. *See* Captive Wildlife Safety Act, H.R. 1006, 108th Cong. (2003).

162. Robert S. Anderson, *The Lacey Act: America's Premier Weapon in the Fight against Unlawful Wildlife Trafficking*, 16 PUB. LAND L. REV. 27, 29 (1995).

trade whose size, profitability, and threat to global biodiversity [Congressman John] Lacey could probably not have imagined."[163] Originally enacted in 1900, the Lacey Act later experienced several amendments that would make it a powerful weapon in combating illegal but lucrative transnational wildlife trafficking.[164] The Lacey Act was originally introduced to protect native bird species and combat illegal interstate wildlife laundering by poachers.[165] In 1981, the law incorporated fish and their parts due to "massive illegal trade" in marine species that was resulting in "grim environmental consequences."[166] Today, this federal statute primarily addresses illicit interstate and international wildlife trafficking activities such as smuggling, mislabeling, and false documentation.[167] The Lacey Act is ideal for application to wildlife trafficking because it applies to more animals, fish, and plants than any other protective U.S. wildlife law and has a greater range of prohibited acts, as well as stronger penalties.[168]

The Lacey Act has two primary prohibitions: 1) failing to mark shipments traveling in interstate or foreign commerce or falsifying documents; and 2) trading in fish or fish parts that have been taken,[169] possessed, transported, or sold in violation of a federal, state, tribal, or foreign law or treaty.[170] These provisions provide an important safety net in combating illegal trade in wildlife due to the ability of wealthier, developed "nations to check the illegal trade at their end because relatively poor countries . . . [often cannot] control their long and remote borders."[171]

IV. CONVENTION ON INTERNATIONAL TRADE IN ENDANGERED SPECIES

A. Introduction to CITES

While CCAMLR manages the sustainability of living marine resources on a regional level, the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) is

163. *Id.* at 85.
164. *Id.* at 29-30, 36.
165. *Id.* at 36-37.
166. *Id.* at 49.
167. Captive Wildlife Safety Act, 16 U.S.C. § 3372(a), (b), (d) (2006).
168. *See* Anderson, *supra* note 162, at 53-73 (for a more detailed discussion of the Lacey Act's provisions).
169. "Take" has a relatively narrow meaning within the Lacey Act; the term means captured, killed, or collected. The term does not include harassment like the Endangered Species Act's definition of "take." Captive Wildlife Safety Act, *supra* note 167, at §3371(j); *see also* Endangered Species Act, *infra* note 192, at §1542(19).
170. Captive Wildlife Safety Act, *supra* note 167, at § 3372(a)(1), (4).
171. Anderson, *supra* note 162, at 51.

the principal international treaty relating to wildlife trade.[172] CITES was created with the mission to prevent the overexploitation of species whose survival is in jeopardy.[173] This mission is accomplished by restricting and prohibiting international transit and trade in the species it protects.[174] Since CITES entered into force on July 1, 1975, not a single species of the 34,086 under its protection has gone extinct.[175] Trade in species encompasses any "export, re-export, import, and introduction from the sea."[176]

CITES has three appendices in which each concerned species may be listed.[177] Species in Appendix I are threatened with extinction and are or may be affected by international trade, such as the elephants with the ivory trade.[178] Appendix I offers the greatest protection to species, prohibiting all trade apart from exceptional non-commercial circumstances.[179] Appendix II species may become threatened with extinction without strict regulation of international trade in wild specimens.[180] All commercial trade in Appendix II species requires an export permit that confirms that trade will not be detrimental to the survival of the species and that the species was obtained legally.[181] The importing country must verify the export permit; however, import permits are not required. Marine species listed in Appendix II that are harvested outside the jurisdiction of any state require an Introduction from the Sea certificate.[182] Appendix III species are of special concern to specific

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172. *See* Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, 27 U.S.T. 1087, T.I.A.S. 8249 (entered into force July 1, 1975) [hereinafter CITES Convention].

173. CITES Convention Website, *supra* note 108, at What is CITES.

174. *Id.*

175. There are 892 species in Appendix I, 33,033 species in Appendix II, and 161 species in Appendix III. In total, there are 34,086 species. Fauna (mammals, birds, reptiles, amphibians, fish, and invertebrates) constitute 5108 of these species. Plants comprise the remaining 28,978 species. CITES Convention Website, *supra* note 108, at CITES Species.

176. CITES Convention, *supra* note 172, at art. I(c).

177. CITES Convention Website, *supra* note 108, at CITES Appendices.

178. CITES Convention, *supra* note 172, at art. II(1).

179. *Id.*

180. *Id.* at art. II(2).

181. *Id.* at art. IV(2).

182. *Id.* at art. IV(6). The term "introduction from the sea" is defined as any "transportation into a State of specimens of any species which were taken in the marine environment not under the jurisdiction of any State." *Id.* at art. I(e). While the CoP14 adopted the meaning of "marine environment not under the jurisdiction of any State" by consensus, the term "transportation" is somewhat disputed. The former constitutes any marine area beyond the areas subject to a State's sovereign rights, consistent with international law in accordance with UNCLOS. CITES Convention Website, *supra* note 108, at COP14 Resolution conf. 14.6 (2007). Areas under the jurisdiction of a state include exclusive economic zones, territorial seas, and internal waters, as well as archipelagic waters surrounding an archipelagic state. In regards to "transportation," the more widely-accepted view is that the term involves the landing of a marine species into the port where it is cleared rather than when the catch is taken aboard a state's vessel. Both the term "transportation into a State" and the term "State of introduction" for the issuance of an Introduction from the Sea certificate will be

member states who request party cooperation in trade involving the particular species.[183] An export permit is only required when species are exported from the state that listed it; otherwise, a certificate of origin and a legality finding, but not a non-detriment finding, are required for trade.[184]

This protective treaty is particularly successful due to its membership, geographic coverage, and decision-making process. CITES currently is comprised of 175 member states.[185] The treaty applies to all listed species no matter where the species originates or is traded when the trade involves its parties.[186] The Conference of the Parties (CoP) is the decision-making mechanism of CITES comprised of all of its members.[187] The CoP is held at least biennially at which time decisions on CITES listings and implementation are conducted.[188] Member states may submit species proposals which require only a two-thirds vote of the parties present and voting for an Appendix I or an Appendix II listing.[189] Parties may unilaterally list a species under Appendix III. Parties may opt-out of a listing, or make a "reservation," within ninety days of a listing adoption, however.[190] Amending a species listing is also somewhat difficult considering that the CoP only meets every two years, the listing amendment needs a two-thirds vote, and the strong conservation goals of CITES even in light of valid scientific assessments.[191]

The treaty is not self-executing, so parties are required to implement CITES's provisions such as the prohibitions and sanctions through domestic legislation. The United States, for example, implements CITES through the Endangered Species Act (ESA).[192]

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discussed at the next CITES Conference of the Parties in 2010. A working group established by the CITES Standing Committee is to draft a revised resolution for the COP15. CITES, CoP14 Decision 14.48 (2007), http://www.cites.org/eng/dec/valid14/14_48.shtml. Qatar is scheduled to host the CoP15 in March 2010.CITES Convention Website, *supra* note 108, *available at* http://www.cites.org/eng/cop/15/doc/index.shtml.

183. CITES Convention, *supra* note 172, at art. II.

184. *Id.* at art. IV.

185. CITES Convention Website, *supra* note 108, at Member Countries.

186. There is a loophole in certain illegal trafficking under CITES. Permits for trading in otherwise stringently protected species may be obtained from non-parties who are not subject to the same requirements agreed to by CITES parties. CITES Convention, *supra* note 172, at art. X.

187. *Id.* at art. XI.

188. *Id.*

189. Voting on procedures only requires a simple majority. *Id.* at art. XV.

190. Japan, Norway, and Iceland made a reservation regarding the whale listing in Appendix I for example. This is not a common procedure however. CITES Convention website, *supra* note 108, at Reservations entered by Parties (follow "Documents" hyperlink; then follow "Reservations" hyperlink).

191. Halvard P. Johansen, *CITES Listing Criteria and Fisheries Management: A Cause For Concern*, IWMC.ORG, http://www.iwmc.org/fish/020517-1.htm (last visited Mar. 11, 2011).

192. Endangered Species Act, 16 U.S.C. §§ 1531-1543 (2006). The ESA passed in 1973. It prohibits the shipping, sales, or offer for sale, in interstate or foreign commerce, or any

CITES provides the minimum regulation required and states are encouraged to build upon these parameters with stricter measures such as required import permits for trade in Appendix II species.[193] Nevertheless, each state must have (1) a scientific and management authority, (2) prohibition of trade that violates CITES, (3) sanctions for illegal trade, and (4) seizure authority in the event illegal trade is discovered.[194] Unfortunately, many parties do not enforce CITES in the manner they should. At the 2002 CoP when toothfish was on the proposal list, 67% of the parties were not fully implementing CITES provisions.[195]

Although infrequently used, CITES provisions allow for serious non-compliance penalties.[196] Recommendations are usually first made to the non-complying state in an effort to put domestic measures in place to implement the CITES framework.[197] In the event of persistent non-compliance, CITES parties may be notified of a temporary suspension in commercial trade in one or more CITES species with the non-complying country.[198] Unfulfilled duties by a party are also reported at each meeting of the CoP.[199]

One of the more common breaks in compliance is in regards to reporting.[200] Non-reporting is particularly harmful to species because it makes problem area identification much more difficult and less timely. Record-keeping is more difficult with regards to smaller countries due to administrative costs, but this information is essential to tracking trade and its participants.[201] Public access to these records also ensures government accountability, support, and dissemination of otherwise scarce information.

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species listed as endangered or threatened under federal law. *Id.* at § 1538(a)(1). ESA provides sanctions including criminal fines up to $50,000 and imprisonment, as well as civil fines up to $25,000 and forfeiture of specimens. *Id.* at §1540(a)(1), (b)(1). The ESA also regulates the habitats of listed species.

193. CITES Convention, *supra* note 172, at art. XIV(1).

194. Seized fish such as toothfish are often sold by the apprehending country but in one case, polar bears at the Buffalo Zoo received 2,600 pounds of sturgeon seized while crossing the United States-Canadian border. *His Loss; Our Gain*, CHRISTIAN SCIENCE MONITOR, Apr. 19, 2000, *available at* http://www.csmonitor.com/2000/0419/p24s3.html.

195. Johansen, *supra* note 191.

196. CITES, Forty-Sixth Meeting of the Standing Committee, *Interpretation and Implementation of the Convention, Possible Measures for Non-Compliance*, SC46 Doc. 11.3 at 2-4 (March 2002), *available at* http://www.cites.org/eng/com/SC/46/46-11-3.pdf.

197. *Id.* at 1.

198. *Id.* at 4.

199. WILLOCK, *supra* note 11, at 16.

200. *Id.* at 11.

201. *Id.*

B. CITES and Marine Species

The effort to include marine species within CITES as a supplemental trade response to the relentless overexploitation of fish stocks occurred as recently as the early 1990s.[202] The listing is repeatedly on the agenda at CITES-related meetings such as the biennial Conference of the Parties and the Animals Committee meetings, including the twenty-fourth Animals Committee meeting in April 2009.[203] Although almost one hundred marine species from queen conch to napoleon wrasse are listed under CITES,[204] the protection of commercially important fish species in the high seas continues as a hotly debated issue within CITES.[205] There are three primary concerns with CITES's involvement in commercially harvested marine species protection: 1) restrictions on fish trade will harm the global food supply and fishing industry; 2) CITES is not competent to fully address marine issues; and 3) CITES only protects species truly threatened with extinction.[206]

The strongest opponents to marine species' listings typically are large-scale, high-seas commercial fishing nations that prefer to maximize short-term harvesting as much as possible within current fisheries regulations.[207] Countries such as Japan are not interested in seeing their profitable fishing industry diminished.[208] Many nations' concerns centered on the ability of CITES to address fishery issues.

In 2004, CITES adopted the FAO's recommended amendments to align CITES with the protection goals for commercial marine species.[209] CITES and the FAO formalized their working partnership in a Memorandum of Understanding in October 2006.[210] The FAO created an objective ad hoc expert advisory panel to provide recommendations to CITES on specific proposals to list commer-

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202. In 1991, Sweden proposed listing Atlantic bluefin tuna, regulated by International Commission for the Conservation of Atlantic Tunas (ICCAT), on CITES Appendix II. However, the proposal was later withdrawn. ICCAT implemented a catch documentation scheme similar to CCAMLR's scheme the following year in 1992. CCAMLR followed this example almost a decade later by strengthening its own catch documentation scheme to compensate for the withdrawal of the toothfish proposal in the year after its removal.

203. CITES Convention Website, *supra* note 108, at Animals Committee.

204. There are 86 fish species. *Id.* at CITES Species.

205. FAO Sub-Committee on Fish Trade, *CITES Issues with Respect to International Fish Trade*, 11th Sess., COFI:FT/XI/2008/4, at ¶32 (June 2008), *available at* http://www.fao.org/fishery/about/cofi/reports [hereinafter FAO *CITES Issues*].

206. WILLOCK, *supra* note 11, at 3.

207. *Last Chance Saloon*, *supra* note 10.

208. Schulman, *supra* note 2.

209. FAO Press Release, FAO-CITES Agreement Promotes Sustainable Fish Trade: Collaborative Relationship Formalized in MoU (Oct. 3, 2006), *available at* http://www.fao.org/newsroom/en/news/2006/1000410/index.html [hereinafter FAO Press Release].

210. *Id.*

cially exploited aquatic species but the expert panel's advice is not consistently followed.[211] The core of the debate on marine species within CITES focuses on whether CITES should be used as a means for actively encouraging sustainability in aquatic species or as simply a trade control with regards to extinction.[212] As marine species are proposed with increasing frequency for CITES listings, the Convention's current role and future potential in regulating commercial fish is becoming clearer. As one of the "largest and most successful international conservation treaties" in the world, CITES is well-qualified to guard the continued existence of commercially exploited marine species.[213]

One marine species within a commercial fishery that was accepted into CITES protection is the sturgeon (*Acipenseridae*). As living fossils, sturgeon survived the extinction of dinosaurs and date back farther than 200 million years ago.[214] Sturgeon are very similar to Patagonian toothfish. The large, prehistoric fish is slow-growing with low fecundity making it extremely susceptible to overfishing. Beluga sturgeon is the largest freshwater fish today, easily weighing a ton and even occasionally eating baby seals.[215] Sturgeon can live for over 100 years but may not reach sexual maturity until twenty-five years old and then only to reproduce about every four years.[216] Overfishing of the sturgeon due in large part to poaching, compounded by habitat destruction and pollution, has rapidly depleted sturgeon stocks.[217] In three decades, spawning sturgeon populations decreased by 50% and the average weight of individual sturgeon dropped by 40%.[218]

Caviar, or "black gold," is a delicacy from the unfertilized eggs of sturgeon which are primarily found in the Caspian Sea and are exported by Russia, Iran, Azerbaijan, and Kazakhstan.[219] Beluga

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211. FAO *CITES Issues*, *supra* note 205; *see generally* FAO, *Report of the FAO Ad Hoc Expert Advisory Panel for the Assessment of Proposals to Amend Appendices I and II of CITES Concerning Commercially-Exploited Aquatic Species (Rome, 13-16 July 2004)*, FAO FISHERIES REPORT No. 748 (2004); *see generally* FAO, *Report of the Second FAO Ad Hoc Expert Advisory Panel for the Assessment of Proposals to Amend Appendices I and II of CITES Concerning Commercially-Exploited Aquatic Species (Rome, 26-30 March 2007),* FAO FISHERIES REPORT No. 833 (2007).

212. *See* FAO Press Release, *supra* note 209.

213. *Last Chance Saloon*, *supra* note 10.

214. Peter T. McDougall, United States and Caspian Sea Regions, Seafood Watch Seafood Report 2, 6, n.4 (May 19, 2005), *available at* http://www.montereybayaquarium.org/cr/cr_seafoodwatch/content/media/MBA_SeafoodWatch_SturgeonReport.pdf.

215. INGA SAFFRON, CAVIAR: THE STRANGE HISTORY AND UNCERTAIN FUTURE OF THE WORLD'S MOST COVETED DELICACY 31-32 (Broadway Books 2002).

216. Press Release, Institute for Ocean Conservation Science, Quick Action Needed to Avoid Gathering Wave of Ocean Extinctions, Says Dr. Ellen Pikitch (Apr. 13, 2009), *available at* http://www.oceanconservationscience.org/projects/sharks/manage_nr2009.04.13.shtml.

217. McDougall, *supra* note 214, at 34.

218. *Id.* at 33.

219. *Id.* at 2, 10.

sturgeon produce the most expensive caviar, currently selling for about $465 per ounce at its highest quality.[220] The Caspian Sea sturgeon, including the beluga sturgeon, have historically accounted for over 90% of the global caviar trade.[221] In 1998, due in large part to extensive illegal harvesting following the end of communist-era restrictions, all twenty-seven species were listed in CITES Appendix I or II.[222] Earlier that same year, two smuggling rings alone brought in more illegal caviar than Russia's entire legal quota.[223] After the listing, sturgeon recovered significantly on the international level, particularly because the United States was the largest importer of caviar and fully implemented CITES provisions including the treaty's restrictions.[224] The damage done was nonetheless significant. In 2004, the total catch of the Caspian Sea sturgeon was 5% of the catch twenty years earlier primarily due to illegal harvesting at an estimated six to ten times the legal catch limit.[225] In 2005, the United States completely prohibited all personal and commercial trade in beluga sturgeon and its products since caviar continued to be illegally harvested for domestic markets where laws are inadequately enforced and corruption is common, facilitating the species' demise.[226] As sturgeon, particularly beluga, becomes scarcer, the price of its eggs increases, thereby encouraging greater poaching and the quintessential tragedy of the (illegal) commons.

Although sturgeon responded favorably to CITES protection, a new problem occurred with the CITES sturgeon listing. Since the enactment of international quotas,[227] caviar is as valuable as co-

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220. *Id.* at 10. The most expensive caviar is Almas (meaning "diamond"), from beluga sturgeon over one hundred years old, or "centenary beluga." A prestigious European caviar store sells one ounce of beluga "Special Reserve" caviar for $464.75 or one kilogram for $15,491.56 (plus shipping, of course).

221. *Id.* at 8.

222. CITES Convention Website, *supra* note 108, at Sturgeon Species. Today, twenty-five of the twenty-seven species are listed on the 2006 IUCN Red List of Threatened Species and seventeen species of sturgeon are considered Endangered or Critically Endangered. CITES listed all species in its Appendices in 1998 with two species in Appendix I and the remaining species of sturgeon, including beluga, in Appendix II.

223. Julie Finnin-Day, *You Expect Me to Eat That?*, CHRISTIAN SCI. MONITOR, Oct. 24, 2002, *available at* http://www.csmonitor.com/2002/1024/p15s01-bogn.html.

224. Press Release, *U.S. Government Acknowledges Beluga Sturgeon "Threatened with Extinction" but Takes No Action to Protect the Fish*, THE PEW CHARITABLE TRUSTS (April 20, 2004), *available at* http://www.pewtrusts.org/news_room_detail.aspx?id=22870.

225. McDougall, *supra* note 214, at 34.

226. *Id.*; One study on sturgeon resources found that 80% of Moscow stores were selling the delicacy under false documentation. *Sturgeons and the 14th Meeting of the conference of the Parties to CITES*, TRAFFIC AND WWF BRIEFING DOCUMENT (Traffic Europe), May 2007, *available at* http://www.traffic.org/cites-cop-papers/traffic_pub_cop14_14.pdf. Many sturgeon are now being caught for sustainable fisheries and artificial hatcheries in an effort to sustainably trade in caviar. Caviar Fact Sheet, *supra* note 216.

227. Quotas set a certain number of specimens allowed to be caught and traded and ban exports once that quota is met.

caine in the black market due to the inability to substitute a similar product of equal quality.[228] Even with the ancient sturgeon's extinction on the horizon, this scarcity fuels the black market and poaching incentive. As caviar becomes rarer, caviar dealers are discovering that "[p]eople are willing to pay twice, three times or whatever to buy that sense of exclusiveness."[229] As one specialty market owner accurately assessed the elitist competition for the remaining roe, "[w]e're not trying to sell caviar to the world."[230] Despite shrinking spawning grounds, increasing pollution, and illegal harvesting for domestic and exclusive black markets, it is encouraging to see caviar continue to successfully recover under CITES protection.

V. CITES, CCAMLR & TOOTHFISH: PROPOSAL FOR A NEW PARTNERSHIP

An alliance between CITES and CCAMLR with regards to the toothfish would effectively combat IUU fishing on an international level by directly targeting the fundamental flaws of the current regime. While CITES would firmly regulate international trade in toothfish, CCAMLR would maintain its position as the principal fisheries management organization. Although a similar proposal was met with resistance in recent years from the current regulating body of the toothfish, the practical benefits of such a partnership eclipse its difficulties. With organized, thoughtful implementation from the conception of a CITES-CCAMLR partnership, toothfish protection can achieve wider and greater success than its current regime can hope to offer.

In 2002, Australia nominated the Patagonian toothfish, or Chilean sea bass, for protection under Appendix II of the United Nations' Convention on International Trade in Endangered Species at the twelfth meeting of the Conference of the Parties in Santiago, Chile.[231] The location was fitting considering the toothfish was first discovered and marketed by Chilean fishermen in 1982.[232] As CCAMLR's Depository State and host country, Australia expressed its deep commitment to CCAMLR and to preserving marine resources.[233] The Environment Minister of Australia intended to "send a very clear signal . . . for both the commercial sus-

228. Finnin-Day, *supra* note 223.

229. Sarah Chung, *Caviar Becomes Endangered Delicacy*, N.Y. TIMES, Dec. 25, 1996, at C3.

230. *Id.*

231. Schulman, *supra* note 2.

232. *Last Chance Saloon*, *supra* note 10.

233. *See generally* CCAMLR-XXI, Commission Report (2002), *available at* http://www.ccamlr.org/pu/e/e_pubs/cr/02/toc.htm. *See also* Schulman, *supra* note 2.

tainability of [toothfish] and responsible environmental conduct."[234] Unfortunately, a different signal was sent when the proposal was withdrawn after pressure from CCAMLR members already regulating toothfish.[235]

Australia nominated the toothfish before CCAMLR's Commission discussed the proposal formally;[236] however, Australia stressed to the Commission that CCAMLR would remain the primary regime responsible for toothfish and that the CCAMLR-CITES relationship would maintain the CDS.[237] Nineteen Commission members requested that Australia withdraw its CITES proposal immediately.[238] Japan voiced concern that the "proposal may affect the reputation of CCAMLR" and "be construed as evidence that CCAMLR [m]embers [were not] competent to manage toothfish."[239] Many other nations echoed Japan's concerns, including Norway, in that "the credibility and authority of CCAMLR might be seriously undermined."[240] Interestingly, nations such as Russia proposed that until CCAMLR "exhausted all the options in improving methods of managing toothfish,"[241] CITES should not be involved and emphasized "that available scientific data on the status of toothfish stocks [was] inadequate to reach an unequivocal conclusion of the necessity for such a listing."[242] As one principle underlying CCAMLR's foundation and its management decisions is the precautionary principle, it is arguably more in line with the

234. Schulman, *supra* note 2.

235. South African fisheries are not commercially viable today as a result of IUU fishing. *See* Schulman, *supra* note 2. Yet, South Africa did not support Australia's proposal, stating South Africa "has sovereign territories in the Convention Area and would be reluctant to set a precedent for other fisheries, as this could have dire socio-economic consequences for South Africa as a developing nation." CCAMLR-XXI, *supra* note 233, at 52.

236. Australia consulted Commission members before submitting the toothfish proposal. It generally received non-committal responses, along with some positive and negative feedback. *Id.* at 46.

237. *Id.*

238. *Id.* at 46-52.

239. *Id.* at 46.

240. *Id.* at 47. While this argument makes a valid point, the Commission would still have primary control over toothfish regulations and would only be supplemented by CITES regulations. Furthermore, the principal goal is to protect the toothfish and reputation of the species' protector should be secondary to this commendable objective.

241. Some Commission members suggested inviting other nations to implement the CDS and other measures before turning to CITES. *Id.* at 48. CCAMLR's later Resolution 25/XXV concerning IUU fishing by non-Contracting Parties stated a concern that these nations "have failed to respond to correspondence from the Commission . . . seeking that they cooperate with the Commission." CCAMLR IUU Resolution, *supra* note 16, at 195.

242. CCAMLR-XXI, *supra* note 233, at 48.

Convention's provisions for Commission members to be proactive in protecting the toothfish.[243]

Many environmentalists believed this proposal, if accepted, would "signal the 'coming of age' of CITES as an international conservation instrument," protecting commercially valuable marine species subject to piracy.[244] The CITES Secretariat[245] agreed that the provisions of both CCAMLR and CITES could be complementary particularly because virtually all toothfish enter international trade.[246] In 2008, CCAMLR's Commission adopted a resolution concerning IUU fishing by non-contracting parties that urges all CCAMLR parties to take action in "relevant international" forums individually and collectively.[247] The purpose of this action is to persuade non-parties to recognize CCAMLR's conservation measures, investigate and report to the Commission the nation's flagged vessels' activities, and engage in port inspection of IUU vessels.[248] CITES has the ability to mandate these conservation measures if the toothfish is listed within either Appendix I or II. While CCAMLR would remain the primary fisheries management body,[249] CITES could facilitate controlled international trade regulations. With CITES tightening international trade controls, less trade in illegal toothfish would be available to pirates resulting in less IUU fishing.

A. Appendix II Listing for Toothfish

The Patagonian toothfish is best suited for an Appendix II listing, which includes "all species which although not necessarily now threatened with extinction may become so unless trade in specimens of such species is subject to strict regulation in order to avoid utilization incompatible with their survival."[250] In accordance with CITES's criteria for Appendix II, it may be projected from trade data and trend information that regulation of the toothfish trade is

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243. Some Commission members proposed strengthening CDS application within their area of control. Seven years later in 2009, IUU fishing continues to be a problem despite the Commission's improvement of the CDS. *Id.* at 52.

244. Antarctic and Southern Ocean Coalition (ASOC), *Conservation for a Blue Planet: Monitoring and Controlling Trade in Marine Species*, http://assets.wwf.org.uk/downloads/consblueplanet.doc (last visited Mar. 11, 2011).

245. The CITES Secretariat, monitors the implementation of the treaty. The Secretariat recommends solutions to implementation or enforcement problems and receives annual trade reports on listed species. CITES Convention, *supra* note 172, pt. XII, art. 36.

246. CITES Amendment Consideration, *supra* note 1, at 3.4.

247. CCAMLR IUU Resolution, *supra* note 16, at 195.

248. *Id.*

249. CCAMLR would continue to set total allowable catch limits, regulate fishing equipment, and operate the CDS.

250. CITES Convention, *supra* note 172, at art. II, ¶2(a).

necessary to ensure its harvest from the wild does not reduce the toothfish population to a level that would threaten its survival with either continued harvesting or other influences.[251] Furthermore, CCAMLR integrates a rational use principle in the controlled catch and landing of toothfish.[252] Appendix II likewise provides for controlled trade through the introduction, import, and export of a species at a level suitable within its' ecosystem.[253] In recognition of the primary reason for the toothfish nomination—sustainable consumption—Appendix II is the listing most likely to receive the two-thirds vote necessary for the toothfish's inclusion within CITES. Patagonian toothfish are not yet faced with extinction in accordance with Appendix I. Appendix III would not have much effect on the overall sustainability of toothfish since a non-detriment finding is not required nor are any provisions on an introduction from the sea included. Although a party may enter a reservation on an amendment to protect the Patagonian toothfish, political pressure from the other 174 parties to CITES may prevent this from occurring.[254]

The Antarctic toothfish (*Dissostichus mawsonii*) may be listed as well under the Appendix II listing look-alike provision.[255] Unlisted species that are similar in appearance to the listed species and can be incidentally traded or targeted as substitutes may be regulated by CITES under this provision as if they were listed under Appendix II in their own right. A species is sufficiently similar to an Appendix II species if it is unlikely that an enforcement officer who encounters a specimen of each species would be able to distinguish the two.[256] The Patagonian and the Antarctic toothfish share many of the same physical characteristics and are not distinguishable by visual examination in filleted form.[257] In fact, the two fish supply the same market and have the same name in many countries such as the Republic of Mauritius where both Patagoni-

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251. CITES COP9, Criteria for amendment of Appendices I and II, Annex 2a(B), Resolution Conf. 9.24 (Rev.CoP14) (Nov. 7-18, 1994), *available at* http://www.cites.org/eng/res/09/09-24R14.shtml [hereinafter Resolution Conf. 9.24]. *See also* CCAMLR Convention Website, *supra* note 39, at CCAMLR Scientific Committee Working Group on Fish Stock Assessment Report (2007).

252. CCAMLR, *supra* note 25, at art. II(2).

253. CITES Convention, *supra* note 172, at art. IV.

254. Japan entered a reservation for marine turtle listings but removed its reservation after negative international response to this action. WILLOCK, *supra* note 11, at 18. A party that entered a reservation would still have to provide documentation equivalent to an introduction certificate in order to export the fish to a non-reserving CITES member.

255. CITES Convention, *supra* note 172, at art. II, ¶2(b).

256. Resolution Conf. 9.24, *supra* note 251, at Ann. 2b(A).

257. CITES Amendment Consideration, *supra* note 1, at Prop. 12.39, 5.

an and Antarctic toothfish are appropriately sold as "butterfish."[258] Toothfish, however, is "quite distinct," even when filleted, from other fish due to its incredibly white, oily flesh.[259]

B. Benefits of a Complementary CCAMLR-CITES Relationship

CITES is capable of addressing the primary weaknesses in CCAMLR's regime, namely narrow jurisdiction with respect to membership and geographic coverage. With over one hundred nations involved in the toothfish harvest and/or trade,[260] only Taiwan is not party to CITES as of early 2010.[261] However, Taiwan still voluntarily applies to some of CITES's provisions.[262] Thus, virtually every nation engaged in toothfish trade on some level, even if not party to CCAMLR, would still be subject to trade controls with a CCAMLR-CITES partnership.[263] Importantly, a greater number of countries would implement CCAMLR's catch documentation scheme and refuse to accept undocumented or IUU catches, which would in effect close many current markets exploited by pirates. The broad application of the catch documentation scheme would ultimately provide greater assurance to Chilean sea bass devotees that their meal was legally and sustainably caught. Furthermore, the FAO's Sub-Committee on Fish Trade recently endorsed the establishment of a CDS on an international level.[264] CITES's worldwide trade provisions would extend regulation coverage for toothfish to areas outside of CCAMLR's reach.

CCAMLR currently cooperates with coastal states both within and beyond the Convention's area to manage a significant portion of toothfish waters. Nevertheless, the high seas outside of CCAMLR's area are often used in misreporting catch origins in order to obtain legal status for illegally caught fish. Additionally, some flag states do not effectively validate their flagged vessels' catches and not every port state verifies the catch's origin through VMS proof or other information before its landing. Rather than address at-sea conduct, CITES provisions would regulate toothfish

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258. WILLOCK, *supra* note 11, at 4. The toothfish has other names: in Spain, it is Merluza negra; in the United States and Canada, it is Chilean sea bass; in France, the fish is legine; and in Japan, it is known as mero. *Id.* at 4, tbl. 1.

259. WILLOCK, *supra* note 11, at 25.

260. *Continuing CCAMLR's Fight*, *supra* note 38, at 8.

261. WILLOCK, *supra* note 11, at 17; CITES Convention Website, *supra* note 108at List of Contracting Parties.

262. WILLOCK, *supra* note 11, at 17.

263. Five Commission members (Belgium, Spain, Sweden, Germany, and Italy) are currently not contracting parties to the CDS. Only two of the acceding states implement the CDS (Republic of Mauritius and Peru).

264. *New Steps Toward Sustainable Trade in Fish*, FAO NEWSROOM, June 17, 2008, http://www.fao.org/newsroom/en/news/2008/1000867/index.html (last visited Mar. 11, 2011).

upon every introduction from the sea, export, and import, as well as every re-export.

CITES's enforcement mechanisms would allow for compliance tools not otherwise available to CCAMLR members. States which did not implement the necessary conservation regulations could be closed off from international trade by every other CITES member.[265] The larger membership base in CITES would also put even greater pressure on non-complying CCAMLR members to implement integrated tools such as the catch documentation scheme. Canada, an acceding state to CCAMLR, is among the four largest importers of toothfish and yet refuses to implement the CDS for toothfish.[266] Spain is also a large toothfishing nation and a Commission member but does not implement the CDS.[267] While CITES is not self-executing and not every party fully implements its provisions, the non-compliance measures may serve as a key provision in enforcing many of CCAMLR's more effective regulations.[268]

C. Implementation of a CCAMLR-CITES Relationship

As an Appendix II species, Patagonian toothfish harvested within the jurisdiction of a state would require two of three findings for the necessary export permit issued by the Management Authority of the state of export.[269] First, a non-detriment finding by the Scientific Authority of the state confirms that trade in the toothfish catch is not detrimental to the survival of the species. A detrimental impact may be found if trade exceeds "over an extended period, the level of harvesting that can be continued in perpetu-

265. Should a CCAMLR member unilaterally take such action against another Convention member, World Trade Organization (WTO) issues may come into play. *See generally* Ian J. Popick, *Are There Really Plenty of Fish in the Sea—The World Trade Organization's Presence is Effectively Frustrating the International Community's Attempts to Conserve the Chilean Sea Bass*, 50 EMORY L.J. 939 (2001).

266. Lack & Sant, *supra* note 69, at 10-11. *See also Last Chance Saloon*, *supra* note 10.

267. Lack & Sant, *supra* note 69, at 6, tbl. 2.

268. The United States does completely comply with CITES. Therefore, since the United States imports approximately half of the toothfish caught, there should still be a significant impact on the species' recovery regardless of this enforcement mechanism, similar to the situation regarding caviar imports. Chilean Sea Bass Frequently Asked Questions, Fact Sheet by the U.S. Department of State (Jan. 20, 2009), http://www.state.gov/g/oes/rls/fs/2009/115007.htm (last visited Mar. 11, 2011).

269. The third finding, humane treatment during shipment, is not applicable to toothfish which are frozen upon their catch. With regards to any explicit provisions concerning CITES and another convention, CITES Article XIV, governing the effects of international conventions with regards to CITES provisions, is not applicable to CCAMLR because the relevant specifications (paragraph 4 and 5) only apply to agreements prior to CITES. Since CCAMLR was created after CITES, Article IV, regulating Appendix II trade, would govern compliance. Vienna Convention on the Law of Treaties, art. 30(2), May 23, 1969, 1155 U.N.T.S. 339, 343. ("[w]hen a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.").

ity" or if trade will reduce "the species to a population level at which its survival would be threatened by other influences."[270] Harvesting methods that are inconsistent with long-term conservation and sustainability regarding catch limits, gear requirements, and area restrictions also constitute detrimental impacts. A Scientific Authority may place limits on the export of a species, such as an annual quota, in order to preserve a healthy population within a species' role in the ecosystem.[271]

Lawful acquisition is the second finding and is granted by the Management Authority of a state upon satisfaction that the toothfish was not obtained in contravention of that state's laws. Legality is linked to the non-detriment finding because illegal harvesting is proven to be detrimental to conservation measures and the management of a species. Patagonian toothfish listed under Appendix II and harvested in waters not under a state's jurisdiction require the issuance of an Introduction from the Sea (IFS) certificate by the port state's Management Authority before the catch can be introduced.[272] The Management Authority relies on the Scientific Authority's recommendations concerning any detrimental impact on the species from the introduction.[273] No legality finding is required however, as discussed above, the two concerns are linked. The introduction is neither an export nor an import of the catch under CITES.

All toothfish, except those caught by a state within its own jurisdiction, will require an Introduction from the Sea certificate at its first landing port. While the IFS certificate only requires a non-detriment finding, a legality finding is a consideration in determining whether the catch is detrimental to the species' survival as IUU catches are inherently detrimental to the conservation of toothfish. When the catch is then exported by a CITES party, it will require an export permit under Appendix II based on a non-detriment and a legality finding. The non-detriment finding by the state's Scientific Authority will generally be the same for both the IFS certificate and the export permit. Some parties to CITES such as the United States also require import permits prior to an Appendix II species entering the importing country.

In order to avoid undue duplication of data and efforts, as well as to create uniformity among CITES and CCAMLR, the basis for both a non-detriment finding and a legality finding needs to be determined. Non-detriment findings by the state's Scientific Authori-

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270. WILLOCK, *supra* note 11, at 14.
271. *Id.*
272. CITES Convention, *supra* note 172, at art. IV(6).
273. *Id.* at art. IV, ¶6(a).

ty may be based on the total allowable catch limits set annually by CCAMLR's Commission, which reflect the sustainable catch limit within an ecosystem approach. TACs for each fishery operate in a similar manner that quotas set by CITES states operate. Rather than allocating individual catch limits, the fisheries are open to competition and closed once the total limit is met. Coastal states within CCAMLR's area set their TACs either upon the Scientific Committee's advice or by their own process and then notify CCAMLR.[274] Fisheries under state jurisdiction outside of the Convention's area implement their own control measures often similar to a TAC. These catch limits could be a factor in determining whether trade in a toothfish catch is detrimental to the species. However, TACs are set for both species of toothfish and would require CCAMLR's Commission to set separate TACs for the Patagonian toothfish and the Antarctic toothfish.[275]

CITES Article IV, paragraph 7 permits a state's Scientific Authority to consult "international scientific authorities" in reaching its non-detriment determination.[276] CCAMLR's Scientific Committee could serve as this authority; however, a more concrete and uniform method of consulting TACs and the underlying data would be to simply pass a CoP decision at the time of the toothfish listing. The decision could require that TACs be consulted during a non-detriment determination. Currently, CCAMLR does not take into consideration the IUU catch in setting or monitoring fishery TACs so only member countries are competing for a catch before the TAC is reached. Insofar as the legality function of the permits is effective, the TAC consultation should not place any excessive pressure on legitimate fishermen. If a very strong stance was desired to halt the overexploitation of fisheries, the IUU catch that is apprehended by port states could be taken into account when determining whether the TAC limit has been met. While IUU figures within TACs would limit legal fishing, it would substantially decrease overexploitation of fisheries regarding a non-detriment finding.

With respect to catches from the high seas outside of CCAMLR's Convention Area where no management framework exists, parties could adopt a nil, or zero, quota since there is no basis upon which to make a non-detriment finding. If a nil quota is established, a major loophole in reporting would be effectively closed. Fishermen who claim to have harvested their catch in the high seas outside the Convention Area to escape TAC limits or detection of other IUU fishing activities would be barred from land-

274. WILLOCK, *supra* note 11, at 22.
275. Presently, the CDS separately records the toothfish. *Id*, at 25.
276. CITES Convention, *supra* note 172, at art. IV(7).

ing or exporting their catch. However, these fishermen could then claim the toothfish were caught within CCAMLR's high seas, if licensed to fish there, and would technically be subject only to a non-detriment finding for the Introduction from the Sea certificate. If using TACs for this determination, the illegal catch would be factored into the total catch within the limit for the claimed fishery of origin. The outcome would be comparable to the situation of legal and illegal fishermen competing for the same TAC to the one discussed above, with the same loss to legal operators and the same benefit to the sustainability of fish stocks. One possible solution to pirates turning toward the CCAMLR high seas claim and edging out legal fishermen is for the Port State to verify each catch's origin and license.

Another option, with regards to the high seas outside of CCAMLR's area, is to designate CCAMLR's Scientific Committee as the expert authority under CITES Article IV in determining a non-detriment basis for this area since the stocks are the same as those within CCAMLR's area. After international toothfish trade is regulated within a CITES-CCAMLR framework for an amount of time sufficient to develop significant statistics on legal and illegal trade tracked by the CDS, a basis for high seas' non-detriment finding may be established similarly to current TACs. This alternative would allow CITES Article IV to regulate trade harvested outside of the CCAMLR area and would not close off the fisheries to legal operators.

The determination by a state's Scientific Authority that the catch was not taken in contravention of any laws of the exporting state is required for all export permits. As discussed above, this lawful acquisition determination may also play a role in the non-detriment finding for an Introduction of the Sea certificate. Determining legality is best done when the catch first enters, or is introduced, into port as there is little sense in landing a catch that cannot be exported. As IUU fishing is the single greatest threat to the survival of Patagonian toothfish, the legality of a catch should be considered in the non-detrimental finding for the IFS certificate.

Vessels using Flags of Convenience are often engaged in illicit activities but are not IUU vessels per se. While the flag state that issues the license has the responsibility of monitoring its vessels, these flags are convenient for the purposes of avoiding stringent regulations, taxes, insurance, and other controls. Often FOCs do not sufficiently verify the legality of catches and IUU harvests are negligently validated for port landing. To directly address FOCs and their vessels' IUU landings, CITES members could adopt a resolution that mandates toothfishing vessels be in accordance

with CCAMLR's regulations before being licensed to harvest the fish. The fulfillment of the resolution's requirements could also be a factor in determining the legality of a catch. If the vessel is not in compliance with CCAMLR's regulations, then the catch will be rejected by the port state.

A close cooperation between CITES and CCAMLR would require the free flow of scientific information and regular, open communication between the two regimes. The accuracy of non-detrimental findings by states depends upon the full advice and data of CCAMLR's Scientific Committee. This information could be further supplemented by the CITES party reports on both legal and illegal international trade as well as IUU inspections concerning toothfish. This shared information may also increase the accuracy of IUU estimates for CCAMLR decisions in setting toothfish conservation and management measures. One study found that while CCAMLR estimated the IUU catch to be ten percent of total landings between 2004 and 2007, the IUU catch shown in international trade data was approximately 17%—almost twice CCAMLR's estimate.[277] CITES trade flow information would also provide transparent global monitoring of toothfish trade.

CITES and CCAMLR already are engaged in information sharing on a smaller level and CCAMLR has specifically invited CITES to its Commission meetings as an observer. CCAMLR provides for observer status at Commission meetings and attending observers such as non-governmental organizations and non-member countries may submit their views for consideration.[278] With the dynamic nature of both fish stocks and fleets, open and regular information sharing will ensure the CCAMLR-CITES partnership can respond to changes while remaining complementary.

A final logistical aspect to fully integrate CCAMLR and CITES concerns documentation. Both the catch documentation scheme and the CITES permit system are comprehensive and uniform in their application.[279] In fact, the *Dissostichus* Catch Documentation required for all toothfish catches under CCAMLR is very similar in form to the permits and certificates provided under CITES Appendix II with regards to information requirements although a few minor differences exist. The CDS provides for greater information concerning the source and quantity of the catch for tracking purposes while CITES requires the purpose of the transaction and the

277. *Continuing CCAMLR's Fight*, *supra* note 38, at iv.

278. At the 2008 Commission meeting, observing non-governmental organizations such as COLTO (Coalition of Legal Toothfish Operators) and a non-contracting party, Marshall Islands, were present. CCAMLR Convention Website, *supra* note 40, at CCAMLR-XXVII (2008) Annex I, List of Participants.

279. CITES Convention Website, *supra* note 108, at CITES Resolution Conf. 10.2(Rev).

species' appendix number.[280] CITES also requires the country of origin to be noted on the permit while CCAMLR mandates that a copy of the DCD accompanies the catch from hook to cook. Given the similarity of the content in the two systems, the DCD could certainly be adopted as the required permit for the CITES' permitting system and could be amended to include the two provisions the CDS does not presently require. This adaptation should not place any significant administrative burden on CITES parties and would prevent undue duplication.

D. Implications of a CCAMLR-CITES Relationship

A complementary relationship between CCAMLR and CITES has the potential to greatly impact the Patagonian toothfish's conservation. These results are not limited to the toothfish and may be applied to other marine species. Still, there are a few challenges to this relationship as an aspect of Antarctica is internationalized for the first time. Additionally, the Commission's firm consensus mechanism will be affected in every future decision based upon an initial non-consensus decision to cooperate with CITES.

Patagonian toothfish, unlike beluga sturgeon, is substitutable as a food source.[281] The toothfish itself, as Chilean sea bass, was the substitute for California sea bass and consumers barely noticed the switch. If the sustainability of fish cannot be maintained, each species will simply be replaced in the marketplace and our world will continue to globally eat down the food chain, destroying the next valuable marine species on the list of exploitation in the name of food security, nutrition, and income.

Listing the Patagonian toothfish within CITES would internationalize an aspect of Antarctica generally regulated solely by CCAMLR within the Antarctic Treaty System (ATS). Currently, CCAMLR's Commission is the only body which institutes regulations concerning toothfish; even some signatories of CCAMLR are only allowed observer status. Although the ATS is technically open to any state that wishes to become party to it, the costs and manpower required to have any significant role in decision-making often make consultative membership unachievable in practice. The non-ATS states' desire for the internationalization of Antarctica as part of the common heritage of mankind may in part be realized if the Patagonian toothfish is protected under a treaty with such a

280. WILLOCK, *supra* note 11, at 30, tbl.4.

281. Patagonian toothfish are valuable to our world for a number of additional reasons and should be protected for moral and ethical, as well as scientific and ecological reasons, in addition to the reason for their harvest—food.

large membership base. With CITES providing protection for the toothfish, more states will contribute to the species' management. Nevertheless, CCAMLR would remain the primary body responsible for the toothfish and its conservation measures.

Perhaps the greatest barrier to the realization of a CCAMLR-CITES relationship is the consensus mechanism of CCAMLR and the Antarctic Treaty System in general. Without agreement from each Commission member of CCAMLR, a pact with CITES could arguably be in contravention to this decision-making principle of CCAMLR and affect cohesion in future decisions made within CCAMLR's regime involving non-consenting parties to the original CITES pact. Nevertheless, in CCAMLR's Commission discussion of the CITES proposal in 2002, New Zealand "expressed surprise that [the proposal] did not meet with the full agreement of the Commission."[282] With the Commission's subsequent resolutions on international cooperation regarding IUU fishing and an increasing international consensus on the need to combat piracy, the Commission may in fact react as New Zealand predicted in future discussions.

VI. CONCLUSION

The challenges the Patagonian toothfish face are not unique to the species. The relatively recent popularity and the corresponding demand for this culinary sensation stem from the overexploitation of fish stocks worldwide, with piracy at the core of this crisis. The toothfish's biological vulnerability to overfishing, combined with the inability of the regional fisheries management organization to apply well-designed conservation measures to non-parties involved in the species' trade, necessitates international cooperation to address IUU fishing.

The Convention on International Trade in Endangered Species, as one of the "largest and most successful international conservation treaties" in the world, may be the most practical response to our resource-depleted seas.[283] The debate continues over the protection of commercially valuable, high seas marine species, especially when the species is currently otherwise regulated. However, the international trend is continually moving closer to the widely accepted inclusion of such species within CITES. Through the integration of CCAMLR and CITES, the Antarctic RFMO's most effective tools to combat illegal, unreported and unregulated trade in Patagonian toothfish will be utilized and enforced on a global level,

282. CCAMLR-XXI, *supra* note 233, at 49.
283. *Last Chance Saloon*, *supra* note 10.

thus effectively addressing the fundamental flaws of the current regime.

CRAFTING AN INTERNATIONAL CLIMATE CHANGE PROTOCOL: APPLYING THE LESSONS LEARNED FROM THE SUCCESS OF THE MONTREAL PROTOCOL AND THE OZONE DEPLETION PROBLEM

CHRIS PELOSO*

I. INTRODUCTION

In most cases, air pollution has been considered a local issue. Traditional pollutants such as smog, soot, and heavy metals tend to settle out or dissipate within a few hundred miles of where they are emitted. As such, the legal frameworks designed to improve air quality have historically been geared towards small-scale and

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meso-scale solutions.[1] International treaties and agreements on air pollution have generally focused on regional transboundary issues, such as acid rain.[2] Greenhouse gas emissions (GHGs) present a different class of environmental air quality issues. GHGs such as CO_2 do not cause localized health effects in the same manner as smog and mercury, or regional environmental effects such as acid rain. GHGs are responsible for climate change on a global scale. Regional solutions and bilateral treaties are unlikely to have a significant effect on the problem because reducing emissions only in one area could not be expected to have a significant effect on the global concentration of GHGs in the atmosphere. A global solution is required to solve the problem.

The need for a global solution was the impetus behind the Kyoto Protocol to the United Nations Framework Convention on Climate Change (Kyoto Protocol) signed in 1997.[3] However, the Kyoto Protocol, as currently envisioned, may prove to be insufficient to stem GHG emissions. The United States has not signed the Protocol, many countries are unlikely to meet their target emission reductions, and some of the biggest future polluters have no obligations to reduce their emissions under the Protocol at all.[4] A new international agreement which addresses the Kyoto Protocol's problems is therefore needed to effectively stop climate change.

In order to develop a new climate change agreement that will be more effective and more widely accepted, it might be useful to examine the clauses, history, and results of the Montreal Protocol on Substances that Deplete the Ozone Layer (Montreal Protocol).[5] The Montreal Protocol is considered a success since it is widely followed and has been shown to have effectively addressed the ozone depletion problem, an issue which has many similarities with that of climate change.[6] The Montreal Protocol is thus a pos-

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1. *See, e.g.,* Clean Air Act, 42 U.S.C. § 7401 (2006).

2. *See, e.g.,* Agreement Between the Government of the United States of America and the Government of Canada on Air Quality, U.S.-Can., Mar. 13, 1991, 30 I.L.M. 676, *available at* http://www.epa.gov/airmarkt/progsregs/usca/agreement.html (last visited Mar. 11, 2011); Convention for Settlement of Difficulties Arising from Operation of Smelter at Trail, U.S.-Can., Apr. 15, 1935, 1935 U.N.T.S. 74, *available at* http://www.jstor.org/stable/2213437 (last visited Mar. 11, 2011) [hereinafter Convention for Settlement].

3. Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 12, 1997, 37 I.L.M. 22, *available at* http://unfccc.int/resource/docs/convkp/kpeng.html (last visited Mar. 11, 2011).

4. This includes Annex B countries such as the Russian Federation and non-Annex I countries such as China and India. *Id.*

5. Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, S. Treaty Doc. No. 100-101522 U.N.T.S. 3 (1987), *available at* http://www.unep.org/ozone/pdfs/montreal-protocol2000.pdf.

6. United Nations Environment Programme, *Presentation of the Synthesis Report of the 2006 Assessments of the Scientific Assessment Panel, the Environmental Effects Assessment Panel, and the Technology and Economic Assessment Panel*, 3,

sible roadmap to use when developing a new GHG emissions agreement.[7]

II. GREENHOUSE GASES (GHG) AND CHLOROFLUOROCARBONS (CFC) PRESENT SIMILAR PROBLEMS FOR INTERNATIONAL ENVIRONMENTAL LAW

GHGs and CFCs both pose the same type of environmental problems in terms of their spatial, temporal, and causal complexity. Spatially, both CFCs and GHGs are non-localized, non-toxic pollutants that present a global environmental hazard. Regardless of where they are produced, both CFCs and GHGs uniformly affect the entire planet, instead of just the immediate area around the source. Temporally, they both cause subtle, gradual effects over long time periods. Causally, with both climate change and ozone depletion, it is difficult to draw a direct line from cause to effect, and it is impossible to pinpoint a source to definitively blame for damage that does not occur until fifty years later, half a world away. These three factors make it less likely that the polluters will feel directly responsible for the consequences of their pollution. This situation thus creates a "Tragedy of the Commons," *i.e.*, multiple individuals acting independently in their own short-term self-interest ultimately destroying a shared resource against the long-term interest of all.[8]

A second similarity comes from the fact that both GHGs and CFCs are (or were) widely used in industry and commercial

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UNEP/OzL.Pro.WG.1/27/3, *available at* http://ozone.unep.org/Meeting_Documents/oewg/27oewg/OEWG-27-3E.pdf.

7. The goal of this Comment is to highlight some of the deficiencies in the Kyoto Protocol as it is currently written and to suggest potential fixes based upon the Montreal Protocol's success. If implemented, these fixes may improve the Kyoto Protocol by encouraging more countries to become parties, to improve the compliance of countries that are already parties, to encourage the development of new technologies, and to have a greater overall effect on reducing worldwide greenhouse gas emissions.

This Comment is not intended to address the social, political, and economic arguments for and against climate change regulation. Even if the amendments proposed in this Comment are implemented, numerous arguments remain for why countries may still choose to not participate in an international climate change regulation regime. Cass Sunstein has written an extensive study of the cost-benefit analysis of both the Montreal and Kyoto Protocols; it concludes that the Montreal Protocol was successful because the United States, largely driven by domestic cost-benefit analysis, found it prudent to unilaterally address CFC emissions, whereas a cost-benefit analysis of GHG regulation fails to clearly show that America and the world as a whole has more to gain than to lose from the Kyoto Protocol. While this Comment addresses ways to change the cost-benefit accounting to make Kyoto more attractive from an economic point of view, it does not address Sunstein's fundamental argument that economic interests will continue to be a barrier to successful implementation of international climate change regulation. *See* Cass R. Sunstein, *Of Montreal and Kyoto: A Tale of Two Protocols*, 31 HARV. ENVTL. L. REV. 1 (2007).

8. Garrett Hardin, *The Tragedy of the Commons*, 163 SCIENCE 1243, 1243-48 (1968), *available at* http://www.garretthardinsociety.org/articles/art_tragedy_of_the_commons.html.

products. Many pollutants, such as toxic heavy metals, are only produced by a small number of polluters in a few specific industries. Pollutants such as these are easier to control by specific regulations targeting the few sources, and there are few stakeholders whose interests must be taken into consideration. However, prior to the Montreal Protocol, CFCs were incorporated into a variety of consumer products and industrial sources, and many everyday products available in developed countries contained CFCs.[9] To an even greater degree, as a byproduct of combustion, GHGs (especially CO_2) are produced by billions of people every day. In the case of both CFCs and GHGs, designing regulations becomes more difficult because there are a large number of interested parties affected by the regulations, and the administrative costs of enforcing regulations increases with the number of businesses and persons the regulations must cover.

A third similarity stems from the fact that both GHGs and CFCs affect human health and welfare in an indirect manner. Observers easily recognize pollutants with immediate, direct effects, such as soot or foul-smelling sulfur from a smokestack as a threat. A hole in the ozone layer over a continent most people have never been to is hard to perceive as a direct problem that requires their immediate attention. In the same way, the full consequences of a change of average temperature by a few degrees can be difficult to conceptualize. As one popular American television character said, "I say let the world warm up . . . We'll grow oranges in Alaska!"[10]

Another similarity is that skeptics initially rejected the science of both climate change and ozone depletion, and early efforts at regulation were opposed by industry. Numerous websites and articles have referred to both ozone depletion and climate change as "myths."[11] Failure by segments of the public to recognize that there is a problem that requires a solution makes public willingness to accept the costs of that solution less likely. Industries' continued efforts to lobby against regulation even after a scientific consensus is reached have also made finding solutions more difficult. For example, as late as 1990, both Dow Chemicals and Imperial Chemical Industries lobbied against strong controls

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9. ALTERNATIVE FLUOROCARBON ENVIRONMENTAL ACCEPTABILITY STUDY (AFEAS), PRODUCTION, SALES AND ATMOSPHERIC RELEASE OF FLUOROCARBONS THROUGH 1992 (1993), *available at* http://www.ciesin.org/docs/011-423/011-423.html.

10. *King of the Hill: Pilot* (FOX television broadcast, Jan. 12, 1997).

11. *See, e.g.,* C.J. Carnacchio, *The Sky Falls on Environmental Myths* (1997), (on file with author); *Myths in modern times*, http://www.thebear.org/essays2.html (last visited Mar. 3, 2011); Howard Hayden, Global Warming: More Hot Air, *in* 21st Century Sci.. & Tech., (Spring, 2010), available at http://www.21stcenturysciencetech.com/Articles%202004/Spring2004/global.html.

on the ozone-depleting chemical methyl chloroform despite scientific evidence of its effect on the ozone layer.[12] Likewise, industry has fought against climate change regulation through both litigation and lobbying efforts. For example, in 2007, the auto industry sued Vermont to block a regulation curbing greenhouse gas emissions from new motor vehicles,[13] and in 2008, a "Climate Skeptics" Conference was hosted by the Heartland Institute, which has executives from Exxon, Amoco, and General Motors on its Board of Directors.[14]

The similarities between the climate change and ozone depletion problems suggest that there could be similar solutions. While world governments are still struggling to deal with an effective regulatory framework to reduce GHG emissions, they have been able to develop a far-reaching protocol to curb CFC emissions. This protocol is widely considered to be successful, so an understanding of the history of CFC regulation could be illuminating in the search for GHG regulation solutions.

III. HISTORY OF CFC REGULATION AND THE MONTREAL PROTOCOL

Historically, air pollution was considered a local problem. Most pollution came from industrial sources such as smelters and affected a localized area immediately downwind of the source. Judicial decisions from this era approached air pollution as a localized nuisance issue,[15] and treaties and international arbitrations were bilateral, and focused on regional cross-border pollution.[16] As industry grew, and science learned more about the planet's ecosystem, concern about long-term, non-localized pollution began to grow.[17] One of the first treaties to recognize non-localized air pollution was the Convention on Long Range Transboundary Air Pollution (LRTAP), signed in 1979.[18] This treaty was designed to address:

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12. KAREN T. LITFIN, OZONE DISCOURSES: SCIENCE AND POLITICS IN GLOBAL ENVIRONMENTAL COOPERATION 140 (1994).

13. Green Mountain Chrysler-Plymouth Dodge Jeep v. Crombie, 508 F. Supp. 2d 295 (D. Vt. 2007).

14. Ali Firck, Think Progress, Global Warming Denier Group Funded by Big Oil Hosting Climate Change Denial Conference, http://thinkprogress.org/2008/02/01/heartland-climate/ (last visited Mar. 11, 2011).

15. *See, e.g.,* Madison v. Ducktown Sulphur, Copper & Iron Co., 83 S.W. 658 (Tenn. 1904).

16. *See, e.g.,* Convention for Settlement, *supra* note 2, at 2.

17. *See generally*, WEART SPENCER, THE DISCOVERY OF GLOBAL WARMING (2008)

18. Convention on Long-Range Transboundary Air Pollution, Nov. 13, 1979, 34 U.S.T. 3043, *available at* http://www.unece.org/env/lrtap/full%20text/1979.CLRTAP.e.pdf.

> air pollution whose physical origin is situated wholly or in part within the area under the national jurisdiction of one State and which has adverse effects in the area under the jurisdiction of another State at such a distance that it is not generally possible to distinguish the contribution of individual emission sources or groups of sources.[19]

LRTAP originally focused on SO_2, but has been amended to cover Nitrous Oxides (NO_x), volatile organic compounds (VOCs), heavy metals, persistent organic pollutants (such as PCBs and DDT), ground-level ozone, and acid rain.[20] The LRTAP treaty set the stage for global treaties on CFC emissions.

CFCs were originally developed in the 1920s as a non-toxic, non-flammable alternative to ammonia for use as refrigerants and as aerosol propellants.[21] At the time, they were hailed for their safety.[22] By the 1970s, CFCs and related chemicals had widespread use in industry and consumer products, were produced in volumes of millions of tons, and were used to produce goods and services and operate equipment worth hundreds of billions of dollars.[23] Evidence of their potentially harmful effects first appeared in 1974, when scientists published research suggesting that CFCs could migrate into the upper atmosphere and cause catalytic chain reactions that could damage the ozone layer.[24]

Over the next two decades, many scientists conducted experiments and produced research supporting the supporting the initial claims.[25] In response, the chemical industry mounted a public relations campaign to discredit the association between CFCs and ozone depletion.[26] A senior executive at DuPont, the world's largest CFC producer, testified before a Senate panel that the "chlorine-ozone hypothesis is at this time purely speculative with no concrete evidence . . . to support it."[27] Arguing that the science

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19. *Id*. at art. 1(b).

20. *See* United Nations Economic Commission for Europe, 1979 Convention on Long-Range Transboundary Air Pollution, Protocols to the Convention, *available at* http://www.unece.org/env/lrtap/status/lrtap_s.htm.

21. T.S.S. DIKSHITH, HANDBOOK OF CHEMICALS AND SAFETY 171 (2011).

22. J.R. MCNEILL, SOMETHING NEW UNDER THE SUN: AN ENVIRONMENTAL HISTORY OF THE TWENTIETH-CENTURY WORLD 111-113 (2001).

23. EDWARD A. PARSON, PROTECTING THE OZONE LAYER: SCIENCE AND STRATEGY 3 (2003).

24. Mario J. Molina & F.S. Rowland, *Stratospheric Sink for Chlorofluoromethanes*: *Chlorine Atomc-atalysed Destruction of Ozone*, 249 NATURE 810 (1974).

25. PARSON, *supra* note 23, at 34.

26. *Infra* notes 27-30.

27. Sunstein, *supra* note 7, at 10 (quoting RICHARD ELLIOT BENEDICK, OZONE DIPLOMACY: NEW DIRECTIONS IN SAFEGUARDING THE PLANET 26 (enlarged ed. 1998)).

was too speculative to justify regulation,[28] DuPont executives claimed that restrictions on CFCs "would cause tremendous economic dislocation."[29] Industry supporters forestalled precautionary action by creating the impression that there was scientific disagreement over ozone depletion.[30]

Despite the chemical industry's efforts, media attention on the problem caused a change in consumer behavior, and by 1975, American consumers had cut their demand for aerosol sprays by greater than 50%.[31] As public awareness grew, legislatures in the United States began to act. Oregon became the first state to ban the sale of CFC aerosols in 1975.[32] In 1977, The Clean Air Act was amended to permit regulation of substances that "may reasonably be anticipated to affect the stratosphere, especially ozone."[33] In 1978, the federal Toxic Substances Control Act (TSCA) banned the use of CFCs in aerosol propellants in non-essential applications.[34] As a result of the ban, aerosol production in the United States fell by nearly 95%.[35] Facing these regulatory restrictions, U.S. chemical manufacturers reluctantly began research on effective substitutes.[36]

Conversely, European countries were more resistant to regulation of CFCs. European citizens tended to be more indifferent to the problem than Americans,[37] and the European chemical industry was more successful in their lobbying efforts, especially in the United Kingdom.[38] Such lobbying led to weaker domestic regulations within European countries and a resistance to international cooperation on CFC controls.[39]

By the mid-1980s, the science behind ozone depletion had become much stronger,[40] making industry arguments against regulation less successful. In addition, U.S. manufacturers had made significant progress on developing substitutes, and were looking for commercial opportunities in Europe.[41] These factors led to the

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28. PARSON, *supra* note 23, at 32.

29. RICHARD ELLIOT BENEDICK, OZONE DIPLOMACY: NEW DIRECTIONS IN SAFEGUARDING THE PLANET 31 (1991).

30. *See* SETH CAGIN & PHILIP DRAY, BETWEEN EARTH AND SKY: HOW CFCS CHANGED OUR WORLD AND ENDANGERED THE OZONE LAYER 324 (1993).

31. Sunstein, *supra* note 7, at 11.

32. PARSON, *supra* note 23, at 36.

33. 42 U.S.C. § 7457(b) (1977) (repealed and recodified as 42 U.S.C. § 7671n (2005)).

34. Toxic Substances Control Act, 15 U.S.C. § 2605 (2006).

35. BENEDICK, *supra* note 29, at 24.

36. PARSON, *supra* note 23, at 53.

37. *Id*. at 43.

38. BENEDICK, *supra* note 29, at 25.

39. *Id.*

40. *See, e.g.,* M. H. Proffitt et al., *High Latitude Ozone Loss Outside the Antarctic Ozone Hole*, 342 NATURE 233, 233-237 (1989).

41. *See* Sunstein, *supra* note 7, at 14.

U.S. Senate pressing President Reagan to take aggressive action to reduce ozone-depleting chemicals and passing a resolution on this issue by a vote of eighty to two.[42] Both the EPA and the Council of Economic Advisors presented cost-benefits analyses that suggested the cost savings from decreased cancer deaths outweighed the costs of CFC controls.[43]

By 1987, the United States had taken the lead in urging significant international controls on CFC production,[44] culminating in the Montreal Protocol, which dramatically restricted the production of CFCs.[45] The Montreal Protocol and its subsequent amendments have been very successful in reducing CFC emissions. In 1986, total consumption of CFCs worldwide was about 1.1 million metric tons; by 2004, this had dropped to a mere 70 thousand metric tons.[46]

The similarities between the ozone depletion problem and the climate change problem, combined with the success of the Montreal Protocol, suggest that a similar agreement could be successful in reducing GHG emissions. However, there are some significant differences between the two issues that must be noted.

IV. GHG AND CFC PRESENT DIFFERENT PROBLEMS FOR INTERNATIONAL ENVIRONMENTAL LAW

First, the production and consumption patterns of these two pollutants are very different. The majority of CFCs were produced and consumed in a small number of countries, with the United States responsible for almost 50% of the worldwide CFC use.[47] Conversely, GHG are produced in every country in the world and in amounts far in excess of CFCs. While consumption of CFCs in 1986 was 1.1 million metric tons,[48] 2002 production of GHGs surpassed 25,000 million metric tons.[49] The significantly greater amount of emissions, and the larger number of countries that would have to reduce production, suggest that it may be more difficult to develop and get consensus on a comprehensive solution.

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42. S. Res. 226, 100th Cong. (1987).

43. Stephen J. DeCanio, *Economic Analysis, Environmental Policy, and Intergenerational Justice in the Reagan Administration: The Case of the Montreal Protocol*, 3 INT'L ENVTL. AGREEMENTS: POL., LAW & ECON. 229, 302 (2003).

44. BENEDICK, *supra* note 29, at 51-55.

45. Montreal Protocol, *supra* note 5.

46. JEFFREY L. DUNOFF ET AL., INTERNATIONAL LAW, NORMS, ACTORS, PROCESS 802 (2d ed. 2006).

47. BENEDICK, *supra* note 29, at 26.

48. DUNOFF, *supra* note 46, at 802.

49. Environmental Protection Agency, Global Greenhouse Gas Data, http://www.epa.gov/climatechange/emissions/globalghg.html (last visited Mar. 11, 2011).

In addition, most of the countries with significant CFC production capabilities were modern, industrialized, liberal democracies,[50] and CFCs are only produced in expensive, sophisticated chemical production facilities that require strong management and accounting to operate.[51] Passing and enforcing complex regulations was thus a relatively manageable task. Conversely, GHGs require no technology to produce and are produced in every country, including those with little capability for enforcing environmental regulations. While it was relatively simple to reduce CFCs in the United States and Europe by passing legislation restricting their production, it may prove much more difficult to effectively reduce GHG emissions from developing countries through treaties and passage of domestic laws.

CFCs were used in industry because they were stable, non-toxic compounds with low boiling points.[52] These features made them very useful as propellants and refrigerants.[53] However, their chemical properties were not unique. DuPont and other manufacturers had already identified chemical substitutes for CFCs in the 1970s and only had to develop a commercial synthesis process in order to bring them to market.[54] This transition did require some time and investment in research and development, but economically viable alternatives clearly existed at the time the Montreal Protocol was signed. By contrast, despite rapid technological advancements, few economically viable alternatives currently exist for GHGs. Solar, wind, nuclear, and other non-carbon power sources may one day prove to be alternatives, but the production capacity and the infrastructure is not currently present to replace coal, oil, and natural gas. There is also no commercially viable alternative for combustion engines for motor vehicles. Thus, countries and industries may continue to resist significant GHG emission regulation until a clear alternative path forward presents itself.

Although it is tempting to compare the widespread use of CFCs to the widespread use of GHGs, the analogy may not be valid. CFCs were mainly used as refrigerants and as propellants in aerosol spray cans. While extensive and important, neither of these products was absolutely critical to the world economy. Conversely, virtually every form of human activity produces

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50. World Resources Institute, Stratospheric Ozone Depletion: Celebrating Too Soon, http://www.wri.org/publication/content/8359 (last visited Mar. 11, 2011).

51. *See generally* Siegemund, *et al.*, *Fluorine Compounds*, ORGANIC ULLMANN'S ENCYCLOPEDIA OF INDUSTRIAL CHEMISTRY (2000).

52. DIKSHITH, *supra* note 21, at 171.

53. *Id.*

54. PARSON, *supra* note 23, at 126.

GHGs. GHG emissions are a byproduct of combustion, and without combustion, it is impossible to drive a car, cook meals, power homes and businesses, or operate factories. Because GHGs are far more ubiquitous and central to industry and society, they may represent a completely different class of problem from CFCs. CFCs were mainly used in non-essential consumer products such as hair spray and air conditioners, and so changing consumer habits had a large effect on CFC usage, at least in the United States. After media attention was given to the "ozone hole" problem, American consumers cut purchases of aerosol sprays by over 50%.[55] It is unlikely that consumers will be willing to reduce their GHG emissions by such a large amount. Asking people sacrifice hair spray is much easier than asking them to stop driving, cooking, and heating their homes.

Another difference is the ability to keep a good accounting of production and consumption. None of the chemicals regulated by the Montreal Protocol are naturally occurring, and CFC production requires a sophisticated chemical manufacturing plant. There were a limited number of facilities that produced CFCs, and since they were a commercial product, it was relatively easy to monitor and track how much was being produced and consumed. By contrast, GHGs are produced everywhere, including countries without good reporting mechanisms. For example, in 2006, China produced approximately 4.9 GT of CO_2.[56] An accounting error of 3% of China's coal consumption (147 MT) would represent as much coal as was consumed by the UK that year.[57] This is not an unreasonable assumption, considering that China has a problem with undocumented coalmines. In 2006, China investigated over 89,000 cases of illegal coal mining,[58] implying that a large amount of coal is being mined and consumed outside of China's official accounting. If large GHG-emitting countries like China cannot accurately account for their GHG production, then it will be difficult if not impossible to accurately enforce emissions targets.

Cass Sunstein argues that a major difference between the CFC problem and the GHG problem is the cost-benefit analysis. Sunstein suggests that the economic data shows a worldwide benefit of over $900 billion dollars from the implementation of

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55. BENEDICK, *supra* note 29, at 26.

56. Energy Information Administration, Other International Coal Data, http://www.eia.doe.gov/emeu/international/coalother.html (follow "Million Metric Tons of Carbon Dioxide" hyperlink) (last visited Mar. 11, 2011). A MT is a mega ton and is equivalent to one million tons. A GT is a gigaton and is equivalent to one billion tons.

57. *See id.*

58. *China Punishes Over 5,000 Officials for Illegal Coal Mine Participation*, PEOPLE'S DAILY ONLINE, June 3, 2007, *available at* http://english.peopledaily.com.cn/200706/03/eng20070603_380411.html.

the Montreal Protocol, due mostly to reduced cancer deaths.[59] However, Sunstein's analysis of the Kyoto Protocol shows a net cost of up to $242 billion dollars, making it not in the world's financial best-interest to take action.[60] There is considerable debate on whether Sunstein's data accurately reflects the true costs and benefits of climate change regulation,[61] and some argue that cost-benefit analysis should not be used to make decisions on environmental issues because the analysis is too easily politicized.[62] However, countries tend to value their economic interests, and if politicians continue to believe that the costs to GHG regulation outweigh the benefits, regulations controlling GHGs will remain a much harder sell than those controlling CFCs regardless of what changes are made to Kyoto.

Finally, the ubiquitous nature of GHG emissions makes it less likely to be in anyone's interest to act unilaterally. In the 1970s, the United States was responsible for nearly 50% of global CFC use,[63] so even unilateral activity by the United States would significantly mitigate the problem. In 1985, the EPA estimated that if the United States unilaterally implemented the Montreal Protocol, the net benefits would be $3.5 trillion dollars even if no other countries became signatories.[64] By contrast, there are a number of countries that are large GHG emitters, several of which rival the emissions levels of the United States.[65] In 2001, the United States pulled out of the Kyoto Protocol, claiming that it was unfair for the United States to obligate itself while major developing states such as China and India were not obligated to cut their emissions.[66] Since GHG emissions are a much more distributed problem than that presented by CFC emissions, it may not be in any country's interest to act unilaterally to address climate change, resulting in a global game of 'chicken' where countries refuse to take action themselves until they can be guaranteed others are also taking action.

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59. Sunstein, *supra* note 7, at 19.

60. *Id*. at 36.

61. *See generally* NICHOLAS STERN, STERN REVIEW ON THE ECONOMICS OF CLIMATE CHANGE (2006) (arguing that 1% of global GDP per year must be invested in order to avoid the worst effects of climate change, and that failure to do so could risk global GDP being up to 20% lower than it otherwise might be).

62. *See, e.g.,* FRANK ACKERMAN & LISA HEINZERLING, PRICELESS: ON KNOWING THE PRICE OF EVERYTHING AND THE VALUE OF NOTHING (2004).

63. BENEDICK, *supra* note 29, at 26.

64. SCOTT BARRETT, ENVIRONMENT & STATECRAFT 228 (2005).

65. *See* United Nations Framework Convention on Climate Change, *National Greenhouse Gas Inventory Data for the Period 1990-2006*, FCCC/SBI/2008/12 (Nov. 17, 2008), *available at* http://unfccc.int/resource/docs/2008/sbi/eng/12.pdf.

66. Press Release, The White House, President Bush Discusses Global Climate Change (June 11, 2001), *available at* http://georgewbush-whitehouse.archives.gov/news/releases/2001/06/20010611-2.html.

V. HISTORY OF GHG REGULATION AND THE KYOTO PROTOCOL

Before discussing how the Kyoto Protocol might be improved by looking at the lessons learned by the Montreal Protocol, it is prudent to examine the events that lead to the Kyoto Protocol.

Scientists first proposed the possibility of a "greenhouse effect" from rising CO_2 levels in 1896,[67] but it was not until the 1970s that advances in scientific modeling capabilities and data collection presented the first hard evidence that rising GHG concentrations were actually having an effect on global temperature.[68] International discussions about climate change began in the 1970s, leading to the 1979 World Climate Conference sponsored by the World Meteorological Organization (WMO).[69] The WMO Conference led to the establishment of the World Climate Programme (WCP),[70] which in turn led to creation of the UN Intergovernmental Panel on Climate Change (IPCC) in 1989.[71]

In 1990, the IPCC released their first scientific assessment on the potential impacts of GHG emissions on the environment.[72] The report got the attention of both policymakers and the general public. In December of 1990, the UN General Assembly approved the start of negotiations for a comprehensive climate change treaty.[73] The United Nations Framework Convention on Climate Change (UNFCC) was reached in May 1992,[74] and has currently been signed by 193 countries.[75] The UNFCC calls for "developed" countries (Annex I) to make a "commitment" to limit GHG emissions with the aim of returning to below 1990 levels.[76] The UNFCC, though, did not place restrictions on non-Annex I countries.[77]

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67. Svante Arrhenius, *On the Influence of Carbonic Acid in the Air upon the Temperature of the Ground*. 41 LONDON, EDINBURG AND DUBLIN PHIL. MAG. AND J. OF SCI. 237 (1896), *available at* http://www.kuuvikriver.info/uploads/science/Arrhenius.pdf.

68. The first simulations of the climate of a planet with coupled ocean and atmosphere models, establishing the role of oceanic heat transport in determining global climate were published in S. Manabe and R. T. Wetherald, *Thermal equilibrium of the atmosphere with a given distribution of relative humidity*. 24 J. OF THE ATMOSPHERIC SCIENCES 241, 241-259 (1967).

69. *See* Notes by W.M. Connelly, World Climate Conference 1979, http://www.wmconnolley.org.uk/sci/iceage/wcc-1979.html (last visited Mar. 11, 2011).

70. World Meteorological Organization, World Climate Programme (WCP) Website, http://www.wmo.int/pages/prog/wcp/index_en.html (last visited Mar. 11, 2011).

71. Intergovernmental Panel on Climate Change, http://www.ipcc.ch/organization/organization_history.shtml (last visited Mar. 11, 2011) [hereinafter IPCC Website].

72. *Id*.

73. DUNOFF, *supra* note 46, at 814.

74. United Nations Framework Convention on Climate Change, May 9, 1992, 1771 U.N.T.S. 107.

75. *Parties and Observers*, U.N. FRAMEWORK CONVENTION ON CLIMATE CHANGE, http://unfccc.int/parties_and_observers/items/2704.php (last visited Mar. 11, 2011).

76. UNFCC, supra note 74 at art. 4(2)(b).

77. *Id*. at pmbl. (acknowledging that "the largest share of historical and current global emissions of greenhouse gases has originated in developed countries.").

Like most framework conventions, the UNFCC had no specific requirements other than data collection and reporting.[78] The details were left to be decided in a series of Protocols. Work on a Protocol to the UNFCC sped up in 1995 after the IPCC released a new report detailing a growing scientific consensus that human activities were affecting the global climate.[79] In 1997, the Kyoto Protocol to the United Nations Framework on Climate Change was signed.[80] The Kyoto Protocol set specific reductions targets for various developed countries (listed in Annex B) but does not require any reductions for less-developed countries.[81] Some of the countries without emissions reduction requirements include China and India, both of whom are increasingly large emitters of GHG.[82]

In 2000, the Kyoto Protocol suffered a setback when the United States announced that it would not submit the treaty for ratification without "meaningful participation" by developing nations,[83] and in March 2001, President Bush announced that the United States would not ratify the Kyoto Protocol at all but would instead turn to domestic policy to address climate change.[84]

Since the United States was the biggest emitter of GHG, the Kyoto Protocol's future was in doubt. It would only enter into force when enough Annex I countries to account for 55% of the Annex I GHG emissions became parties.[85] The signatories nevertheless continued to work on outstanding issues and press for ratification,[86] and as a result, the Protocol entered into force and became legally binding when Russia ratified it in February 2005.[87] By 2006, "161 countries had ratified the Protocol including 37 Annex I Parties representing 63% of the 1990 Annex I GHG emissions."[88]

Work continues on implementation of the Kyoto Protocol. A series of conferences has been held, most recently in Poland in December 2008,[89] in Copenhagen in December 2009,[90] and in

78. *Id*. at art. 4(1)(a).
79. IPCC Website, *supra* note 71.
80. *Id*.; *see also* Kyoto Protocol, *supra* note 3, at 2.
81. Kyoto Protocol, *supra* note 3, at Annex B.
82. Union of Concerned Scientists, Each Country's Share of CO2 Emissions, http://www.ucsusa.org/global_warming/science_and_impacts/science/each-countrys-share-of-co2.html (noting that as of 2006, China and India were the first and fourth largest emitters of CO2) (last visited Mar. 11, 2011).
83. DUNOFF, *supra* note 46, at 821.
84. *Id*.
85. *Id*. at 823.
86. *Id*.
87. *Id*.
88. *Id*.
89. The United Nations Climate Change Conference in Poznań, 1-12 December 2008, http://unfccc.int/meetings/cop_14/items/4481.php. (last visited Mar. 11, 2011) [hereinafter COP-14].
90. COP15 Copenhagen: UN Climate Change Conference 2009, http://www.cop15.dk/en (last visited Mar. 11, 2011) [hereinafter COP-15].

Cancun Mexico in November 2010.[91] These conferences have been held in order to address outstanding issues related to the UNFCC, develop mechanisms for implementation of the Kyoto Protocol, and to suggest a roadmap for future climate change agreements.[92]

It is currently too early to tell if the Kyoto Protocol will have a significant effect on the global climate. The commitment period only began in 2008, and countries have several more years to achieve their target emissions levels.[93] However, considering that almost no country has "made demonstrable progress in achieving its commitments," which was the 2005 goal,[94] and some of the largest GHG emitters (United States, China, India), are not bound by the Protocol to reduce emissions at all, the Protocol is not likely to meet its envisioned goals. Moreover, Kyoto's effectiveness at controlling global GHG levels is questionable because there is data showing that even if it is fully implemented, the Protocol will be largely ineffective at slowing climate change.[95]

VI. DIFFERENCES BETWEEN THE KYOTO PROTOCOL AND THE MONTREAL PROTOCOL

Although the issues of GHG and CFC emissions present similar problems for international law, the Kyoto Protocol is unlikely to achieve the same level of effectiveness as the Montreal Protocol. There were a number of differences between how the two treaties were negotiated, and an understanding of those differences could illuminate ways in which the Kyoto Protocol could be approved.

The largest difference between the negotiations for the Montreal Protocol and the Kyoto Protocol has been the lack of a strong commitment by the United States. America was one of the first countries to take aggressive domestic actions to reduce ozone-depleting chemicals and took the lead in urging significant international controls on CFC production.[96] By contrast, the United States has constantly obstructed the Kyoto Protocol and, in 2001, walked away from participating in any global scheme to reduce GHG emissions.[97] Since the United States is the biggest emitter of

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91. COP-16 UN Climate Change Conference: Cancun, Mexico, http://ecovillagenetworkcanada.ning.com/events/cop16-un-climate-change (last visited Mar. 11, 2011) [hereinafter COP-16 Website].

92. *Id*.

93. Kyoto Protocol, *supra* note 3, at art. 3(1).

94. *Id*. at art 3(2).

95. BBC NEWS, *In Depth—Climate Change*, http://news.bbc.co.uk/hi/english/static/in_depth/sci_tech/2000/climate_change/evidence/reduced.stm (last visited Mar. 11, 2011).

96. BENEDICK, *supra* note 29, at 51-55.

97. *See supra* notes 83-84 and accompanying text.

GHGs, the failure to include it in the Protocol casts doubt on the ability of the Protocol to be effective.

Second, treaties such as the Montreal and Kyoto Protocols are only effective if there is public acceptance and awareness of the problem to drive governmental action. Unlike the ozone depletion issue, there is continued, vocal skepticism of the science of climate change and public apathy of the problem, especially within the United States.[98] Although the first IPCC report was published in 1990, as late as 2003, the Chairman of the Senate Committee on Environment and Public Works Committee was still referring to the threat of global warming as "the greatest hoax ever perpetrated on the American people."[99] There are numerous websites dedicated to exposing global warming as a myth,[100] and a survey conducted in 2008 found that only 73% of Americans believe that global warming is happening.[101] The above stands in sharp contrast to the American public's reaction to the threat of ozone depletion where the first published research was in 1974,[102] and by 1975, American consumers had cut their demand for aerosol sprays by more than 50%.[103] Meeting the emission reduction targets of the Kyoto Protocol will require a dramatic shift in consumer behavior, and a strong commitment to research and development by industry. Until public skepticism of the problem dissipates, the Protocol may not spur the societal changes necessary for it to be effective.

Another major shortcoming of Kyoto is its failure to place restrictions on Developing Country Parties. This shortcoming has reduced the treaty's effectiveness in two ways. First, some of these developing countries are large emitters. Currently the second and fourth largest GHG emitters (China and India) are Developing Country Parties.[104] Experts estimate that 85% of energy demand growth in the next fifteen years will be in the developing world.[105] The EPA estimates that by 2015, developing countries will emit

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98. *Infra* notes 99-103.

99. James Inhofe, U.S. Sen. from Okla., Climate Change Update: Senate Floor Statement, (Jan. 4, 2005), *available at* http://inhofe.senate.gov/pressreleases/climateupdate.htm (last visited Mar. 11, 2011).

100. *See, e.g.,* Global Warming Hoax: Where Only the Truth Heats Up, http://www.globalwarminghoax.com/news.php (last visited Mar. 11, 2011).

101. Nature Conservancy, Climate Change—What Do Americans Believe About Climate Change?, http://www.nature.org/initiatives/climatechange/features/art26253.html. (last visited Mar. 11, 2011).

102. Molina & Rowland, *supra* note 24, at 249.

103. Sunstein, *supra* note 7, at 11 (citing RICHARD ELLIOT BENEDICK, OZONE DIPLOMACY: NEW DIRECTIONS IN SAFEGUARDING THE PLANET at 27-28, 31 (enlarged ed. 1998)).

104. Union of Concerned Scientists, *supra* note 82.

105. MCKINSEY GLOBAL INSTITUTE, CURBING GLOBAL ENERGY DEMAND GROWTH: THE ENERGY PRODUCTIVITY OPPORTUNITY 24 (2007).

more aggregate GHG than developed countries.[106] Thus, by 2015, less than half of all GHG emissions will be covered by the Kyoto Protocol. Even if Annex I countries were required to reduce their emissions to zero, the problem would still be less than half solved.

Second, the failure to regulate developing countries has significantly reduced the willingness of developed nations, especially the United States, to join the Protocol. In 1998, the U.S. Senate unanimously recommended that the United States not enter into a treaty mandating "new commitments to limit or reduce greenhouse gas emissions" unless the treaty "also mandates new specific scheduled commitments to limit or reduce greenhouse gas emissions for Developing Country Parties."[107] When the United States walked away from the Kyoto Protocol in 2001, President Bush issued a statement arguing that the treaty was "unfair" because it would cause harm to the U.S. economy while exempting "80 percent of the world, including major population centers such as China and India, from compliance."[108] The Kyoto Protocol has no provisions specifically aimed at non-parties to prevent free-riding or to create incentives to accept any GHG emissions restrictions. It also has no provisions to encourage Developing Country Parties to eventually accede to Annex I status. Any treaty that requires some countries to take drastic action while imposing no requirements on other countries which are also part of the problem is unlikely to garner the level of support required to be truly effective in the long term.

Another shortcoming of the Kyoto Protocol is the lack of effective enforcement mechanisms. While the targets contained in Annex B are legally binding, the Protocol is vague on what the penalties will be for failure to meet the targets. The Protocol specifies increased reporting requirements over the FCCC[109] and creates "expert review teams" to perform assessments of implementation of the Protocol,[110] but upon receiving a report of non-compliance, the Protocol Secretariat is only empowered to circulate a report to the parties who "shall take decisions on any matter required for the implementation."[111] Thus, the Protocol does not identify the consequences of failure to meet emissions targets; it only directs the parties to create procedures and mechanisms to address noncompliance in the future. Until countries

106. Environmental Protection Agency, Global Greenhouse Gas Data, *supra* note 49.

107. S. Res. 98, 105th Cong. (1997).

108. Letter from George W. Bush, U.S. President, to Sens. Hagel, Helms, Craig, and Roberts (Mar. 13, 2001), *available at* http://georgewbush-whitehouse.archives.gov/news/releases/2001/03/20010314.html.

109. Kyoto Protocol, *supra* note 3, at art. 7(3).

110. *Id*. at art. 8(1).

111. *Id*. at art. 8(6).

know what the consequences of failure to meet their targets will be (if there even are any), they will be unable to properly calculate a cost-benefit for compliance.

Similarly, the Kyoto Protocol does not specify mechanisms to facilitate compliance. Article 11(2) states that financial resources will be provided to developing country parties to meet their obligations under Article 10, but procedures and mechanisms to transfer funds and technology have not yet been developed.[112] With no mechanisms in place, it remains unclear which countries will be providing these funds to the developing country parties and what the total bill might be. Moreover, no provision is made to assist Annex I countries who are struggling to meet their obligations.[113] Developing countries may decide to not sign Kyoto, or not sign on as Annex I parties due to worries that they will lack the technology or monetary resources to make the necessary upgrades to achieve compliance. Without specific mechanisms defined and no specific donor countries named, developing countries cannot be sure that they will actually receive promised funding, and developed countries may worry that they will be obligated to contribute large sums to help developing countries meet their obligations.

VII. ROADMAP FOR APPLYING CFC SOLUTION TO THE GHG PROBLEM

During the negotiations of the Montreal Protocol, countries confronted issues similar to the ones currently complicating the ongoing negotiations of the Kyoto Protocol. In many cases, they came up with effective solutions that may be applicable to Kyoto. Article 13(4) of the Kyoto Protocol calls for a series of meetings (known as Conference of the Parties (COP) to develop implementation plans.[114] The next Conference of the Parties (COP-17) is scheduled for March 2011 in Durban, South Africa.[115] At that conference, the Parties should consider the following recommendations for modifying the Kyoto Protocol based on the success of the Montreal Protocol.

A. Include Developing Nations in the Regulatory Regime

As noted above, some developed countries that are Annex I Parties to the Kyoto Protocol find it unfair that they are required

112. *Id*. at art. 11.
113. *Id*. at art. 11(2).
114. *Id*. at art 13(4).
115. COP-17 Website, http://www.cop17durban.com/Pages/default.aspx (last visited Mar. 11, 2011).

to reduce emissions while Developing Country Parties are under no such obligation. For their part, these developing countries argue that the developed countries were the ones who created the problem in the first place, that they have the right to catch up in development, and that they still have a lower per capita emissions rate than most developed countries.[116] Currently, the Kyoto Protocol is at an impasse on this issue. Developing countries refuse to submit to restrictions because of environmental justice concerns, and developed countries are pushing for a level playing field. The world faced a similar problem in dealing with CFC emissions. The Montreal Protocol addressed this problem by creating a mechanism for developing countries to gradually come into compliance.[117] Article 5 of the Montreal Protocol defines a special category for countries that have low per capita consumption of CFCs.[118] Instead of placing no requirement on these countries (as the Kyoto Protocol does), the Montreal Protocol gives developing countries a ten-year delay for implementation.[119] In addition, the Montreal Protocol creates a financial mechanism that provides financial and technical assistance to developing countries to help them come into compliance.[120]

While taking into account the issues of environmental justice and poverty eradication in the developing world, Kyoto should be modified to gradually bring developing countries into a regulatory scheme instead of allowing them to forever remain free-riders. Like the Montreal Protocol, this scheme should be designed as a sliding scale of delayed compliance and increasing regulation to reduce the financial burden on the developing countries. For example, instead of basing emissions reduction targets on an absolute and arbitrary scale as they are in the Kyoto Protocol, they could be based on an "emissions per capita" scale. This system would allow developing countries to continue to grow, while bringing them into the regulatory regime and assuring developed countries that they will be subject to future restrictions as their emissions increase. Kyoto should also be designed to implement financial mechanisms to encourage developing countries to remain in compliance as the regulations gradually tighten. This recommendation should address the concerns of the Annex I Parties that are being required to submit to unfair restrictions while other are

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116. *See CO2 Emissions,* WORLD BANK, http://data.worldbank.org/indicator/EN.ATM.CO2E.PC (last visited Mar. 11, 2011); but *see* Keith Bradsher, *China to Pass U.S. in 2009 in Emissions*, N.Y. TIMES, Nov. 7, 2006, at 1.

117. *Infra*, notes 118-120.

118. Montreal Protocol, *supra* note 5, at art. 5(1).

119. *Id*.

120. *Id*. at art. 10.

not and address the concerns of the non-Annex I Parties that cannot meet the same requirements, on the same timetable, as the developed countries.

B. Define and Enforce Penalties for Non-Compliance and Non-Accession

The Kyoto Protocol does not identify the consequences for not meeting its emissions targets. Article 18 states that the Parties will approve measures to address non-compliance, and that binding consequences for non-compliance can only be adopted by amendment.[121] Further, Kyoto has no procedures in place to penalize countries that chose not to be Parties. In fact, Article 13(8) even allows for countries that are not a party to the UNFCC to send representatives with observer status to Conferences.[122] Non-parties can therefore help develop regulations that ultimately will not apply to them. There also is no mechanism to force accession or compliance other than the threat of bad publicity. Countries who do not believe that Kyoto is in their best interest will ignore its requirements or drop out of the treaty altogether. This shortcoming is of special concern for developing countries that are not currently subject to any GHG emission restrictions but may find themselves under political pressure to accede to restrictions in the future.

By contrast, the Montreal Protocol has very specific penalties for non-compliance and for non-participation. Article 4 provides for specific restrictions on trade with non-Parties.[123] Parties to the Montreal Protocol are not permitted to import or export most CFCs (or products containing CFCs) from countries that are not Parties.[124] Parties are also forbidden to provide non-Parties with technology or financial assistance for projects that produce or use CFCs.[125] Similarly, Article 8 sets up a mechanism for treatment of Parties found to be in non-compliance.[126] Under Article 8, the Parties have authorized the United Nations Environment Programme (UNEP) to establish an Ozone Secretariat to meet regularly to investigate non-compliance and recommend penalties.[127] Penalties

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121. Kyoto Protocol, *supra* note 3, at art. 18.
122. *Id*. at art. 13(8).
123. Montreal Protocol, *supra* note 5, at art. 4(1)-(3).
124. *Id*.
125. *Id*. at art. 4(5)-(6).
126. *Id*. at art. 8.
127. *See* United Nations Environment Programme, Ozone Secretariat, Reports of the Implementation Committee Under the Non-Compliance Procedure for the Montreal Protocol, http://ozone.unep.org/Meeting_Documents/impcom/impcom_reports_index.shtml (last visited Mar. 11, 2011).

can be as severe as treating non-compliant Parties as if they were non-Parties under Article 4.[128]

The Kyoto Protocol should be amended to restrict Parties from importing or exporting certain products and technologies from or to non-Parties. GHGs are not commercial products like CFCs are; the types of products and technologies restricted would be different, but the idea is similar. For example, an amended Kyoto could restrict trade in automobiles that do not meet a minimum miles per gallon standard, or appliances that do not meet a certain level of energy efficiency. Technologies and products used to build high GHG-emitting power-generating facilities could also be restricted.

In addition, Parties should be restricted from providing financial assistance to non-Parties for projects that will result in significant increases in GHG emissions or the destruction of natural carbon sinks. Like the Montreal Protocol, these restrictions could be applied in stages so that non-Parties have time to adjust and come into compliance with the treaty.[129] Furthermore, as part of the implementation of the Kyoto Protocol's Article 18, Parties should approve sanctions for non-compliance to include treating the non-complying Party as a non-Party.

By taking these actions, Parties will have a large economic "stick" that can be used to encourage countries to become Parties to the Protocol and to enforce compliance once they do. When combined with the previous recommendation to require developing countries to submit to eventual GHG emission restrictions, this combination will help address the concerns of countries, like the United States, that fear their industries will be undercut by countries that are "pollution havens." and will encourage other countries, such as China and India, to submit to GHG restrictions or else possibly lose export markets. It is also likely to have a technology-forcing function that will provide economic encouragement for industries to abandon older technology and upgrade to more GHG-efficient technology. Finally, this recommendation will change the cost-benefit calculations so that it is less economically lucrative to remain outside of the Protocol. This change could help to address Sunstein's argument that countries will not accede to

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128. *See, e.g.,* The Secretariat of the Multilateral Fund for the Implementation of the Montreal Protocol, *Potential non-compliance with the freeze on CFC consumption*, UNEP/OzL.Pro/13/10, Decision XIII/16, *available at* http://ozone.unep.org/Publications/MP_Handbook/Section_2_Decisions/Article_8/decs-potential_non-compliance/Decision_XIV-17.shtml (last visited Mar. 11, 2011); Report of the Thirteenth Meeting of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer, *Potential Non-Compliance with the Freeze on CFC Consumption in Article 5 Parties in the Control Period 1999-2000*, UNEP/OzL.Pro/13/10, Decision XIII/16, *available at* http://www.unep.org/ozone/pdf/13mop-10.pdf.

129. *See* Montreal Protocol, *supra* note 5, at art. 4.

GHG regulations as long as it remains in their domestic economic interests not to do so.[130]

C. Establish a Single, Independent Body to Implement Technology Transfer

Article 10(c) of the Kyoto Protocol requires parties to take all practicable steps towards facilitating the transfer of GHG reduction technologies to developing countries and the private sector.[131] The language of this article is very similar to the technology transfer provision of the Montreal Protocol.[132] Presently, there are many independent mechanisms to facilitate GHG-reducing technology transfer like the UNDP's Global Environment Facility,[133] bilateral donors, NGOs, and private emissions trading enterprises. But the activities of these mechanisms are dispersed, uncoordinated, and lacking any long-term goals or strategy.

The Parties to the Montreal Protocol implemented their technology transfer provision through the creation of a Technology and Economic Assessment Panel (TEAP), which was created with the mandate of providing "technical information related to the alternative technologies that have been investigated and employed to make it possible to virtually eliminate use of . . . CFCs."[134] This focal organization avoids duplication and coordinates efforts to minimize costs and maximize efficient transfer of technology.

Effective technology transfer is critical to the UNFCC's success. Developing countries will not be able to reduce emissions without technology assistance from donor countries. The Parties to the Kyoto Protocol should follow the Montreal Protocol's technology transfer model, especially the lessons learned during the provision's implementation.

D. Create a Mechanism to Allow for Modification of Emission Reduction Targets

Under Kyoto, the quantified emission limitation or reduction commitment is directly written into the Protocol in Annex B.[135] In order to modify these reduction targets, a Party must propose an

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130. *See* Sunstein, *supra* note 7, at 11.

131. Kyoto Protocol, *supra* note 3, at art. 10(c).

132. *See* Montreal Protocol, *supra* note 5, at art. 10.

133. United Nations Development. Programme, Global Environment Facility, http://www.undp.org/gef/index.html (last visited Mar. 11, 2011).

134. United Nations. Environment Programme, Ozone Secretariat, Technology & Economic Assessment Panel, http://ozone.unep.org/teap/index.shtml (last visited Mar. 11, 2011).

135. Kyoto Protocol, *supra* note 3, at Annex B.

amendment to the Protocol, which is a laborious process.[136] Countries willing to accede to the Kyoto Protocol might worry about future condemnation if they cannot meet their targets, and since amending targets is difficult, they are likely to propose the weakest possible targets in order to ensure that they will be able to meet their commitments. In addition, climate science is still advancing, and thus, the reduction targets currently written into the Protocol may turn out to be too lax to achieve the goals or stricter than necessary. After all, the required reduction of 5% below the 1990 emissions level is an arbitrarily-derived number with no particular scientific basis.[137]

The Montreal Protocol has a specific provision to allow for modification of CFC limits.[138] Under the Protocol, every four years the Parties are to convene a panel of scientific experts to assess how the control measures are working.[139] Based on this assessment, the Parties can change the mechanism, scope, or timing of the control measures.[140] They can also add new chemicals to the list, or remove chemicals that no longer need to be controlled.[141] Under the Protocol, Parties can even increase limits if they determine that a chemical is less damaging than previously believed, or if a critical need for continued use is identified.[142] This flexibility allows for the Protocol to remain in synch with developments in the science of ozone depletion. It also gives countries an assurance that they will be subjected to the right amount of regulation, and that they are not committing to a target that is neither achievable nor desirable, while ensuring that they will be taking measures that will be effective at alleviating the problem. The Kyoto Protocol should therefore be modified to include a provision similar to Article 2(10) of the Montreal Protocol, which allows for Parties to adjust the mechanism, scope, and timing of the control measures without requiring an amendment.

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136. *See id*. at art. 20.

137. *See id*. at art. 3(1). Commitments to GHG reductions are political decisions undertaken by countries on the basis of their economic, diplomatic, and technical interests, and do not necessarily reflect any scientific consensus on what is needed to minimize climate change. *See* Copenhagen Accord Annex I, UNFCC, FCCC/CP/2009/11/Add.1 (March 30 2010) *available at* http://unfccc.int/home/items/5264.php.

138. Montreal Protocol, *supra* note 5, at art. 2(10).

139. *Id*. at art. 6.

140. *Id*. at art. 2(10)(a)(ii).

141. *Id*. at art. 2(10)(a)(i).

142. For example, in 2003 the United States pushed to have the general guidelines for implementing the critical-use exemptions changed to allow for greater emission of methyl bromide. *See* United Nations Environment Programme, *Report of the First Extraordinary Meeting of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer*, 14-15, 26, U.N. Doc. UNEP/OzL.Pro.ExMP/1/3 (Mar. 27, 2004). A lawsuit by NRDC followed. Natural Res. Def. Council v. EPA, 440 F.3d 476 (D.C. Cir. 2006).

E. Education and Public Awareness

As noted above, skepticism of the science of climate change continues to dampen public outcry and makes politicians less willing to expend the political capital that is required to address the issue. Promoting public awareness can increase compliance and motivate change. The language of UNFCC's Article 6 should therefore be strengthened, and specific research and education targets should be incorporated into Kyoto. Article 10(e) of the Kyoto Protocol gives a requirement for countries to "facilitate at the national level public awareness of, and public access to information on, climate change,"[143] but it does not discuss details or require reports of activities like Article 9(3) of the Montreal Protocol does.[144] The Montreal Protocol requires all parties to submit a summary of public outreach activities to the Secretariat every two years.[145] A similar provision in Kyoto could be valuable in encouraging countries to develop programs to reduce skepticism and increase public awareness. Additionally, the implementation plans for education and public awareness have yet to be finalized. Finalizing implementation plans at the next COP will help countries develop their national campaigns for education and public awareness.

F. Develop Effective Substitutes

One of the factors in achieving high compliance rates with the Montreal Protocol was the availability of effective substitutes for CFCs. One of the main obstacles to Kyoto's implementation is the lack of effective substitutes for GHG-producing technologies. Article 5 of the UNFCC and Article 2(1)(a)(iv) of the Kyoto Protocol call on parties to implement policies such as promoting "[r]esearch on . . . development and increased use of, new and renewable forms of energy, of carbon dioxide sequestration technologies and of advanced and innovative environmentally sound technologies."[146] However, unlike Article 9 of the Montreal Protocol, there is no requirement to report or exchange information on new technologies.[147] In addition, since the language of Article 2(1)(a) is merely

143. Kyoto Protocol, *supra* note 3, at art. 10(e).

144. Montreal Protocol, *supra* note 5, at art. 9(3).

145. *Id*.

146. Kyoto Protocol, *supra* note 3, at art. 2(1)(a)(iv); United Nations Framework Convention on Climate Change, *supra* note 74, at art. 5.

147. Montreal Protocol, *supra* note 5, at art. 9.

suggestive and not obligatory, it appears to be optional.[148] This leeway could lead to free-riding because countries will likely wait for someone else to develop the technology to fix the problem rather than spending the money to develop their own solutions. Without a stronger statement on or requirement to develop new technologies, Article 2(1)(a)(iv) appears to be toothless, and potentially ineffective at driving technological development.

It may be that Kyoto's drafters assumed that the reduction targets would be technology-forcing in that countries and private businesses may find the only way to meet their targets is to develop new technology. However, this strategy may backfire if countries are not forward-leaning enough to begin developing technologies early enough to reach market in time. Adding a reporting requirement and enforcement mechanisms to Article 2(1)(iv) would help to drive technological solutions.

VIII. THE WAY FORWARD

Negotiations on an international climate change regime are by no means complete, and the Kyoto Protocol is at best considered to be a work in progress. Many of the criticisms outlined in this paper will certainly be solved as the process moves forward. Some solutions, like developing effective substitutes and increasing public awareness, will happen regardless of the Kyoto Protocol's provisions. For example, efforts are already underway in Europe to raise public awareness and provide access to environmental information.[149] Other issues, such as better definition of the penalty enforcement mechanisms and technology transfer mechanisms, are actively being developed at a series of ongoing conferences. The UNFCC Subsidiary Body for Implementation is currently working on how best to implement Kyoto's provisions, and it recently held its 29th session in Poznan, Poland to address issues such as the establishment of financial mechanisms and the development and transfer of technologies.[150] The Body will undoubtedly come to agreement on how to implement the Protocol; the only issue

148. Specifically, the clause states that "Each Party . . . shall . . . [i]mplement . . . policies . . . such as . . . ." Research and development is only included as an example of what a Party may choose to implement. Kyoto Protocol, *supra*, note 3, at art. 2.

149. The Aarhus Convention is not specific to climate change, but climate change is included in the goal of the treaty to improve access on environmental matters. Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, June 25, 1998, 38 I.L.M. 517 (1999), *available at* http://www.unece.org/env/pp/documents/cep43e.pdf.

150. United Nations Framework Convention on Climate Change, 29th Session of the Subsidiary Body for Implementation, *Provisional Agenda and Annotations*, Dec. 1-10, 2008, U.N. Doc. FCCC/SBSTA/2008/7 (Sept. 4, 2008), *available at* http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G08/630/08/PDF/G0863008.pdf?OpenElement.

is what the specific terms of that implementation agreement will be. This Comment suggests that the Body use the implementing language of the Montreal Protocol as a guide.

Other more fundamental issues addressed in this Comment, such as getting developing nations into the regulatory regime, are also being actively considered by the international community.[151] The Kyoto Protocol is designed to only be in effect until 2012.[152] At that point, the Protocol's emissions targets expire.[153] The Protocol specifies that commitments for subsequent periods be developed by the Parties.[154] The United Nations Climate Change Conference in Cancun Mexico (COP-16) occurred in November 2010. As in previous conferences, the delegates in Cancun failed in their stated goal to enter into a binding global climate change agreement that will apply to the period after 2012.[155] However, the international community is aware of the shortcomings of Kyoto and is working toward a more conclusive solution that will address some of the shortcomings outlined in this Comment. For example, at the United Nations Climate Change Conference in Bali in 2007, the European Union pushed to have the major developing countries to agree in principle to firm emissions targets in the future.[156] While this proposal failed at Bali, it may succeed in Durban. The Parties will likely come to agreement on new commitments, but it is unclear if they will develop language similar to the Montreal Protocol, which successfully brought both developing and developed nations within a successful regulatory regime.

IX. CONCLUSIONS

The Montreal Protocol is widely considered to be a successful treaty that brought all the nations of the world together to fight a common, global, environmental problem, whereas the Kyoto Protocol is not. Modifying Kyoto based upon Montreal's lessons thus serves as a possible way to significantly strengthen the Kyoto Protocol so that it is more widely accepted and effective at fighting the common, global, environmental problem of climate change.

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151. *See e.g.* COP-14, COP-15, COP-16, *supra* notes 89-91.

152. Kyoto Protocol, *supra* note 3, at art. 3(7).

153. *Id.*

154. *Id*. at art. 3(9).

155. Julet Eilperin and William Booth, *193 Nations Sign Climate-Change Package*, WASHINGTON POST, Dec., 12, 2010; Juliet Eilperin and Anthony Faiola, *Climate Deal Falls Short of Key Goals*, WASHINGTON POST, Dec. 19 2009, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2009/12/18/AR2009121800637.html.

156. Richard Black, *Big Steps Ahead on the Bali Roadmap*, BBC NEWS, Dec. 11, 2007, http://news.bbc.co.uk/2/hi/science/nature/7136485.stm.