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## POLLUTION RIGHTS: DO MARKETABLE ALLOWANCES TAKE AWAY OUR COMMON LAW REMEDIES?

KRISTIN M. MURPHY\*

The United States Environmental Protection Agency ("EPA") recently has promulgated regulations<sup>1</sup> under the Clean Air Act Amendments of 1990<sup>2</sup> that implement an innovative program of marketable pollution allowances. The program targets the reduction of sulfur dioxide ("SO<sub>2</sub>") emissions in furtherance of the goals of the acid rain control plan of Title IV of the Clean Air Act ("CAA").<sup>3</sup>

The SO<sub>2</sub> program allocates to each "affected unit" (generally, fossil-fuel-burning utility plants) an amount of allowances (authorizations to emit a ton of SO<sub>2</sub>) equal to the unit's annual SO<sub>2</sub> emissions tonnage limitation.<sup>4</sup> The unit will be able to pollute an amount equal to or less than the amount authorized by the purchased allowances; unused allowances may be banked for future use or sold to any purchaser.<sup>5</sup> Discretion thus is given to the unit's owner to determine the most cost-effective means to pollute within the established limits. Newly constructed units must either purchase unused allowances from existing units, or purchase allowances through annual auctions held by the EPA.<sup>6</sup>

The SO<sub>2</sub> program is also part of a policy initiative attempting to shift the focus of environmental protection from pure governmental regulation to economic incentives. In fact, after the announcement of the program, the Chicago Board of Trade created a private market for these sulfur dioxide emission rights.<sup>7</sup> While economists believe that allowance trading will lead to cost-efficient pollution reduction, critics have

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1. 56 Fed. Reg. 65,592 (1991).

2. 42 U.S.C. § 7651b (a)(1) (1991).

3. 42 U.S.C. § 7651 (b) (1991).

4. The limit is found in the Clean Air Act at 42 U.S.C. § 7651 (1991).

5. 56 Fed. Reg. 65,592 (1991).

6. *Id.*

7. Peter Passell, *A New Commodity to be Traded: Government Permits for Pollution*, N. Y. TIMES, July 17 1991 at A1. Individuals now will be able to speculate not only on stocks and bonds, but on the rise and fall of the value of pollution rights. The Exchange will seek to set up a futures market, enabling individuals to speculate on pollution rights up to three years in advance. The estimated price of an allowance (equal to one ton of sulfur dioxide emissions) ranges from \$400 up to, but not exceeding, \$2000. *Id.*

questioned the underlying motives of the program's proponents:

When it comes to finding innovative ways to make a buck, you've got to hand it to our neighbors across the border . . . who else would think of setting up a market where "pollution rights" are traded like gold, pork bellies or any other commodity? Who, but those consummate practitioners of pure capitalism, those faithful disciples of the Great Free Market, the Americans.<sup>8</sup>

Whether the "Great Free Market" adequately will address environmental concerns remains to be seen. Nevertheless, EPA's SO<sub>2</sub> program has opened a new era of air pollution regulation and raises the possibility of the extension of the marketable allowance approach to other air pollutants.<sup>9</sup>

This article raises two issues that must be addressed in light of the new marketable allowances approach to air pollution control. First, is the sale of such "pollution rights" reconcilable with notions of public rights in natural resources? Furthermore, how do statutory "pollution rights" affect common law remedies for injuries resulting from air pollution?

#### PUBLIC RIGHTS IN NATURAL RESOURCES

Legal theories concerning the public interest in natural resources recognize that certain resources such as air are so vital to the public that their availability should "be preserved for the whole of the populace."<sup>10</sup> Roman law recognized the air and the sea as public property; natural law also considered "sacred things" (churches) and wild animals as belonging

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8. Peter Matthews, *Smog Futures Innovative Way to Clean Air*, THE TORONTO STAR, July 22, 1991 at B1.

9. For example, the allowance program could expand to include all air pollutants for which there are national ambient air quality standards. See 42 U.S.C. § 7409 (1991). The national ambient air quality standards ("NAAQS") were established under the 1970 Clean Air Act to determine "safe" levels for air pollution. H. LANDSBERG ET AL., *ENERGY: THE NEXT TWENTY YEARS* 374-83 (1979). Pollutants must be included on the list for NAAQS if the pollutant has an adverse effect on public health and welfare, and the pollutant is emitted from numerous and diverse sources. *Train v. Natural Resources Defense Council, Inc.*, 545 F.2d 320 (2d Cir. 1976).

10. Joseph L. Sax, *The Public Trust Doctrine*, 68 MICH. L. REV. 471, 484 (1970).

to everyone.<sup>11</sup> Some modern states even have incorporated the public interest in natural resources into their constitutions and codes.<sup>12</sup>

Two public rights theories are useful in the protection of certain natural resources -- the public trust doctrine and the identification of a resource as inherently public property.

### *Public Trust Doctrine*

The public trust doctrine mandates that natural resources, such as navigable waters and public lands, be held in trust for the public by the government.<sup>13</sup> Air is another natural resource within the scope of the doctrine.<sup>14</sup> The government, as trustee, must protect the resources from private uses, regardless of the value that the private uses may create.<sup>15</sup> The resources are to be maintained in "common and renewable form."<sup>16</sup> The public trust doctrine presumes that nonconsumptive uses of a resource

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11. Stephen A. DeLeo, *Phillips Petroleum Co. v. Mississippi and the Public Trust Doctrine: Strengthening Sovereign Interest in Tidal Property*, 38 CATH. U.L. REV. 571, 574 (1989); See generally Sax, *supra* note 10.

12. For example, Rhode Island and Connecticut have adopted the following language:  
[It is the] duty of the general assembly to provide for the conservation of the air, land, water, plant, animal, mineral and other resources of the state, and to adopt all means necessary and proper by law to protect the natural environment of the people of the state . . . .

R.I. CONST. Art. 1 § 17.

DECLARATION OF POLICY. It is hereby found and declared that there is a public trust in the air, water and other natural resources of the state of Connecticut and that each person is entitled to the protection, preservation and enhancement of the same. It is further found and declared that it is in the public interest to provide all persons with an adequate remedy to protect the air, water and other natural resources from unreasonable pollution, impairment or destruction.

CONN. GEN. STATE. § 22a-15 (1990).

13. *Illinois Central Railroad Co. v. Illinois*, 146 U.S. 387 (1892).

14. In order to apply the public trust doctrine to a given resource, three conditions must be met. First, the public must possess a legal right to the resource. Second, this public right must be enforceable against the government. Third, concerns for environmental quality must be consistent with the public right in the resource. Sax, *supra* note 10, at 474. Air arguably meets this test. The air, under Roman law, was considered within the scope of the public trust doctrine. DeLeo, *supra* note 11, at 574.

15. Heidi Wendel, *Restoration As the Economically Efficient Remedy for Damage to Publicly Owned Natural Resources*, 91 COLUM. L.REV. 430, 441 (1991).

16. *Id.*

are the most valuable uses.<sup>17</sup> The economic efficiency arguments supporting private use are irrelevant under this doctrine;<sup>18</sup> rather, the preservation of the resource is the goal.

The government, as trustee, must obey three restrictions on the use of the resource.<sup>19</sup> First, the property must be used for a public purpose and be held available to the public.<sup>20</sup> Second, the property cannot be sold for monetary reimbursement.<sup>21</sup> Third, the property must also be maintained for particular uses.<sup>22</sup>

The government's public trust duties were defined further in *Illinois Central Railroad Company v. Illinois*.<sup>23</sup> In a dispute over state regulation of tidal lands, the United States Supreme Court held that if the state legislature is found to have acted in violation of the trust, the legislative action is void.<sup>24</sup> The Court noted that while the state retained sovereignty over trust lands, the state could regulate the trust lands only as long as the regulation occurred "without substantial impairment of the interest of the public . . . ."<sup>25</sup> Other courts have held that the government may determine the direction of public trust lands within its jurisdiction, as long as the uses promote the public interest.<sup>26</sup>

Under this interpretation of the public trust doctrine, the government may determine the uses of the air, held in public trust, as long as the uses promote the public interest. But what is the public interest in the air? The most basic and important public use is respiration, and presumably the public is interested in unlimited access to clean air. However, the sale of pollution rights, an indirect purchase of the air,

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17. *Id.* at 440. The most valuable use recognizes the intrinsic value, or inherent value and moral significance of the resource, rather than simply recognizing the instrumental or use value of the resource. *Id.* at 444.

18. *Id.* at 441.

19. Sax, *supra* note 10, at 477.

20. *Id.*

21. *Id.*

22. *Id.*

23. 146 U.S. 387 (1892).

24. *Id.*

25. *Id.* See also LYNDIA LEE BUTLER & MARGIT LIVINGSTON, *Development of Public Trust Doctrine*, in VIRGINIA TIDAL AND COSTAL LAW, 105, 127 (1988).

26. DeLeo, *supra* note 11, at 588. For further discussion, See Stone, *Public Rights in Water Uses and Private Rights in Land Adjacent to Water*, 1 WATERS AND WATER RIGHTS 177, 193-205 (Robert Clark ed. 1967); *State v. Lyon*, 29 Cal. 3d 210, *cert. denied* 454 U.S. 865 (1981); *State v. Village of Lake Delton*, 286 N.W.2d 622, 628, 630 (Wisc. Ct. App. 1979).

necessarily conflicts with the government's duties under the public trust doctrine.<sup>27</sup>

### *Air as Public Property*

Traditionally, air has been regarded as a "plenteous good" worthy of protection as public property.<sup>28</sup> Because of its plentiful and boundless characteristics, air usually is considered to be too difficult to reduce to private ownership, so it is "left open to the public at large."<sup>29</sup> However, the trend towards privatization of the air through the creation and distribution of pollution rights (such as the SO<sub>2</sub> program) calls into doubt the characterization of air as a plenteous good.<sup>30</sup>

Yet the strong public interest in air as a natural resource indicates the impropriety of establishing an entirely private ownership scheme for air. Instead, air should be conserved as an "inherently public property."<sup>31</sup> As such, air should be managed and owned by the unorganized public, which possesses claims to the resource superior to private parties and the government.<sup>32</sup>

The government's role regarding inherently public property should be limited to stepping in to maintain public use rights when common management fails.<sup>33</sup> The public remains the beneficial owner of the resources and the government's duty is to protect the public from privatization efforts that may result in a holdout, thereby denying public use of the resource.<sup>34</sup> This theory is similar to natural resources

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27. Although industry certainly does promote the public interest, it seems unlikely that the externalities of industrial products, namely pollution, could in any way serve the public interest. The public does benefit from jobs and industry growth, however, these same benefits can and should be derived from non-polluting sources. The public interest would be best served by minimal pollution; although that may be costly, the state has a duty to protect the air for its citizens.

28. See Rose, *The Comedy of the Commons: Custom, Commerce and Inherently Public Property*, 53 U.CHI. L. REV. 711, 718 (1986).

29. *Id.* at 717.

30. *Id.* at 718 n.29.

31. See Rose, *supra* note 28.

32. *Id.* at 749.

33. *Id.* The term "use" will refer to the public's use of air for respiration purposes.

34. *Id.* This theory is best explained in terms of land use and ownership. A holdout occurs when one property owner refuses to sell his parcel that is included in a larger area needed for public use. *Id.* at 750. An example of a holdout may occur during the construction of a highway. Each affected landowner will be required to sell his parcel of land to the government to allow public access. If a threat of holdout is present, the

conservation under the public trust doctrine<sup>35</sup> where, as here, the public maintains an ownership interest superior to that of the government.<sup>36</sup>

There is little fear that a private person or group somehow will acquire absolute ownership of the air. Nevertheless, the implementation of the SO<sub>2</sub> program of marketable pollution allowances clearly marks the beginning of the privatization of the air, an initiative in conflict with the government's obligation regarding inherently public property. Foreseeable manipulation of the SO<sub>2</sub> program could lead to the concentration of allowances in the hands of a few large companies. Such privatization thus raises the specter of future monopolization, or at least exclusive use by polluters, relegating to inferior status the public interest in clean air for respiration.

COMMON LAW CLAIMS:  
PROPERTY "TAKEN" THROUGH PREEMPTION

A recent study in New York City produced startling results: thirty minutes of jogging in NYC was found to have the carbon monoxide equivalent of smoking twenty cigarettes.<sup>37</sup> People need a form of redress against these nonconsensual pollution emissions. Remedies under common law theories of battery, trespass, and nuisance are appropriate for pollution-related injuries. Such common law claims arguably are property interests; yet by creating pollution rights, the federal government is taking these interests through the doctrine of preemption.

*Common Law Claims for Pollution-Related Injuries*

A "spillover effect" occurs when the use of property affects the health or well-being of others.<sup>38</sup> In terms of pollution, spillover effects develop in different ways. For instance, the use of a polluter's land can result in pollution restricting the use of other's land. Also, a person's use

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government may exercise its power of eminent domain to ensure that the fair market value of the land is given in exchange for its use. *Id.* The fear of holdouts is one justification for governmental regulation in areas where the market, manipulated by a landowner, may fail to produce a fair price.

35. See *supra* notes 13-27 and accompanying text.

36. Rose, *supra* note 28, at 721.

37. W. David Slawson, *The Right to Protection from Air Pollution*, 59 S.CAL. L. REV. 672, 697 (1986).

38. Joseph L. Sax, *Takings, Private Property, and Public Rights*, 81 YALE LAW J. 149, 162 (1971).

of a common resource can affect the use of others who share an equal claim to the resource.<sup>39</sup> Common resources potentially affected by spillover include land, air, water, and visual prospects, or landscapes.

Air pollution may be both a visual prospect spillover, and a spillover restricting use of another's land or property. For example, the current controversy surrounding pollution over the Grand Canyon is a visual prospect spillover.<sup>40</sup> Pollution can damage the landscape by forcing smoke, noise, and large smokestacks upon all viewers. Pollution restricts people's lives by forcing them to move if the pollution is severe, and restricts people's lives by causing illness.

Of course, polluters could argue that pollution still allows people to use air (although dirty) and does not restrict the public's access to the air, or that pollution does not necessarily stop a landowner from using his land. Nevertheless, pollution limits the options available to landowners and clearly restricts public access to the landscape and clean air necessary for good health. Moreover, extreme pollution could render land completely useless for people, animals, and plants.

Use of property that has spillover effects may be constitutionally restrained regardless of the economic loss to the owner.<sup>41</sup> One form of restraint would be to encourage citizens to sue for pollution-related injuries. Such suits act as an economic incentive for polluters to limit their pollution, especially when injunctions and high damage claims are awarded regularly.

Suits for pollution-related injuries should be based on the plaintiff's right to common law claims of battery, trespass, and nuisance.<sup>42</sup> A common law claim for battery intuitively seems to accrue to the citizen personally injured by air pollution caused by a specific source. Similarly, a trespass may occur when pollution passes over land or is absorbed into the land without prior consent from the owner. Pollution trespass violates an essential idea of property: our "absolute right to exclude."<sup>43</sup> In

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39. *Id.* at 161-162.

40. See *EPA Offers Congratulations on Navajo Accord*, PUBLIC UTILITIES FORTNIGHTLY, September 15, 1991, at 23.

41. Sax, *supra* note 38 at 161. If the polluter were to be restricted from a use that does not produce any such spillover effects, compensation would need to be given. *Id.* at 164.

42. Slawson, *supra* note 37, at 769.

43. Mark Kelman, *Taking Takings Seriously: An Essay for Centrists*, 74 CAL. L. REV. 1829, 1837 (1986)(reviewing RICHARD A. EPSTEIN, PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985)). This reasoning may also be used to defend an



addition, nuisance law evolved to protect plaintiffs from odors, dust, smoke, and vibrations from neighboring landowners; injunctions were granted to abate the "pollution."<sup>44</sup>

### *Common Law Claims as Property*

A citizen's rights to redress for pollution-related battery, trespass, and nuisance harms are property interests.<sup>45</sup> These rights are important protection against air pollution, a violent, injurious poison.<sup>46</sup>

The theories of reliance, expectation, and security justify considering redress for such harm as a property interest.<sup>47</sup> A person always expects and relies on the government to protect them from violence. Insofar as pollution may be equated with violence, poisoning by pollution is an evil from which many expect to be protected. Security in one's home is also a paramount interest. A person does not expect to have to move because a plant occupies a nearby area. People rely on the common law claims of nuisance, for example, to be able to obtain an injunction or abatement of the pollution.

### *Preemption of Common Law Claims*

Since no federal common law rights have been established in the regulation of air pollution,<sup>48</sup> only state common law provides protection

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argument that pollution is a taking of our physical property. Pollution may limit the uses we have of our land and render it uninhabitable.

44. Nuisance law is based on the doctrine *sic utere tuo ut alienum non laedas*, meaning "so use your own as not to injure another's." The presumptive remedy for a prevailing plaintiff was the entitlement to an injunction. Jeff L. Lewin, *Compensated Injunctions and the Evolution of Nuisance Law*, 71 IOWA L. REV. 775 (1986).

45. Slawson, *supra* note 37, at 769.

46. *Id.* at 770.

47. Frank I. Michelman, *Property as a Constitutional Right*, 38 WASH. AND LEE L. REV. 1097, 1103 (1981).

48. Only Congress has the authority to set standards of law, yet two situations exist when courts may fashion federal common law: 1) a federal rule of decision is "necessary to protect uniquely federal interests," and 2) Congress has given the courts the power to develop substantive law. *Nat'l Audubon Soc'y v. Dept. of Water*, 869 F.2d 1196, 1201 (9th Cir. 1988).

The Clean Air Act is a comprehensive statute regulating pollution. Under the Act, the EPA has the authority to determine which pollutants are dangerous and what levels may be maintained to protect the welfare of the public. *Id.* at 1202. However, Congress did not authorize the courts to develop substantive law of air pollution because

for persons injured by air pollution.<sup>49</sup> Such remedies may arise under tort theories of battery, trespass, and nuisance. EPA's marketable allowances program, however, may preempt these common law claims, leaving poisoned citizens without their property right to redress for pollution-related injuries.

The Supremacy Clause of the Constitution provides that state laws must give way to federal laws that come in direct conflict.<sup>50</sup> Preemption can apply to state law rooted in statute, regulation, or common law rule.<sup>51</sup> The state law will be impliedly preempted if it "interferes with the methods by which the federal statute was designed to reach this goal."<sup>52</sup> A recent case, *Papas v. Upjohn Co.*,<sup>53</sup> held that the federal government, through the EPA, possesses the authority to regulate pesticide labels under the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA").<sup>54</sup> A section of FIFRA provides that the states may not impose any

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it is not necessary to protect "uniquely federal interests." *Id.* The definition of "uniquely federal interests" includes those narrow interests involving interstate and international disputes involving conflicting rights of the states or relations with foreign countries. *Id.*

In addition, under the Clean Air Act states have the primary responsibility for ensuring air quality within the state. *Id.* at 1203. Thus, neither of the two exceptions applies to enable the courts to fashion federal common law under the Clean Air Act.

49. Of course, the savings clause of the Clean Air Act does not restrict a person's statutory or common-law right to seek enforcement of an emission standard. 42 U.S.C. § 7604(e) (1988)(a "savings clause" preserves or saves other rights not addressed in the Clean Air Act). In *Cipollone v. Liggett Group*, 789 F.2d 181 (3d Cir. 1986), the Third Circuit held that state common law damage actions can create obstacles to the accomplishment of congressional purposes. This reasoning also was adopted by the Eleventh Circuit. *Stephen v. American Brands, Inc.*, 825 F.2d 312, 313 (11th Cir. 1987).

50. The Supremacy Clause of the U.S. Constitution, Article VI, clause 2 states: This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CONST. art. VI, cl. 2.

For a discussion of federal preemption in the environmental field, see Dion Hayes, *Emasculating State Environmental Enforcement: The Supreme Court's Selective Adoption of the Preemption Doctrine*, 16 WM. & MARY J. ENVTL. L. 31 (1991).

51. *Taylor v. General Motors Corp.*, 875 F.2d 816, 822, 825-826 (11th Cir. 1989).

52. *International Paper Company v. Oullette*, 479 U.S. 481, 494 (1978).

53. 926 F.2d 1019, 1024 (M.D. Fla. 1991).

54. 7 U.S.C.A. § 136 (1980).

requirements in addition to or different from those required by FIFRA.<sup>55</sup> Through this comprehensive statute and regulations, the EPA approves labels for each pesticide.

The court further held in *Papas* that FIFRA impliedly preempted state common law tort actions based on labeling claims.<sup>56</sup> The court perceived the federal government as occupying the entire field of labeling regulation, "leaving no room for the states to supplement federal law, even by means of state common law tort actions."<sup>57</sup> In addition, the court noted that any damage awards for injuries would conflict with the federal law because the EPA has provided the labels as an adequate means to protect the public.<sup>58</sup>

Similar to these labeling cases, the federal government has provided for air quality standards as a means to protect the public from harm. The Clean Air Act contains two sections governing the establishment of national ambient air quality standards ("NAAQS").<sup>59</sup> The Clean Air Act instructs the Administrator of the EPA to identify pollutants which may reasonably be anticipated to "endanger public health or welfare."<sup>60</sup> Also, the Administrator is instructed to propose and promulgate primary and secondary NAAQS for statutorily-listed pollutants.<sup>61</sup> The standards are based on providing for an "adequate margin of safety" for the public health (primary standard), and protecting public welfare from adverse effects caused by the presence of the pollutants in the air (secondary standard).<sup>62</sup>

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55. 7 U.S.C.A. § 136v(b) (1980).

56. *Papas*, 926 F.2d at 1024.

57. *Id.*

58. *Id.* The first case to hold that state common law remedies are preempted by FIFRA was *Fitzgerald v. Mallinckrodt, Inc.*, 681 F. Supp. 404 (E.D. Mich. 1987). In that case, the court relied on *Palmer v. Liggett Group, Inc.*, 825 F.2d 620 (1st Cir. 1987), *cert. den.*, 488 U.S. 1030 (1989), which came to a similar conclusion regarding the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. §§ 1331-1340 (1984). (The Supreme Court recently granted certiorari to determine the question of whether state tort claims, based on a failure to warn theory, are preempted by the Federal Cigarette Labeling and Advertising Act. See *Cipollone v. Liggett Group Inc.*, 893 F.2d 541, *cert. granted* (1991)). These courts believed that common law claims would serve as obstacles to the purposes of federal legislation because the manufacturers would be compelled to change a product's label after an adverse jury verdict. *But see Ferebee v. Chevron Chemical Co.*, 736 F.2d 1529 (D.C. Cir.1984), *cert. den.*, 469 U.S. 1062 (1985).

59. 42 U.S.C. §§ 7408, 7409 (1991).

60. *Id.* § 7408.

61. *Id.* § 7409.

62. *Nat'l Audubon Soc'y v. Dept. of Water*, 869 F.2d 1196, 1201 (9th Cir. 1988).

Congress passed the Clean Air Act intending to protect the public from harmful pollutants,<sup>63</sup> as determined by the Administrator of the EPA. The NAAQS and other air pollution initiatives such as the SO<sub>2</sub> program may be viewed as adequate means of enforcement, eliminating the need for common law remedies. Indeed, common law remedies may conflict with the purposes of the Clean Air Act. For example, allowing a plaintiff to sue under nuisance would be in direct conflict with the SO<sub>2</sub> program because the remedy of an injunction would not seem to be available against a polluter who possesses the requisite pollution rights. If the purpose of the Clean Air Act and the marketable allowance program is to efficiently reduce pollution to safe limits, common law claims may come in direct conflict because even allowable or "safe" limits of emissions may cause injuries to citizens. A company is already "paying to pollute" by purchasing the allowances; placing additional costs on the companies, through personal injury suits, may penalize the company unnecessarily.

In addition, once the EPA has determined that certain emissions are safe, the courts cannot decide differently.<sup>64</sup> For example, the Supreme Court held in *Chicago & N.W. Transportation Co. v. Kalo Brick & Tile Co.* that the principles of implied preemption prohibit a state from imposing common law damages on individuals who act in accordance with a federal act or regulation.<sup>65</sup> The reasoning was that a person cannot be held liable for doing what a federal rule tells him to do.

A company thus could not be held liable merely for participating in the pollution program. If a person cannot be held liable for acting in accordance with the law by purchasing pollution rights, any pollution he emits is also legal. Therefore, the right to pollute, established by the Clean Air Act and its regulations, should insulate the polluter from the common law claims.

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63. 42 U.S.C. § 7401 (1991).

64. See Robert L. Glicksman, *Federal Preemption and Private Legal Remedies for Pollution*, 134 U. PA. L. REV. 121 (1985). Glicksman asserted that four values reflected in case law argue against preemption. The values are legitimacy, individual liberty, accommodation, and efficiency. These values are essential to persons injured by pollution and need to be properly applied by the courts. Case law holding for preemption, in his view, misconstrued these four values.

65. 450 U.S. 311, 318 (1981).

*"Taking" Common Law Claims Through Preemption*

The Constitution prohibits the government from taking private property for public use without giving compensation, unless the taking is justified under a valid exercise of state police power.<sup>66</sup> A citizen's right to redress for pollution-related battery, trespass, and nuisance harms are property interests.<sup>67</sup> Since the Clean Air Act preempts federal and state common law claims, the federal government essentially has "taken" citizens' rights to redress.

In theory, preemption of common law claims should be considered a *prima facie* taking of property because it alters the distributive share an individual possesses in the system protecting common law property and tort rights.<sup>68</sup> The EPA program under the Clean Air Act which preempts state common law claims results in such an alteration of the system and must be considered a taking.

Further, when a property right is taken, the Constitution requires that just compensation be given. However, what is "just" is not clearly defined, and monetary compensation may not be sufficient to provide an adequate remedy to a person injured by air pollution.<sup>69</sup> In addition, one purpose of compensation is the protection of property owners against governmental discrimination.<sup>70</sup> When accommodating conflicting interests, the government should not force the owner, upon whom the loss would fall, to bear the costs.<sup>71</sup>

The government, through implementation of the Clean Air Act's marketable allowance program, has placed the costs of pollution prevention on non-polluting citizens. Compensation should be provided to the parties injured by air pollution. The common law remedies exist to provide compensation and act as a deterrent to polluters; yet preemption necessarily renders redress unavailable to injured citizens.

## CONCLUSION

The EPA program for SO<sub>2</sub> emissions allows companies to purchase the right to pollute. Polluters not only are allowed to continue

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66. U.S. CONST. amend. V. *See also* Sax, *supra* note 38.

67. Slawson, *supra* note 37, at 769.

68. *See* Kelman, *supra* note 43, at 1831.

69. Michelman, *supra* note 47, at 1112.

70. Sax, *supra* note 38, at 169.

71. *Id.*

polluting, but they may profit by selling unused pollution rights. Other citizens may also profit by speculating on how much pollution will be produced in a year by playing the "pollution market."

The public trust doctrine, however, mandates that the government preserve the air, not sell it off to be destroyed. Air is also inherently public property; any distribution by the government of the air must be in pursuance of the public interest. The government is best able to bear the costs and should uphold the duty imposed under the public trust doctrine and the public interest in the preservation of air quality. The public interest is not served by allowing polluters to pay for the right to pollute. The public interest is served by holding polluters liable for the harms they cause and preserving a citizen's right to sue for these harms. Public rights exist in the preservation of the air and need to be enforced through common law remedies.

Citizens possess common law claims (such as battery, trespass, and nuisance) to remedies for injuries suffered as a result of pollution. This right to redress is a property right and should be protected at all costs. The injuries suffered as a result of pollution should not go uncompensated.

Yet the Clean Air Act preempts these rights and thus commits a taking by extricating these rights from the people. The Act has completely occupied the field of air pollution regulation. The federal government has determined which pollutants are harmful and at what level the pollutants are harmful. According to the government program establishing marketable allowances for SO<sub>2</sub> emissions, a company does not wrongfully pollute as long as the company possesses the requisite pollution rights. Above this, the courts cannot attempt to also determine at what level pollutants, namely sulfur dioxide, are harmful and produce injuries for which people should be compensated.

The government, through preemption, takes these claims from the people. Yet adequate compensation may be illusory; instead citizens should be allowed to pursue their common law claims and seek the remedy they wish. Courts should be able to grant injunctions, regardless of whether or not the company was violating the Clean Air Act. Preemption must not be allowed to occur and the Clean Air Act should be amended to reflect the preservation of these common law claims. The ability to purchase the right to pollute cannot be equated with a license to cause uncompensated harm to others.